Neutral Citation Number: [2009] EWHC 1324 (Admin)

Case No: CO/2508/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2009

Before :

THE HONOURABLE MR JUSTICE DAVIS

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Between :

THE QUEEN ON THE APPLICATION OF ABDI	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Ms Laura Dubinsky (instructed by **Birnberg Pierce Solicitors**) appeared on behalf of the **Claimant (Mr M Henderson** for judgment)
Mr Robin Tam QC and **Mr Jeremy Johnson** (instructed by **The Treasury Solicitor**) appeared on behalf of the **Defendant**

Hearing dates: 6 and 7 May 2009

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Judgment

Mr Justice Davis :

Introduction

1. This case is the aftermath of a decision which I handed down on 19 December 2008 [2008] EWHC 3166 (Admin). By that decision I decided that a policy introduced by the Secretary of State for the Home Department in April 2006 with regard to the detention of foreign national prisoners was unlawful, but that such unlawful policy had not been causative of the detention or continued detention of the various claimants: whose detention I decided had been lawful. There is an appeal and proposed cross-appeal with regard to my previous decision. Having reaching my conclusion as to that policy, I dealt with the individual cases then before me on the facts. However the case of the claimant, Mr Abdi, was expressly adjourned for further argument on the facts and I heard the matter on 6th and 7th May 2009, an earlier substantive hearing date for various reasons not having proved practicable.

2. As before, Mr Tam QC and Mr Johnson appeared on behalf of the Secretary of State for the Home Department. Ms Dubinsky appeared for Mr Abdi.

3. In the interim period certain matters had come to light which caused Ms Dubinsky to seek to add to her grounds of claim, as I will come on to mention, and I gave her leave to do so. Further, in the light of my previous decision, the Secretary of State has since revised her policy as set out in Chapter 55 of the current Enforcement Instructions and Guidance, in order to meet the criticisms which I had made in my previous judgment. Ms Dubinsky claims that the new revised policy is still unlawful.

4. I will not repeat the background facts and matters to this case, as they are set out in my previous judgment.

5. The principal issues arising for decision now are these:

   (1) Was the claimant, Mr Abdi, unlawfully detained by reason of the policy introduced in April 2006 and subsequently by reason of the revised policy introduced in 2009?

   (2) Is the revised policy itself unlawful?

   (3) In any event has the detention of the claimant, Mr Abdi, been (or alternatively is it at all events by now) unlawful, as contravening the principles set out in R v Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704?

The New Policy

6. It is I think convenient to deal first with the validity of the revised policy. A description of the policies previously in place can be found in my earlier judgment, to which reference can be made.

7. At first sight, and indeed at second sight, the revised policy (which was revised on 22nd January 2009 and again on 9th March 2009) meets the criticisms which I had made of the policy as stated at 9th September 2008. I had found it objectionable in law that that policy in places stated with regard to foreign national prisoners that the starting presumption in favour of temporary admission or temporary release did not apply: see in particular paragraphs 117 and 210 of my previous judgment. Those offending passages are now all removed. Paragraph 55.1.1 and paragraph 55.1.2 and other places of the revised Enforcement Instructions Guidance expressly refer to the presumption in favour of early admission or release as applicable. The need for individual consideration and the essential elements of the Hardial Singh criteria are also all fully set out in substance and repeated at various stages in the revised Enforcement and Instructions Guidance.

8. Ms Dubinsky nevertheless submits that the latest revised policy still remains objectionable. She draws attention, for example, to paragraph 55.3.A which says that conviction for one or more of the more serious offences is:

> "strongly indicative of the greatest risk of harm to the public and a high risk of absconding ... and that in practice it is likely the conclusion that such a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean detention is not appropriate."

Likewise, for example, in paragraph 55.3.2.11 it is stated:

> "In cases involving serious offences on the list ... a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling."

The appended list itself (as revised) is now headed:

> "Cases where release from immigration detention or at the end of custody would be unlikely."

The list is a long one, ranging from offences of murder, serious sexual offences, robbery and drug dealing, but also, for example, extending to cases of harassment and to cruelty to or neglect of children. She also referred to other passages in the revised chapter.

9. I can see no valid basis for these criticisms of the revised policy. It is not illegitimate by way of guidance contained in the Enforcement and Instructions Guidance to give a steer towards a particular outcome in certain specified circumstances, and to advise on the weight to be given to certain factors. Indeed, to do so can promote consistency in decision-making. The point remains that the revised Enforcement and Instructions Guidance repeatedly stress the starting presumption in favour of early release, and that all reasonable alternatives to detention must be considered and that each case must be considered on its own merits: see, by way of example paragraphs 55.3.2.1, 55.3.2.6. I therefore reject this particular argument, which in fairness to Ms Dubinsky, was by no means at the forefront of her overall argument. I reject her submission that in reality the

revised Enforcement and Instructions Guidance has the effect of precluding individual consideration in individual cases or that it is unduly prescriptive so as in effect to reintroduce a rebuttable presumption in favour of detention.

10. Ms Dubinsky also submitted that the revised chapter 55 of the Enforcement and Instructions Guidance was, in her words "an extraordinarily convoluted document", which was so unclear, she said, as not to have the quality of law. I can accept that it is perhaps over detailed and repetitious in places and no doubt could, with profit, be more concise and more precise. But it is, in my view, of sufficient clarity to be valid and effective.

11. I should in any event add that the continuing detention reviews relating to Mr Abdi and made after the revised Enforcement and Instructions Guidance was introduced in 2009 clearly show that a presumption in favour of release was applied to him and that careful individual consideration was given to his case before the decisions to continue detention were made. So in causative terms the revised policy did not dictate the outcome.

Unlawful detention

12. The next question is whether the detention of Mr Abdi from November 2006 and continuing to the present-day was and is unlawful. That period is now some 30 months: on any view, a very long time indeed to be held in immigration detention.

