

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA199/2007
[2008] NZCA 295**

BETWEEN CHIEF EXECUTIVE OF THE
 DEPARTMENT OF LABOUR
 Appellant

AND HOSSEIN YADEGARY
 First Respondent

AND DISTRICT COURT AT AUCKLAND
 Second Respondent

Hearing: 19 March 2008

Court: William Young P, O'Regan and Baragwanath JJ

Counsel: M S R Palmer and B J R Keith for Appellant
 D J Ryken for Respondents

Judgment: 13 August 2008 at 10am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the respondent's costs which we fix at \$6,000 plus usual disbursements.**
- C The Court orders that the affidavits of Arron Baker may not be searched nor published.**
-

REASONS

Baragwanath J	[1]
O'Regan J	[163]
William Young P (Dissenting)	[207]

BARAGWANATH J

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The appeal and its context

[1] The respondent is an Iranian national who is unlawfully in New Zealand. In November 2004 he was detained by a warrant of commitment made under s 60 of the Immigration Act 1987. He remained in detention until April 2007, when he was released by order of the High Court: *Yadegary v Manager, Custodial Services, Auckland Remand Prison* [2007] NZAR 436. The Chief Executive of the Department of Labour now appeals against that decision.

[2] The respondent had destroyed his passport and, as Iran will not accept repatriation of its nationals without a passport, he could not be deported. The respondent could have ended his detention by applying for an Iranian passport to replace the one he destroyed, in which case he would have been immediately deported. But he has persistently refused to do so.

[3] The question raised by this appeal concerns the interpretation and effect of s 60 as part of the scheme for removal of unlawful immigrants from New Zealand. The section was amended in response to a decision of the High Court which ordered the release of two Iranian overstayers who refused to apply for passports: *Mohebbi v Minister of Immigration* [2003] NZAR 685. The amendment removed the three-month limit in the case of persons whose own conduct is a reason for their inability to leave New Zealand (s 60(6)). Certain other aspects of the amendment must be examined in detail.

[4] Being unlawfully in New Zealand, the respondent is obliged by law to leave (s 45). A removal order was made against him by an immigration officer (s 54). He was arrested (s 59) and detained under a series of warrants of commitment issued by a District Court Judge and extended several times (s 60). Two years after the respondent was first imprisoned, an application for a further extension of the warrant of commitment was heard

by Judge Field. The Judge was satisfied that the respondent had committed no criminal offence, was not a flight risk, and had support available if granted conditional release from detention (available under s 60(5)). But he understood s 60(6) to prohibit release in the absence of “exceptional circumstances”. The Judge considered that there were no “exceptional circumstances” and so granted the Crown’s application and ordered that the warrant be extended. On judicial review of that decision, Courtney J in the High Court decided that there were “exceptional circumstances” and ordered that the respondent be released on bail.

[5] Under international law the decision whether a non-citizen may remain in New Zealand is the sole prerogative of the executive. That is, in general, also the domestic law of New Zealand. An often-cited statement (see *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2002] 1 WLR 3131 (HL) at 794 – 795) is that of Lord Atkinson, giving the decision of the Privy Council in *A-G for Canada v Cain, A-G for Canada v Gilhula* [1906] AC 542 at 546:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book 1, s. 231; book 2, s. 125

[6] The allusion is to the elected government, which has plenary authority to admit immigrants to the country. It is only when statute otherwise provides, as in the case of successful applicants to the Removal Review Authority (ss 47 - 52), that the executive’s decision is not final. So the crucial question is the meaning and effect of s 60 in its amended form.

[7] I have reached the conclusion that the learned District Court Judge erred in extending the warrant of commitment. Because of the way the legislation was read in the District Court and the High Court, as in this Court, the parties confined their submissions to the concept of “exceptional circumstances” in the new s 60(6). As a result those Courts did not recognise the significance of the concepts of “unreasonable period” and “public interest” in s 60(3) which are imported in the present class of case by the new s 60(6A)(a)(ii). Courtney J was however right to grant relief on the exceptional circumstances ground.

[8] The other members of this Court are of a different opinion as to whether the concepts of “unreasonable period” and “public interest” in s 60(3) apply to persons falling within subs (6). In my view the plain language of subss (3) and (6A)(a)(ii) says that s 60(3) does apply. The other members regard subs (3) as inapplicable, despite the language, because the amendment to meet the *Mohebbi* decision introduced the “exceptional circumstances” test for persons falling within subs (6); that, they consider, is inconsistent with the continued application of subs (3). They say, in short, that Parliament has made a mistake and we should read the section as if the reference to subs (3) were deleted.

[9] My view is that, since Parliament has stated that subs (3) as well as subs (6) applies, and since such construction can be adopted consistently with Parliament’s expression of its purpose, both subsections must be applied by the Court. This construction also accords with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) and the principle of legality. Moreover if doubt existed as to what that purpose is, it must be resolved in favour of the common law presumption in favour of ability to apply for bail, which under the Immigration Act is preserved even for terrorism suspects and others who threaten national security. Bail conditions are devised to ensure that due process of law is followed. If the Crown’s continued attempts to reach agreement with Iran succeed, such conditions should ensure that the respondent remains available to be removed from New Zealand.

Background facts

[10] The respondent arrived in New Zealand on 1 October 2003, whereupon he destroyed his Iranian passport. This fact, and the fact that he declines to apply for a replacement, is central to the case and must be set in context. Such conduct, like the use of a false passport, may in the case of a bona fide refugee status claimant have reduced moral and sometimes legal significance: see *R v Asfaw* [2008] 2 WLR 1178 (HL) approving *R v Uxbridge Magistrates’ Court, ex p Ademi* [2001] QB 667 (QB), followed in *Ghuman v Registrar of the Auckland District Court* [2004] NZAR 440 (HC). There is at present no agreement between New Zealand and Iran by which the respondent could be removed there without his consent. While New Zealand has been negotiating with Iran to alter its policy of refusing entry to its citizens if they do not hold a passport, there is no evidence of likelihood of any change in the foreseeable future. As a Christian convert, the respondent believes that to

return to Iran would expose him to risk of death and he therefore declines to apply for a passport. The relevant New Zealand authorities, including Judges of the District Court and of the High Court, accept the honesty of his belief.

[11] On his arrival in October 2003, the respondent applied for refugee status on the ground of political persecution. The application was declined by the Refugee Status Branch of the Department of Labour (the RSB) and an appeal to the Refugee Status Appeals Authority (the RSAA) was dismissed. While the respondent's credibility was accepted by the RSAA, which found that he might suffer difficulties in Iran, the ground of well-founded fear of persecution was not established.

[12] Following his conversion to Christianity, the respondent made a second application, based on fear of religious persecution. The application was rejected by the RSB and the RSAA. An application to the High Court for judicial review of that decision was dismissed. A third application to the RSB and to the RSAA was dismissed as showing no change of circumstances.

[13] An application to the Removal Review Authority was also dismissed and the dismissal was sustained on application to the High Court for judicial review. Applications to the Minister of Immigration seeking a special direction in favour of the respondent under s 130 were also rejected.

[14] On 2 November 2004 the respondent was served with a removal order and taken into custody at Auckland Central Remand Prison where he remained under successive warrants issued by the District Court. After delivery of Courtney J's judgment on 4 April 2007 he was released on conditions fixed by the District Court. Those included residence at a stipulated address, a curfew between 7 pm and 7 am, and reporting to the police three times a week.

[15] The 29 months in custody took their toll on the respondent. A psychiatrist reported in July 2005:

He presents with a mixture of both anxiety and depressive symptoms in direct response to both his incarceration and his ongoing uncertainty about the possible length of that incarceration. In my opinion Mr Yadegary currently qualifies for the diagnosis of *adjustment disorder with depressed mood and anxiety* as per the

Diagnostic and Statistical Manual 4TR (DSMIV TR)) of the American Psychiatric Association.

I am also of the opinion that Mr Yadegary's symptoms appear to be worsening while incarcerated. It appears likely that his symptoms will continue to develop to the point where he develops a major depressive episode in the future unless there is significant alteration to his current circumstances. Continued incarceration without a release date will result in deterioration of Mr Yadegary's mental state.

[16] The High Court Judge stated:

[63] The circumstances of the detention and Mr Yadegary's psychological response to them are hardly unusual. Regrettably, many people find themselves in the Auckland Central Remand Prison and find the conditions difficult to bear. However, not many spend more than two years there with the prospect of ongoing detention for an unknown period (possibly years) without having committed or even being accused of any crime.

The immediate legislative scheme

[17] When he was served with a removal order, the respondent became liable to be removed from New Zealand under Part 2 of the Immigration Act (ss 53 – 4).

[18] It is necessary to reproduce the essential sections. I have italicised relevant provisions and underlined those of special importance. I have added in bold certain words and numbers. Since the factual and legal setting for the analysis must be provided, their discussion is deferred to [66] – [69].

55 Content and effect of removal order

(1) *A removal order authorises any member of the police to take into custody the person named in the order and to proceed to execute the order in accordance with section 59.*

...

59 Execution of removal order

(1) **1** *Any member of the police may arrest without warrant a person on whom a removal order has been served and detain that person in accordance with this section.*

(2) *The purpose of arrest and detention under this section is to execute the removal order by placing the person on a craft that is leaving New Zealand.*

- (3) *A person arrested and detained under this section may be detained for up to 72 hours without further authority than this section pending their placement on a craft that is leaving New Zealand.*

...

60 Release or extended detention if craft unavailable, etc, within a 72-hour period

- (1) *Where a person is arrested and detained under section 59 and it becomes apparent that –*

- (a) *no craft will be available within the 72-hour period specified in that section; or*

...

- (c) *it is not practicable for the person to be placed on a craft within the 72-hour period; or*

- (d) *for some other reason the person is unable to leave New Zealand within the 72-hour period, –*

then, unless the person is released, an immigration officer must arrange for the person to be brought before a District Court Judge for the purpose of obtaining a warrant of commitment.

- (2) *Subject to any extension of it under subsection (4) or subsection (6A), a warrant of commitment issued under this section authorises the detention of the person named in it for a period of 7 days or such shorter period as the Judge thinks necessary to enable the execution of the removal order.*

- (3) **2 4** *A Judge may issue a warrant of commitment on the application of an immigration officer if satisfied on the balance of probabilities that the person in custody is the person named in the removal order and *that* any of the following applies:*

- (a) *A craft is likely to be available, within the proposed period of the warrant of commitment, to take the person from New Zealand:*

- (b) *The practical difficulties that meant that the person could not be placed on an available craft within 72 hours are continuing and are likely to continue, but not for an unreasonable period:*

- (c) *The other reasons the person was not able to leave New Zealand within the 72-hour period are still in existence and are likely to remain in existence, but not for an unreasonable period:*

- (d) *In all the circumstances it is in the public interest to make a warrant of commitment.*

- (4) **3 8** *If at the expiry of a warrant of commitment made under this section the person has still not left New Zealand, then, unless released, the person must be again brought before a Judge for an extension of the warrant of*

commitment, in which case subsections (2) and (3) (and, if appropriate, subsection (6A)) apply.

- (5) *If a person is brought before a Judge under subsection (4) for a second or subsequent time the Judge may, where it seems likely that the detention may need to be extended a number of times, and where satisfied that the person is unlikely to abscond otherwise than by leaving New Zealand, instead of extending the warrant of commitment for a further period of up to 7 days, order that the person be released subject to—*
- (a) *Such conditions as to the person's place of residence or as to reporting at specified intervals to an office of the Department of Labour or a Police station as the Judge thinks fit; and*
 - (b) *Such other conditions as the Judge may think fit to impose for the purpose of ensuring compliance with the residence and reporting conditions.*
- (6) **6** *Unless the Judge considers that there are exceptional circumstances that justify the person's release, 5 a Judge may not order the release of a person under subsection (5) if—*
- (a) *the person is currently a refugee status claimant who claimed refugee status only after the removal order was served; or*
 - (b) *a direct or indirect reason for the person being unable to leave New Zealand is or was some action or inaction by the person occurring after the removal order was served.*
- (6A) **7** *Where a Judge determines not to order the release of a person to whom subsection (6) applies, the Judge may—*
- (a) *extend the warrant of commitment for a further period of up to 30 days, in which case—*
 - (i) *the warrant authorises the detention of the person named in it for the period specified in the extension of the warrant; and*
 - 8** (ii) *subsections (3) to (6) and this subsection apply at the expiry of the extension of the warrant; and*
 - (b) *make any orders and give any directions that the Judge thinks fit.*
- (7) *No person may be detained under 1 or more warrants of commitment under this Part for a consecutive period of more than 3 months, unless the person is a person to whom subsection (6) applies.*
- (8) *In making any decision under this section a Judge is to seek to achieve an outcome that ensures a high level of compliance with immigration laws.*
- (9) *No release of a person under this section in any way affects their liability for later detention and removal.*

[19] The general purposes of arrest and detention under these provisions are stated in ss 59(2) and 60(8): to execute the removal order by placing the person on a craft leaving New Zealand and to achieve a high level of compliance with immigration laws. The specific purpose of subss (6) – (7) is to impose an incentive on the person to conform with the immigration laws.

[20] Parliament contemplates by ss 59(3) and 60 that removal will normally take place within a 72-hour period. Close judicial control of the statutory processes is stipulated. If removal within such period is not practicable (s 60(1)(c)) the person must (unless released, an option not generally considered appropriate in cases falling within s 60(6)) be brought before a District Court judge for the purpose of obtaining a warrant of commitment (s 60(1)).

[21] Subject to s 60(6), a judge may issue a warrant if the person is not able to leave New Zealand within 72 hours, but not if the inability will extend for an unreasonable period (s 60(3)(c)), unless it is in the public interest to make a warrant of commitment (s 60(3)(d)). Warrants are generally for no longer than 7 days (s 60(2)) with a maximum of 30 days at a time (s 60(6A)). And, again subject to s 60(6), where a person who is unlikely to abscond comes before the judge on a second or subsequent occasion, the judge may order the person's release subject to appropriate reporting and other conditions. Except in cases falling within s 60(6), no one may be detained for a consecutive period of more than three months (s 60(7)).

[22] Subsection (6) however provides an exception to the limitations on issue of warrants and on the court's powers to order release from detention. A judge may not order release under subsection (5) if:

a direct or indirect reason for the person being unable to leave New Zealand is or was some action or inaction by the person occurring after the removal order was served.

Unless there are exceptional circumstances that justify the person's release.

[23] There can be no doubt that the respondent's continued refusal to apply for an Iranian passport constitutes "some action or inaction by the person occurring after the removal

order was served” and is “a direct or indirect reason for the person being unable to leave New Zealand”.

[24] Before proceeding further it is necessary to dispose of a difficulty arising from the way the legislation is drafted. If it is clear that deportation within 72 hours will not be possible, looking at s 59 alone it is arguable that there is no power of arrest under that section. It could be said that the purpose of arrest and detention under s 59(2) is confined to execution of the removal order by placing the person on a craft that is leaving New Zealand *within that time*. Such reading is supported by s 60(1) which permits the issue of a warrant “where a person is arrested and detained under section 59 *and it becomes apparent* that ... it is not practicable for the person to be placed on a craft within the 72-hour period” (s 60(1)(c)). It is also consistent with a reading of s 60(2) that the authorised detention is “for a period of seven days ... to enable the execution of the removal order”, ie *removal within seven days* must be in contemplation.

[25] But ss 59 and 60 are to be read as a whole, which includes s 60(6). That makes plain that a person may be under detention and unable to leave New Zealand because of some action or inaction on his part *after the removal order was served*. It follows that the textual argument in [24] cannot succeed. Section 59(2) is not to be confined to the case where the person will be removed within 72 hours but extends to cases where that is not possible. On such reading, s 60(1) is not limited to the case where it became apparent after arrest and detention that it is not practicable for the person to be removed within the 72 hour period. Rather it extends to cases where it becomes apparent at some other stage, as after service of the removal order in terms of subs (6)(a). Likewise s 60(2) may be read to authorise the detention either for a period of seven days (if removal is not imminent), or for a shorter period (if it is). The alternative to such construction would be to deprive subs (6) of effect, which is a conclusion the Court will decline to reach if, as in this case, another option is reasonably available.

[26] Once that construction is adopted there is, at first sight, no difficulty in operating the successive stages as argued by the parties and accepted in the lower Courts. This is also the construction preferred by the other members of this Court.

- (1) A removal order is served and executed under s 59;
- (2) If the person cannot be removed within 72 hours an immigration officer applies for a warrant under s 60(1);
- (3) The warrant is issued under s 60(2) for seven days if it is in the public interest (s 60(3)(d)) which s 60(6) may justify;
- (4) If the person cannot be removed before the expiry of the first warrant a further application will be made under s 60(4). If the conditions in 60(6) are extant release may not be ordered in the absence of exceptional circumstances; and
- (5) If s 60(6) applies, the three-month time limit under s 60(7) is excluded.

[27] But as is apparent from the difference of opinion in this Court the scheme is in fact more complex. To explain it requires further detail of the parties' submissions, of legal principle, of fact, and of New Zealand's policy concerning imprisonment.

