OUTER HOUSE, COURT OF SESSION

[2010] CSOH 151

P1140/09

OPINION OF LORD MENZIES

in Petition of

HCS

Petitioner;

for

Judicial Review of a decision to detain the petitioner

Petitioner: Bovey, Q.C., Forrest; Drummond Miller LLP
Respondent: Lindsay; C Mullin, Office of the Solicitor to the Advocate General

12 November 2010

Introduction

[1] The petitioner is a national of Somalia. He arrived in the United Kingdom on 2 March 2003 and applied for asylum. His claim was refused, he appealed against refusal, and his appeal was dismissed. His rights of appeal became exhausted on 20 January 2004. He remained in the United Kingdom, and between October 2004 and July 2006 he was convicted of several offences. On 28 October 2004 he was convicted of shoplifting and given a twelve month conditional discharge. On 2 March 2005, whilst on bail, he was convicted of burglary and theft and possession of

cannabis and was given a six month community rehabilitation order. On 21 April 2005, again whilst on bail, he was convicted of robbery and sentenced to two years' imprisonment. On 14 July 2006 he was convicted of shoplifting and given an absolute discharge. A notice of intention to deport was served on the petitioner on 14 August 2007 and he was detained on 16 August 2007. A Deportation Order was served on him on about 16 January 2008. He has not appealed against the Deportation Order.

[2] Between January and May 2008 the respondent avers that arrangements were being made to remove the petitioner from the United Kingdom. On 19 and 20 May 2008 the petitioner applied to the European Court of Human Rights ("ECtHR") asking the court to suspend any plans to remove him from the United Kingdom. The ECtHR granted his request on 21 May 2008 and the respondent cancelled the removal directions, which had been set for 4 June 2008, upon receipt of this Order.

[3] By letter dated 21 October 2008 the ECtHR advised the respondent that all applications concerning expulsions to Somalia would be adjourned pending the decision in *HH and Others (Mogadishu: Armed Conflict: Risk) Somalia* [2008] UK AIT 00022. The Court of Appeal issued its judgment in *HH and Others* on 23 April 2010.

[4] The present petition proceedings were commenced on 4 September 2009. In these proceedings the petitioner seeks several orders, including declarator that the decision of the respondent to detain and continue to detain him is unlawful and irrational, reduction of the decision to detain and continue to detain, damages for wrongful imprisonment, and an order for liberation of the petitioner from detention. A diet of first hearing was fixed for 6 November 2009 but was discharged on the unopposed motion of the petitioner. A further diet of first hearing was fixed for 6 May 2010, but this was also discharged on the unopposed motion of the petitioner. The matter came

before me on 8 June 2010 for a first hearing. Having heard counsel, and given counsel for the respondent an opportunity to make enquiries, on 11 June 2010 I granted the petitioner's motion (which was by that time unopposed) and ordered the respondent to liberate the petitioner *ad interim* on specified conditions. The respondent immediately complied with this order and liberated the petitioner *ad interim*.

[5] There remained outstanding issues between the parties. In particular, issues arose as to (i) whether the respondent's initial decision on about 16 August 2007 to detain the petitioner was lawful and reasonable, (ii) whether the respondent's subsequent monthly decisions to continue to detain the petitioner until he was liberated by this court were lawful and reasonable, and (iii) if the answer to either of the above questions is in the negative, quantification of damages.

[6] Both counsel helpfully provided the court with written outline submissions (Nos.13 and 14 of process). I do not seek to repeat these *verbatim* here, but have taken account of their whole content, as well as everything said in oral submissions.

Submissions for the petitioner

[7] Senior counsel for the petitioner began his submissions on 8 June 2010 with three propositions, the third of which was concerned with the argument for *interim* liberation and which I need not repeat here. The other two remain relevant and are as follows:

(1) The detention of the petitioner ceased to be for the purpose of deportation when a Rule 39 direction was given by the ECtHR on 21 May 2008, and it has accordingly been in violation of Article 5 and unlawful since then.

(2) The period set by the European Union in relation to its common immigration policy is a proper measure of a reasonable period for detention,

> notwithstanding that the United Kingdom is not a party to that policy. The detention of the petitioner therefore ceased to be for a reasonable period after eighteen months (ie 16 February 2009), since which date it has been unreasonable and unlawful and separately in violation of Article 5.

Reference was made to the Opinion of an Extra Division in *AAS* v *Secretary of State for the Home Department* [2010] CSIH 10, 2010 SC 383, a case in which the Inner House declined to hold that a period of twenty two months between the detention of the petitioner and the decision of the court was unreasonable. Senior counsel then turned to the facts of the present case, some of which are rehearsed in the introduction above. The petitioner had applied for bail on six occasions between July 2008 and February 2010, but on each occasion his application was refused. A detention review was carried out in May 2010, which described the case as "finely balanced" but reached the conclusion that his detention should be maintained for a further twenty eight days.

[8] In support of his first proposition, senior counsel referred me to the case of *Gebremedhin* v *France* (Application No.25389/05) and to *R on the application of WL (Congo)* v *Secretary of State for the Home Department* [2010] EWCA Civ 111 (particularly at paragraph 61, and the quotation from *Saadi* [2002] UKHL 41, (2008) 47 EHRR 17). After the issuing of the Rule 39 notice on 21 May 2008, the petitioner's detention was referable to the procedures before the ECtHR, and not to any underlying deportation procedures.

[9] In support of his second proposition, senior counsel referred me to Directive 2008/115/EC and in particular to paragraphs (12), (16), and (26) of the recital, and to Article 15, which provides that detention must be for the purpose of removal. Any detention shall be for as short a period as possible and only maintained

as long as removal arrangements are in progress and executed with due diligence (paragraph 1). When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately (paragraph 4). A period of detention may not exceed six months except that this may be extended for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to a lack of co-operation by the third country national concerned, or delays in obtaining the necessary documentation from third countries (paragraphs 5 and 6). This Directive imposed a much stricter timetable than had been discussed in the courts of the United Kingdom. It sets out EU policy and is indicative of international standards. Senior counsel accepted that there was express provision in the Directive that (like some other states) the United Kingdom would not take part in the adoption of the Directive and was therefore not bound by it in its entirety or subject to its application. However, in the course of discussion senior counsel accepted that the Directive could be used as a yardstick or a cross-reference for the courts of the United Kingdom to assist them in deciding what constitutes a reasonable period of detention.