13. The overall background is, as set out in my previous judgment, that Mr Abdi has a long history of criminal offending. His convictions variously include two counts of indecent assault, robbery, burglary, assault on a police officer and a drugs offence. A number of his offences were committed whilst he was on bail or on licence. It seems that for at least part of the time he had become addicted to crack cocaine. In the circumstances he was, as it seems to me, properly assessed both as posing a high risk of offending and also as posing a high risk of absconding. Further, bail applications in the interim had been refused by immigration judges.

14. Ms Dubinsky, for the purposes of her argument divided the detention into five separate periods: although obviously I also have to consider the totality. But her essential submissions were these:

(1) That in reality Mr Abdi was never likely to be removed to Somalia within a reasonable time;

(2) That detention now amounting to some 30 months is too long to be justifiable;

(3) That the Secretary of State had wrongly misstated or overstated alleged lack of co-operation on the part of Mr Abdi with a view to his being removed to Somalia;

(4) That Mr Abdi's detention was caused by the unlawful former policy or alternatively by a failure to follow the correct policy; in particular, in that other alternatives, such as tagging, were not properly explored or in that the Secretary of State did not direct herself

that it was necessary that the claimant be kept in detention for the shortest period necessary.

15. The first period identified by Ms Dubinsky was 30th November 2006, the date of initial detention, to 31st March 2007, when a second and valid notice of intention to deport was served. The second period of detention was 1st April 2007 to 14th November 2007, when an application for reconsideration was granted. The third period was 15th November 2007 to 20th April 2008, when it was established that return to Somaliland within Somalia, which up until then the Home Office had been proposing, was not feasible. The fourth period was 21st April 2008 to 22nd January 2009, when the new revised policy was introduced. The final period was 23rd January 2009 to the present.

16. It is important for the purposes of aspects of the overall argument to note the litigation history. Notice of intention to deport (expressly referring to a court recommendation for deportation on, as it transpired, an incorrect date and purportedly made pursuant to section 3(6) of the Immigration Act 1971) was given on 29th November 2006. The claimant, Mr Abdi, was then detained on completing the custodial element of his then prison sentence on 30th November 2006. He appealed against the decision to deport on 18th January 2007. An immigration judge allowed that appeal on 13th March 2007, on the grounds of the invalidity of the notice. A fresh notice of intention to deport was given on 20th April 2007 and Mr Abdi immediately appealed.

17. On 30th October 2007 a determination of an immigration judge was promulgated dismissing that appeal. There was then an application by Mr Abdi for reconsideration and reconsideration was ordered on 14th November 2007. An application for bail was refused on 6th March 2008. These proceedings for judicial review were issued on 12th March 2008 and permission was granted on 16th April 2008. An application in these proceedings for interim relief, in the form of seeking an order for release from detention, was refused by Wyn Williams J on 1st May 2008.

18. On 12th May 2008 at a hearing in the Asylum and Immigration Tribunal, it was conceded on behalf of the Home Office that there had indeed been an error of law in the previous determination and that full reconsideration was needed. A further hearing took place, after various requests for adjournments in the interim, on 23rd October 2008 and that was adjourned part-heard. The hearing was eventually concluded in December 2008.

19. On 30th March 2009 the determination of the Asylum and Immigration Tribunal was promulgated, dismissing Mr Abdi's appeal. I was told that an application for permission to appeal to the Court of Appeal has been made, but I have not been informed of the outcome of that. Overall, it can be seen that for almost the entire period of Mr Abdi's detention there have been extant appeals or legal proceedings instituted by him with regard to whether or not he could lawfully be removed to Somalia.

The Hardial Singh principles

20. The applicable relevant principles, as first formulated by Woolf J in the Hardial Singh case, are helpfully restated by Dyson LJ in the case of R (ex parte I) v Secretary of State for the Home Department [2002] EWCA Civ.888 in these terms:

> "There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in Re Hardial Singh [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in Tan Te Lam v Tai A Chau Detention Centre [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:
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> i. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
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> ii. ii. The deportee may only be detained for a period that is reasonable in all the circumstances;
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> iii. iii. 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;
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> iv. iv. The Secretary of State should act with reasonable diligence and expedition to effect removal.
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> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.
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> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the

> obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

21. By reference to those principles, Ms Dubinsky submitted that Mr Abdi had been detained for a period that was longer than was reasonable in all the circumstances. At all events, she said, it has been and is now apparent that the defendant would not be able to effect removal within a reasonable period of time.

22. The Hardial Singh principles are clearly stated. The overarching element in the relevant respects is an assessment of what is reasonable in all the circumstances. That therefore involves a judgment to be made by reference to the facts of each case. That may or may not be a difficult evaluation in some cases but the principles themselves to be applied are clear enough. Mr Tam, however, sought to introduce a restriction, which he says is applicable in all such cases, to the stated principles of Hardial Singh. He submitted that, in assessing whether a reasonable time has elapsed or whether deportation can be effected within a reasonable time, the rule is that one entirely excludes as a relevant consideration any period where the individual is pursuing an asylum claim or a judicial remedy or appeal in respected of the asserted right not to be removed. I had not understood Mr Tam to make such a submission to me in the earlier stages of the proceedings before me in relation to the other claimants involved. Nor does it seem that in the past counsel appearing for the Home Office in other cases have always sought to advance so fixed a viewpoint. But that, at all events, is the submission now made.

23. Mr Tam acknowledged only two exceptions to such a rule as he advances. The first is that the state must, of course, act with due diligence and the court hearings must be provided within a reasonable time, as required by Article 6 of the European Convention on Human Rights. The second is where, in causative terms, the individual remains in detention not because of any legal or appellate process which he is pursuing but because of some extraneous factor which would itself cause removal to be impossible: as illustrated by the case of I itself.

24. Mr Tam submitted that there are sound policy reasons why that should be so. First, he said the pursuit of such proceedings, whether by way of appeal or otherwise, shows that the applicant in question is refusing to return voluntarily. Second, if it were otherwise a person, who might be a dangerous person, might be able to increase his chances of release by pursuing every conceivable point and every avenue of appellate or legal process. Third, it is not desirable for judges in assessing whether the Hardial Singh principles have been correctly applied potentially to have to form a view on the merits of the legal challenges raised. For example, he said the High Court should not be seeking to second-guess any decision of the Asylum and Immigration Tribunal.