The submissions

[28] The Deputy Solicitor-General contends for the Crown that Courtney J erred in directing the respondent's release because there are no exceptional circumstances in this case. He submits that there is nothing exceptional about a person's failure or refusal to sign a passport application which would enable his removal from New Zealand; rather it is a deliberate policy adopted to resist the operation of the law which imposes an obligation to leave New Zealand. Nor, says the Crown, can simple passing of time ever fall within the concept of exceptional when it is open to the person imprisoned to bring the detention to an end at any time, by signing the passport application and there is the prospect of removal proceeding as a result of diplomatic negotiations. So the case falls outside the s 60(6) ground on which release from detention is permissible. There is no other justification for release. This Court should therefore allow the appeal and return the respondent to detention.

[29] Mr Ryken for the respondent submits that Courtney J construed and applied the law correctly. The learned Judge stated:

[31] The opening words of s 60(6) specifically envisage that there will be people to whom s 60(6) applies who should nevertheless be entitled to conditional release. In adding these words, Parliament had drawn back from the kind of unmistakable language used by the Australian legislature. I find that the opening words must have been intended by Parliament to ensure that there was a safety net that would prevent the literal effect of s 60(6) being implemented. The result is that the *Hardial Singh* principles apply to those detained under s 60(6) as to any other person detained under s 60.

...

[34] Clearly, the words “exceptional circumstances” require circumstances that are special and not usually encountered. But because the phrase is not qualified so as to be limited to humanitarian factors whereas it is so qualified elsewhere in the Act, I do not consider that it needs to be strictly limited to humanitarian factors in the sense of physical or mental well-being. I infer that a broader meaning was intended. Given my conclusion that the *Hardial Singh* principles are to be implied into s 60(6), I find that “exceptional circumstances” must include detention that would be regarded as unreasonable within those principles. Only in this way can the *Hardial Singh* principles be given effect to.

...

[63] ... Against the background of his good character and the likely effect of ongoing detention on his mental condition, in the absence of any other factor, I consider that ongoing detention would be unreasonable.

[64] Against those factors, however, is Mr Yadegary’s obstructiveness. He could secure his removal from New Zealand at any time. He has a genuine belief that he will be in danger if he does that. However, it was beyond the scope of either the District Court considering the application for extension of the warrant or of this Court in reviewing the District Court’s decision to enquire into the foundation for that belief. While accepting that the belief is genuine, I must proceed on the basis that Mr Yadegary’s status has been properly determined and that he could, if he wished, effect his removal from this country within a very short time by applying for a passport.

[65] Given my earlier conclusion as to the intention behind s 60(6) that a person in Mr Yadegary’s position be treated less favourably, I accord this factor significant weight. However, it cannot have the status of a trump card. There is a point at which the unreasonableness of ongoing detention outweighs the need to sanction obstructive conduct. This does, of course, give rise to the unpalatable possibility that a detainee may be able to secure release simply by enduring detention long enough for a Court to declare further detention unreasonable. However, had Parliament intended the sanctioning of obstructive conduct to prevail over other factors it could have stated its intention in unmistakable terms. It has not done so.

[66] I find that, even taking into account Mr Yadegary’s obstructiveness, the circumstances of his detention are such as to make further detention unreasonable. Exceptional circumstances therefore exist for the purposes of s 60(6) and Mr Yadegary is entitled to conditional release under s 60(5).

Tools of interpretation

[30] The Courts have at their disposal a range of tools for interpreting legislation that is susceptible of more than one meaning. First, Parliament has directed the Courts when construing legislation to consider both its text and its purpose (Interpretation Act 1999, s 5). Second, Parliament has directed the Courts to prefer an interpretation that is consistent with the rights and freedoms contained in the Bill of Rights Act where such a meaning is available (Bill of Rights Act, s 6). Third, recourse may be had to settled common law principles of statutory interpretation, which include the principle of legality and the principle of proportionality.

[31] In the present case, the issue arises as to the correct application of the procedures in s 60 and, on my reading, we are required to give meaning to concepts of “unreasonable period”, “exceptional circumstances” and “public interest”.

Text

[32] Under s 60(3) a person may be kept in detention as long as the detention will not be for an unreasonable period or it is in the public interest to continue the detention. As earlier noted, in considering whether these criteria are satisfied, regard must be had to the stipulation that a person caught by s 60(6) may not be released unless there are exceptional circumstances.

[33] The definitions of the three material expressions are indeterminate. Parliament has refrained from setting time frames for the operation of s 60(6) and it is not our task to do so. The rule of law requires that laws be as clear and predictable as practicable (see John Finnis *Natural Law* (1980) at 270). But as Jeremy Bentham observed in his “Theory of Legislation” (Etienne Dumont edition translated and edited by CM Atkinson, 1914) at 62:

... the legislator, who cannot pass judgment in particular cases, will give directions to the tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decision to the special circumstances.

[34] It is neither practicable nor desirable for us, in the context of a single appeal, to seek to give a ruling as to the precise meaning of “exceptional”, “reasonable” or “public

interest”. In this judgment I will consider only whether the particular circumstances of this case fall within those broad concepts.

The Bill of Rights Act and the principle of legality

[35] Section 6 of the Bill of Rights Act requires that legislation be interpreted so as to give effect to the rights and freedoms contained in that Act. Similarly, the principle of legality requires that the law be applied consistently with fundamental human rights. In a celebrated passage in *R v Home Secretary ex parte Simms* [2000] 2 AC 115 at 131 (HL) Lord Hoffmann stated:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights.... The constraints upon [the] exercise [of its power] by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

[36] It is therefore to be assumed that, when it enacted s 60(6), Parliament did not intend to infringe fundamental liberties. That conclusion is supported by its use of the terms “exceptional circumstances” and “unreasonable”. While, as the President explains (at [258], see also O’Regan J’s discussion at [195] – [197]), the “exceptional circumstances” test has been held to be exacting when the right to trial by at least 11 jurors is lost (*Rajamani v R* [2008] 1 NZLR 723 (SC) and *Wong v R* [2008] NZSC 29), the approach used in those cases *in favorem libertatis* is not to be applied in reverse. On the contrary, in cases where the exception would affect personal liberty a more generous approach is adopted. In *R v Kelly* [2000] QB 198 (QB) where the Court of Appeal construed legislation requiring it to impose a mandatory life sentence unless there were exceptional circumstances, Lord Bingham of Cornhill CJ said (at 208) that “[w]e must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art.” That decision was followed by the Supreme Court in *Creedy v Commissioner of Police* (2008) NZELC 99,336 at [32] (discussed by O’Regan J at [198]). Here, where s 60(6A) imports

the reasonableness test of s 60(3), “exceptional” naturally bears the first meaning in the Oxford English Dictionary: “out of the ordinary course, unusual, special”.

[37] The next question is which rights are implicated in the current case. Two are potentially relevant. The first is the right to liberty of the person, formulated in the Bill of Rights as the right not to be arbitrarily arrested or detained (s 22). The second is the right not to be subject to cruel or disproportionately severe treatment, identified in s 9 of the Bill of Rights. Each of these rights must be construed using both the language of the Act and the common law (s 28 of the Bill of Rights Act states that existing rights or freedoms shall not be restricted by reason only that they are included only in part).

[38] As to liberty of the person, the Bill of Rights and the principle of legality require us to presume that Parliament did not intend to authorise arbitrary detention. The focus must be on the term “arbitrary”, rather than on the idea of lawful detention, otherwise the right would be substantially diluted. In *van Alphen v The Netherlands* Comm 305/1988 23 July 1990 (UNHRC) cited in *R v Goodwin (No 2)* [1993] 2 NZLR 390 at 393 (CA) it was accepted that “arbitrary” included not merely concepts of unlawfulness, but also “inappropriateness, injustice and lack of predictability.” In a similar vein, Thorp J in *Clarke v Police* HC AK AP208/95 11 October 1995 at 8 defined arbitrary as “unreasonable, unnecessary or unprincipled.”

[39] It follows that by the terms “reasonable” and “exceptional circumstances”, Parliament intended to preserve the right to be free from detention that is inappropriate, unnecessary and unpredictable.

[40] It could be only in the most unusual of circumstance that detention for a period that is unreasonable could nevertheless be in the public interest.

[41] As to the right not to be subjected to treatment that is disproportionately severe, the standard by which that is to be measured is that treatment be “so severe as to shock the national conscience”: *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC) at [289]. Reasonableness is a less exacting test. Here there are no findings as to the conditions likely to have been experienced by the respondent in detention, beyond the evidence that he was seriously assaulted and of there being some effect on his mental health.

Context

[42] Because the words of the statute are indeterminate, we must look at the context in considering how they should be understood. I begin with certain criminological materials which illuminate the nature of imprisonment. I then move on to discuss the local legal context. (The approach in other jurisdictions is sketched in an appendix to this judgment at [134] – [162].) Once this background is in place I return to analyse the words of the legislation in the light of the Interpretation Act, the Bill of Rights Act and the common law principles of statutory interpretation.

New Zealand imprisonment policy

Criminology and the criminal law

[43] Imprisonment is now the most stringent form of punishment known to the law of New Zealand. As the Supreme Court stated in *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [52]:

... it is of prime importance that any powers of detention be approached in light of the fundamental right, long recognised under the common law, of liberty for all persons subject only to such limits as are imposed by law.

[44] The importance of the basic right to be free from detention is evident in New Zealand's legislation as from principles of the common law. Before moving to discuss the legal framework, I mention some academic literature.

[45] Deprivation of liberty is used as a common form of punishment of those who have committed grave crimes. In *A Rage to Punish* (1994) Lois G Forer, an American trial judge for 16 years, records the lack of general public awareness of what happens inside prison walls (at 74). He urges consideration of the need for imprisonment of non-violent offenders (at 95), which carries by necessary implication the need to justify the length of any prison term. An analogous theme is advanced by Professor McSherry of Monash University in her essay "Sex, Drugs and Evil Souls" (2006) 32 *Monash Law Review* 237 at 269, discussing the principle *nulla poena sine lege* - that punishment should be confined to cases of criminal conduct.

[46] In “Imprisonment: An expanding scene” Maguire, Morgan and Reiner (eds) *The Oxford Handbook of Criminology* (4ed 2007) 1110 Rod Morgan and Alison Lieblich say at 1107-1108:

The most fundamental way of answering the question, ‘What are prisons for’, is to distinguish the three legal functions, *custodial*, *coercive* and *punitive*.

Suspects refused bail and detained before trial, or convicted but not yet sentenced, are held in custody to ensure that the course of justice proceeds to its conclusion and that everyone concerned is protected against the likelihood of harm in the interim. A small number of non-criminal prisoners – held under the Immigration Act, for example – are imprisoned pending completion of enquiries or execution of an administrative decision. There is no justification for holding such prisoners in conditions more oppressive than is warranted by the fact of custody itself, either because they are not eligible for punishment (the unconvicted are subject to the presumption of innocence) or, if convicted, because the court has not yet determined that loss of liberty is the appropriate sentence.

Offenders held coercively – nowadays almost entirely fine defaulters – are kept in prison for as long as they fail to comply with a court order that they pay a financial penalty enforced by the court. As soon as they pay, or once the custodial period in lieu of payment is served, they are released. In this case the prison, the loss of liberty, and possibly also the conditions in custody, is used to pressurise the offender into conforming.

Finally, there are persons held punitively – nowadays the great majority – as a sanction for offences of which they stand convicted. Since the abolition of the death penalty in 1965 imprisonment has been the most serious penalty the courts can impose in Britain. The punishment of imprisonment for sentenced prisoners might comprise both loss of liberty and harsh living conditions in the name of ‘less eligibility’ ... or deterrence. Today prison administrators generally disavow such purposes, reiterating Paterson’s famous dictum that offenders are sent to prison ‘as a punishment, not for punishment.’

The purposes of detention under s 60

[47] I consider that the purposes of detention under s 60 must be custodial (to facilitate deportation) and coercive (to encourage the recalcitrant to sign). These immediate purposes both contribute to the ultimate purpose of securing the respondent’s removal from New Zealand. This being a civil and not a criminal procedure, I do not consider that punishment of the recalcitrant for refusing to sign, or indeed (beyond what is inherent in the coercive) to deter others, is a legitimate purpose. While deterrence can be an important element of the criminal law, quite explicit language would be required to justify civil detention in order to dissuade others. Properly, the Deputy Solicitor-General did not seek to

justify continued detention on the basis that s 60(8) contains a purpose of ensuring compliance by others with immigration law.

[48] While Parliament has accepted the need for detention in cases coming within s 60(6), such considerations bear on whether the term of the detention is longer than for “a reasonable period” and also on what is in the public interest. They are also relevant to understanding when detention would fall within “exceptional circumstances that justify the person’s release.”

Custodial sentences in New Zealand

[49] The insistence in the criminological literature on viewing custodial sentences as being of the most serious character is echoed in the New Zealand legislative context.

(i) The Sentencing Act 2002

[50] Parliament’s intentions with regard to the role of imprisonment in New Zealand’s penal system are most evident from the Sentencing Act 2002. Section 10A sets out the hierarchy of sentences and orders that may be imposed, from the least restrictive to the most restrictive:

- (a) discharge or order to come up for sentence if called on:
- (b) sentences of a fine and reparation:
- (c) community-based sentences of community work and supervision:
- (d) community-based sentences of intensive supervision and community detention:
- (e) sentence of home detention:
- (f) sentence of imprisonment.

[51] Section 8(g) of the Sentencing Act requires the Court to impose the least restrictive outcome that is appropriate in the circumstances in accordance with this hierarchy.

[52] That there is an emphasis in the criminal arena on imposing the least restrictive outcome is an important indicator when assessing detention in the administrative arena, as in the case of immigration detention.

(ii) *The Bail Act 2000*

[53] After sentencing, bail is one of the key areas where the law must deal with the propriety of imprisonment. In *Zaoui* the Supreme Court confirmed the inherent authority of the High Court to grant bail in all cases, civil and criminal, where someone is detained. The inherent jurisdiction by its very nature protects the basic liberty of the individual to be free from detention, even if on a conditional basis.

[54] The Courts are well accustomed in the most serious criminal cases, including murder, to the exercise of jurisdiction under the Bail Act 2000 which sets out the public interest considerations. They include:

8 Consideration of just cause for continued detention

- (1) In considering whether there is just cause for continued detention, the court must take into account—
 - (a) whether there is a real and significant risk that—
 - (i) the defendant may fail to appear in court on the date to which the defendant has been remanded; or
 - (ii) the defendant may interfere with witnesses or evidence; or
 - (iii) the defendant may offend while on bail; and
 - (b) any matter that would make it unjust to detain the defendant.
- (2) In considering whether there is just cause for continued detention under subsection (1), the court may take into account the following:
 - (a) the nature of the offence with which the defendant is charged, and whether it is a grave or less serious one of its kind;
 - (b) the strength of the evidence and the probability of conviction or otherwise;
 - (c) the seriousness of the punishment to which the defendant is liable, and the severity of the punishment that is likely to be imposed;
 - (d) the character and past conduct or behaviour, in particular proven criminal behaviour, of the defendant;

- (e) whether the defendant has a history of offending while on bail, or breaching court orders, including orders imposing bail conditions:
- (f) the likely length of time before the matter comes to hearing or trial:
- (g) the possibility of prejudice to the defence in the preparation of the defence if the defendant is remanded in custody:
- (h) any other special matter that is relevant in the particular circumstances.

[55] The statutory scheme is consistent with the principles of the common law, each of which keeps a careful and proportionate balance between the competing public interests of protection of the public and avoiding unnecessary detention.

(iii) The Immigration Act 1987

[56] In accordance with conventional New Zealand standards I take the scheme of the Immigration Act to apply as far as practicable the principle that imprisonment is limited to cases of practical necessity. For example, where there is an obvious flight risk and perhaps other risks in relation to persons whose eligibility for a permit is not immediately ascertainable, custody may be appropriate. Section 60(6) applies that principle to the removal of those who fall within it.

[57] The Supreme Court in *Zaoui* at [48] recounted the various regimes for bail and conditional release provided by the Immigration Act. The Court found that the scheme of the Act did not reveal a consistent approach to detention in immigration cases (at [49]).

[58] Under Part 6 persons whose eligibility for a permit is not immediately ascertainable may not be granted bail (s 128B(15)). However, in such a case the detention must be reviewed if no determination has been made after 28 days and every seven days thereafter (s 128B (9) and (10)). If a determination is made that the permit should be refused, the person must not be granted bail but may be conditionally released from detention (s 128(15)) unless they are caught by s 60(6). Under Part 3 even persons threatening national security and suspected terrorists must be brought before the District Court within 48 hours and may be released on conditions pending deportation (s 79(1)(b)(ii)).

(iv) *Appropriate lengths of imprisonment*

[59] The laws of sentencing, bail and immigration detention all reflect the fundamental proposition that deprivation of liberty in the form of imprisonment is a serious matter, but that it is appropriate in some cases. It is therefore instructive to take into account the type of cases in which imprisonment similar to what the respondent has undergone have been considered appropriate.