[10] I was referred to the case of *Kadzoev* (Case C-357/09) PPU, a decision of the Grand Chamber of the European Court of Justice on 30 November 2009. In that case Mr Kadzoev was arrested on 21 October 2006 and placed in a detention centre on 3 November 2006. Directive 2008/115/EC was not transposed into domestic Bulgarian law until 15 May 2009; before this transposition, detention in a detention centre was not subject to any time limit. He was still detained in the detention centre as at the date of the Grand Chamber's judgment on 30 November 2009. The court held

that time spent in detention before the transposition of the Directive into domestic law counted towards the maximum permissible period of detention under Article 15, and that time spent in detention pending judicial review or appeal proceedings into the lawfulness of deportation or detention also counted towards the maximum permissible period. Eighteen months was the absolute maximum period of detention permitted under the Directive, regardless of any factors. In the present case, the eighteen month period expired on 16 February 2009.

[11] I was also referred to *Raza* v *Bulgaria* (Application No.31465/08), a decision of the European Court of Human Rights on 11 May 2010. In that case Mr Raza remained in custody between 30 December 2005 and 15 July 2008, that is, more than two and a half years. All of this detention occurred before Direction 2008/115/EC was transposed into domestic law. The court held that any deprivation of liberty under Article 5, paragraph 1(f) of the Convention will be justified only for as long as deportation proceedings are in progress, and if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible. In other words, the length of the detention for this purpose should not exceed that reasonably required. The court contrasted the circumstances of that case with those in *Chahal* v *The United Kingdom* (1997) 23 EHRR 413, in which deportation was blocked throughout the entire period under consideration by the fact that proceedings were being actively and diligently pursued with a view to determining whether it would be lawful and compatible with the Convention to proceed with the deportation. In *Raza*, the only reason for the delay was the Government's failure to secure the necessary travel documents from the third party state. The court also observed that after Mr Raza's release he was placed under an obligation to report to his local police station at regular intervals, which showed that the authorities had at their disposal measures other than

the applicant's protracted detention to secure the enforcement of the order for his expulsion. Senior counsel pointed out that similar measures were available to the authorities in the United Kingdom.

[12] Senior counsel also drew attention to the decision in *HH (Somalia)* v *Secretary of State for the Home Department* [2010] EWCA Civ 426, in which the court made remarks (particularly at paragraphs 71 and 95) about the risk of persecution in Mogadishu and the argument that an immigration decision must now specify either a safe point and route of return or at least a point of return from which safety of return can be assessed. The present petitioner would require to be returned *via* Mogadishu. *HH (Somalia)* will give rise to a series of litigations, and there is properly scope for further legal steps on behalf of the petitioner which may take some time to conclude. The decision of the Court of Appeal was issued on 23 April 2010; as at the date on which senior counsel was addressing the court, it was not known whether an appeal would be taken to the Supreme Court. The Rule 39 Direction which was given by the ECtHR on 21 May 2008 was issued pending the decision in *HH (Somalia).*

[13] The question of "self-induced detention" was considered in *KM* v *Secretary of State for the Home Department* [2010] CSOH 8. In that case it appears that the petitioner was detained in February 2006 and was still detained in January 2010. The temporary judge took the view that this period was significantly protracted by the petitioner's refusal to provide information from which his true identity could be ascertained. An affidavit from an official stated that the petitioner had given at least five different names and provided three different dates of birth. Between April 2006 and October 2008 detention reviews recorded apparent lack of co-operation on the part of the petitioner in obtaining essential travel documentation needed to facilitate his removal from the United Kingdom under the Facilitated Return Scheme. The

temporary judge declined to accept that "self-induced detention must eventually lead to the release of a detainee who has shown no respect for the immigration and other laws of the land and for aught yet seen continues to be of such a mindset". Senior counsel observed that these remarks were not endorsed by the Inner House when commenting on the decision in *AAS* v *Secretary of State for the Home Department*, and that in any event the context in which self-induced detention arose in that case was very different from the circumstances of the present case. It would be unreasonable to expect a petitioner who seeks asylum to reverse his account of events and agree to return to the country in which he claimed to fear persecution. Detention of such a person cannot properly be described as self-induced. Even if it can be described as self-induced, the court requires to weigh the unreasonableness of the petitioner's continuing unwillingness to return to the country of origin. It is correct that in the present case the petitioner has changed his position regarding voluntary return to Somalia. On 23 February 2008 he applied to return voluntarily under the Facilitated Returns Scheme, and he was accepted onto the scheme on 13 May 2008. Removal directions were set for 4 June 2008, but these were cancelled because of the petitioner's Rule 39 application. However, although senior counsel did not know the circumstances behind this change, it cannot be described as vacillation, and does not amount to self-induced detention.

[14] Senior counsel went on to refer to *R (Abdi)* v *Secretary of State for the Home Department* [2009] EWHC 1324 (Admin). Mr Abdi had been detained pending proposed removal for some thirty months, which Davis J described as being on any view a very long time indeed. Mr Abdi, like the present petitioner, was detained pending deportation to Somalia by a route involving Mogadishu. He had been convicted of criminal offences in the United Kingdom and had been assessed as

posing a high risk of re-offending and also as posing a high risk of absconding - both assessments which the court described as proper. Mr Abdi had not made an application to the ECtHR for a Rule 39 Notice, but his solicitors had liaised with solicitors acting for other Somali nationals facing deportation, and the court was made aware of the policy of the ECtHR to grant Rule 39 requests pending judgment by the Court of Appeal in *HH*. Applying the *Hardial Singh* principles (*R* v *Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704, as re-stated by Dyson LJ in *R (ex parte I*) v *Secretary of State for the Home Department* [2002] EWCA Civ 888), the court observed that "the time has come in this particular case to say that enough is enough here. The relevant legal proceedings are likely to go on for a long time, so far as concerns Mr Abdi, potentially even running into years. It is time now, in my view, that Mr Abdi be released from detention and I so order." However, the court concluded that thus far Mr Abdi had not been unlawfully detained so as to entitle him to damages. The decision of the High Court in *Abdi* was issued on 22 May 2009.

Further procedure

[15] Senior counsel for the petitioner having made the submissions noted above, and after some discussions, counsel for the respondent sought an adjournment of several days, after which he indicated that he would not oppose *interim* liberation subject to suitable safeguards. I was satisfied that it was appropriate to grant the petitioner *interim* liberation at that stage, and accordingly I pronounced the interlocutor dated 11 June 2010 to that effect. The first hearing was continued to a later date on the question of the petitioner's claim for damages. At the continued first hearing parties were agreed that submissions for the respondent should be heard first.