25. I must say that as a starting point I am somewhat wary of this particular submission. It seems to me to be undesirable, where the core question is an assessment of what is reasonable in all the circumstances, to be astute to look for mandatory restrictions or rules in what ought, one would have thought, to be a fact-specific exercise with an evaluation tailored to the circumstances of each case. Moreover, Article 5(4) of the European Convention on Human Rights provides that everyone who is deprived of his liberty by detention is entitled to take proceedings to challenge the lawfulness of his detention. I do not suggest that the argument of Mr Tam would involve an infringement of Article 5(4). But if he is right it would appear that potentially there will be a restricted application for persons in the position of Mr Abdi himself, and moreover, as I will come on to say, in circumstances where the ability to apply for bail is not to be taken as coterminous with a challenge to whether or not detention is lawful. Further, Mr Tam's argument seems to me to be writing into the operation of the Hardial Singh principles a restriction which has thus far not obviously been invariably applied in other cases.

26. Mr Tam, however, submitted that his approach was indeed supported by authority. First, he relied on the observations of Auld LJ in the case of Q [2006] EWHC 2690 (Admin). At paragraph 20 of his judgment, Auld LJ said this:

> "In the Court's view, despite the unfortunate legal history of this case since January 2003, the appropriate period for considering the delay for the purpose of these applications is from Q's withdrawal in March 2006 of his appeal against deportation, a period of six to seven months. Until then the Secretary could not know whether or when he would have power to deport him and, with it, a corresponding obligation to engage the Algerian authorities as to the details they required in his case as to his identity and family connections etc**..."**

But self-evidently there, as it seems to me, Auld LJ's comments were by reference to the facts of the case before the court: as indeed Auld LJ makes explicit by his reference to "for the purpose of these applications". Auld LJ was not, as I read this judgment, purporting to pronounce a general rule of the kind for which Mr Tam now contends.

27. Mr Tam further relied on the case of Chahal v United Kingdom [1996] 23 EHRR 413. That of course is a very well-known case for other reasons. But Mr Tam's main purpose in citing it was to draw attention to the judgment of the court at paragraphs 113 to 115, and in particular its stated distinction between the time spent by Mr Chahal in custody until the domestic proceedings came to an end and the time spent in custody thereafter. There is no doubt all that such a distinction can, and perhaps should, properly and relevantly be made. But Chahal is not in any way authority for the general proposition by way of rule that Mr Tam now seeks to advance. Indeed, it is noticeable that in that case the court did in fact, as made clear in paragraph 117, look at the overall period of delay as a matter of totality in assessing the position as to whether or not there had been unlawful detention.

28. Then, Mr Tam sought to rely on the case of I itself as supporting his submission. I do not think it does. The point Mr Tam now argues for simply was not a point falling for decision in that case. Mr Tam relied upon parts of the judgment of Simon Brown LJ, in particular at paragraphs 35 and 36:

> "35. What Chahal illustrates is that a detained asylum seeker cannot invoke the delay necessarily occasioned by his own asylum claim (and any subsequent appeal(s)) to contend that his removal is clearly 'not going to be possible within a reasonable time', so that he must be released. That, however, is by no means to say that where, as here, a detainee, whom for reasons quite other than his asylum claim the Secretary of State is unable to remove, chooses during his detention to claim asylum, that claim, whilst unresolved, precludes his asserting that limitation 2 of the Hardial Singh principles is not satisfied. Nor, indeed, did Mr Robb for the Secretary of State put it that high. On the contrary, he made little of the point and suggested no more than that this appellant's asylum claim is a factor in the case.
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> 36. What, then, should the approach be? For my part I found the following illustration (suggested by Mr Nicol) a useful one. Prior to September 11 there was no question of returning Afghanis to Afghanistan. Consider during that period the position of two prospective deportees, one of whom claims asylum, the other not. Could it seriously be argued that there was power to detain the first but not the second? Surely not. Consider, indeed, this very case. The Secretary of State, as it happens, was prepared to regard the appellant's invalid destination appeal in April 2001 as a fresh asylum application (see paragraph 3 above). Assume that he had not done so - or, indeed, assume that the fresh claim (and the subsequent appeal process) had been determined rather more expeditiously (as, perhaps, it should have been). It would then be clear that it was the political impossibility of removing the appellant which alone was responsible for his continuing detention. Should his position be worse because he can seek to take his asylum claim further still? And would it then improve if he chose not to? The answer to these questions is surely no. I am not saying that if, for whatever reason, whilst a properly detained asylum seeker's claim is being resolved, a short-term political difficulty arises which would in any event have delayed his return, he thereby necessarily become entitled to be released. I do, however, say that where, as here, there has been no lengthening whatever of the detention period as a result of the asylum claim, the relevant and substantial cause of the detainee's non-removal should be regarded as the political impossibility of returning him, rather than his claim for asylum."

Moreover, Mr Tam placed reliance on what Dyson LJ said at paragraphs 55 and 56:

> "55. As regards the relevance of the appellant's asylum claim and appeal, I agree that for the reasons given by Simon Brown LJ, this is not material to the reasonableness of the length of detention. The reality in the present case is that the appellant has been detained 'pending removal' since 7 February 2001, and that, as a matter of fact, the reason why he has not been removed is not because he has been pursuing an asylum claim. It is because the Secretary of State is unable to remove persons to Afghanistan whom he wishes to deport to that country.
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> 56. Taking account of all the circumstances of the case, I am of the opinion that by 29 May 2002, the appellant had been detained for a period that was longer than was reasonable. I take account of the difficulties facing the Secretary of State in effecting removals to Afghanistan and the fact that he has been conducting sensitive negotiations with neighbouring countries to enable removals to take place with their assistance. I also take account of the fact that the appellant has been convicted of criminal offences for which he was sentenced to three years' imprisonment and that he became liable to register as a sex offender. On the other hand, there is no evidence that he is liable to reoffend. I accept that there is a risk that he will abscond. I find it difficult to assess the seriousness of this risk, but I am not persuaded on the material that has been placed before this court that he will probably abscond. The nature of his detention and its effect on him have been summarised by Simon Brown LJ at paragraph 18 above. Taking account of all these circumstances, I am satisfied that 16 months detention is unreasonably long."