[60] The respondent has served 29 months in detention. Statistics produced by Soboleva, Kazakova and Chong *Conviction and Sentencing of Offenders in New Zealand: 1995 to 2005* (Ministry of Justice, December 2006) recording sentencing statistics in New Zealand contain the following results at 71 and 89:

Table 1: Average custodial sentence length (months) imposed by type of violent offence 1996 – 2005

Offence	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Kidnapping/ abduction	37.9	36.1	39.5	29.3	32.2	31.7	43.3	32.9	31.5	35.0
Attempted sexual violation	41.1	61.0	47.1	49.2	43.4	55.0	57.3	62.5	44.1	52.8
Indecent assault	21.4	19.9	20.4	21.6	20.7	22.8	19.7	18.9	24.1	18.2
Robbery	16.0	20.4	22.9	22.2	21.4	24.1	19.1	23.1	24.1	24.1
Grievous assault	21.1	21.8	22.9	22.0	25.6	23.6	25.4	23.7	24.1	24.1

Table 2: Average custodial sentence length (months) imposed by type of offence against the administration of justice 1996 – 2005

Offence	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Failure to answer bail	2.0	1.9	2.1	2.0	2.1	2.1	1.9	1.8	2.1	2.1
Breach protection/non-molestation order	2.0	3.4	2.9	3.3	3.3	3.4	3.9	4.0	3.9	3.8
Escape custody	5.3	4.9	6.5	4.5	5.4	5.6	5.8	6.6	4.1	4.4
Obstruct/pervert course of justice	9.1	9.0	12.4	9.8	10.3	9.1	11.5	12.2	10.9	10.1
Other against justice	5.1	12.5	5.0	3.1	7.0	4.2	3.8	10.2	3.9	4.7

[61] It should be noted that to reflect actual time served such periods must generally be reduced by somewhere between one-third and two-thirds.

[62] It is apparent from these statistics that the respondent has spent an amount of time in custody comparable to that which would be served by a person convicted of a serious offence.

[63] The period is far in excess of what would be expected for any other breach of or refusal to comply with a legal order or process. No general statistics for New Zealand contempt cases resulting in imprisonment were presented, but Table 2 above indicates the period of detention deemed appropriate for offences against judicial processes. The decision of the Full Court of the High Court in *Solicitor-General v Siemer* HC AK CIV 2008-404-472 8 July 2008 cites the English regime at [92] – [93].

[64] In the absence of New Zealand statistics it is convenient to consider a selection of the longest custodial sentences imposed for contempt in the United Kingdom since 1981 when the Contempt of Court Act of that year capped the period of imprisonment for contempt at two years (extracts from Arlidge, Eady and Smith *On Contempt* (3ed 2005) Appendix 3):

Table 3: Examples of penalties imposed for contempt since 1981

Name of Case	Nature of Contempt	Penalties
<i>James</i> (1988) 1 Cr App R (S) 392	Threat of violence to a witness and a suggestion that he give false evidence. "A very serious contempt ... upon a man who was clearly susceptible."	Two years' imprisonment upheld.
<i>Att-Gen v Jackson</i> [1994] COD 171	Series of threatening phone calls made from person to a witness.	12 months' imprisonment upheld.
<i>Stredder</i> [1997] 1 Cr App R (S) 209	The appellant spoke to the sole prosecution witness at his trial whose car had been damaged ("That was just a warning"). He also said "I'll do you when I see you anyway". This was "unplanned, hot headed, rash but, nevertheless, severely threatening."	12 months' imprisonment upheld.
<i>Mitchell-Crinkley</i> [1998] 1 Cr App R (S) 368	The appellant was a friend of an accused person. He recognised a juror and telephoned him, mentioning that the previous jury had been discharged. "A grave case."	12 months' imprisonment upheld.
<i>Mesham v Clarke</i> [1989] 1 FLR 370	Repeated breaches of a non-molestation and exclusion order, despite express warning from the judge.	Maximum sentence of two years' imprisonment upheld.
<i>Lightfoot v Lightfoot</i> [1989] 1 FLR 414	Breach of an order not to dispose of any monies received, and to pay them into a joint account. He received £30,000, none of which was paid into the joint account.	18 months' imprisonment upheld.
<i>Re O (Contempt Committal)</i> [1995] 2 FLR 767	Parents writing anonymous letters in breach of an injunction. They would apparently stop at nothing to secure the return of their "former children" who had been adopted. There was a danger of destabilising the adoption and the parents' conduct constituted an attempt to pervert the course of justice.	12 months' imprisonment upheld.
<i>A-A v B-A</i> [2001] 4 FLR 1	The husband raped the wife during the currency of restraining orders.	12 months' imprisonment for the contempt in respect of rape. Upheld on appeal.

[65] It may be noted that while the inherent power of the New Zealand High Court to sentence for contempt is unlimited, the maximum penalty for contempt under the Crimes Act 1961, s 401 and the Summary Proceedings Act 1957, s 206 is three months imprisonment or a fine of \$1,000.

Discussion

[66] Against that setting I return to the application of s 60, using the numbering I have inserted in the legislation set out at [18] above.

First period of detention

- (1) ❶ The person is arrested and detained under s 59.
- (2) ❷ If the person cannot be removed within 72 hours a warrant may be issued under s 60(3) provided one of the conditions in that subsection is satisfied. The warrant can be issued for up to seven days (60(2)).

Second and subsequent periods of detention

- (3) ❸ When the warrant expires, the person must be brought before a judge for extension of the warrant, in which case s 60(4) provides that subs (2) and (3) and (6A) apply.

It is at this point that the difference between my interpretation and that of the other members of the Court occurs in the case of a person falling within subs (6). If subs (3) is given effect, then the judge must undertake the assessment required by that subsection as to whether an extension should be granted. In doing so the judge must take account of what Parliament says in subs (6), (6A) and (7) about how persons affected by subs (6) are to be treated; I return to that point shortly. ❹ On that view, the judge may not issue a warrant “for an unreasonable period” unless “in all the circumstances it is in the public interest to make a warrant of commitment”.

- (4) Once a second or subsequent warrant has been issued, the judge may consider conditional release under subs (5) unless the person is a subs (6) person. ⑤ If the person is a subs (6) person, the judge may not order release under subs (5) unless there are exceptional circumstances. ⑥

The other members of the Court consider that there is an inconsistency between the requirements in subs (3) and the provision of subs (6) that the judge may not order release unless there are exceptional circumstances. I return also to that point.

- (5) ⑦ If a new warrant is issued and there are no exceptional circumstances, the warrant may be extended for up to 30 days and the three month time limit is excluded.
- (6) ⑧ In that event, at the expiration of the warrant subs (3) – (6) and (6A) apply in the same manner (starting again from (3) above).

[67] I return to the two points arising from the foregoing analysis. The first is that at the subs (4) stage subs (2) and (3) and (6A) apply. The second is that there is inconsistency between the requirements of subs (3) and (6). They may be dealt with together.

[68] It is axiomatic that a statute must be read as a whole. Here that entails reading “exceptional circumstances” as consistent with and informing the interpretation of both “unreasonable period” and also the further subs (3) exception that “it is in the public interest to make a warrant of commitment”. Such construction gives effect to the language of both subs (3) and of subs (6), each of which Parliament has said apply at the expiry of a warrant under subs (6). I recognise with respect that the Minister referred only to “exceptional circumstances” as avoiding indefinite detention of a person who refuses to sign a passport application (see the *Hansard* passage reproduced by O’Regan J at [167]). But the constitutional duty of the Court is to apply the language selected by Parliament. It must do so in full.

[69] “Unreasonable” is a flexible term which will readily accommodate the requirements of exceptionality, and thus recognise the need to treat differently cases falling within

subs (6), for which Parliament contemplates longer detention to give effect to the purposes of the section, and those to which subs (6) does not apply. In a context where subs (6) has no application, “unreasonable” will be measured against the three month limit of subs (7). Where subs (6) does apply, “unreasonable” will be measured against the fact that the three month limit has been disapplied; that the test of subs (6) is of “exceptional circumstances”; and in the light of the general purposes of ss 59(2) and 60(8) and the specific purposes of imposing an incentive on the person to conform with the immigration laws (subs (6) – (7)).

Purposes

[70] The Interpretation Act requires consideration of the purpose of the statute in construing “unreasonable”, “exceptional circumstances” and “public interest”. As earlier noted, two principal purposes are expressly stated. Section 59(2) states that “the purpose of arrest and detention under this section is to execute the removal order by placing the person on a craft that is leaving New Zealand”. This purpose is reiterated in s 60(2). That subsection is expressed as being subject to subsections (4) and (6A), but that qualification logically applies to the time period for review (seven days), rather than the purpose. A second purpose is stated in s 60(8). That is “to achieve an outcome that ensures a high level of compliance with immigration laws.”

[71] So long as the detention serves the s 59(2) and 60(8) purposes it will be rare that the circumstances could be exceptional, the period of detention unreasonable, and that the public interest would not require continued detention. But since subs (3) and (6) must be given due weight there will be circumstances where the statutory purposes are being pursued, but the person cannot be detained because there is no sufficient public interest and detention would be for an unreasonable period, which may mean that there are exceptional circumstances which also require release. If the detention does not serve the statutory purpose at all there is simply no basis for detention. This possibility was an alternative ground raised by the respondent and is discussed below at [123].

[72] Returning to the three purposes of detention identified by Morgan and Liebling (at [46] above) I have noted that the purposes of immigration detention under s 59 are *custodial* – to ensure proceedings can be executed swiftly, and *coercive* – to encourage compliance with immigration laws. There is no punitive purpose. Unlike in the UK and the USA, in

New Zealand failure or refusal to sign a passport application to facilitate removal is not a criminal offence triable in a criminal court and punishable by a penalty.

[73] But it is obvious that Parliament was concerned that non-compliance should not be seen as an easy option. The clear policy of section 60(6) is that detention is to be employed as an incentive to compliance with a removal order. This interpretation is reinforced by the fact that subs (6) was added as a direct result of the High Court's grant of habeas corpus to Mr Mohebbi who, in circumstances somewhat analogous to the present, had refused to apply for an Iranian passport.

The principle

[74] The present judgment does not propose any easy option. It contemplates imprisonment to seek to achieve the statutory purposes until, on the stern test appropriate for cases falling within subs (6), it becomes unreasonable to continue the detention or unless the public interest otherwise requires. I cite at [35] the common law rule that legislation is presumed to conform with constitutional principle, at least unless very clear language to the contrary is used.

[75] The constitutional principle in favour of preserving liberty can be traced back to at least 1215, when the Magna Carta expressly prohibited detention otherwise than by law. That measure was confirmed in 1297 and remains part of New Zealand law: see s 3(1) of the imperial Laws Application Act 1988 and Reprinted Statutes vol 30 at 26. It is given effect by the common law presumption that, where more than one construction is available, the law should be interpreted *in favorem libertatis* adopted in *Crowley's Case* (1818) 2 Swans 1, 67-8; 36 ER 514, 53 (HC). Kersley, *Broom's Legal Maxims* (10ed 1939) cites the extended form: *in favorem vitae libertatis et innocentiae omnia praesumuntur*. In its form *in favorem vitae*, the maxim was recently cited by the successful appellant in *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328 at 336 (PC). The principle, which underlies the onus of proof in criminal cases, is of general application. To continue detention for a period that is "unreasonable" would plainly, in my view, run contrary to New Zealand's constitutional values. No New Zealand authority was cited to us to justify such a result.

[76] I therefore respectfully differ from O'Regan J. To justify detention for a term that is unreasonable, via the reference in subs (6A)(ii) back to "this subsection", would give no

effect to the fact that “this subsection” also refers to subs (3) and thereby imports the reasonableness test in *that* subsection. O’Regan J’s construction would add by implication to the language of sub (6A):

(ii) subsections (3) to (6) and this subsection apply at the expiration of the warrant the words [*but subsection (3) applies only if subsection (6) no longer applies to the person*].

I recognise that sometimes the Court is compelled, in order to avoid an absurd result, to read words in to a statute. But while the interpretation proposed by O’Regan J is no doubt a logical possibility, the Court should be reluctant to read words in; and the more so when the consequence would be detention for an unreasonable period. The literal construction suggested in this judgment requires no addition: the statement that “this section appl[ies]” empowers the Judge to extend the warrant provided the conditions of subs (3) are satisfied. It would terminate detention at the point where to continue it would be unreasonable. No “public interest” in terms of s 60(3)(d) was identified.

[77] The literal construction is also consistent with the two evident purposes of s 60: to seek a high level of compliance with immigration laws (subs (8)); and to seek removal by imposing an incentive on the person to conform with those laws (subss (6) – (7)), even though that incentive is lesser than the alternative of indefinite detention.

[78] The liberty principle in my respectful view is also relevant to the President’s argument that the approach adopted in this judgment does not square with the policy expressed in subss (6) and (8) of s 60. Certainly the starting point of this judgment, as of the other judgments of the Court, is s 5 of the Interpretation Act, which requires the Court to examine not only the language but the purpose of the measure. It is common ground that subss (6) and (8) are clear pointers to the general legislative policy. The point of difference concerns whether the text is to be overridden by other indicators of policy.

[79] The President relies on the historical context, which is recounted by the Minister of Immigration in the Hansard passage referred to at [167]. The President proceeds on the basis that s 60(6) was introduced “on a particular assumption as to its effect” (at [223]).

[80] But that conclusion reaches beyond the language Parliament has selected. While reference to Hansard will often shed light on what policy Parliament has adopted, it is

ultimately the language of the statute, read in the light of accepted conventions of interpretation, which constitutes the law. The other members of the Court acknowledge linguistic difficulty with their preferred interpretation (at [165], [223] and [231]). While the literal construction does not in my view give rise to uncertainty, if contrary to that opinion there is any lack of specificity, I prefer the approach that the statute should not be extended beyond the limits of its language and that any residual doubt be resolved by the presumption in favour of liberty.

[81] The New Zealand patterns of use of imprisonment do not permit of long term detention for those who have not been convicted of serious crime. In cases where the elapsed period is not unreasonable another warrant can be issued and the subs (4) procedure may then be employed, and so on until the unreasonable period in subs (3)(c) is reached and the public interest no longer applies, exceptional circumstances have arisen, or the purposes of ss 59(2) and 60(8) are no longer operative.

[82] For detention to remain lawful, each step in the process must be in furtherance of the purpose of placing the person on a craft that is leaving New Zealand (s 59(2)). That point is made by the Minister, who disavowed indefinite detention, even for a person who refuses to cooperate.

[83] In summary, detention of persons falling within s 60(6) must terminate if either:

- (a) there are exceptional circumstances, which includes the case where further detention would be for an unreasonable period unless it is in the public interest to make a warrant of commitment; or
- (b) the purpose of placing the person on a craft that is leaving New Zealand is no longer being served.

These categories may overlap.

[84] What is an unreasonable period may depend upon two particular considerations of present relevance. One is a realistic prospect that the means of removing the person from New Zealand will come into existence, as by the securing of a agreement with the authorities of another state. The other is simply that too much time has elapsed (a topic

considered in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 (QB) judgment discussed at [139] – [140] of the Appendix). What is in the public interest also requires particular consideration.

Review of the District Court decision

[85] This appeal is from a judicial review of a District Court decision. The basis for such review was outlined by Thomas J in *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 at 133 (CA):

It is based on the fundamental premise that statutory (and some prerogative powers) can be validly exercised only within their true limits. It is the task of the High Court to determine those limits and it does so by the process of judicial review. But the High Court cannot review its own decisions; it must determine its own jurisdiction and, if it is responsible for any irregularity, the defect must be corrected by the Court itself or on appeal: see *Isaacs v Robertson* [1985] AC 97, per Lord Diplock at p 103.

[86] Since the grounds in s 60(3) were not taken into account by the District Court in considering the Crown's application, its decision was defective. In considering what relief should follow it is necessary to consider:

- (a) whether Judge Field was properly satisfied on the balance of probabilities that one of the conditions of s 60(3) was established (either that the detention would not be for an unreasonable period or that it was required in the public interest); and, whether the Judge correctly decided there were no exceptional circumstances and therefore he could not make an order for release;
- (b) if not, whether continued detention would serve the statutory purposes.

[87] These must be considered in light of the essential facts before the District Court, which were:

- (a) The respondent had been held in Auckland Central Remand prison for two years;
- (b) He could have secured his own release by signing the travel documents;
- (c) It was not clear when negotiations with Iran allowing for the respondent's release by deportation might be completed;

- (d) There was no evidence that the respondent's determination not to sign travel documents would be altered by further time in prison;
- (e) There was little risk that the respondent would abscond or commit an offence if released;
- (f) The respondent honestly believed that return to Iran would place his life and health at risk; and
- (g) He had suffered psychological damage as a result of his time in prison and further detention would be detrimental to his health.

It is also relevant to our decision that the respondent has now been on bail since the orders following the High Court judgment.

The grounds in subs 60(3) and (6)

[88] It has been noted that the District Court Judge seems not to have been invited to consider the grounds in s 60(3); nor was the High Court; nor were we. But since they provide the basis of the Court's jurisdiction to extend a warrant they must form the starting point of any analysis.

[89] I repeat that subs (3) states that a Judge may issue a warrant of commitment on the application of an immigration officer if satisfied on the balance of probabilities that any of the following applies:

- (a) a craft is likely to be available, within the proposed period of the warrant of commitment, to take the person from New Zealand;
- (b) the practical difficulties that meant that the person could not be placed on an available craft within 72 hours are continuing and are likely to continue, but not for an unreasonable period;
- (c) the other reasons the person was not able to leave New Zealand within the 72-hour period are still in existence and are likely to remain in existence, but not for an unreasonable period;
- (d) in all the circumstances it is in the public interest to make a warrant of commitment.