Submissions for the respondent

[16] Counsel submitted that the petitioner's detention was lawful throughout the period until his liberation in June 2010, and accordingly there was no entitlement to damages. He referred me to paragraph 2(2) of Schedule 3 to the Immigration Act 1971, and to Article 5 of the European Convention on Human Rights. He referred to the *Hardial Singh* principles, and the propositions derived from them by Dyson LJ in *R (ex parte I)* v *Secretary of State for the Home Department*. These had been applied by the Inner House in *AAS* v *Secretary of State for the Home Department*, and in numerous Outer House decisions. The petitioner was not being detained because of the Rule 39 Order. He was being detained for the purpose of deportation, and it was clear from the productions that there was a continuing and careful assessment of the proportionality of his detention in order to satisfy Article 5 and the *Hardial Singh* principles. The reason for his continued detention was summarised in the last sentence of the detention review dated 7 May 2010 (No.7/13 of process) in which the author observed:

> "A finely balanced case, but in the light of his re-offending history I agree that the presumption to liberty is out-weighed by the risk of absconding, re-offending and harm and detention should therefore be maintained for a further twenty eight days."

The reason that the petitioner was still in the United Kingdom was because of the Rule 39 Order, but this was not the reason for his detention (although it might be a factor in deciding whether the period of detention is reasonable or not). In that regard, counsel informed the court that although no decision had been made by the time of the earlier first hearing in June 2010 as to whether the decision in *HH* should be appealed

to the Supreme Court, the respondent has now made the decision not to proceed with such an appeal.

[17] The respondent's position on the *Hardial Singh* principles as applied to this case was as follows:

(i) The Secretary of State detained the petitioner, and continued to detain him until June 2010, for the sole purpose of deporting him to Somalia.

(ii) The period of detention until June 2010 was reasonable.

(iii) At no time before the petitioner's *interim* liberation did it become apparent to the Secretary of State that it would not be possible to return the petitioner to Somalia. Returns to Somalia are still taking place, and the petitioner had indicated earlier that he would return voluntarily. The respondent's expectation was that the legal issues which had necessitated the Rule 39 Order (which was the only outstanding obstacle to the petitioner's deportation to Somalia) would be resolved before the Court of Appeal. However, that did not happen because the case of *AM* was remitted back to the Tribunal for reconsideration.

(iv) The petitioner was about to be removed in 2008. All the necessary documents had been obtained and the question of his nationality had been resolved. There was no lack of due expedition on the part of the respondent, and the petitioner would have been removed but for the Rule 39 Order.

[18] The risks of re-offending and of absconding and refusal to accept voluntary repatriation are all relevant and material considerations when applying the *Hardial Singh* principles. The petitioner was in a closely analogous position to that of the claimant in *R (A)* v *Secretary of State for the Home Department* [2007] EWCA Civ

804 (particularly at paragraphs 54 and 55). There were also points of similarity with the cases of *KM* v *Secretary of State for the Home Department* (particularly at paragraphs [77]/[78]) and *Hussein* v *Secretary of State for the Home Department* [2009] EWHC 2506 (Admin) (particularly at paragraph 93).

[19] I was referred to the case of *TP* v *The Advocate General for Scotland* [2009] CSOH 121, in which Lord Pentland observed that "the question whether the petitioner has been lawfully detained falls to be answered by considering whether the statutory power to detain was exercised in accordance with the *Hardial Singh* principles". In that case the petitioner had been detained since 1 June 2007, a period of almost twenty seven months. The argument for the petitioner in that case was to the effect that because the petitioner had appealed against the proposal to deport her before her detention began, it was inevitable that proceedings would last for a substantial period of time and so it could never be said that she would be deported within a reasonable period of time. The Lord Ordinary considered this argument at paras [21] to [24]; he decided that the *Hardial Singh* principles were satisfied, and he rejected the argument. He concluded that the detention of the petitioner had at all times been reasonable and that it remained reasonable at the date of his opinion. Counsel drew from this authority support for three propositions:

(i) The starting point in the present petition is that this is a case of self-induced detention, brought about by the petitioner's exercise of his appeal rights to the ECtHR. Nothing done or failed to be done by the Secretary of State has caused any delay.

(ii) It was necessary to avoid hindsight. There was no time before the petitioner's *interim* liberation in June 2010 at which it had become apparent that the petitioner could not be removed within a reasonable time.

(iii) It was necessary to look at any delay arising from the legal process in the context of other relevant and material considerations, including the risk of absconding and the risk of offending.

Taking all of these factors together, the decision to detain the petitioner remained reasonable and consistent with the *Hardial Singh* principles throughout the period until his liberation.

[20] The petitioner's detention did not cease to be for the purpose of effecting his deportation when the Rule 39 order was received, and *Gebremedhin* v *France* is not authority for such a proposition. It was clear from the terms of paragraph [74] of the judgment in that case that it was concerned with the unusual facts and circumstances of that particular case and was not a statement of general principle. In *Chahal* v *The United Kingdom* both the Commission (at paras 117-119 of its opinion) and the court (at paras 119 to 123 of its judgment) dealt with the situation in which a person is originally detained with a view to deportation, but challenges that decision or claims asylum and continues to be detained pending determination of that challenge or claim. In that case the claimant had been detained for nearly five years, and it had never been alleged that he would abscond or not answer his bail. He had substantial family ties in the United Kingdom. Despite these factors, the court decided that there had been no violation of Article 5(1) of the Convention.

[21] With regard to Directive 2008/115/EC, it was clear from Recital (26) that the United Kingdom (like Ireland and Denmark) had opted out of this Directive, and is not bound by it. Even those states which are obliged to transpose the Directive into domestic law have a discretion not to apply its provisions to persons in the category of the petitioner, by reason of paragraph 2(b) of Article 2. This provides as follows:

"Member States may decide not to apply this Directive to third country nationals who:

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures."

[22] It is clear that there is no consensus on this issue even within the Member States of the European Union. The Directive is not evidence of any "norm" of national or international law, and does not represent any "measure of common ground". It is not appropriate to have regard to the Directive, even as a yardstick or cross-reference.