29. I can accept that those passages can possibly be read as indicating an assumption that the actual length of period of detention, if occasioned by pursuit of an appeal by Mr I, would not in itself have been regarded as unreasonable. But that was so in the context of the circumstances of that case. There is at all events no statement of principle by the Court of Appeal to the effect that a period of detention occurring by reason of pursuit of an appeal is *always* to be ignored when assessing whether or not a reasonable period of time has elapsed or whether removal is possible within a reasonable period of time. Indeed, in referring to the case of Chahal at paragraph 34 of his judgment Simon Brown LJ said:

> "... a prolonged period of detention pending the final resolution of an asylum claim is sometimes permissible..."

The use of the word "sometimes" is to be noted.

30. Finally, Mr Tam relied on two unreported decisions of Mitting J. The first is the case of R (Bashir) v Secretary of State for the Home Department [2007] EWHC 3017 (Admin).

There, in the context of a total period of detention of 32 months, Mitting J said this at paragraph 13 of his judgment:

> "The blunt facts are, therefore, that the claimant has been detained in administrative detention for two years and eight months. He cannot complain about the first nine months of his detention because it was occupied by his appeal against the deportation order and elongated by his own failure to engage with the original order promptly, thereby delaying the hearing of his appeal. So much is conceded by Mr Jones. He has, however, been detained for 23 months without there being, even now, any immediate prospect that he can be removed, unless he voluntarily decides to depart."

Those comments as to the 9 month period (and by concession) were made by reference to the facts of the case and do not purport to set out any kind of invariable rule of the kind Mr Tam advocates. The second decision of Mitting J is that of A [2007] EWHC 142 (Admin). There, in circumstances where clearly the point was not fully argued, Mitting J, after citing from Hardial Singh, shortly said this at paragraph 5:

> "Those principles have been applied in a variety of factual circumstances. It is now settled law that generally the date from which the lawfulness of detention falls to be considered is the date on which appeal rights were exhausted: see **R (Q) v Secretary of State** [2006] EWHC 2690 at paragraph 20."

31. As I have indicated, I do not think that Q is to be regarded as an authority for any such general proposition. Moreover, by use of the word "generally" Mitting J may well only have been indicating what the position is as it very often is in many cases and no doubt properly considered so to be; but nevertheless in a way admitting of exceptions. If so, then I would not disagree. But if Mitting J was intending to go further and is to be taken as indicating a fixed rule of invariable application then I am afraid I must respectfully disagree.

32. There are, I think, other difficulties in Mr Tam's approach. What, he was asked in argument, was the applicant's effective remedy, on Mr Tam's approach, if seeking to be released from detention whilst pursuing an appeal? His answer was that he could apply for bail under the provisions of the Immigration Act 1971. That is true. In most cases, no doubt, that would be the obvious route to take, at least initially. But it is not a complete answer. For one thing, an immigration judge is, I am inclined to think, in considering whether or not to grant bail, not necessarily required to go through the Hardial Singh reasoning process. Indeed, as Ms Dubinsky pointed out, in paragraph 30 of Schedule 2 to the Immigration Act 1971, the length of time in detention is not even a matter statutorily required to be taken account if the matters there specified are made out. For another thing, it is well established that an application for the grant of bail is to be distinguished from a challenge to the lawfulness of detention: see R (Konan) v Secretary of State for the Home Department [2004] EWHC 22 (Admin).

33. Yet further again, Mr Tam's approach would seem to require the exclusion in all circumstances (assuming due diligence in the court process) of consideration of the individual circumstances of an applicant pending what may be the very lengthy business of completing the appellate process. Suppose, for example, the case of an applicant who poses some, but not the highest, risk of absconding and some risk of offending, albeit not of very serious criminality. Suppose that applicant appeals to the Asylum and Immigration Tribunal and then from the Asylum and Immigration Tribunal to the Court of Appeal, and then again from the Court of Appeal to the House of Lords: at each stage having obtained permission to appeal, thereby connoting that there was what was assessed to be a properly arguable case. That could take up to 2 to 3 years, leaving aside any possible reference to the European Court. He might not get bail under paragraphs 29 and 30 of the Schedule 2 to the 1971 Act; and if Mr Tam is right he cannot be ordered to be released by the Administrative Court on Hardial Singh principles, qualified in the way Mr Tam suggests. That applicant therefore is in no better a position than someone appealing in the like manner who poses the very highest risk of absconding and the very highest risk of reoffending involving the most serious kinds of criminality.

34. In this regard, another difficulty, as it seems to me, in Mr Tam's argument can be identified. His approach, if right, would seem to involve the exclusion from consideration of release of any delays arising within the appeal process itself (which is not the same thing as assessing whether the court process is being pursued with due expedition). Take the present case. Mr Abdi's first appeal succeeded. The initial deportation notice was found to be invalid. It took Mr Abdi some three months to establish that. Yet if Mr Tam is right, that is irrelevant for Hardial Singh purposes because the delay arose by reason of the applicant having pursued the appeal proceedings in the first place.

35. I also do not agree with Mr Tam that the Administrative Court in principle should never, as he was proposing, have regard to the merits of the collateral court process. For proceedings which are still to be launched or are not yet decided, it will very often be inappropriate, I would agree, and often not practicable, for the Administrative Court to make a *prima facie* assessment of the likely merits or lack of them: although sometimes the Administrative Court may be in a position to do so. But for proceedings that have already occurred, it may be entirely in order to do so. Again, take the present case. On two occasions reconsideration has been ordered. At the most recent stage of reconsideration the Secretary of State ultimately conceded that there had been an error of law in the first determination. That at least shows that Mr Abdi had properly arguable grounds and that those Asylum and Immigration Tribunal proceedings were not to be dismissed as a mere abusive stalling tactic: albeit true it is that Mr Abdi is plainly, and to my mind not altogether surprisingly, doing all in his power to avoid removal to Somalia.