For present purposes the relevant grounds are (c) and (d).

Section 60(3)(c)

[90] There is no question that at the time of the District Court judgment (November 2006) the reasons Mr Yadegary was unable to leave New Zealand were still in existence and were likely to remain in existence. There is an issue as to whether those factors were likely to remain in existence for an unreasonable period. If they were likely to remain in existence for no more than a reasonable period this ground would not have been made out.

[91] The questions which, in my view were for consideration by the Judge, were whether he was satisfied on the balance of probabilities that the negotiations would be concluded in early 2007 as the Crown suggested and if so whether that would be a “reasonable” period of detention.

[92] The factors were that Mr Yadegary could not be removed because the Iranian government would not allow him entry without an Iranian passport and because he would not sign the application that would allow him to acquire such a passport. Judge Field had before him an affidavit by the National Manager, Border Security and Compliance Operations of Immigration New Zealand, Mr Baker, suggesting that negotiations with Iran on an agreement that would allow repatriation of Iranian citizens who refused to sign passport applications might be concluded in early 2007. The Judge noted that the respondent viewed this with “some scepticism”, and the Judge did not come to any conclusion on the likely length of time before negotiations would be concluded. There was no suggestion that the respondent was likely to relent and sign the documents. The respondent’s opinion as to the negotiations has to date proved correct.

[93] In the High Court, Courtney J had the advantage of a second affidavit by Mr Baker that gave further detail about continuing negotiations. She was satisfied that progress was being made. But she concluded that there was no “certainty as to when the negotiations might actually produce an agreement that can be implemented” (at [53]). She noted that Mr Baker did not provide any objective basis for thinking an agreement would be concluded in early 2007 (at [53]).

[94] Judge Field had even less information before him as to the likelihood of negotiations being concluded. The only evidence he had was a statement of opinion that an agreement might be reached in early 2007. I consider he could not have been satisfied on the balance of probabilities that Mr Yadegary would be able to be deported at that time.

[95] Even if the Judge had been satisfied that Mr Yadegary would be deported in early 2007 he would have next had to consider whether detention during that time would be unreasonable, employing the test stated at [69] above. This is discussed further below at [99] and following.

Section 60(3)(d)

[96] It would still have been possible for the Judge to have issued a warrant if para (d) was satisfied, that is, if in all the circumstances it was in the public interest to issue a warrant. This ground does not specify any reasonable time requirement. See below at [109] – [110].

[97] In interpreting this term it should be recalled that the Judge is required to seek to achieve an outcome that ensures a high level of compliance with immigration laws.

The presence of a s 60(6) factor and exceptional circumstances

[98] Because the respondent falls within s 60(6), the question of exceptional circumstances arises. See below at [111] and following.

Application of principles

Unreasonable period

[99] From the principles outlined above I draw together the factors that contribute to my conclusion of what constitutes an unreasonable period of detention in the present case.

[100] This appeal concerns the case of self-induced impediment to removal considered in overseas decisions cited in the Appendix including *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97 (PC) (below at [103] – [104] and [144]), the English cases subsequent to *Hardial Singh*, albeit with a different statutory formula (below at [141] – [142]), the Canadian decision *Canada (Minister of Citizenship & Immigration) v Kamail* [2002] FCT 381 (below at [151]) and the US cases *Pelich v INZ* 329 F 3d 1057 (2003) (below at [161]) and *Lema v INS* 341 F 3d 853 (2003) (below at [162]). Other cases, where removal was generally prevented by a refusal of foreign states to admit the detainee, and *Hardial Singh*, where the appellant had lost rather than destroyed his passport and delay in securing a

replacement did not lie with him, are distinguishable. In the former cases detention can contain a potential incentive to the detainee to assist the removal process which is absent from the latter.

[101] The reasons for detention are custodial and coercive. The extent to which detention would continue to serve these purposes is relevant to the reasonableness of the period of detention.

[102] Overseas standards such as those discussed in the Appendix are relevant as a broad reality check: see for example *Lawrence v Texas* 539 US 558 (2003). While the cases show a willingness to maintain detention to provide an incentive to overstayers to facilitate their deportation, there is little evidence in the states against which we are accustomed to compare ourselves of administrative detentions for really long periods, with the exception of in *Al-Kateb v Godwin* (2004) 219 CLR 562 (below at [156]). That decision has been severely criticised, notably by the three very experienced dissenters.

[103] The decision of most assistance to the Crown is *Tan Te Lam*, where the Privy Council restored orders of habeas corpus granted to applicants who had experienced detention for periods ranging between 35 months and 68 months. The Board's view, with which I agree, was that the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable. These remarks were made in the context of periods of detention which considerably exceeded that experienced by the respondent. Accordingly that case favours the Crown argument.

[104] But social conditions in Hong Kong, where in the period leading to the withdrawal of the British Crown over 20,000 migrants awaited repatriation to Vietnam, have little to do with the standards we apply in New Zealand. I appreciate the undesirability of drawing a line of reasonableness of term of detention. Nevertheless, short of imputing a parliamentary purpose of detention of non-offenders for terms equivalent to those imposed on the very worst criminals, there is no escape from the need to make the proportionality judgment in relation to New Zealand standards, that is an integral part of the judicial office.

[105] In the present case there is a low risk of the respondent absconding, and the imprisonment is unlikely to achieve its coercive aims. An alternative to imprisonment, by release on conditions under s 60(5), is available and was properly employed by Courtney J.

[106] On the other hand, Parliament's intention to discourage people from taking advantage of the fact that they cannot be deported without their cooperation must weigh heavily in the analysis. Care must be taken not to give the impression that a person who is unlawfully in New Zealand but cannot be deported unless he or she cooperates will be given free entry to the country if prepared to undergo a certain term of imprisonment in exchange. In the present case the respondent could (in a double sense) determine the length of his detention by agreeing to sign the documents.

[107] But as the criminal and contempt cases show, the principle of legality requires very clear language before there is departure from the constitutional basic: in New Zealand we do not imprison for long periods persons who have not offended gravely against the criminal law. The principles behind our sentencing and bail legislation reflect an awareness that deprivation of liberty is a severe step and that alternatives should always be considered. In the present case, at the time of the District Court Judge's decision the respondent had already been in detention for two years. At least an additional six months must have been in the Judge's contemplation. In terms of the application of the Parole Act 2002 the total would equate to a term of between and seven and a half years imposed by a criminal court at the time.

[108] I have concluded that at the time of the District Court Judge's decision it was apparent that the reasons the respondent was not able to leave New Zealand were likely to remain in existence for what would, by New Zealand standards, constitute an unreasonable period. It follows that the "not unreasonable" time ground of s 60(3)(b) was not established.

Public interest

[109] The purposes of ensuring deportation and a high level of compliance with immigration law indicate a firm perspective that it is in the public interest to deport overstayers expeditiously and to ensure that breaches immigration law are taken seriously. But difficulty in the deportation process is already dealt with under s 60(3)(c), and the reasonableness requirement in that subsection cannot be short-circuited by an appeal to the public interest. Some other circumstance is needed such as, for example, risk of offending or absconding.

[110] In the present case, the only factor that could take the respondent's case outside the normal circumstances that would call for a s 60(3)(c) assessment was his refusal to sign the travel documents. There is no danger to the public and a very low flight risk. The fact that terrorism suspects are eligible to apply for bail ([58] above) is a significant pointer against the proportionality of treating public interest as requiring indefinite detention in the present case. I do not consider there is a sufficient public interest in the respondent's detention to warrant further incarceration beyond a reasonable period. It follows that the ground in s 60(3)(d) is not established.

Exceptional circumstances

[111] As the foregoing analysis above has shown, the question of what constitutes an unreasonable period should take into account whether there are exceptional circumstances in subs (6) cases.

[112] In this Court the Crown's principal submission was that, given the respondent's power to secure release by signing a passport application (ie by assenting to deportation), mere passing of time cannot be a consideration unless the negotiations with Iran have concluded. As I understood the submission, it was based on a premise of human autonomy – that detention from which the detainee can escape by his own decision is self-induced and no responsibility of the Crown, which would be very happy to see him released. On that argument detention of a person who has committed no offence could last many decades and as long as that of the worst criminal.

[113] It has been noted that such submission is not supported by either the text or the purpose of s 60(6). Textually, it would require the Court to ignore the prohibition of detention for an "unreasonable period" in s 60(3)(c) and would read in to the unconditional expression "exceptional circumstances" the unexpressed condition "save any consideration of term of imprisonment". In terms of purpose it would require the Court to disregard evidence that continued imprisonment could not serve the stated statutory purpose of removing the person from New Zealand. Nor does the Crown argument meet the principles of legality and proportionality.

[114] Reading together the criteria of "unreasonable period" and "exceptional circumstances," I agree with the result reached by Courtney J.

Summary: evaluating subs (6) cases

[115] I offer the following summary of considerations relevant to a decision on an application to extend a warrant in a subs (6) case.

[116] The fact that the detention may be terminated at the will of the person detained is of great significance. Normally refusal will be not only unexceptional but the very justification for the detention. Exceptionality may arise from the reasons for the refusal.

[117] The honesty and rationality of the person's reasons for declining to sign are material to the ultimate judgment. Refusal by a person who lacks honest belief in justification for refusal is unlikely to be classed as something exceptional (although lapse of time may be). While the person is bound by decisions of the proper authorities on the topic of justification of belief, rationality is not an identical concept. The less rational the belief the weaker the argument of exceptionality is likely to be; and vice versa.

[118] Evidence of ill-health and adverse effect of prison conditions may be relevant.

[119] The duration of the detention to date and in prospect is of considerable relevance. The prospect of a substantial term yet to serve will usually provide an incentive to sign. The fact that a substantial term has been served may suggest a reducing likelihood that further detention will further the statutory purpose. In considering the significance of duration regard may be had to patterns of sentencing for criminal offending and contempt of court as well as to the conditions of detention.

[120] In making the overall determination, Parliament's terms "reasonable" and "exceptional" and the common law principles of legality and of proportionality can be decisive. They are to be considered together. Germane to them are attitudes in New Zealand and like communities to the significance of imprisonment for mid to long-term periods. For a broad reality check overseas patterns may be taken into account.

[121] Where there is reason to apprehend flight risk and where there is risk of offending if granted liberty, different considerations will arise. Neither of those considerations applies in this case.

[122] These considerations are not exhaustive, and every case will turn on its own facts.

The alternative ground: arbitrary detention

[123] Courtney J in the High Court did not deal with the possibility that the detention was arbitrary in the sense that it did not serve the statutory purpose, a possibility that both parties have addressed in their submissions to this Court. I have set out the purposes of detention above at [19], [47] and [70] – [73].

[124] In the Crown’s submission, so long as there is significant basis for belief that detention will serve the statutory purposes it will fall within the general policy of the Immigration Act and the specific policy of s 60(6).

[125] The judgment in *Hardial Singh*, despite its different facts, warrants careful examination. Lord Woolf’s first proposition undoubtedly conforms with settled principles of New Zealand public law: that detention, like any exercise of public authority, must be for the authorised purpose – here, that of deportation. His second proposition is that the power of detention, given to enable that purpose to be carried out, must be limited to a period which is reasonably necessary for that purpose; and if the purpose cannot be carried out within a reasonable period the power of detention may not be exercised. It is implicit that in such circumstances there can be no detention or any existing detention must be terminated. Again the principle conforms with New Zealand law.

[126] Statutory powers may be used only in order to carry out the purposes of the legislation: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL). Reading s 60(6)(b) within such a context indicates a legislative purpose of detention different from, for example, that of s 79(2)(b)(ii) (ordinary bail in immigration cases) – namely to provide to the detained person an incentive to take whatever action will result in his or her removal from New Zealand, so fulfilling the purposes of ss 59(2) and 60(8). But detention is lawful only so long as it continues to be performed for the purpose of securing the respondent’s departure from New Zealand.

[127] Where there is little or no prospect that the detainee will respond to this encouragement, continued detention cannot realistically be said to fall within the purpose of enabling the removal order to be executed, as it is not contributing to removal in any greater way than could be achieved by the lesser option of release on bail, available for terrorist suspects.

Decision

[128] I have concluded that the District Court Judge erred in the exercise of his power to grant an extension to a warrant of commitment under s 60 of the Immigration Act. In addition, even if he had exercised his discretion correctly, at the time of the District Court judgment there was no prospect of ability to remove the respondent within a period that was reasonable by New Zealand standards. No public interest beyond that in seeking to secure the respondent's deportation was argued. That is in my opinion insufficient to justify continued detention.

[129] Nor can it reasonably be said that the detention of the respondent was contributing any longer to his removal from New Zealand. It was obvious that continuing imprisonment was not going to influence the respondent to sign the travel documents. There was no risk that he would abscond, so release from detention to bail conditions would not have inhibited deportation processes should entry to Iran be secured. There was no realistic prospect that detention would achieve the purposes set out in the statute. It follows that to continue the detention in these circumstances could only be to do so for reasons other than seeking to remove the respondent from New Zealand. It would therefore exceed the power conferred by s 60(6).

[130] To those may be added the fact that the respondent has now been on bail for over a year without incident. It follows a fortiori that to return him to prison at this point, for what would in reality amount to an indefinite period, could serve no lawful purpose. Whatever the position before the District and High Courts, the circumstances are now exceptional and justify the respondent's remaining on bail subject to the current conditions.

[131] The Crown submitted that if we were minded to reject the Crown's arguments we should nevertheless send the case back to the District Court.

[132] I am however satisfied that, in this case involving human detention, we must, as I have sought to do, accept the responsibility for determining whether the respondent's limited liberty is lawful because the term remains reasonable; the public interest is still being served; and the circumstances are not exceptional. Authority for such a course may be found in *Khawaja v Home Secretary* [1984] AC 74 (HL) which followed Lord Atkin's notable judgment in *Eshugbayi Eleko v Government of Nigeria (Officer Administering)* [1931] AC 662 (PC) and was applied in *Zaoui*. That authority is sufficient to justify such

course: while intensity of judicial review will vary according to context, the topic of liberty of the individual requires close scrutiny by a court of review or appeal. The District Court, with its great experience in the day-to-day operation of the Immigration Act, does not claim greater competence than this Court where human liberty is in issue. Indeed, as Potter J pointed out in a second *Mohebbi* case (*Mohebbi v Chief Executive of the Department of Labour* HC AK CIV 2007-404-3710 5 November 2007), there is a right of appeal under s 72 of the District Courts Act 1947 to the High Court from decisions under s 60. A further appeal to this Court is available by leave. There is no justification for imposing on the respondent a more onerous test than would have applied had the different procedural course been adopted.

Orders

[133] O'Regan J is in agreement as to the result, although for different reasons outlined in his judgment below. We therefore make the following orders:

- (a) The appeal is dismissed.
- (b) The appellant must pay the respondent's costs which we fix at \$6,000 plus usual disbursements.
- (c) That the affidavits of Arron Baker, which disclose evidence of the Crown's negotiations with the state of Iran which are still continuing, be not searched nor published.

Appendix

The international context

[134] The law and public policy considerations differ markedly from state to state, but it is nevertheless informative to take into account the approach in other jurisdictions. It is convenient to sketch in an Appendix the approaches to immigration detention in other common law jurisdictions. To provide context I refer to statistics from a report by the Office of Inspector General, United States Department of Homeland Security entitled *Detention*

and Removal of Illegal Aliens (2006) at 19. The report states that, of the 7,144 Iranian immigrants illegally in the US as at 29 June 2004, 105 were detained, and 7,039 were not.

[135] Although the legislative background differs among states, there is a consistent reluctance on the part of the courts to find that indefinite or long-term detention is justifiable in cases such as the present.

(i) The United Kingdom

[136] Unlike in New Zealand, in the United Kingdom it is an offence to refuse to cooperate with making an application for travel documents where required to do so by the Secretary of State: Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 35. The maximum penalty that may be imposed is a term of imprisonment not exceeding two years and a fine.

[137] The immigration regime in the United Kingdom is also different from that in New Zealand in that detention may be authorised by the Home Secretary. It emphasises executive decision-making, unlike the statutorily constructed judicial decisions that authorise detention in New Zealand. The authority stems from the Immigration Act 1971. Schedule 3, paragraph 2(3) provides:

Where a deportation order is in force against any person, he may be detained under the authority of the [Home Secretary] pending his removal or departure from the United Kingdom.

[138] Nevertheless, the comments of the English courts on factors relevant to the appropriate length of detention are relevant to the analysis of appropriate length of detention in New Zealand. In particular, the cases address the question of what is a reasonable length of detention in the face of intransigence on the part of the person held in detention.

[139] In the leading case of *Hardial Singh*, Lord Woolf, then a Judge of first instance, stated at 706:

Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend

upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.

In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.