[23] It is however appropriate for the court to have regard to the determinations of the various immigration judges who have refused the petitioner's many applications for bail, when assessing the lawfulness of the petitioner's past detention - see the observations in *KM* v *Secretary of State for the Home Department* at paragraph [77]. Nos. 7/7 to 7/12 of process are decisions by six independent immigration judges in the period July 2008 to February 2010. Each immigration judge refused bail, having regard principally to the risk of absconding, the history of offending and the risk of re-offending. The immigration judges were aware of the existence of the Rule 39 order and that this would be likely to cause delay. They considered that his continuing detention was warranted.

[24] When applying the *Hardial Singh* principles there is no automatic cut-off point after which continued detention becomes unlawful. It was observed in *Jamshidi* v *Secretary of State for the Home Department* [2008] EWHC 1990 (Admin) that "thirty one months is plainly something which puts the court very much on the alert. But there is no set sign-off time. There is no particular period of time which will in itself, simply because of the period of time, be determinative of the issue of legality of the

detention. One must have regard to all the circumstances of each case." The same approach was taken in *MAS* v *Secretary of State for the Home Department* [2009] CSOH 32, in which Lady Smith observed (at paragraph [41]):

> "There is no particular period of time beyond which it can categorically be said that it is unreasonable to continue detention. All cases are fact sensitive and a shade or nuance in one direction may cause that which would otherwise seem unreasonable to appear reasonable, and *vice versa*. The fact that it can, broadly, be commented that a person has been detained for a 'long time' may well raise the question of whether it is so long as to be unreasonable but does not of itself point to it being unreasonable nor does it raise any presumption that it is unreasonable."

The same point was made by Lord Pentland in *TP* at paragraph [25]. Having regard to the shades and nuances in the present case, the petitioner's detention remained lawful until his liberation. It was also proportionate for the purpose of Article 5 of the Convention. On the relationship between the *Hardial Singh principles* and a detainee's Article 5 rights, counsel referred me to *R (A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804 (at paragraphs [74] and [75]) and *SK (Zimbabwe)* v *Secretary of State for the Home Department* [2009] 2 All ER 365, [2008] EWCA Civ 1204.

[25] The respondent's decision to continue to detain the petitioner prior to his liberation by this court was lawful and reasonable. It was in conformity with the *Hardial Singh* principles. The respondent still intends to deport the petitioner to Somalia. Having regard to the risk of absconding, the risk of re-offending, the vacillation and refusal to co-operate with his voluntary return to Somalia, and self-imposed detention caused by his seeking and obtaining a Rule 39 order all supported

the reasonableness of his detention. Throughout his dealings with the authorities, the petitioner had been less than honest. For example, in July 2007 he told the Border Agency that he had indefinite leave to remain, and provided a Home Office reference. This reference was for another person with the same date of birth and a similar name to that of the petitioner. This supported the view that the petitioner could not be trusted not to abscond if he were liberated. The lawfulness of the petitioner's detention is supported by three recent authorities, namely *Ismail Abdi Mohamed* v *Secretary of State for the Home Department* [2010] EWHC 1244 (Admin), *R (A)* v *Secretary of State for the Home Department* [2010] EWHC 808 (Admin), and *R (Abdi)* v *Secretary of State for the Home Department* [2009] EWHC 1324 (Admin). Many of the facts considered in those cases were closely analogous to the facts in the present case; although in some of these cases *interim* liberation was granted, in none of them did the court make a finding that past detention was unlawful (detailed submissions were made about these cases at paragraphs 39-45 of the written submissions for the respondent, to which I have had regard but which I do not repeat here.)

[26] In the event that the court took the view that any part of the petitioner's detention prior to his liberation was unlawful, the question of quantification of damages fell to be considered. There was no scope for "vindicatory" or "exemplary" damages, which are contrary to the principles of Scots law and incompetent - *Black* v *North British Railway Company* 1908 SC 444; *Watkins* v *Secretary of State for the Home Department* [2006] 2 AC 395. Damages fall to be quantified in accordance with the principles set out in *R* v *Governor of Brockhill Prison, ex parte Evans (No.2)* [1999] QB 1043, *Thompson* v *Commissioner of Police of the Metropolis* [1998] QB 498, *Johnson* v *Secretary of State for the Home Department* [2004] EWHC 1550 (Admin) and *R (B)* v *Secretary of State for the Home Department* [2008] EWHC 3189

(Admin). These cases were authority for the propositions (a) that any damages must be on a tapering scale, that is to say higher at the beginning and lower at the end, (b) that they must take account of the initial shock of being arrested, and (c) that there was no "tariff" which could be precisely formulated or applied in a mechanistic manner - each case must depend on its own individual facts and circumstances.

[27] In the present case, there was no question of "the initial shock of being arrested", because the petitioner was simply transferred from criminal imprisonment to immigration detention. In *R (B)* the court observed that the authorities did not enable any precise quantification of damages for a period of unlawful detention of about six months, and that a quantification of damages for non-pecuniary loss is, in any event, far from an exact exercise. In that case the court assessed the appropriate figure for basic damages at £32,000 in respect of a six month period of unlawful detention. The Secretary of State did not appeal that decision, and counsel did not take issue with the court's quantification on those lines in the circumstances of that case.

Response for the petitioner

[28] Senior counsel drew attention to the fact that the petitioner had been detained from 16 August 2007 until his liberation on 10 June 2010, a period of 1,029 days (approximately two years and ten months). Applying the *Hardial Singh* principles, as distilled by Dyson LJ in *R (ex parte I)* v *Secretary of State for the Home Department* and approved by the Inner House in *AAS* v *Secretary of State for the Home Department*, it was submitted that there were twelve events on the occurrence of which the detention of the petitioner became unlawful. Senior counsel made it clear that his primary position was that the detention of the petitioner was unlawful on (or very shortly after) the date of the first event; if the court was against him on this, his

alternative position was that the detention became unlawful by the date of the second event, and so on until the twelfth event. He helpfully set out in his written submissions a table of all these events, which I do not repeat here in full, but which may be summarised as follows:

(i) 21 May 2008 - the issuing of the Rule 39 letter. By this time the petitioner had been detained for 279 days, and he remained in detention thereafter for 750 days.

(ii) 21 October 2008 - the letter from the ECtHR intimating that all applications that concern expulsions to Somalia will be adjourned until the question of risk of return has been considered fully by the domestic courts. By this time the petitioner had been detained for 432 days, and he remained in detention thereafter for 597 days.