36. Accordingly, I do not think that there is any such general and inflexible rule for which Mr Tam argues. I can certainly accept that the fact that a period of detention occurs whilst the applicant is pursuing an appeal or comparable judicial process will always be a highly relevant factor: commonly, no doubt, in cases where there is also a risk of absconding and/or of reoffending, it may be a decisive one where the only operative bar to removal is pursuit of the very appeal process. Thus it is most certainly one of the

matters, and a very important one, to be taken into account in deciding on the reasonableness of detention. But that is not the same as there being a rule of the kind Mr Tam advances.

37. That I think accords with the approach of Munby J at first instance on this issue in the case of R (SK) v Secretary of State for the Home Department [2008] EWHC 98 (Admin) at paragraphs 108 and 109 of his judgment. Some aspects of the actual decision were reversed by the Court of Appeal on other grounds, but not in any way controverting Munby J's approach on this point. What Munby J said is this:

> "108. In the present case the entire period from 24 March 2006 to 16 July 2007 was taken up with SK's application for asylum and his various appeals against the Secretary of State's decisions and orders. I do not say that the period before 16 July 2007 simply falls out of account – of course not: the period since 16 July 2007 has to be assessed in the light of and having regard to the fact that by 16 July 2007 SK had already been detained for some 16 months – but in the light of Mitting J's approach there is force in Mr Chamberlain's submission that the primary focus ought to be on the period since 16 July 2007 when, having reached the end of the road, SK became a failed asylum seeker.
>
> 109. Putting the same point rather differently, I think a weighty factor that has to be built into any evaluation of the reasonableness of the overall time that SK has spent in detention is the fact that during the greater part of that time he was vigorously pursuing through the appellate system both what in common with two Immigration Judges I agree was a transparently fabricated asylum claim and also an appeal against the deportation order which was probably always little short of hopeless."

The decision of Mitting J there referred to, I should add, was the decision in Bashir.

38. It is to be noted that Munby J was there declining to take any view (nor was counsel then appearing for the Home Office advancing the view) that there was an inflexible rule or that the period in detention whilst SK was pursuing his appeal was wholly irrelevant. Rather Munby J was regarding it as a matter which was certainly to be taken into account and assessing the weight to be given to it accordingly. I agree with that approach.

39. I conclude, therefore, that the principles of Hardial Singh are not to be glossed or subjected to a fixed exception in the way for which it is contended on behalf of the Secretary of State.

Application of Hardial Singh principles to facts of this case

40. Against that conclusion I revert to the circumstances of this particular case. Mr Abdi, as I have said, has now been detained pending proposed removal for some 30 months. On any view, as I have said, that is a very long time indeed. It is, however, in my view an

important factor that he has entirely properly, as I conclude having considered the evidence, been assessed as posing a high risk of reoffending in circumstances where there are antecedents of serious, even if not the most grave, continued criminality. In addition, he has been properly assessed as posing a high risk of absconding.

41. It is to be borne in mind that immigration detention of foreign national prisoners is not to be used as a disguised form of preventative detention for the public safety. Nevertheless, as pointed out by Toulson LJ in the case of A [2007] EWCA Civ 304, public safety remains a relevant factor in assessing the reasonableness of detention.

42. I reject Ms Dubinsky's complaint that lack of co-operation on the part of Mr Abdi had been wrongly assessed by the authorities or had had too much weight given to it. It is not necessary for me to go into details. The evidence and the reviews show that there was, on occasion, a lack of co-operation on the part of Mr Abdi, even allowing for the fact that he had not been in a position to provide all relevant papers to the Home Office to facilitate his removal. At all events, in the initial periods of detention, there was properly assessed a degree of obstructiveness and that was then, and thereafter, properly taken into account. I accept that in recent times there has been identified no relevant lack of co-operation. But that does not render past obstructiveness of itself irrelevant.

43. I also reject the criticism that other alternatives, particularly tagging, were not properly considered. Again, I find on the evidence that they were and the authorities were at all relevant times alive to competing alternatives. The position, in particular so far as tagging is concerned, is summarised in paragraph 4 of the second witness statement of Hannah Honeyman dated 15th April 2008, which I accept.

44. Ms Dubinsky also submitted that in causational terms the Secretary of State had not shown that Mr Abdi was lawfully detained on Hardial Singh principles, as opposed to being detained by reason of the previous unlawful policy: a point which of course occupied much of the time and argument in the other four cases which I decided in December 2008.

45. I intend no disrespect to Ms Dubinsky's submissions if I take this point also quite shortly. It is quite true that some case workers initially had been recommending release, albeit in a way not accepted by their superiors. Nevertheless, as I read the papers and detention reviews, individual consideration was throughout given to Mr Abdi's case and the Hardial Singh approach was correctly applied. I can see nothing of substance to show that the (unlawful, as I have held) former policy relating to foreign national prisoners was either ostensibly or in actuality applied to him, so as to cause his continued detention. His detention was, I conclude, authorised in line with principles presuming in favour of release.

46. There is, however, one feature in this case pointed out by Ms Dubinsky which does distinguish it from the other four cases I previously decided: although I stress the other four cases were decided on their own facts in any event. Included in the documents are reviews which indicate that, at all events from January 2008 to March 2008, Mr Abdi on four occasions was excluded from consideration from release "under the current detention

policy". That clearly is a reference to the Cullen criteria, which I mention in my earlier judgment and which are themselves an application of the unlawful policy. Thus, in this particular case of Mr Abdi it can be said that regard was had to the unlawful policy in deciding at that time to detain Mr Abdi.

47. That may be so. But looking at the matter overall it is, I think, reasonably clear, and I find, that the Secretary of State - properly relying, in particular, on the high risk of absconding and the high risk of reoffending – would, and properly so, have detained Mr Abdi anyway, irrespective of the unlawful policy and Cullen criteria.