[140] Woolf J would have granted habeas corpus to a man who had been imprisoned on burglary charges and would have been released on 23 May 1983. But in January 1983, being apprehensive following a visit from immigration officials that he might be deported, he became distressed and absconded from prison, thereby losing remission. He was then due for parole on 20 July 1983 and but for a decision of the Home Secretary to deport him because of his offences he would then have been released. He remained in detention until the hearing and judgment on 13 December 1983. The Judge decided that unless the Home Office evidence were filed within three days, showing that the applicant would be removed within a very short time indeed, habeas corpus would issue.

[141] A second relevant case is *R (A) v Home Secretary* [2007] EWCA Civ 804. In that case the Home Secretary accepted that where there is no risk of absconding or of serious offending, in the ordinary way there is no obvious reason for the Home Secretary to exercise the power of detention: at [53]. Keene LJ at [82] recognised that it is exceptional to regard lengthy administrative detention as lawful where there is some prospect of removal but no clearly predicted date for it but since the appellant in that case could have voluntarily ended his detention he considered that the detention was reasonable. A practical test, recognised by the Divisional Court in *R (Q) v Home Secretary* [2006] EWHC 2690 (Admin) per Auld LJ at [22], is whether “the process towards deportation appeared ... to have current momentum.” In that case the delay was the result of dilatoriness on the part of the authorities of the detainee’s home country in processing his travel documents.

[142] In *R (I) v Home Secretary* [2003] INLR 196 (CA) Simon Brown LJ rejected an argument that refusal to accept voluntary repatriation was an irrelevant consideration, because the question was the legality of the continued detention pending enforced removal and the premise of that question was unwillingness to go. He noted that in *Hardial Singh* willingness to return voluntarily had been a factor in the applicant’s favour and accordingly the converse must be relevant. He distinguished the position in Hong Kong (discussed

below at [143] – [144]) where the Ordinance referred to the relevance of failure to apply for voluntary repatriation, but added at [31]:

... that is not to say that the court should ignore entirely the applicant's ability to end his detention by returning home voluntarily.

Mummery J, dissenting, considered that the detention was lawful. Dyson LJ, in a passage at [51], emphasised by Mr Ryken, said:

... the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable.

He accepted a point made by Mummery J, that if it might be inferred from the refusal of voluntary repatriation that the detained person was likely to abscond, the refusal was relevant to the reasonableness of the duration of the detention. But he added at [52] that:

The relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake.

(ii) *Hong Kong*

[143] The Hong Kong Immigration (Amendment) Ordinance 1991 provided that a former resident of Vietnam who had not been granted an exemption might be detained in a detention centre pending (1) a decision to grant or refuse him permission to remain in Hong Kong and (2) after refusal, pending deportation. The statutory test for legality of detention was whether the period was “reasonable” having regard to all circumstances including whether the person had declined arrangements made or proposed for his removal.

[144] Given the use in the Ordinance of the standard of “reasonable” it is unsurprising that in *Tan Te Lam* the Privy Council held that the *Hardial Singh* principles applied. Delivering the advice of the Board Lord Browne-Wilkinson at 111 recognised that:

... the legislature can vary or possibly exclude the *Hardial Singh* principles. But ... the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative decision and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods on in unreasonable circumstances.

At 114 – 115 the Board stated:

In their Lordships' view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable.

As Toulson LJ pointed out in *R(A)* (at [48]), the requirement of the Ordinance to consider whether the person had refused to take part in a voluntary scheme of repatriation was germane to the Privy Council's decision.

(iii) *Canada*

[145] In Canada there is no limit on the period for which a person may be detained, subject to regular reviews. Unsurprisingly, the issue of potentially indefinite detention has arisen in a number of cases and under different immigration statutes.

[146] In *Rojas v The Queen* (1978) 88 DLR (3d) 154 the Ontario Court of Appeal considered the case of a citizen of the Dominican Republic, who had been held in custody for over ten months pending his deportation. Although it is not entirely clear from the report, it appears that he was refusing to leave Canada voluntarily. The Canadian authorities were having significant difficulty finding a country to accept him, including the Dominican Republic which would not renew his passport.

[147] The relevant statute permitted detention only "pending" deportation. In the Ontario High Court, Linden J held that it was "well settled that a person cannot be held in custody indefinitely under a detention order": (1977) 40 CCC (2d) 316 at 323. On the facts, however, it was held that Mr Rojas was not being detained indefinitely. Despite the prospects of further delay, the efforts to secure his removal were not hopeless. The Court of Appeal affirmed Linden J's decision and was in substantial agreement with his reasons.

[148] In *Sahin v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 214 in a disputed refugee claim (to which New Zealand law takes a different approach) Mr Sahin, a Turkish national, had been held in detention for 14 months following his arrival in Canada. He had been granted refugee status, but the decision was under appeal.

[149] The adjudicator's decision to continue to hold Mr Sahin in detention was appealed to the Federal Court. Rothstein J took the view that detention under the Immigration Act 1985 could not be indefinite (at 227 – 228):

Having regard to the fact that detention under section 103 of the *Immigration Act* is not for the purpose of punishment after conviction, but rather, in anticipation of an individual's likely danger to the public or likely failure to appear for inquiry, examination or removal, I do not think such detention may be indefinite.

[150] Rothstein J concluded that the adjudicator had erred in law by not taking, in particular, s 7 of the Canadian Charter of Rights and Freedoms into consideration. Indefinite detention could constitute a deprivation of liberty contrary to the principles of fundamental justice. He formulated the following non-exhaustive list of principles, observing that the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case (at 231 – 232):

- (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.
- (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
- (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.
- (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

A consideration that I think deserves significant weight is the amount of time that is anticipated until a final decision, determining, one way or the other, whether the applicant may remain in Canada or must leave.

[151] *Kamail* concerned an Iranian who could not be deported because he refused to sign travel documents. He was released on bail after four months' detention but the bail decision was overturned on appeal. O'Keefe J held that, on a proper application of the *Sahin* factors, Mr Kamail should not have been released. His continued detention was entirely due to his refusal to sign travel documents. O'Keefe J regarded this factor as weighing heavily against release, and concluded that to allow Mr Kamail's release at this stage would be to undermine the Canadian immigration system.

[152] The issue of indefinite detention arose again in *Canada (Minister of Citizenship and Immigration) v Romans* [2005] FC 435. The detainee was a chronic paranoid schizophrenic with numerous violence, drug and dishonesty convictions. He was detained in April 1999 and had remained in immigration detention for five and a half years while various appeals and challenges to his deportation order were conducted. In August 2004, despite still being regarded as an ongoing danger to the public, Mr Romans was released because his detention had become effectively indefinite and was therefore contrary to s 7 of the Charter. (It should be noted that within 48 hours of his release Mr Romans was detained involuntarily under mental health legislation.)

[153] The decision to release Mr Romans was affirmed on appeal. Mactavish J held that the *Sahin* principles had been properly applied and his detention could reasonably be classified as indefinite. It appears that the requirement that a person be only detained “pending deportation” (cf *Rojas*) was read into the Immigration and Refugee Protection Act 2001 at [51]:

While those held in immigration detention are entitled to a detention review every thirty days, and may be held only as long as a removal order is pending, nevertheless, when a number of steps remain to be taken before the removal process can be implemented, and the time required to complete those steps is unknown, a lengthy detention may, for practical purposes be reasonably termed “indefinite”.

[154] Given that Mr Romans’ detention had become indefinite, it was open to conclude that this violated s 7 of the Charter and he should accordingly be released. This was despite the fact that he was acknowledged still to pose an ongoing danger to the public. For this reason, Mactavish J also held that the Board was wrong not to attach conditions to Mr Romans’ release.

(iv) *Australia*

[155] Section 196 of the Australian Federal Migration Act 1958 states:

- (1) An unlawful non-citizen detained under s 189 [which required an officer to detain an unlawful non-citizen] must be kept in immigration detention until he or she is
 - (a) removed from Australia ...; or
 - (b) deported ...; or

(c) granted a visa.

...

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention ...

[156] This section was construed by a divided High Court of Australia in *Al-Kateb*. The appellant wished to leave Australia but as a stateless person was unable to secure the necessary international cooperation to do so. There was no real likelihood or prospect of his removal in the reasonably foreseeable future. Three of the four senior judges, including the Chief Justice, considered that his indefinite detention could not be justified. The appellant must be released since continued imprisonment could not serve the purpose of detention – that the appellant should leave Australia. The majority however considered that the language of the statute admitted of no such implication. The appeal against an order effectively of indefinite detention was dismissed.

(v) *USA*

[157] Section 234(1) of the Immigration and Nationality Act 1953 (8 USC 1253) provides a four year prison term for wilful refusal to apply for travel documents.

[158] *Zadvydas v Davis* 533 US 678 (2001) is the leading authority on the interpretation of s 243(a)(6), which authorises the further detention of persons who have not been removed during the 90-day statutory “removal period” if they are determined to be either a risk to the community or unlikely to comply with the order of removal. At issue was whether the words “may be detained beyond the removal period” permitted the indefinite detention of such persons. The petitioners in *Zadvydas* were not frustrating the deportation process; no country was willing to accept either of them.

[159] The Supreme Court rejected the Government’s argument that an alien could be detained indefinitely, rather than only for the period reasonably necessary to secure his removal. The Court, with responsibility for setting general standards for the United States, fixed a term of six months as the time for which an alien might reasonably be detained for removal purposes. If after that period the alien provides good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the Government must furnish evidence to rebut that conclusion.

[160] In *Clark v Martinez*, 543 US 371 (2005), *Zadvydas* was held to be of general application. The report of the US Department of Homeland Security states cited above at [134] states at 17:

Thousands of criminal aliens with final orders are released because of the unwillingness of some countries to issue travel documents necessary for repatriation. [The two cases cited] mandate the release of criminal and other high-risk aliens 180 days after the issuance of a final removal order, if their repatriation is not likely to occur in the reasonably foreseeable future, except in “special circumstances”...[(defined as (1) highly contagious disease that threatens public safety; (2) where release would have foreign policy implications; (3) where there is high threat to national security; (4) violent criminals with a mental disorder)].

[161] In *Pelich* the Court of Appeals for the Ninth Circuit held that *Zadvydas* did not save an alien who whose own conduct was responsible for his continued detention.

[162] *Lema* concerned an individual who was refused to co-operate in his removal to Ethiopia and as a result had been detained for over two years. The same Court concluded (at 856 – 857) that continued detention was appropriate as Mr Lema was unable to show that there was no significant likelihood of removal in the reasonably foreseeable future:

We cannot know whether an alien’s removal is a “remote possibility,” *Zadvydas*, 533 U.S. at 690, 121 S.Ct. 2491, until the alien makes a full and honest effort to secure travel documents. A particular alien may have a very good chance of being removed, but if that alien is refusing to cooperate fully with officials to secure travel documents, neither the INS nor a court can sensibly ascertain the alien’s chance of removal... . We conclude that 8 U.S.C. § 1231(a)(1)(C), interpreted mindful of the concerns underlying *Zadvydas* and *Pelich*, authorizes the INS’s continued detention of a removable alien so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents.

O’REGAN J

Introduction

[163] Prior to his release after the delivery of the decision under appeal, Mr Yadegary had been in detention for two years and five months. He is unlawfully in New Zealand. The intention of Immigration New Zealand (INZ) is that he will be repatriated to Iran as soon as that can be achieved. However, that will not be able to occur unless he signs an application for an Iranian passport, which he consistently refuses to do, or if New Zealand and Iran

successfully conclude an agreement under which Iranians unlawfully in New Zealand can be repatriated to Iran without the need to apply for a passport. We are told the efforts to achieve such an agreement are proceeding but after some years of effort there is still no timeframe for the conclusion of the process.

[164] The District Court Judge found that Mr Yadegary had genuine reasons for refusing to sign a passport application form. The fears which Mr Yadegary has about persecution if he returns to Iran are, on the basis of the findings of the Refugee Status Appeals Authority, not well founded. An alternative view would be that Mr Yadegary does not genuinely fear persecution, but is so adamantly opposed to the prospect of return to Iran that he refuses to sign the application forms. Either way, his attitude is characterised by a high level of obduracy and determination which, given the length of time he endured in detention prior to the High Court decision, seems unlikely to be altered.

Section 60 in context

[165] Baragwanath J has highlighted the rather awkward drafting of ss 59 and 60 at [19] – [27] of his judgment. The amendment made to s 60 to deal with uncooperative detainees sits rather uneasily with the rest of s 60. While s 60(6) appears, on its face, to create a quite separate, and considerably more draconian, regime for such persons, the drafter has not entirely separated the legal requirements relating to them from the remainder of s 60. The result is something of a conundrum.

[166] The Hansard record from the debate leading to the supplementary order paper containing the provisions which became s 60(6) and (6A) assists in identifying the legislative context. The historical context is outlined at [216] in the judgment of William Young P.

[167] The then Minister of Immigration, Hon Lianne Dalziel, described the reason for the amendments in the following terms (4 September 2003) 611 NZPD 8405:

This amendment was required to address a serious situation where a High Court ruling enabled the release from detention of two individuals who were unlawfully in New Zealand and awaiting removal. The only reason they were still in New Zealand was that we were unable to obtain travel documents for them because, in both cases, they refused to sign applications for them. The fact that both were released without conditions is of significant concern. It occurred because there was no basis to detain them, so there was no basis to impose conditions on them, either.

The fact that the judge said the writ of habeas corpus was issued “albeit with some reluctance” was a significant signal from the court that it was up to Parliament to fix this.

Section 60 came into force in 1999, when National was changing the rules around removals from New Zealand. The 3-month limitation was believed to be a sufficient balance between the time needed to obtain travel documents and the amount of time someone would be detained. No one contemplated someone holding out for 3 months—effectively, preventing that person’s removal and effecting that person’s freedom. I hope the lawyers who successfully argued for this loophole are satisfied at the result of their work and at what they have achieved for their clients.

I hope that, in light of the changes that have been brought in, the Green Party stops saying this amendment is indefinite detention. It is not. It is a warrant of commitment that can be renewed on a 30-day basis by a court. The court retains the ability to consider exceptional circumstances, even though it is the action or inaction of the individual concerned that means he or she cannot be removed. If the particular individuals concerned had signed their applications, they would not be in detention—they would be gone—and, if certain charges were proven, maybe a woman would not be lying critically ill in hospital today. I am not blaming anyone for that; it would be wrong to do so. I would say, though, that members of the Opposition would do that if it were the other way round—they would blame this Government if we had been responsible for bringing in section 60. But it is not a case of fault; nobody could have foreseen that this would occur.

[168] The Minister was adamant that the new provisions did not provide for “indefinite detention”, even for a person who was refusing to cooperate. As she correctly pointed out, the Court retained the power to order release if there were exceptional circumstances even though the reason for detention was the failure of the detainee to cooperate. In light of that comment, it is hard to see why the fact that detention is effectively self induced should be seen as a conclusive factor against a finding of exceptional circumstances. Of course, if a Court does find that there are exceptional circumstances, then the detainee can be released on conditions (unlike the release of Mr Mohebbi, which had to be done unconditionally), as, in fact, happened in the present case.

Purposes

[169] As explained by William Young P at [214] – [215], the sections were originally drafted with a view to being compliant with the *Hardial Singh* principles, because the time periods for detention were closely circumscribed and the purpose of detention under s 59 (and the continuation of detention under s 60) was stated to be to enable the execution of the removal order: s 59(2). A warrant from a judicial officer is required for detention under s 60. Section 60(3) requires the Judge to consider whether the delay in executing the

warrant is “for an unreasonable period”, and if so a further warrant of commitment is not available unless there is some other “public interest” reason.

[170] The maximum period of detention is three months: s 60(7).

[171] Against this background of carefully circumscribed provisions for detention, s 60(6) is a significant departure from the regime which existed prior to the amendment which added s 60(6) to the Act.

[172] Courtney J concluded that the purpose of detention of a detainee to whom s 60(6) applied was still the execution of the removal order. While that is so, the special circumstances which arise when the detainee fails to cooperate engage subsidiary purposes of encouraging or coercing cooperation and prevention of abuse of the system (obtaining effective rights of residence even though not entitled to them). Section 60(8) evidences that purpose. In determining whether exceptional circumstances have arisen, those subsidiary purposes are important factors.

Exceptional circumstances

Unreasonableness

[173] Courtney J saw the application of the *Hardial Singh* principle as requiring an interpretation of “exceptional circumstances” as being effectively synonymous with unreasonable. I do not believe that that is correct.

[174] As explained at [169], s 60 as originally drafted effectively incorporated the *Hardial Singh* principles. However, in enacting s 60(6) and (6A), the legislature departed from the then existing regime which was consistent with the *Hardial Singh* principle of unreasonableness and applied a more exacting test of exceptional circumstances. In other words, the introduction “of exceptional circumstances” in s 60(6) imposed a higher threshold than unreasonableness.

[175] What was meant by exceptional takes colour from the Hansard debate: it was not intended that s 60(6) impose indefinite detention for detainees who were refusing to cooperate in their removal, nor did the three month maximum apply.

Time

[176] On behalf of the Crown, Mr Palmer suggested that exceptional circumstances are limited to circumstances relating to the detainee, i.e. matters of a humanitarian nature such as illness (physical or mental) or the like which cannot be adequately provided for in the prison environment. However, unlike other provisions in the Act which expressly refer to exceptional circumstances of a humanitarian nature (see, for example, s 47) the present section does not. In principle, I cannot see why the extensive period of time for which someone has been detained cannot be brought to bear in the consideration of the existence of exceptional circumstances.