(iii) 27 January 2009 - the issuing of revised country guidance in relation to Somalia by the Asylum and Immigration Tribunal in *AM and AM* v *Secretary of State for the Home Department* [2008] UKAIT 00091, which the High Court later observed in *MM (Somalia)* [2009] EWHC 2353 (Admin) at paragraphs 15 and 47 prompted a need to review the detention of the Somali claimant in that case. By that date the petitioner had been detained for 530 days, and he was detained thereafter for 499 days.

(iv) In early 2009 *HH (Somalia)* was directed to wait upon another pending appeal in the Court of Appeal called *QD*. (As observed in *Abdi* at paragraph 74, "these cases are all stacking up, one after the other.")

(v) 16 February 2009 - the petitioner had been detained for eighteen months. Directive 2008/115/EC is relevant. By this time the petitioner had been detained for 550 days, and he was detained for 479 days thereafter.

(vi) 22 May 2009 - the decision of the High Court in *Abdi* was issued, in which the court observed (at paragraph 76) that "the relevant legal proceedings are likely to go on for a long time ... potentially even running into years. ... I do not think that it can now be said that Mr Abdi will be or is likely to be removed within a reasonable time." These observations applied equally to the present petitioner, who by that time had been detained for 645 days and was detained thereafter for 384 days.

(vii) 25 June 2009 - when the decision of the High Court was issued in *Ahmed Daq* v *Secretary of State for the Home Department* [2009] EWHC 1655 (Admin). The claimant in that case was also Somali, and the Deputy High Court judge observed (at paragraph 30) that "I should be surprised, given the likely nature of the further litigation to which the test of humanitarian protection gives rise and other cases involving the return of Somali nationals ... that there is any reasonable possibility of the claimant being removed until well into next year ... Given the possibility of further appeals, that prospect of removal may itself be over-optimistic." By that date the present petitioner had been detained for 679 days, and was detained thereafter for 350 days.

(viii) 22 July 2009 - the decision of the High Court was issued in *MM (Somalia)* v *Secretary of State for the Home Department*, in which the court observed (at paragraph 34) that "there is little real prospect that a decision will come from the Strasbourg Court, on the information I have, this year. If it does, it seems to me that it is unlikely ... that there will be resolution of all the relevant issues in this case during 2010. My best 'guesstimate' on the information I have been provided with is therefore about eighteen months." By this time the present

petitioner had been detained for 706 days, and was detained thereafter for 323 days.

(ix) 18 September 2009 - the respondent acknowledged service of the present petition. (See *MM (Somalia)* at paragraphs 48/49). By this time the petitioner had been detained for 764 days, and was detained thereafter for 265 days.

(x) 13 January 2010 - *HH (Somalia)* was adjourned until 1 March 2010, so further delay was inevitable. By this date the present petitioner had been detained for 881 days and was detained thereafter for 148 days.

(xi) 9 February 2010 - the decision of the High Court in *R (A)* v *Secretary of State for the Home Department* was issued, in which the Deputy High Court judge observed (at paragraph 32) that it was likely that the legal impediments to the removal of the claimant would last for at least a further eighteen months, and possibly for two years. By that date the present petitioner had been detained for 908 days, and he was detained for a further 121 days thereafter.

(xii) 23 April 2010 - the decision of the Court of Appeal in *HH (Somalia*) [2010] EWCA Civ 426 made it clear that further consideration on the merits was required, and the issue of an appeal to the Supreme Court arose. By that date the petitioner had been detained for 981 days, and he was detained for 48 days thereafter.

[29] The monthly detention reviews were an opportunity for the respondent to take account of each of the twelve events relied on. In none of these reviews was there an understanding of how long the legal procedures would be likely to last.

[30] With regard to quantification of damages, senior counsel referred to *R (on the application of Stephen Miller)* v *The Independent Assessor* [2009] EWCA Civ 609, and to the cases of *Lunt*, *Bouazza* and *B* referred to therein. He accepted that a

mathematical approach is not appropriate, and that a useful starting point was the award of £32,000 (worth about £33,608 as at May 2010) in respect of a six month period of unlawful detention in *R (B)* v *Secretary of State for the Home Department*. [31] The cases of *Ismail Abdi Mohamed*, *R (A)* and *Abdi*, which were relied on for the respondent, were distinguishable on their facts and dissimilar to the present case. *Mohamed* was a claimant from Somaliland, a more benign region of Somalia than the area from which the present petitioner comes, and with a different regime. Unlike the present petitioner, Mr Mohamed was assessed by the probation service as posing a high risk of causing serious harm, if released into the community, and also as posing a risk to females; while it was accepted that there was a risk that the present petitioner would re-offend, this was not described as a high risk. Only one of the immigration judges who considered bail referred to a high risk of absconding, the other five immigration judges merely referring to a risk of absconding. Unlike Mr Mohamed, the present petitioner did not remain in prison. Mr Mohamed was recorded as showing a lack of co-operation, but there is no record of this for the present petitioner. The only barrier in the *Mohamed* case to his deportation was the absence of a travel document. *R (A)* was also not similar to the present case; the claimant in that case was convicted on twenty five occasions of thirty seven offences, and amongst other custodial sentences he was sentenced to five years' imprisonment. He had a much more serious criminal background than the present petitioner. He also came from the more benign regime of Somaliland. He was not seeking a finding from the court of unlawful past detention. *Abdi* also had a more serious criminal record than the present petitioner, including two convictions for indecent assault, robbery, burglary, assault on a police officer and a drugs offence, he had become addicted to crack cocaine, and the court agreed that he had been properly assessed as posing a high risk of offending

and a high risk of absconding. He was also properly assessed as showing a degree of obstructiveness, and he had not applied for a Rule 39 order. It is difficult to understand why the observations of the court at paragraphs 73 to 77 of *Abdi* should not apply to the present petitioner, and this should have been apparent to the respondent.

[32] Senior counsel accepted that there was no absolute "cut-off point" and that the eighteen month period specified in the 2008 Directive cannot be more than a cross-check, but the length of the petitioner's detention is a key factor, amongst many other factors.