48. I do not think it necessary to assess the position in detail by reference to each of the five periods identified by Ms Dubinsky. Considering them individually and in totality I do not think that it appears that, all events judging matters solely by length of time elapsed, the period of detention was too long to be reasonable. In all the circumstances, and in particular the high risk of absconding, the high risk of `reoffending and the fact that Mr Abdi had been pursuing appeals for much of that time, I would conclude that, in terms of length (and long though the period of detention has been), such detention would have been and was reasonable. In reaching that conclusion I was not much impressed by Mr Tam's reliance on the case of A, to which I have already referred, where the detention there of the foreign national prisoner concerned was in excess of 3 years in that case and was held reasonable: although I should add that that case does, if I may say so, provide most valuable guidance as to the applicable principles. I should, however, just add that it seems to me, in so far as the counsel for the Secretary of State places reliance on A as almost indicating a norm as to the permissible length of detention, it does nothing of the kind. Indeed it may be regarded as a rather special case on its facts. Neither was I much impressed by Ms Dubinsky's reliance on cases where periods of detention for less than 30 months were held unreasonable. They just illustrate the obvious: which is that all cases depend on their own facts.

49. I should say something, however, about the first period of detention, between 30th November 2006 and 13th March 2007. Ms Dubinsky submitted that the deportation notice was, and was held to be, defective, in that it relied upon a purported court recommendation of deportation on a date when that recommendation had not been made. That is true: although it is to be noted that a court recommendation in fact had been made on another date. She also observed that the notice wrongly relied on section 3(6) of the Immigration Act 1971, rather than section 3(5)(a), as conferring the relevant power to deport. The invalidity of the notice was established by decision of the Asylum and Immigration Tribunal on 13th March 2007. Thus Ms Dubinsky says that for at least that period Mr Abdi was unlawfully detained and entitled to damages.

50. I do not agree. The notice may have been defective, but it was still a notice of intention to deport. It is not to be regarded as a nullity by reason of the errors it contained. It is clear that the Secretary of State was lawfully empowered to serve a notice of intention to deport, intended to do so and had grounds for doing so; and as subsequent events have shown, the Secretary of State would have decided and did decide to do so irrespective of the matters erroneously stated in the initial notice.

51. But that is not the end of the matter. The second principle of Hardial Singh overlaps with the third principle. An assessment of whether detention has been for a period which is reasonable in all the circumstances has to include an assessment whether removal could be affected within a reasonable period. It is clear (and perhaps unsurprising given that Somalia was the country involved) that, as the papers show, some of the case workers involved at various stages thought that there was no realistic prospect of returning Mr Abdi in the near future. But the matter was continuously appraised and the determination was made at various stages during the detention that removal within a reasonable time was foreseeable. It was appreciated that documentation was also needed to achieve removal to Somalia (Somaliland, as I have said, at that time being considered as the actual place of destination for removal) and it also took some time to collate the bio data form and other information needed.

52. On 20th April 2008, however, and after some prompting to the Home Office to ascertain the position, the Somaliland authorities indicated that they would refuse to accept the claimant for return to Somaliland, as he was not considered to be a Somalilander, by reason of his father's clan not being from there.

53. Thereafter the defendant proceeded on the footing that the claimant would be returned instead to Mogadishu in south Somalia. It then became common ground, at least by 12th December 2008 and in the light of the country guidance case of AM and AM [2008] UKIAT 0091, that the claimant, Mr Abdi, could not safely be returned to live in Mogadishu. In fact, it was in the course of those proceedings in 2008 that the suggestion was then made, and adopted by the Secretary of State, that Mr Abdi might be returned via Mogadishu to Puntland, where his father's clan was.

54. Notwithstanding the various hesitations and reservations on the part of officials expressed on occasion within the documents and reviews relating to Mr Abdi, I conclude on the evidence that the overall assessment was properly made throughout this time that the claimant, Mr Abdi, was capable of being returned to Somalia within a reasonable time.

55. Further, by witness statement of Hannah Honeyman on behalf of the UK Borders Agency dated 12th April 2008, the following is said:

> "There are currently two barriers to effecting the Claimant's deportation. Firstly, he has an outstanding appeal to the AIT against the decision to deport. Secondly, it is necessary to obtain sufficient bio-data from the Claimant in order to effect his removal to Somaliland under the Memorandum of Understanding which the United Kingdom has with the Somaliland authorities."

Those comments in some ways were overtaken by events. Indeed, thereafter, as I have said, the Somaliland authorities indicated that they would not accept the claimant. On 16th July 2008, however, Ms Honeyman made a third witness statement. She referred to the Operational Guidance Note relating to returns to Somalia. She said this, in paragraph 9:

> "I can confirm that a route has been available for enforced returns to Somalia (including both Mogadishu and Somaliland) since July 2006, following agreements with the relevant airlines and authorities in transit countries."

56. She also said this:

> "16. Subject to that period, removals to Somaliland under the MOU have been possible throughout the period of the Claimant's detention. I am advised by ReSCU that they have effected 7 removals to Samaliland since September 2006.
>
> Returns to South-Central Somalia
>
> 17. There have been various practical difficulties with the route of return for enforced removals to Mogadishu over the past few years. However, I can confirm that the route was re-opened from late July 2006 and has been in operation throughout the period of the Claimant's detention with the exception of a short period (approximately 3 weeks) in April/May 2007 when the airline asked for a hold on removals.
>
> 18. A policy decision was taken in 2006 that enforce removals should not recommence until the Court of Appeal had handed down judgment in AG (Somalia) [2006] EWCA Civ 1342. Judgment in the Defendant's favour was handed down on 17th October 2006, and removals to Mogadishu have been proceeding since then. Kate Massie's statement of 1 May 2008 confirmed that there were at least 10 enforced removals to Mogadishu between November 2007 and April 2008. Further enquiries with ReSCU have confirmed that they have effected 22 removals to Mogadishu since December 2006, indicating that this has been possible throughout the period of the Claimant's detention.
>
> ...
>
> 19. There is no prior requirement (equivalent to that in the MOU with Somaliland) for South-Central Somalia to accept an individual and they can simply be returned to Mogadishu on an EU letter issued by the Home Office."