[177] The circumstances which arise where an application for refugee status occurs (s 60(6)(a)) provide an interesting contrast to the present situation. Where a detainee seeks refugee status after a removal order has been served, one can assume that the outcome will be known within a few months or, at most, something over a year (depending on the exercise of appeal rights). The additional purpose in that case is to ensure that the tactic of making a belated claim for refugee status does not yield the beneficial side effect of de facto residency. But in order to achieve this, the period of detention will be a finite period and, in many cases not significantly greater than the three month maximum provided for in s 60(7).

Purpose

[178] In the case of someone in Mr Yadegary's position, the elimination of the time factor from the "exceptional circumstances" inquiry would mean that, absent illness or the like, detention could continue indefinitely, unless Mr Yadegary gives in. But Mr Palmer submitted that the Crown was not contending for indefinite detention – he put his case this way:

... it is at no point suggested that s 60(6)(b) must be interpreted to authorise indefinite detention. Rather, absent exceptional circumstances, detention is authorised for so long as voluntary repatriation is available but intentionally obstructed by the person concerned **and, in addition, where there is also the prospect of removal proceeding as a result of diplomatic negotiations.**

... Provided diplomatic negotiations retain momentum, rather than failed, as in having "stalled", it is submitted that detention remains authorised by s 60(6)(b).

(Emphasis added.)

[179] The Crown accepts that, where the overarching purpose of s 60, removal from New Zealand of a person who is in New Zealand illegally, could no longer be achieved, continued detention would not be permitted. It also appears that the Crown accepts that, if the negotiations with Iran were to break down so that removal of Mr Yadegary without the need for him to sign an application form was foreclosed, then the purpose of removing him could no longer be achieved. That in turn appears to involve an acceptance that there is no real prospect that Mr Yadegary will sign an application form. I consider that to be a realistic assessment of the position.

[180] Given the position taken by the Crown, its case appears to depend on the continued viability of the negotiations with Iran. The updating affidavit provided by the responsible official for the purposes of this appeal indicated those negotiations continuing to make progress, but without providing an indication of the likelihood of success or the likely timeframe. Nevertheless, I am prepared to accept that, even if it is assumed that Mr Yadegary will never sign an application for an Iranian passport, the purpose of removing him from New Zealand remains a possibility because it is possible that the negotiations with Iran will eventually succeed. Thus, if the test postulated by the Crown is applied, there is no basis for ordering that Mr Yadegary's detention cease on the basis that the purpose of removing him is no longer achievable.

Analogy with contempt of court

[181] On the other hand, if the negotiations with Iran do break down, then in my view the prospects of Mr Yadegary signing an application form are now so remote that it should be accepted that no reasonable prospect of removing him exists. As I understand it the Crown accepts that. I reach that conclusion because in my view the obduracy shown by Mr Yadegary, enduring imprisonment for 29 months, is such that there can now be no realistic prospect of his yielding to the coercion imposed on him by his detention.

[182] The present situation has a number of similarities to the flouting of court orders, leading to imprisonment for contempt. William Young P refers to the case of *Re Davies* (1888) 21 QBD 236 at [251] of his judgment. In that case, Mrs Davies was imprisoned for 18 months when she refused to abide by an injunction issued against her. Matthew J referred to a need to ensure that the punishment is commensurate with the offence: at 238.

[183] The President also refers to *Re Barrell Enterprises* [1973] 1 WLR 19 (CA), which dealt with the failure of the appellant to deliver certain documents to the Official Receiver, when required to do so by court order. She was found to be in contempt of court and imprisoned pending compliance with the order. After five months of incarceration, the court of appeal ordered her release, notwithstanding her continued non-compliance with the order. Russell LJ observed (at 27):

If we thought it at all likely that the dismissal of all Miss Barrell's applications to this Court and the continuance of her incarceration for some reasonable period would lead to her producing the securities or enabling them to be recovered by the Official Receiver then we would be in favour of refusing her application for release. We cannot accept a proposition that a person committed for failure to obey a mandatory order should never be released so long as he continues in disobedience. The only case that could be thought to support that proposition was *Corcoran v Corcoran* [1950] 1 All ER 495, where Wilmer J used firm language, no doubt with a view to inducing the contemnor to comply with the order of the Court. It is inconceivable that with a view to enforcement of its order the Court should keep a man or woman in prison for life or for a long term of years.

[184] Russell LJ did not accept the proposition that compliance would be likely if the contemnor had to face the possibility of truly indefinite detention. He said (at 27):

[Counsel] for the Official Receiver suggested that with the dismissal of these appeals against the original finding of contempt, Miss Barrell would now be forced for the first time to face the grim reality of her situation, and be therefore more likely to give an acceptable explanation as to these documents. But we do not think there is the least likelihood that if the appellant were kept in prison she would now within a short time disclose the true story of these securities. We very much doubt if she would ever do so

[185] A similar sentiment was expressed by Lord Denning MR in *Danchevsky v Danchevsky* [1974] 3 All ER 934 (CA). At 937, Lord Denning expressed the view that, while an indefinite order for imprisonment may be justifiable where there is a reasonable prospect of the detainee complying with the court order, it would not be appropriate to do so where there is no prospect of compliance. In the latter case, a fixed term for the past disobedience is the appropriate sanction.

[186] In *Enfield London Borough Council v Mahoney* [1983] 1 WLR 749 at 758, May LJ expressed the view that, once a contemnor has been sufficiently punished for disobeying a court order, he should not be punished further for continuing to do the same thing, even though in a sense this shows that he is continuing to be contumacious. He continued:

If ... the Court takes the view he has been punished enough for the original contempt, then the only remaining justification for continuing to keep him in custody is that this may still have a coercive effect and make him comply with the original order. If it is quite clear that he is not going to comply however long he stays in custody, then provided, as I say, that he has been punished enough there is in my view no justification for continuing to keep him in prison.

[187] I do not share the view expressed by William Young P (at [254] of his judgment) that it is still possible Mr Yadegary might eventually cooperate in his return. It seems to me that the present situation is more analogous with the situations dealt with at [251] of the judgment of William Young P. In cases of ongoing flouting of court orders amounting to contempt of court, the reality that entrenched positions are unlikely to change by the passing of time and detention is well recognised, as the cases cited by William Young P illustrate. I cannot see a strong case for a different approach in the present context. So, while I accept the point made by William Young P at [252] that the contempt cases are not on all fours with the present case, I consider them to have sufficient similarity to provide guidance in the present context.

Application of s 60(3)

[188] I disagree with the analysis of Baragwanath J that a judge determining whether an uncooperative detainee's warrant for detention should be renewed is required to be satisfied that the reasons that the detainee cannot leave New Zealand under s 60(3) continue and are likely to continue "but not for an unreasonable period" or that it is "in the public interest" that the detainee's detention continue. In my view, s 60(6A) provides its own authority for a Judge to extend a warrant whether s 60(3) applies or not – all that is required is that the Judge had decided not to order the detainee's release under s 60(6). While s 60(6A)(ii) says that s 60(3) applies, it also says that s 60(6) and s 60(6A) itself applies, and s 60(6) and 60(6A) effectively regulates the position of an uncooperative detainee.

[189] The only circumstances in which s 60(3) or (5) could apply would be where the detainee has discontinued his or her non-cooperation so that the reason that his or her removal cannot occur promptly is something other than his or her own action or inaction or a Judge has determined that there are exceptional circumstances for the purposes of s 60(6). I do not consider that there is any need to add words as suggested by Baragwanath J at [76]. Nor do I consider it necessary to strain the words to reach an interpretation in favour of

liberty of the person. My interpretation is consistent with the purposes identified at [172] above, and the exceptional circumstances qualification to s 60(6) provides protection for an uncooperative detainee against indefinite detention.

[190] Even if I am wrong on that, if s 60(3) did apply it would have to be read in context. Both s 60(6) and s 60(8) are important elements of that context. Section 60(6) displaces the presumption of a three month maximum, and contemplates that for uncooperative detainees, detention will be in the public interest unless exceptional circumstances apply. Section 60(8), with its emphasis on ensuring compliance with immigration laws, is also important. It emphasises the subsidiary purpose of detention in cases such as this, namely incentivisation of compliance and rendering unattractive non-compliance. So the standard to be applied by the Judge would still be “exceptional circumstances” because in the absence of such circumstances, detention is treated as being in the public interest.

[191] On the facts before us I accept that the purpose of removing Mr Yadegary remains achievable because the negotiations with Iran may yield a result that makes it possible to remove him without his signing anything. I also accept that continued detention of Mr Yadegary would serve the subsidiary purpose of deterring non-cooperation by others.

“Exceptional circumstances”

[192] The question then is whether Mr Yadegary’s position amounted to an exceptional circumstance, at the time Judge Field considered the application for the extension of the warrant of commitment. It is clear that the mere fact of imprisonment for more than the three month maximum period referred to in s 60(7) does not constitute exceptionality. Those who delay their removal by their own actions are not entitled to the protection of that time limit for the reasons accepted as valid in cases such as *Tan Te Lam v Superintendent of Tai A Chan Detention Centre* [1997] AC 97 at 114 – 115 (PC) and *R (A) v Secretary of State for the Home Department* [2007] EWCA CIV 804 at [54].

[193] As noted earlier, the time factor cannot be excluded from the consideration of exceptional circumstances. If it were excluded, as the Crown argued it should be, indefinite imprisonment would have to be countenanced, and the Crown rightly conceded the section did not provide for that. I agree with Baragwanath J that, if the time factor was intended to

be excluded from the analysis of exceptional circumstances, s 60(6) would have needed to say so.

[194] The circumstances would be exceptional, in my view, if the only method of removing Mr Yadegary was with his cooperation and the purpose of coercion could not be expected to succeed. If the coercion purpose could not be expected to succeed, neither could the overarching purpose of effecting Mr Yadegary's removal. The point at which the purpose of coercion can be said to have failed is a matter on which views can reasonably differ, but I would be prepared to find on the present facts that it had been reached after 29 months of detention. Such a period is also sufficient in my view to disincentivise non-cooperation (though I acknowledge that an even longer period of detention would provide an even greater disincentive). It has to be remembered that the situation which led to the enactment of s 60(6) was that there was a three month maximum. Mr Yadegary was in detention for almost ten times as long as that.

[195] I am conscious of the very strict interpretation of the term "exceptional" in the recent decisions of the Supreme Court in *Rajamani v R* [2008] 1 NZLR 723 and *Wong v R* [2008] NZSC 29.

[196] In *Rajamani*, the Court determined what "exceptional" meant by reference to the sort of situations highlighted in the parliamentary debates leading to the enactment of the relevant provision. Parliament had legislated to allow a trial court to direct that a trial continue with fewer than 11 jurors without the consent of all counsel if the court considered that that was appropriate "because of exceptional circumstances relating to the trial (including, without limitation, the length or expected length of the trial), and having regard to the interests of justice". The Supreme Court noted that the amendment had been made in anticipation of a trial of an alleged serial rapist which involved 27 complainants and was expected to last five months. It said the phrase "exceptional circumstances" had to be construed against that background.

[197] In *Wong* it was decided that exceptional circumstances did not exist where the trial had entered its fourth week and the prosecutor was part way through the Crown closing address when the number of jurors fell below 11. There were several accused, interpreters and 41 witnesses of whom 30 were heard orally and one of whom had come from overseas

to give evidence. The Court said that, to be exceptional, the circumstances “need not be rare but in combination they must be distinctly out of the ordinary” (at [9]).

[198] More recently, the Supreme Court considered the meaning of the phrase “exceptional circumstances” in ss 114 and 115 of the Employment Relations Act 2000 in *Creedy v Commissioner of Police* (2008) 8 NZELC 99,336 (*Wilkins & Field Ltd v Fortune* [1998] 2 ERNZ 70 at 76 cited at [31]). Section 114 requires that an employee who wants to raise a personal grievance must do so within a 90 day period. This period may be extended in certain circumstances including where the delay “was occasioned by exceptional circumstances”. The Supreme Court referred to a decision of this Court which treated “exceptional circumstances” in a similar context as “unusual, outside the common run, perhaps something more than special and less than extraordinary”. The Supreme Court said this formulation combined two different meanings, the first being unusual and the second being a more stringent interpretation of somewhere between special and extraordinary. It said that it preferred the first meaning. One of the reasons it gave for choosing that meaning was that equating “exceptional” with “unusual” was desirable because it did not limit unduly the power to extend the otherwise short timeframe.

[199] The contrast between *Rajamani* and *Wong* on the one hand, and *Creedy* on the other, emphasises the importance of context in determining the meaning of a phrase such as “exceptional circumstances”. In the present case the statutory history (outlined in [166] – [168] above) provides important context. The speech of the Minister at the introduction of the Bill makes it clear that s 60(6) was not intended to provide for indefinite detention, and the court was able to consider exceptional circumstances even though the detention of the individual was effectively self-induced (see ([168] above). On the other hand, it is clear that Parliament considered that unlawful overstayers who refused to cooperate in their removal from New Zealand should not be able to obtain de facto residence rights by simply enduring three months detention.

[200] There was, perhaps, an anticipation that the prospect of a longer period of detention would coerce the detainee to cooperate, but that has not happened in relation to the only two detainees who have become subject to s 60(6), Mr Mohebbi and Mr Yadegary. However Parliament chose to leave the decision to the District Court as to where on the spectrum between three months detention and indefinite detention a halt should be brought to the detention of an uncooperative detainee, requiring that that assessment be measured against

the criterion of “exceptional circumstances”. The Crown appears to have accepted that, in the case where removal is not achievable except with the detainee’s consent, and it has become clear that that consent will not be obtained, detention is no longer permitted. I have come to the view that after the period of detention endured by Mr Yadegary, that point has been reached.

[201] In this case, however, there is an alternative means of removal, and the Crown argues that as long as that alternative remains as a possibility, detention should continue. I do not accept that proposition. Mr Yadegary was in detention for 29 months, and his release as a result of the High Court judgment occurred well over a year ago. Yet the alternative method of removing him (through an agreement with the government of Iran) has still not eventuated.

[202] In my view a delay of that magnitude would have been regarded as constituting exceptional circumstances by Parliament when it enacted s 60(6) and the provision should be interpreted accordingly given the context and its statutory history. In particular:

- (a) Parliament did not intend that there be indefinite detention and countenanced the release of an uncooperative detainee if a Judge found exceptional circumstances existed;
- (b) Time is not ruled out by the statutory language as a factor in assessing exceptional circumstances;
- (c) Imprisonment for those applying for refugee status (triggering s 60(6)(a)) would not be likely to exceed 12 months;
- (d) The purpose of coercion should now be regarded as unlikely to be achieved;
- (e) The purpose of deterring non-cooperation has been furthered by a long term of imprisonment (though I accept it would be better achieved if even longer imprisonment followed);
- (f) An agreement with Iran remains only a possibility despite some years of negotiation;

- (g) Mr Yadegary's detention for two years and five months is nearly ten times as long as the maximum period for those to whom s 60(6) does not apply. It constitutes a significant sanction for his failure to leave New Zealand when legally obliged to do so;
- (h) It was the application of that three month maximum to Mr Mohebbi which led to the enactment of s 60(6); and
- (i) Detention for such a long period of an unlawful overstayer is highly unusual.

Consequences of there being exceptional circumstances

[203] Once it is determined that exceptional circumstances exist, the Judge considering the application for renewal of the warrant is directed to s 60(3) – (5) and must determine whether it is appropriate to release the detainee on conditions in terms of s 60(5). Once those provisions came into play, a release on conditions was an appropriate response in Mr Yadegary's case, given the lack of flight risk and of any risk of offending while subject to release.

Arbitrary detention

[204] Having reached this conclusion it is unnecessary for me to determine whether Mr Yadegary's detention was arbitrary.

Approach to relief

[205] I am satisfied that it was appropriate in the unusual circumstances of this case for Courtney J to substitute her own decision for that of Judge Field. That is reinforced by the fact that Mr Yadegary could have appealed to the High Court rather than seeking judicial review, and if he had done so the Judge would clearly have been entitled to do what she did.

Result

[206] For these reasons I would dismiss the appeal. I agree with the orders proposed by Baragwanath J.

WILLIAM YOUNG P (Dissenting)

Overview

[207] I see this case as turning on three issues:

- (a) Is the proposed removal of Mr Yadegary so unlikely or remote as to no longer justify detention?
- (b) Did Mr Yadegary's detention become indefinite?
- (c) Are there exceptional circumstances which justify Mr Yadegary's conditional release?

As will become apparent, these issues, although warranting individual discussion, are closely interconnected. Before turning to that discussion I will address:

- (a) The key facts;
- (b) My interpretation of s 60(6);
- (c) The way in which similar issues have been addressed in other jurisdictions;
and
- (d) The possible application of the New Zealand Bill of Rights Act 1990.

The key facts

[208] It is common ground that:

- (a) Mr Yadegary was able at all times to obtain release from imprisonment by seeking appropriate travel documentation from the Iranian authorities; and
- (b) Diplomatic efforts to obtain a change in the Iranian policy which prevents compulsory repatriation are continuing. Whether they will be successful and, if so, when compulsory repatriation will be possible are uncertain.