[33] It is not correct to categorise this case as one of self-induced detention. Senior counsel suggested that there were four categories of claimant - (i) a claimant who has a safe country to go to but cannot go there (eg because of lack of travel documents); (ii) a person who has an unsafe country to go to, to which he should not go; (iii) a person who has a safe country to go to, to which he will not go for a good reason; and (iv) a person who has a safe country to go to, but to which he will not go for a bad reason. Only the last of these can properly be described as a self-induced detention. That was what the temporary judge was concerned with in the case of *KM*, in which the only obstacle to the claimant being returned to Iran was his refusal to apply for an Iranian passport. The present petitioner falls into category (ii), because Somalia is an unsafe country. No court has found it safe for a claimant to be returned to Mogadishu. The respondent's position is based on the assertion that it is safe for the petitioner to return to Somalia, but the court is not being asked to decide that issue, and has no material before it to enable it to do so. This is not a case of wilful failure to leave, but rather a well-reasoned refusal to leave, and the reason has the support of the ECtHR. The argument that refusal of voluntary repatriation amounted to self-induced

detention, or unreasonable conduct justifying continued detention, was rejected by Lord Pentland in *TP* v *The Advocate General for Scotland* (at paragraphs 30/31).

Discussion

[34] Parties were agreed that the proper role of the court was not simply to review the Secretary of State's decision to continue to detain the petitioner on grounds of irrationality or traditional *Wednesbury* grounds; the court must decide for itself whether the petitioner's detention was justified, and whether (and if so, when) it became unlawful. This approach is consistent with the approach of the Court of Appeal in England in *R (A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804, and with *TP* v *The Advocate General for Scotland* and *KM* v *Secretary of State for the Home Department*, and the cases cited therein. I am satisfied that this is the correct approach.

[35] The petitioner was detained on 16 August 2007 and liberated on 11 June 2010, a period of about two years and ten months. That is a lengthy period by any standards, and as it was put in *Jamshidi* v *Secretary of State for the Home Department* this is "plainly something which puts the court very much on the alert". However, there is no automatic cut-off point after which continued detention becomes unlawful (see *Jamshidi* at paragraph [35], *MAS* at paragraph [41] and *TP* at paragraph [25]). When this petition came before me in June 2010 I took the same view as Davis J took in *Abdi*, namely "that the time has come in this particular case to say that enough is enough here". I came to the conclusion that after two years and ten months of detention, and with continuing uncertainties as to the progress of connected litigations, both before the domestic courts and the ECtHR, the petitioner's continued detention could no longer be justified against the *Hardial Singh* principles, nor was it

reasonable or proportionate for the purposes of Article 5. However, it does not follow from that conclusion that the petitioner's detention until that point was unreasonable or unlawful. Courts in other cases have reached the view that a petitioner should be liberated but have not found that he was unlawfully detained so as to entitle him to damages. Each case must depend (perhaps to a greater extent than many other types of cases) on its own particular facts and circumstances. Both parties referred to the *Hardial Singh* principles, as re-stated by Dyson LJ in *R (ex parte I)* v *Secretary of State for the Home Department*, and applied in Scotland by the Inner House in *AAS* v *Secretary of State for the Home Department*. The dispute lay in the application of these principles to the circumstances of the present case.

[36] There were several separate but related arguments which arose in the course of the submissions for the parties, and it is convenient that I should deal with these in turn (in no particular order of importance).

The purpose of the petitioner's detention

[37] The first of the *Hardial Singh* principles is that the Secretary of State must intend to deport the person and can only use the power to detain for that purpose. It was submitted on behalf of the petitioner that after the issuing of the Rule 39 notice on 21 May 2008 the petitioner's detention was referable to the procedures before the ECtHR, and not to any underlying deportation procedures. The respondent submitted that the detention of the petitioner did not cease to be for the purpose of effecting his deportation upon receipt of the Rule 39 order. I consider that the respondent's submission on this point is well-founded. The case of *Gebremedhin* is not authority for the general proposition that detention ceases to be for the purposes of effecting the removal of a claimant. The case of C*hahal* v *United Kingdom* is authority for the

proposition that the detention of a claimant may be justified for a very length period of time (in that case nearly five years) where the person is originally detained with a view to deportation but challenges that decision and continues to be detained pending determination of that challenge. The effect of the Rule 39 order was to delay the deportation of the petitioner, but it did not change the underlying purpose for the detention of the petitioner, which remained his deportation.

[38] It cannot be correct that a claimant can, by his own act, change the Secretary of State's purpose in detaining him. I do not consider that, just by applying for and obtaining a Rule 39 order, a claimant can achieve a change in the purpose of his detention such that he must be liberated automatically when the Rule 39 order is made. The Rule 39 order does not purport to cause such a result, and I can see no justification in logic or in principle for this being a necessary consequence of a Rule 39 order being made.

Directive 2008/115/EC

[39] As senior counsel for the petitioner accepted, this Directive is not directly binding on the United Kingdom; however, he submitted that it could be used by the United Kingdom courts as a yardstick or cross-reference in assessing what constitutes a reasonable period of detention. I am not persuaded that it is justifiable to use this directive even for this limited purpose. The directive cannot be described as setting out a "norm" accepted by Western European nations as establishing the maximum period of detention in all circumstances. The United Kingdom is not the only state not bound by the Directive in its entirety - there are special provisions relating to Denmark, Ireland, Norway, and to a lesser extent Switzerland and Lichtenstein. Moreover, even those Member States who are bound by the Directive have a

discretion not to apply it in certain circumstances. Article 2, paragraph 2(b) provides that Member States may decide not to apply the Directive to third country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

[40] The question of the continuing lawfulness of detention of a person awaiting deportation is in my view adequately covered by the application of the *Hardial Singh* principles in the domestic law of the United Kingdom, which appear to me not to offend against any of the principles of the European Convention on Human Rights. I do not consider that the terms of Directive 2008/115/EC are of assistance in answering the question whether the continued detention of the petitioner was unlawful.

[41] I note in passing that the same conclusion was reached by Lord Bannatyne in *AM* v *Secretary of State for the Home Department* [2010] CSOH 111, a decision which post-dated the arguments in the present case.

Self-induced detention

[42] The submission for the respondent was to the effect that the only obstacle to the deportation of the petitioner was his application for (and the subsequent granting of) a Rule 39 order. Were it not for this, the petitioner would no longer be detained but would have been deported. His detention is therefore "self-imposed". A similar argument was advanced in *TP* v *The Advocate General for Scotland* on the basis that the petitioner in that case had refused voluntary repatriation. The submission in that case was advanced on the basis of the observations made in the Court of Appeal in *R (A)* v *Secretary of State for the Home Department*, at paragraph 54. Lord Pentland

distinguished the situation in *TP* from the circumstances in *R (A)* on the basis that in the earlier case all appeal rights had been exhausted, whereas in *TP* the petitioner was continuing to pursue her appeal against the making of a Deportation Order and that appeal was unresolved when the case was before him. He rejected the submission advanced for the respondent, and observed that "in these circumstances, it does not seem to me to be right or fair to criticise the petitioner for refusing voluntary repatriation".