57. She then dealt fully with the reviews of detention with regard to the claimant, reviewed the history of events and concluded in this way:

> "62. The Claimant's continued detention was reviewed in light of these changes in circumstances and it was decided that detention remains appropriate. In essence, in circumstances where the Claimant is expected to be documented and able to be removed

> within a short time of his appeal rights being exhausted - should he fail at the second stage of his reconsideration hearing - the Claimant's detention is deemed to be necessary at this stage as he is very likely to abscond and has a history of failing to comply with licence conditions imposed by the Courts in the past. Whilst the hearing is not listed until mid-August, it is noted that this was at the request of the Claimant's representatives. The full reasons are set out in the detention reviews dated 15 May 2008, authorised 23 May 2008... and 19 June 2008 authorised 20 June 2008...
>
> 63. The only present barrier to effecting the Claimant's deportation is his outstanding appeal to the AIT against the decision to deport. Once the Claimant's appeal rights are exhausted, the only steps remaining are to obtain a signed Deportation Order, issue an EU letter and arrange a flight. It should be possible to obtain a Deportation Order within 10 days, issue an EU letter within a few days, and ReSCU have confirmed that it should be possible to remove the Claimant within 6 weeks of his appeal rights being exhausted**."**

58. In addition, a witness statement of Ms Massie dated 11th May 2008 confirmed that in the last 6 months there had been at least ten enforced removals to Mogadishu. Mr Wools explained in his witness statement of 20th November 2008, in terms I accept, that notwithstanding that at one stage arrangements for a new memorandum of understanding concerning returns to Somaliland were being negotiated, returns were indeed still possible throughout the period.

59. If matters rested there, that would indicate that, notwithstanding there were difficulties and notwithstanding the delays, at no stage was there a complete impasse on returns to Somalia, including Somaliland, and that returns were capable of being effected, albeit not without difficulty. Moreover, that would support the proposition that in causative terms the only reason why Mr Abdi could not promptly be removed was his pursuit of his appeal.

60. However, since the hearing before me at the end of last year there have been two major developments. The first is that the Asylum and Immigration Tribunal promulgated on 30th March 2009 its decision on the reconsidered appeal of the claimant, Mr Abdi. (Indeed, the proceedings before me relating to Mr Abdi were partly deferred in order to enable that decision to be obtained and considered.) The Tribunal dismissed the appeal of Mr Abdi. It did so on the footing that the area within Somalia to which Mr Abdi was to be returned was Puntland, via Mogadishu to which city he would be flown. The Tribunal ruled that Puntland was to be deemed Mr Abdi's home area and found that:

> "Although we accept that he would face some difficulties on return to Puntland, we do not consider those difficulties are such as to cross the relatively high Article 3 threshold."

The Tribunal further concluded that removal would not be disproportionate and rejected the appeal on Article 8 grounds also.

61. In the light of the country guidance case of AM and AM, the Tribunal accepted that it would not be safe for the claimant to return to Mogadishu to live there. An obvious question then arose, and was argued before the Tribunal on behalf of the claimant Mr Abdi, and was this. If the claimant could not be returned safely to Mogadishu to live there and given that, as was accepted, there was no direct route of return from the United Kingdom to Puntland itself, by what safe route was the claimant, Mr Abdi, to get to Puntland from Mogadishu? Expert evidence from a Dr Hohne was placed before the Tribunal on behalf of Mr Abdi with a view to showing that there were no safe routes of return to Puntland from Mogadishu. Further, it was common ground that the claimant would need to travel on an EU travel document. Dr Hohne's evidence was that Puntland did not accept such documents and that the claimant would not be admitted to Puntland on such a document, and so would remain at risk in Somalia.

62. The Tribunal decided that, given there was a degree of uncertainty as to the method and route of return, such matters could not be decided on a statutory appeal to the Asylum and Immigration Tribunal. As I read their decision, they reached that conclusion in the light of authorities such as GH [2005] EWCA Civ 1182 and MS [2009] EWCA Civ 17. The implication is that such ground of challenge had to be raised by way of judicial review proceedings when removal directions were eventually set. I express no view on that. Indeed, the authorities were not cited to me. The point remains that the Tribunal reached no conclusion one way or another on the safety of the en route arrangements, whatever they might be.

63. Furthermore, the Home Office put in no evidence before the Tribunal, or me for that matter, to rebut Dr Hohne's evidence that Puntland would not accept for entry a person travelling on an EU travel document. The Tribunal made no finding on that point either.

64. The second major development is this. During the early part of 2009 the legal advisers to Mr Abdi were notified of the position being adopted by the European Court of Human Rights since 7th October 2008 (if not earlier) with regard to cases of forced removal to Somalia, or at all events to Mogadishu. Thus, on 21st October 2008, in a separate United Kingdom case relating to the proposed removal of an individual to Somalia, the European Court of Human Rights wrote to the advisers there involved to indicate that the court was proposing to wait for proceedings in the domestic courts to be concluded in the test case of HH Somalia [2008] UK AIT 0022 before considering applications by persons facing expulsion to Somalia. The letter, amongst other things, said this:

> "The Court decided on 7th October to adjourn all applications that concern expulsions to Somalia until the question of risk of return has been considered fully by the domestic courts."

The letter indicated that interim measures granted under Rule 39 would remain in place.

65. When Mr Abdi's advisors became aware of this, they participated in further requests for information from the European Court of Human Rights and liaised with other lawyers involved in similar such cases.

66. A letter was sent by the European Court of Human Rights dated 2nd March 2009 to another lawyer who was concerning himself in the point concerning forced removal to Somalia. That letter says this among other things:

> "The Government has not suspended all removals and deportations to Somalia. The court, however, has been granting interim measures under Rule 39 of the Rules of Court to all applicants issued with removal directions to Mogadishu.
>
> Although the Court continues to grant Rule 39 requests, all applications by Somalis... have been adjourned pending judgment by the Court of Appeal in *HH & Others* ... Interim measures granted under Rule 39 will not be lifted until this judgment is issued.
>
> *HH* concerns the issue of risk of return to Mogadishu, which will be considered in relation to Article 3 of the Convention and Article 15(c) of the European Union Qualification Directive ..."