There are, however, two factual issues on which I should comment.

[209] Mr Yadegary was first detained on 2 November 2004. We do not have much detail of the decisions to grant warrants of commitment which preceded the final decision of Judge Field on 17 November 2006. From the material we have it appears that there were opposed hearings as to the extension of the warrant of commitment on 18 November 2004, 10 February 2005, 1 August 2005 and 18 December 2005. As well, on 9 November 2005, Mr Yadegary sought humanitarian relief from the Associate Minister of Immigration which was not declined until 29 September 2006. Mr Yadegary then sought the written advice which the Minister had acted on and invited the Minister to reconsider his decision. On the material before us, there is no explanation for the delay between Mr Yadegary's detention (on 2 November 2004) and his application to the Minister (on 9 November 2005). What is clear, however, is that for the 12 months preceding the hearing on 17 November 2006, Mr Yadegary was seeking legal permission to remain in New Zealand and there is no evidence to suggest that this was not his aim in the period between November 2004 and November 2005.

[210] In an affidavit of 1 December 2006 which Mr Yadegary filed in the High Court proceedings he said:

I will rather die in prison than live one moment in Iran.

Such an assertion, by its nature, is not easy to controvert. But it need not necessarily be accepted at face value. There is no finding of fact in either the District Court or the

High Court as to the likelihood (one way or the other) of Mr Yadegary agreeing to return voluntarily to Iran rather than face continuing detention.

[211] It is important to recognise that throughout his period of detention, Mr Yadegary had not given up hope of being permitted to remain in New Zealand. Given his continuing efforts in this regard, it is not surprising that he has not been prepared to return voluntarily to Iran even though the immediate alternative was remaining in prison. For this reason, I do not see his stance to date as necessarily conclusive as to what he would do upon foreclosure of all other options of remaining in New Zealand or securing his liberty.

[212] An associated factual issue is whether there is a risk of absconding. I say “associated” because the more adamant Mr Yadegary is about not returning to Iran, the greater might be thought to be the risk of him absconding if that is the only alternative to repatriation. I have no difficulty in accepting that Mr Yadegary does not pose a substantial flight risk providing there is no immediate prospect of him being returned to Iran. I rather suspect that the comments in the District Court and High Court judgments as to the absence (or only limited) risk of absconding were directed to that situation. If, however, there is eventually a diplomatic solution to the current impasse (so that Mr Yadegary could be repatriated involuntarily), it is far from obvious to me that he would cooperate in his removal from New Zealand. If his history to date is any guide, it is quite possible that he would go to ground rather than surrender so as to facilitate repatriation.

[213] The associated risk of absconding might arguably be at a level which could preclude conditional release under s 60(5). I do not, however, see it as a controlling consideration in relation to this appeal. In large measure this is because the findings on this point in the District Court and High Court were in favour of Mr Yadegary on this issue and were not challenged by the Crown. As well, as will become apparent, I am sceptical about the likelihood of there being a diplomatic solution in the foreseeable future.

My interpretation of s 60(6)

The Hardial Singh principles

[214] The starting point for an analysis of s 60 of the Immigration Act is *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 (QBD) which addressed a power of detention pending removal. The case concerned not an illegal immigrant but rather one who was subject to deportation by reason of criminal offending who, by the time of the hearing in the High Court, was prepared to return to his home country. The principles which emerge from that case are that, in the absence of a contrary legislative direction:

- (a) The power to detain can only be exercised during the period which is reasonably necessary to effect removal;
- (b) If removal is not possible within a reasonable period, no further detention is permissible; and
- (c) Those insisting on detention must take all reasonable steps to ensure removal within a reasonable time.

[215] It is clear that as first enacted s 60 was intended to be consistent with the *Hardial Singh* principles.

The origins s 60(6)

[216] Section 60(6) came into effect on 9 September 2003 as a hurried response to *Mohebbi v Minister of Immigration* [2003] NZAR 685 (HC) in which Chambers J held that s 138A(5) of the Immigration Act did not provide for the continued detention of an Iranian overstayer whose circumstances were similar to those of Mr Yadegary. Having regard to this context, and what was said in Parliament when the bill was under consideration, it is clear that s 60(6) was enacted to address the particular problem that can arise with Iranian overstayers: that the Iranian government will not issue a passport for an Iranian national

without that person's request. It is right to recognise, however, that problems with compulsory repatriation can arise with citizens of other countries.

The policy underlying s 60(6)

[217] The policy considerations which underlie s 60(6) are presumably as follows:

- (a) Although overstayers are under a legal obligation to leave New Zealand under s 45, breach of this obligation does not entail criminal responsibility. Unless s 60(6) can be invoked, there is no practical sanction on overstayers who block their removal.
- (b) There is an underlying policy (expressed in s 60(8) in terms of the obligations of Judges) to ensure a high level of compliance with the law. In the cases addressed by s 60(6)(b), compliance with the law involves the cooperation of the detainee (in seeking travel documentation). The prospects of obtaining such compliance are enhanced if the alternative to cooperation is imprisonment.
- (c) To put the point just made in (b) another way, allowing those who do not conform to their legal obligations to enjoy freedom and the de facto benefits of residency in New Zealand does not tend to "ensure" a high level of compliance.

The fundamental purpose of s 60

[218] It is implicit in the scheme of ss 59 and 60 that the detention which is contemplated is for the purpose of facilitating removal. I am therefore prepared to accept that there may be cases where removal is so unlikely or remote in time as not to warrant detention.

The problems with s 60(6)

[219] There are two problems with s 60(6), which have both come to the fore in the judgments of Baragwanath and O'Regan JJ:

- (a) The lack of clarity as to the inter-relationship between s 60(6) and the rest of s 60; and
- (b) The failure to address what is to happen if, despite imprisonment, a detainee declines to cooperate with removal.

Lack of clarity as to the inter-relationship between s 60(6) and the rest of s 60

[220] Under s 60(1), (2) and (3), the power to issue a warrant of commitment involves the exercise of discretionary authority. A person arrested under s 59 who cannot be removed within 72 hours must be released unless an immigration officer exercises his or her discretion to seek (and obtains) a warrant of commitment. And where a warrant is sought, s 60(3) suggests that the Judge also has a discretion to decide whether to issue a warrant, even where one or more of the listed pre-conditions is satisfied. The power to order conditional release under s 60(5) arises only where a second or subsequent extension (under s 60(4)) is sought. But on such an application, it will also be open to a Judge simply to decline to extend the warrant (pursuant to the general s 60(3) discretion which is preserved under s 60(4)). Further, leaving aside s 60(6) for the moment, a Judge will not get to the s 60(5) discretion unless satisfied that one or more of the s 60(3)(b), (c) or (d) pre-conditions are satisfied.

[221] Section 60(6) is expressed so as to restrict the exercise of the discretion to order conditional release under s 60(5). As well, it provides an exception to what would otherwise be the three months limit on detention provided for by s 60(7). The subsection does not purport to control expressly the underlying discretions of a Judge not to issue or not to extend a warrant of commitment. Nor does it expressly legislate away the continuing operation of the s 60(3) preconditions. Indeed s 60(6A), which provides for what happens when the Judge decides not to order release under s 60(6A), is itself cast in discretionary terms (“the Judge may ... extend the warrant ...”).

[222] This clumsiness of expression leaves scope for a literal interpretation of the section under which a Judge who cannot find exceptional circumstances in relation to a particular detainee may avoid the effect of s 60(6) by:

- (a) Exercising a general discretion not to extend a warrant.
- (b) Or holding that none of the key s 60(3) preconditions have been satisfied and therefore holding that there is no jurisdiction to extend the warrant. In a case such as Mr Yadegary's, this would involve conclusions that the period likely to elapse before he can be removed is unreasonable (for the purposes of s 60(3)(b) and (c) and that an extension of the warrant of commitment is not in the public interest (see s 60(3)(d)).

This is broadly the interpretation which is favoured by Baragwanath J.

[223] Although this interpretation is in accord with the literal words of the section, I do not see it as conceivably consistent with the intention of the legislature. It is clear that the parliamentary assumption was that a detainee in the position of Mr Yadegary would only be able to secure release if the exceptional circumstances test is satisfied. It sometimes happens that the legislature amends an act on the basis of a misunderstanding of the existing statutory position. Where this happens, there is no requirement for the courts to construe the existing statute so as to accord with the legislature's mistaken assumption as to its effect, see for instance *R v Andersen* [2005] 1 NZLR 774 at [48] and [59] (CA). The situation here, however, is rather different. This is because the legislature did not really misconstrue s 60 as a whole. Rather it introduced s 60(6) on a particular assumption as to its effect. In this context I am reluctant to construe the section on the basis that the legislature missed its mark.

[224] In my view, when the legislature enacted s 60(6), it did so on the basis that a detainee who was thwarting removal (so as to be within s 60(6)(b)) could not maintain that the resulting delay in arranging removal was for an unreasonable period for the purposes of s 60(3)(b) and (c). Likewise in such a case, continuing detention would be in the public interest in the absence of exceptional circumstances under s 60(6). On this basis, I construe s 60(6) and (6A) as occupying the ground when Mr Yadegary came before Judge Field on

17 November 2006. The options open were conditional release under s 60(5) and (6) (providing the Judge considered that there were exceptional circumstances that justified release) or further detention under s 60(6A). In saying this, I have not overlooked the fact that the s 60(6A) power to extend the warrant is itself expressed in discretionary terms but I confess to difficulty seeing how a Judge who had got as far as s 60(6A) could realistically decline to extend a warrant. I am inclined to treat the discretion as reflecting the range of options available (for instance extending the warrant for a lesser period than 30 days or as to other orders which might be appropriate under s 60(6A)(b)). Although I accept that the language of the section is awkward, I do not regard it as inconsistent with my preferred interpretation.

[225] There are two more general considerations which I should mention:

- (a) Baragwanath J adopts his interpretation on the basis of a preference for construing the statute *in favorem libertatis*. I prefer to apply s 5(1) of the Interpretation Act 1999. The text of the section being ambiguous, we should resolve that ambiguity in light of the legislative purpose. That purpose is reasonably discernible in light of the policies which resulted in the enactment of s 60(6). Section 60(8) is also material. There was no point in the legislature seeking to constrict through s 60(6) the circumstances in which a detainee might obtain conditional release if the decision whether to extend the warrant is otherwise at large.
- (b) For reasons which appear later in my judgment, I am of the view that my preferred interpretation of s 60(6) does not involve any conflict with the New Zealand Bill of Rights Act 1990.

[226] The corollary of my interpretation of s 60 is that I disagree with the approach taken by Courtney J in terms of the continuing application of the second of the *Hardial Singh* principles. In my view, in a situation which is covered by s 60(6), the critical issue is whether there are “exceptional circumstances” and the reasonableness or otherwise of the period of detention which is brought about by the recalcitrance of the detainee is not a controlling consideration. In saying this, however, I am not disputing the relevance of length of detention. A period of detention which goes beyond what could have been

contemplated by the legislature in enacting s 60(6) will, I accept, amount to an exceptional circumstance.

Failure to address what is to happen if, despite imprisonment, a detainee declines to cooperate with removal

[227] The legislature did not address what should happen where a detainee refuses to cooperate in removal despite detention and, in particular, was not specific as to how long a recalcitrant detainee should be held. One possible view of the section is that it contemplates detention for such period, no matter how long, as is necessary to coerce cooperation.

[228] O'Regan J has set out what the Minister of Immigration said as to the reasons for the amendment at [167]. She denied the proposition that the “amendment is indefinite detention” although quite what she meant by her denial is unclear. In some of the cases to which I will refer later, judges in other jurisdictions have been unwilling to treat as indefinite a detention which can be ended by the detainee agreeing to voluntary repatriation. I doubt, however, if this was what the Minister had in mind. It is more probable that she thought that detainees would submit to repatriation or involuntary repatriation would become possible before the detention provided for had become indefinite. I note as well that in argument before us, the Crown accepted that s 60 was not intended to provide for indefinite detention.

[229] In that context, I proceed on the basis that the legislation would not permit holding Mr Yadegary in prison until he either dies or cooperates in his removal (which is what I mean by indefinite detention). I see such a limitation as able to be achieved by either (or both):

- (a) Construing or applying the exceptional circumstances test so as to include detention which has – or threatens to – become indefinite; and
- (b) Accepting that detention which has – or threatens to – become indefinite is necessarily associated with any prospect of removal being unacceptably unlikely or remote in time

I do not think it matters which approach is taken. For ease of discussion I propose to treat indefiniteness of length of detention as an independent basis justifying release. I should make it clear, however, that I see a difference between indefinite detention (as I have defined it) and indeterminate detention which is contemplated under s 60(6) in the sense that at the point detention begins, it is not necessarily going to be clear when it will end.

[230] This analysis does not solve the fundamental problem of identifying a point in time when detention must cease and exposes a fundamental weakness in the legislative scheme in the context of the sort of Iranian overstayers to whom it was addressed. Unless there is a diplomatic solution, there will necessarily come a time when a detainee who refuses cooperation will have to be released. Of course, identifying the length of time after which the courts will require release (which in reality is what the judgment Courtney J does) is an invitation to such overstayers to sit out the government and in this way obtain de facto residency (which, subject to the possibility of a diplomatic solution, is what Mr Yadegary has now managed to do).

[231] I am not particularly enamoured of my own interpretation of the section. It involves a degree of coercion which, as well as being a little uncomfortable to contemplate, will not necessarily be effective; this because even on my approach, a detainee in Mr Yadegary's situation will know that, absent a diplomatic solution, he or she will eventually be released (albeit on my approach probably after a period considerably longer than two years). On the other hand, at least on my approach, the policy under-pinning s 60(6), imperfect though it may be, is given a chance to work. The section is not given a chance to work if the courts treat as an exceptional circumstance a period of detention during which Mr Yadegary was seeking to remain in New Zealand and thus could not sensibly have been expected to leave voluntarily.

The way in which similar issues have been addressed in other jurisdictions

England and Wales

[232] There are a number of English cases which have addressed the relevance of a refusal by the detainee to return voluntarily. The relevant jurisprudence is reviewed in *R (ex parte*

A) v Secretary of State for the Home Department [2007] EWCA Civ 804. These cases have been decided in the context of a legislative scheme which makes no specific reference to the relevance of such a refusal. In *A*, the key issues were (1) the detainee's risk of absconding, and (2) the substantial risk the detainee posed to the public in terms of his potential for seriously re-offending. His refusal to leave voluntarily was regarded as relevant to (1), as well as in its own right, and minimising (2) was seen as a valid purpose of detention pending removal. So refusal to return voluntarily is a significant factor in assessing the reasonableness of detention. It was put this way by Toulson LJ (with whom Longmore LJ concurred) at [54]:

The refusal of voluntary repatriation is important not only as evidence of the risk of absconding but also because there is a big difference between administrative detention on circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.

The third Judge in that case, Keene LJ, regarded refusal to return voluntarily as being "relevant" but not as "some sort of trump card" (at [79]). The detention upheld in that case (admittedly in respect of a detainee who was far less meritorious than Mr Yadegary) was for a total of 35 months.

Australia

[233] The relevant regime in Australia is about to change but up until now it has been more harsh than that provided under our Immigration Act. In *Al-Kateb v Goodwin* (2004) 219 CLR 562 indeterminate detention of a stateless person was upheld by a majority of the High Court of Australia. The Court held that the legislative scheme did not limit detention to cases where removal from Australia was reasonably practicable in the foreseeable future. It accordingly overruled a contrary judgment of the Full Court of the Federal Court, *Minister of Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54. What is of some interest in the present context is that the Court in *Al Masri* was of the view (expressed at [137]) that, "ordinarily at least", the second of the *Hardial Singh* principles was not infringed by detention that could be terminated by the detainee agreeing to repatriation. In such cases it would be difficult to show that removal was not reasonably likely.

Canada

[234] In Canada, the detention of persons subject to deportation orders is governed by Division 6 of Part 1 of the Immigration and Refugee Protection Act 2001 SC, c 27. The scheme of the legislation is broadly as follows:

- (a) A person may be arrested and detained without a warrant if there are reasonable grounds for the officer to believe that the person is inadmissible and a danger to the public or unlikely to appear for removal (s 55(2));
- (b) A review of this detention must take place within 48 hours (s 57(1)); and
- (c) A further review of the reasons for continued detention must occur at least once during the seven days following the first review and thereafter at least once within every subsequent 30-day period (s 57(2)).

There is no limit on the period for which a person may be detained, subject to regular reviews. Nor does the statute specifically address the significance of a refusal to cooperate with removal.

[235] The leading Canadian case is *Sahin v Canada (Minister of Citizenship & Immigration)* [1995] 1 FC 214. Mr Sahin, a Turkish national, had been held in detention (14 months as at the date of the appeal) since his arrival in Canada. He had been granted refugee status, but this decision was under appeal. The adjudicator's decision to continue to hold Mr Sahin in detention was appealed to the Federal Court. Rothstein J noted at 227 – 228 that detention under the then Immigration Act could not be indefinite:

Having regard to the fact that detention under section 103 of the *Immigration Act* is not for the purpose of punishment after conviction, but rather, in anticipation of an individual's likely danger to the public or likely failure to appear for inquiry, examination or removal, I do not think such detention may be indefinite.