[43] I agree with Lord Pentland's reasoning in *TP*, and his observations apply with equal force to the circumstances of the present case. Although the present petitioner applied on 23 February 2008 to return voluntarily under the facilitated returns scheme and was accepted onto the scheme on 13 May 2008, he appears to have subsequently changed his mind and applied for a Rule 39 application. I do not consider that he can be criticised for availing himself of a remedy which may significantly increase his prospects of avoiding deportation to Somalia. As senior counsel for the petitioner observed, this is not akin to what was described as a "wilful failure" in *Mowleed Mohammed Hussein* v *Secretary of State for the Home Department* - this was not a wilful failure to leave on the part of the petitioner, but a well-reasoned failure to leave, and moreover one which had the support of the ECtHR. This cannot be compared with the conduct of the petitioner in *KM* v *Secretary of State for the Home Department*, in which the period of detention was significantly protracted by the petitioner's giving at least five different names and three different dates of birth and refusing to co-operate in obtaining essential travel documentation. There is, in my view, a distinction to be drawn between wilful obstructiveness of the kind discussed in *KM*, and the resort to a legitimate remedy which might assist the petitioner in resisting deportation.

[44] I agree with the temporary judge in *KM* v *Secretary of State for the Home Department* that it cannot be a correct result in accordance with the *Hardial Singh* principles that self-induced detention must eventually lead to the release of a detainee who has shown no respect for the immigration and other laws of the land. However, I do not consider that it is proper to categorise the circumstances of the present case as amounting to self-induced detention. I reject this aspect of the respondent's submissions.

[45] The consequence of this view is that the Rule 39 order itself does not assist either the petitioner or the respondent. As indicated above, it does not by itself alter the respondent's purpose in deciding to continue to detain the petitioner, because the underlying purpose remains his deportation. On the other hand, it does not result in the petitioner's detention being self-induced, and so does not amount to a factor which might go against him. To that extent it may be categorised as broadly "neutral". However, the delay in proceedings which it has caused is nonetheless a factor to which regard must be had.

The Hardial Singh principles

[46] It follows from my remarks above that I am satisfied that the respondent intends to deport the petitioner and that the detention of the petitioner was for that purpose. The first of the *Hardial Singh* propositions is therefore satisfied in favour of the respondent. I am also satisfied that throughout the period from the date on which the petitioner's detention began on 16 August 2007 until the date of his liberation that the respondent acted with reasonable diligence and expedition to effect removal. A Deportation Order was served on about 16 January 2008, on 23 February 2008 the petitioner applied to return voluntarily under the facilitated returns scheme, and he

was accepted onto the scheme on 13 May 2008. Removal directions were set for 4 June 2008, but these were cancelled because of the petitioner's Rule 39 application. Nothing in this sequence of events is indicative of undue delay on the part of the respondent in seeking to effect the removal of the petitioner. The fourth of the *Hardial Singh* principles is accordingly answered in favour of the respondent.

[47] It remains to consider the second and third of the *Hardial Singh* principles, namely that the petitioner may only be detained for a period that is reasonable in all the circumstances, and that if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention.

[48] Before considering the twelve events referred to by senior counsel for the petitioner, it is relevant to have regard to the reasons given for the petitioner's detention and continued detention. As narrated above, he had a history of criminal offending. Although this was not as serious as the history of offending in some of the authorities to which I was referred, it cannot be categorised as trivial. He repeatedly offended whilst on bail, and his offending appears to have become more serious over time, escalating from shoplifting to burglary, theft and a drugs offence to robbery, for which he was sentenced to two years' imprisonment. He was assessed as being at risk of re-offending - an assessment which I consider to be justified. He was also assessed as being at risk of absconding. In light of the false information which he gave to the Border Agency in July 2007, together with a false Home Office reference, that assessment also appears to me to be justified. These were factors which were considered by six independent immigration judges when they decided to refuse bail. These are factors to which I am entitled (indeed, obliged) to have regard. It may be, as senior counsel for the petitioner argued, that the risk of re-offending and the risk of

absconding was assessed as being higher in other cases, but nonetheless that risk existed. I am entitled to take account of the views of these various immigration judges, and on the information before me I agree with these views.

The twelve events

[49] Turning to the twelve events relied on by senior counsel for the petitioner, my observations are as follows:

(i) I do not consider that the Rule 39 letter dated 21 May 2008 is of itself such as to render the detention of the petitioner unlawful, even having regard to the period already spent in detention. It was not apparent at that time that this would necessarily have the consequence of an extended delay in the proceedings for deportation of the petitioner.

(ii) The same applies to the Rule 39 letter dated 21 October 2008.

(iii) As observed in *MM (Somalia)*, a decision was made by the AIT relating to country conditions in Somalia in the context of returns in the light of internal armed conflict, the general effect of which was that returns to Mogadishu would be a breach of the relevant conditions. However, the possibility of re-locating elsewhere in Somalia was open, or potentially open, if the individual was a member of a majority clan. It is clear from the Detention Review dated 7 May 2010 (No.7/13 of process) that at that time it could not be ascertained to which clan the petitioner belonged. Indeed, despite protracted efforts to ascertain this, it does not appear that this had been definitely ascertained by May 2010. The revised country guidance issued by the AIT in late 2008 or January 2009 was not therefore something which caused the continued detention of the petitioner to be unlawful.

(iv) The fact that *HH (Somalia)* was directed to await the outcome of *QD* is neither here nor there.

(v) Standing my decision on the relevance of Directive 2008/115/EC, the fact that by 16 February 2009 the petitioner had been detained for eighteen months is not relevant.

(vi) On 22 May 2009 the judgment of Davis J was issued in *Abdi*. As has already been noted, he observed that the relevant legal proceedings are likely to go on for a long time, so far as concerns Mr Abdi. He decided that Mr Abdi should be released from detention. However, he found that thus far Mr Abdi had not been unlawfully detained, and he made it clear that his decision related to the particular facts and circumstances of that case. Those facts and circumstances were different from those relating to the present petitioner. In particular, Mr Abdi had already been detained since 30 November 2006, which is almost nine months earlier than the date of the petitioner's detention. As senior counsel observed, a reasonable time is a reasonable further period of time having regard to the period already spend in detention. I do not consider that the views expressed by Davis J in the *Abdi* case can be transposed wholesale to the present case, nor do I consider that the decision in *Abdi* rendered the present petitioner's continued detention unlawful.