67. In a letter sent to Mr Abdi's own solicitors dated 8th April 2009 this was said on behalf of the European Court of Human Rights:

> "1. The Court is currently granting interim measures under Rule 39 of the Rules of Court to all applicants with removal directions to Mogadishu pending the adoption of a lead judgment. Applications by applicants challenging expulsion to Somaliland or Puntland are currently considered on a case by case basis."

It then refers to the position with regard to interim measures, saying that thus far they have been granted to with regard to 134 Somali applicants, the vast majority of whom were challenging expulsion to Mogadishu.

The letter went on to say this:

> "5. The Court's policy is always to ensure coherence and equitable treatment of States. To the best of my knowledge, however, no other Member State of the Council of Europe is currently returning Somalis to Mogadishu.
>
> 6. Neither the UK Government (nor the Government of any other Contracting State) were ever officially asked by the Court to suspend expulsion of Somalis pending the adoption of a lead judgment."

68. Ms Dubinsky was thus entitled to say that it appears that the European Court of Human Rights is currently granting such interim measures across the board with regard to all expulsions to Mogadishu, which are before the court, on what she styled a "fact insensitive basis".

69. Ms Dubinsky pointed out further that Mr Abdi is only himself not in a position to apply to the European Court of Human Rights because he has not yet exhausted his domestic remedies. Otherwise, she assured me, he certainly would apply to the European Court of Human Rights. She further told me, and I have no reason not to accept, that, were a stage to be reached where the Home Office set removal directions for Mr Abdi, he would immediately issue a further judicial review claim seeking to set those directions aside and to stay removal on the footing of the points thus far not decided by the Asylum and Immigration Tribunal: that is to say the safety of en route travel from Mogadishu to Puntland and the issue of whether Puntland would even admit entry of a person travelling on an EU travel document. At present, however, Mr Abdi's intention is to attempt to seek to challenge the Tribunal's approach on those points, as well as other points, before the Court of Appeal.

70. Furthermore, as it seems to me, Ms Dubinsky was entitled to say that, in the light of the European Court of Human Rights' approach and pending final disposal of the relevant test case, if in judicial proceedings an application were made to stay removal to Mogadishu on removal directions which had been set that application might well result in an injunction being granted by the domestic courts.

71. For his part, Mr Tam told me that it is policy for the Home Office to abide by a Rule 39 measure given in a particular case. Here, however, he said no such Rule 39 measure had been made with regard to Mr Abdi by the European Court of Human Rights. He accepted that the Home Office knew by October 2008 of the stance being adopted by the European Court of Human Rights, with regard to forced returns to Mogadishu, in cases before the European Court of Human Rights.

72. In a letter from the Treasury Solicitor to Mr Abdi's solicitors dated 15th April 2009, it is said that, currently, there is no policy to preclude returns to Somalia/Mogadishu. All cases are considered on their individual merits. That letter also dealt with a question which had been posed in these terms by Mr Abdi's solicitors. The question is:

> "What is the Home Office's policy in relation to the ECtHR indication that it is issuing Rule 39 interim measures in respect of all Somali applicants who have removal directions for Mogadishu?"

Answer:

> "It is the UK Border Agency's policy to defer enforced removal in cases where the European Court of Human Rights has made a Rule 39 indication prohibiting removal. The UK Border Agency continues to remove via Somalia/Mogadishu in cases where the

European Court of Human Rights has not made a Rule 39 indication."

73. All this shows a nice (or perhaps, changing the mean of the word, not so nice) regard on the part of the Home Office to the letter of the law. It shows, in my view, an almost total disregard to the spirit behind the European Court of Human Rights' stance. It also, and most unattractively, places at a serious and potentially irreversible disadvantage those Somalis facing forced return to Mogadishu who do not have the legal assistance or resources or knowledge to enable them to seek to apply to the European Court of Human Rights.

74. Moreover, the whole legal position with regard to forced removal to Somalia, or at all events Mogadishu, awaits in legal terms a definitive decision. The European Court of Human Rights has stated that it is awaiting upon the domestic proceedings in HH to be resolved. I was told during the hearing before me that HH in turn has now been directed to wait upon another pending appeal in the Court of Appeal called QD. So these cases are all stacking up, one after the other. Lawyers involved in those cases have been contacted and have written to indicate that whatever the outcome in the Court of Appeal, an appeal to the House of Lords is a very realistic possibility, quite apart from the matter being referred to the European Court of Human Rights.

75. The course of progress of such decisions, over which Mr Abdi himself has no involvement or control, clearly could potentially impact upon his own case. In the meantime, as I have said, the European Court of Human Rights is granting interim measures under Rule 39 to restrain removal to Mogadishu in all comparable cases before it.

76. Given all these circumstances, I think 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. Rejecting, as I do, Mr Tam's argument that the court should ignore any period of time, whether in the past or hereafter to be spent in detention, whilst Mr Abdi is pursuing his appeal and any other related litigation, 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; and I think that by now a reasonable period of time for detaining him has elapsed.

77. I am entitled, in reaching that conclusion, to have at least some regard to the already very long period of time he has already spent in detention: that is, the 30 months. As I have said, I have also borne in mind, in deciding this matter, the fact of his ongoing appeals, the risk of absconding and the risk of re-offending. All the same, as to this last point it should at least be borne in mind that the gravity of his criminality is of a lesser order than that in the Court of Appeal case of A. Ms Dubinsky also told me that not only is Mr Abdi of course now older but also he has, in the light of his long detention, broken himself of his drug addiction.

78. I should add that if Mr Abdi is released - and I am directing that he be released – then, as I am told, he has secured section 4 NASS support and that accommodation will be provided to him.

Conclusion

79. In conclusion therefore, I find on the evidence that thus far Mr Abdi has not been unlawfully detained so as to entitle him to damages. But in all the circumstances he should now be released, as I conclude, on the application of Hardial Singh principles. Clearly I would impose conditions as to the terms of his release, and I will hear counsel on that. Mr Abdi will understand that if he reoffends, or otherwise breaches the terms of the conditions, he will not be saved from prospective further detention.