The Judge concluded that the adjudicator had erred in law by not taking, in particular, s 7 of the Canadian Charter of Rights and Freedoms into consideration. Indefinite detention could constitute a deprivation of liberty not in accordance with the principles of fundamental

justice. In returning the decision whether to continue Mr Sahin's detention, the Judge set down at 231 – 232 a non-exhaustive list of factors to be considered in such cases:

(1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.

(2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.

(3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.

(4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

A consideration that I think deserves significant weight is the amount of time that is anticipated until a final decision, determining, one way or the other, whether the applicant may remain in Canada or must leave.

[236] These factors have been referred to in a number of subsequent cases and are now largely incorporated into s 248 of the Immigration and Refugee Protection Regulations.

[237] *Canada (Minister of Citizenship & Immigration) v Kamail* [2002] FCT 381 involved a fact situation very similar to the present. Mr Kamail was an Iranian who by refusing to sign travel documents was frustrating attempts to deport him. After four months in detention, he was released on bail. This decision was overturned on appeal by O'Keefe J. It was held that on a proper application of the *Sahin* factors, Mr Kamail should not have been released on bail. The sole reason for his continued detention was his refusal to sign travel documents. O'Keefe J (at [33]) regarded this factor as weighing heavily against his release:

[33] When the factors enunciated by Rothstein J. (as he then was) in *Sahin*, supra, are applied to the facts of the present case, factors one and three would favour keeping the respondent in custody. Under factor one, the respondent is not likely to appear. With respect to factor three, the respondent was the cause of the delay in executing the removal order and therefore, it should count against him. In relation to factor three, I cannot accept that the delay caused by the respondent's refusal to sign travel documents can be used to support a finding that his detention time cannot be ascertained or to support a finding that a further lengthy detention is anticipated. The

respondent himself is causing the delay. In the circumstances, the respondent's stay in detention of approximately four months was not an unreasonable length of time. Finally, since the respondent is unlikely to report for removal, it is unlikely that other options, such as outright release, bail bond, periodic reporting or reporting changes of address, would be available so as to favour release.

And at [38] the Judge concluded that to allow Mr Kamail's release at this stage would be to undermine the Canadian immigration system:

It is my view that the decision of the adjudicator was unreasonable. To hold otherwise would be to encourage deportees to be as uncooperative as possible as a means to circumvent Canada's refugee and immigration system. The decision of the adjudicator cannot be allowed to stand.

Hong Kong

[238] *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (PC) concerned the position of large numbers of Vietnamese asylum-seekers who had arrived in Hong Kong following the fall of Saigon in 1975. The Hong Kong legislative scheme provided for the detention of these people pending removal, but only for a period that was "reasonable having regard to all the circumstances affecting that person's detention". One such circumstance was whether the detainee had "declined arrangements made or proposed for his removal". The four appellants had experienced detention for periods ranging between 35 months and 68 months.

[239] The Privy Council accepted that the *Hardial Singh* principles applied and was able to determine the appeals on the basis that:

- (a) Removal of the appellants to Vietnam was not possible. The Vietnamese authorities would not accept repatriation of those whom they did not regard as Vietnamese and all of the appellants were in this category.
- (b) Accordingly, their cases were within the first of the *Hardial Singh* principles.

This conclusion meant that there was no need to determine how the second of the *Hardial Singh* principles was to be applied in the context of the statutory direction as to the relevance of the detainee having "declined arrangements made or proposed for his removal". The Privy Council did, however, make the following comments (at 114 – 115):

However, since there are a large number of Vietnamese boat people still in Hong Kong who may only be able to bring proceedings on the basis that the inordinate length of their detention renders it unreasonable, it is desirable to emphasise one point. The large majority of those in detention do not wish to return to Vietnam and have declined to apply for voluntary repatriation. The evidence shows that, if they did so apply, most of them would be repatriated in a comparatively short time, thereby regaining their freedom. It follows that, in such cases, the Vietnamese migrant is only detained because of his own refusal to leave Hong Kong voluntarily, such refusal being based on a desire to obtain entry to Hong Kong to which he has no right. In assessing the reasonableness of the continuing detention of such migrants, s 13D(1A)(b)(ii) requires the court to have regard to “whether or not the person has declined arrangements made or proposed for his removal.” In their Lordships’ view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable.

Given that these remarks were made in the context of periods of detention which considerably exceeded that experienced by Mr Yadegary, this case favours the Crown’s argument. It is also right to recognise, however, that the huge number of Vietnamese migrants to Hong Kong created problems for the Hong Kong authorities which were of a completely different order of magnitude from those faced by Immigration New Zealand.

United States

[240] The United States Supreme Court decisions cited by Baragwanath J (*Zadvydas v Davis* 533 US 678 (2001) and *Clark v Martinez* 543 US 371 (2005)) were decided in the context of the Immigration and Nationality Act. This statute provides for a default removal period of 90 days in which inadmissible aliens must be detained while deportation is arranged. Section 241(a)(6) contemplates detention beyond the removal period in certain circumstances, in particular if the alien is deemed either a risk to the community or unlikely to comply with an order of removal. In issue in the two Supreme Court cases was whether this provision contemplated indefinite detention. Neither case concerned detainees who were frustrating repatriation.

[241] The same legislative scheme does, however, provide (see s 241(a)(1)(C)), that:

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

Of more interest in the present context, therefore, are two cases which address this provision.

[242] In *Pelich v INS* 329 F 3d 1057 (2003) (9th Cir) the detainee had not been able to be removed because he had refused to fill out passport applications and had provided conflicting information regarding his name, birthplace and residence and his parents' names, birthplaces and residences. At 1060 the Court held:

The risk of indefinite detention that motivated the Supreme Court's statutory interpretation in *Zadvydas* does not exist when an alien is the cause of his own detention. Unlike the aliens in *Zadvydas*, *Pelich* has the "keys [to his freedom] in his pocket" and could likely effectuate his removal by providing the information requested by the INS

... *Zadvydas* does not save an alien who fails to provide requested documentation to effectuate his removal. The reason is self-evident: the detainee cannot convincingly argue that there is no significant likelihood of removal in the reasonably foreseeable future if the detainee controls the clock.

Therefore, on the basis that Mr Pelich's conduct was the reason for his continued detention, the Court concluded that his detention was not indefinite. Indeed the length of detention was held (at 1062) to be "in direct proportion to the detainee's recalcitrant refusal to cooperate in effectuating his removal".

[243] Just over three months after the *Pelich* decision the Court of Appeals for the Ninth Circuit reaffirmed its position in *Lema v INS* 341 F 3d 853 (2003). Mr Lema was refusing to cooperate to facilitate his removal to Ethiopia and, accordingly, had been detained under s 241(a)(1)(C) for over two years. The Court concluded (at 856 – 857) that Mr Lema was unable to show that there was no significant likelihood of him being removed in the reasonably foreseeable future:

We cannot know whether an alien's removal is a "remote possibility," *Zadvydas*, 533 U.S. at 690, 121 S.Ct. 2491, until the alien makes a full and honest effort to secure travel documents. A particular alien may have a very good chance of being removed, but if that alien is refusing to cooperate fully with officials to secure travel documents, neither the INS nor a court can sensibly ascertain the alien's chance of removal.... We conclude that 8 U.S.C. § 1231(a)(1)(C), interpreted mindful of the concerns underlying *Zadvydas* and *Pelich*, authorizes the INS's continued detention of a removable alien so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents.

The application of the New Zealand Bill of Rights Act 1990

[244] The most immediately relevant provisions of the New Zealand Bill of Rights Act (“NZBORA”) are ss 9 and 22, which provide:

9 Right not to be subjected to torture or cruel treatment

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

22 Liberty of the person

Everyone has the right not to be arbitrarily arrested or detained.

[245] Also relevant are ss 4 – 6:

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[246] In the context of this case, these provisions give rise to the following questions:

- (a) Does my interpretation involve “disproportionately severe treatment” for the purposes of s 9 of the NZBORA or “arbitrary” detention for the purposes of s 22 of the NZBORA; and if so, is there a contrary but tenable interpretation of s 60(6) which is to be preferred by reason of s 6?

- (b) Does the application of s 60(6) contended for by the Crown result in “disproportionately severe treatment” or “arbitrary detention”?

The first of these questions involves interpretation of the statute. The second is one of application. A conclusion that the continued detention of Mr Yadegary involved disproportionately severe treatment would suggest (and may be require) his release under s 60(5) on the basis that “exceptional circumstances” should be construed or applied so as to prevent such treatment.

[247] I do not see my interpretation of s 60 or a refusal of conditional release as resulting in a detention which is arbitrary. It is pursuant to a legal process and, subject to the issues identified in [246] above being resolved in favour of the Crown, serves legitimate public ends.

[248] Likewise, I am of the view that my interpretation of s 60 would not lead, and the refusal of conditional release would not amount, to “disproportionately severe treatment”.

[249] The appropriate approach to s 9 of the NZBORA was addressed by the Supreme Court in *Taunoa v Attorney-General* [2008] 1 NZLR 429, a case which of course focused on the conditions of detention rather than detention itself. Section 9 is unusual, in the context of human rights instruments, in specifically incorporating the concept of disproportionality. The majority view in *Taunoa* was that the concept involved “treatment or punishment which is grossly disproportionate to the circumstances”, see Blanchard J at [176] (with whom McGrath J agreed at [340]), or “conduct which is so severe as to shock the national conscience”, see Tipping J at [289] with whom Henry J agreed at [383] and [384].

[250] As I have noted, the proportionality issue raised by this case is rather different from that in *Taunoa*. Here there are legitimate public purposes which are being served: Mr Yadegary is acting in defiance of his legal obligation to leave; if he is allowed to remain in the community, this will tend to undermine the effectiveness of the immigration system and as well give Mr Yadegary in a de facto sense (at least for the time being) rights of residency to which he is not entitled.

[251] Similar issues can arise where there has been a contempt of court. It is open (at least theoretically) to a New Zealand court to impose a sentence of indeterminate imprisonment as a means of coercing a contemnor into compliance. But resort is not often had to this power. The sort of contemptuous conduct which might merit such a sanction is likely to be associated with high levels of obstinacy and irrationality on the part of the contemnor. Experience has shown that such contemnors are sometimes willing to spend lengthy periods of time in prison and then, in the end, are released anyway (by way of example, after 18 months in *Re Davies* (1888) 21 QBD 236). The Courts have understandably shied away from the concept that a person who remains in disobedience of a court order should never be released (see *Re Barrell Enterprises* [1973] 1 WLR 19 (CA)). Once the point has been reached that the period of imprisonment served is appropriate by way of punishment for the contempt and there is no longer any likelihood of the contemnor complying with the court order, release will be directed (see *Re Barrell Enterprises* where the contemnor had served six months in prison).

[252] Although the analogy with contempt of court cases has some relevance to this case, there are differences. The first is that detention of indeterminate duration has been specifically provided for by the legislature. Further, it cannot be said that Mr Yadegary is acting irrationally. By sitting out the government he has managed to obtain de facto residency rights. As well, the periods of detention which have troubled courts in the contempt cases are distinctly different from those which have been found acceptable in immigration contexts in other jurisdictions, which perhaps provide a more sensible yardstick for assessing proportionality. And by that yardstick, it cannot fairly be said that imprisonment in the present circumstances of Mr Yadegary involves disproportionately severe treatment.

Is the proposed removal of Mr Yadegary so unlikely or remote as to no longer justify detention?

[253] A number of Western countries have encountered difficulties in repatriating Iranian overstayers and I am considerably less sanguine than the Crown about the prospects of an early diplomatic solution to the current impasse. So I am inclined to see the prospect of involuntary removal (standing by itself) as too remote to justify continuing (or resumed) detention. Given that nearly four years has passed since s 60 was amended (and three and

half years since Mr Yadegary was first detained), I think that it is now too late to detain him against the off-chance that the Iranian government may change its policy. This means that I necessarily approach the case on a rather different basis than that primarily contended for by the Crown under which the appropriateness of the detention depended fundamentally on the continuing momentum of the current diplomatic process. Counsel for the Crown was reluctant to acknowledge that the purpose of the detention is effectively one of coercion.

[254] On the other hand, as I have indicated, I think it at least possible that Mr Yadegary might eventually cooperate in his return and I have explained why. The overseas authorities suggest a general reluctance on the part of the Courts to accept that removal will not occur when such removal can be effected providing the detainee cooperates.

[255] In this context, I do not see the proposed removal of Mr Yadegary as so unlikely or remote as to no longer justify detention.

Did Mr Yadegary's detention become indefinite?

[256] It is common ground that Mr Yadegary was able secure his release at any time by cooperating in his repatriation to Iran. I see this consideration as extremely important in assessing whether his detention has become indefinite but not, as in itself, resolving the question in favour of the Crown.

[257] The decisive consideration in relation to this issue is that the possibility of Mr Yadegary submitting to removal has yet to be excluded (at least to my way of thinking). Given that the underlying statutory purpose may still be achieved, I do not regard the detention as indefinite.

Are there exceptional circumstances which warrant Mr Yadegary's conditional release?

[258] Section 60(6) provides a default rule which is to apply to particular (defined) situations and also power to depart from that default rule in "exceptional circumstances". This is a fairly common legislative technique. To give effect to the underlying legislative intention, it is necessary to confine "exceptional circumstances" to situations that are

outside the general run of cases that are prima facie subject to the default rule. As to this, see the recent Supreme Court decisions: *Rajamani v R* [2008] 1 NZLR 723, *Wong v R* [2008] NZSC 29 and *Creedy v Commissioner of Police* (2008) 8 NZELC 99,336.

[259] On this approach I think it appropriate to identify the type of case which the legislature had in mind in enacting s 60(6).

[260] *Mohebbi* highlighted what, from the view point of Immigration New Zealand, was a gap in the system. The three month limit provided for by s 60(7) meant that an Iranian national without a passport or travel documents could sit out the Immigration Service and secure his or her release by refusing, for three months, to make the necessary request of the Iranian embassy for the issue of a passport or travel documents.

[261] In this context, it is clear that:

- (a) Section 60(6)(b) was enacted with the particular problem that can arise with Iranian overstayers firmly in mind.
- (b) More particularly, it was intended to apply in a situation where the overstayer was prepared to sit in prison for three months rather than seek travel documents from the Iranian authorities.
- (c) Further, because s 60(6) applies to prevent the conditional release under s 60(5), the legislature must have assumed that it would apply in cases in which conditional release under s 60(5) would otherwise have been ordered. Since a Judge can only order conditional release under s 60(5) if “satisfied that the person is unlikely to abscond”, s 60(6) must likewise have been intended to apply in such cases.

[262] The sort of circumstances which are part and parcel of the ordinary run of cases which must have been envisaged when the legislative scheme was enacted do not seem to me to be properly regarded as “exceptional”. So the general unpleasantness of imprisonment (which is a given in any debate about imprisonment) and predictable impacts of detention on the appellant seem to me to be of no more than contextual significance. Nor

is the absence of flight risk (because absence of flight risk is a precondition to the discretion to release under s 60(5), which is constrained by s 60(6)). I also do not place the significance that Baragwanath J does on the rationality and honesty of Mr Yadegary's reasons for not wishing to go back to Iran. No one would rationally be prepared to stay in prison rather than return home unless he or she had good reasons (at least when assessed from that person's point of view).

[263] On that analysis, the only factor associated with the case which might be exceptional is the length of Mr Yadegary's detention. As is apparent from what I have said already, I have no difficulty in accepting that length of detention may be an exceptional circumstance. I also agree that whether any particular period of detention amounts to an exceptional circumstance falls to be determined in the context of the other time limits stipulated in s 60 (72 hours, seven days and three months). But it also falls to be determined in the context of the sort of situation which the legislature must have envisaged as likely to arise involving an obdurate detainee who is not prepared to cooperate in repatriation. In this context, s 60(8) is of significance.

[264] If the judgment of Courtney J is upheld, the next person in Mr Yadegary's situation will be reasonably confident that, absent a change in policy by the Iranian government, he or she will gain de facto residency rights if prepared to spend say two years in prison. Someone who prefers to live in New Zealand rather than Iran may well be prepared to undergo two years imprisonment on that basis. So the reality is that the result of this case will encourage non-compliance with immigration laws, both by Mr Yadegary (who will be encouraged to remain in resolute defiance of his obligations under s 45 of the Act) and by anyone else similarly placed.

[265] As already indicated by my approach to the issues associated with remoteness of removal and whether Mr Yadegary's detention had become indefinite, I think that the underlying legislative purpose had not been spent in his case at the time he was released.

[266] In short, I am of the view that the circumstances of Mr Yadegary were not exceptional.

Proposed disposition

[267] I have no desire to see Mr Yadegary returned to prison and I am prepared to accept the possibility that the apparent harshness of returning him to prison after his period of liberty as a result of the judgment Courtney J might form a basis for a defensible finding of exceptional circumstances. Given that mine is a minority view, I need not explore its implications in any detail. It is sufficient to say that I would allow the appeal but on the basis that the question whether there are now exceptional circumstances warranting conditional release be reconsidered in the District Court.

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