(vii) On 25 June 2009 judgment was given in the case of *Ahmed Daq* by Mr John Howell, QC, sitting as a deputy High Court judge. He considered the effect of Rule 39 orders and the effect that a decision of the Court of Appeal in *HH* v *Secretary of State for the Home Department* might have upon returns to Mogadishu, and observed that "plainly how all this may affect the claimant's case must be a matter for some speculation." He then expressed the view that

he should be surprised if there was any realistic possibility of the claimant being removed until well into 2010. I do not consider that the expression of these views, involving as they did a degree of speculation, in the case of *Daq* can be regarded as rendering the present petitioner's continued detention unreasonable or unlawful. As in *Abdi*, the facts and circumstances were different - for example, Mr Daq had been detained since June 2006, fourteen months earlier than the date of the present petitioner's detention. Again, no claim was made for damages for unlawful detention prior to that date.

(viii) On 22 July 2009 judgment was issued in *MM (Somalia)* v *Secretary of State for the Home Department.* Again, the court discussed the possible timescale for determination of the issues relating to returns to Somalia, and ventured a "guesstimate" on the information that it had been provided with of about eighteen months. Again I do not consider that the expression of such views by a court in a different case should lead to the conclusion that the present petitioner's continued detention was by that time unlawful or unreasonable.

(ix) On 18 September 2009 the respondent acknowledged service of the present petition. In *MM (Somalia)* the date of acknowledgement of service was held to be the latest date that should be taken for the determination in the circumstances of that case as to when the detention became unlawful. However, that was because this amounted to an assertion by the Secretary of State that the detention remained lawful at that date. Charles J disagreed with that view in the particular circumstances of that case. There is nothing about the circumstances of the present case that persuades me that the detention of the petitioner had become unlawful by 18 September 2009. In these

circumstances, the mere acknowledgement of service of the petition by the respondent does not in my view render it unlawful.

(x) On 13 January 2010 *HH (Somalia)* was adjourned until 1 March 2010. This is not an event which I regard as causing the petitioner's continued detention to be unlawful.

(xi) On 9 February 2010 judgment was issued in *R (A)* v *Secretary of State for the Home Department*, in which (as in some of the other cases discussed above) the deputy High Court judge expressed the view that the legal impediments to the removal of the claimant would last for at least a further eighteen months, and possibly for two years. This was an *ex tempore* judgment delivered from the bench, and these remarks were made in the context of an application for liberation; the court was not being asked to determine that any part of the claimant's detention until that date was unlawful. I do not consider that the views expressed by the court in that case are of direct relevance to the present case.

(xii) On 23 April 2010 the judgment of the Court of Appeal was published in *HH (Somalia)*, from which it was clear that further consideration on the merits of the application was required. Again, this does not lead me to conclude that the detention of the present petitioner became unlawful as at that date.

[50] I am therefore unable to conclude that any of the twelve events relied on for the petitioner was such, even having regard to the period already spent in detention as at the date of the event, as to render his continuing detention unlawful, unreasonable or disproportionate. I am satisfied that the second of the *Hardial Singh* principles falls to be answered in favour of the respondent. Having regard to all of the circumstances of this case, including the length of the petitioner's detention, the risk of re-offending and

the risk of absconding, I consider that until my interlocutor of 11 June 2010 liberating the petitioner the period of his detention was reasonable in all the circumstances. With regard to the third of the *Hardial Singh* principles, there was no time during the period of detention in which it became apparent that the Secretary of State would not be able to effect deportation within a reasonable time. His continued detention was reviewed by six independent immigration judges, and on each occasion it was held to be lawful. I agree with these decisions. The petitioner's detention was also subject to careful and anxious scrutiny by the respondent's officials. In the Detention Review Report the comment was made on 5 May 2010 that "based on the presumption to release, I have assessed the legality of Mr S's detention and concluded that the associated risks outweigh the presumption in favour of liberty. I therefore agree that a further 28 days detention is appropriate and justified at this stage." The senior officer who gave authority to maintain the detention observed on 7 May "a finely balanced case, but in the light of his re-offending history I agree that the presumption to liberty is outweighed by the risk of absconding, re-offending and harm and detention should therefore be maintained for a further 28 days."

[51] As discussed above, my task is to reach a view myself as to whether the continued detention of the petitioner became unlawful at any time before 11 June 2010, not simply to assess the rationality, *Wednesbury* reasonableness or procedures adopted by the respondent or her officials. However, their decisions do have some relevance to my task; if no steps were taken to assess the continuing lawfulness of the petitioner's detention this would cause me to regard the respondent's conduct of the proceedings as less reasonable than if it appeared that regular consideration was being given to the balancing of risks against the presumption of liberty, and the assessment of the continuing lawfulness of the detention. In the present case, I am satisfied not

only that the respondent has not been guilty of any undue delay in these proceedings, and that delays have been caused by the Rule 39 order and the need to review *HH (Somalia)*, but also I am satisfied that the respondent and her officials (and the independent immigration judges) have kept the lawfulness of the petitioner's continuing detention at the forefront of their minds. I agree with their assessment. By 11 June 2010 "enough was enough" and I was satisfied that the petitioner's detention could no longer be justified. However, I am unable to conclude that the petitioner was unlawfully detained at any stage prior to that date.

Article 5 and proportionality

[52] For the reasons given above I am satisfied that the detention of the petitioner until 11 June 2010 was in accordance with the *Hardial Singh* principles and lawful under domestic law. For the reasons explained above I do not consider that the respondent's decision to continue to detain the petitioner was arbitrary. Having regard to the risks of re-offending and of absconding, and to all the circumstances discussed above, I consider that the continuing detention of the petitioner until 11 June 2010 was proportionate.

Conclusion

[53] For these reasons the petitioner's claim for damages for wrongful imprisonment must fail. Similarly I am not prepared to grant decree of reduction of the respondent's decision to detain and continue to detain the petitioner. However, counsel for the respondent made it clear on 11 June 2010 that he wished the order for liberation to be *ad interim*, and senior counsel for the petitioner did not challenge that view.

Accordingly this matter will be put out By Order in early course to enable parties to address me as to what further procedure should be adopted.