Case No: C5/2009/2346

**Neutral Citation Number: [2009] EWCA Civ 1518**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**(MR TIMOTHY BRENNAN QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 14th December 2009

**Before:**

**LORD JUSTICE WALLER**
**LORD JUSTICE LAWS**
**and**
**LORD JUSTICE ETHERTON**

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**Between:**

**AS (SUDAN)**

**Appellant**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

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**Mr Graham Denholm** (instructed by TRP Solicitors) appeared on behalf of the **Appellant**.
**Ms L Busch** (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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# Judgment

**Lord Justice Laws:**

1. This is an appeal, with permission granted by Sedley LJ on 26 November 2009, against the decision of Mr Timothy Brennan QC, sitting as a deputy High Court judge in the Administrative Court on 5 October 2009. By that decision he dismissed the appellant's application for judicial review directed to the legality of his continued detention under administrative powers conferred by the Immigration Act 1971.

2. The appellant is a national of Sudan born on 16 February 1963. He entered the United Kingdom on 6 July 1991 with a six-month visitor's leave and claimed asylum on 15 July 1991. That was refused on 19 April 1993, but he was granted exceptional leave to remain until 19 April 1994. In 1994 he married a British citizen and his exceptional leave was extended to 19 April 1997 and later extended further to 19 April 2000. On 15 August 1997 he was convicted of six offences of dishonesty and sentenced to 240 hours' community service. On 22 November 1999 he applied for indefinite leave to remain. On 19 April 2000 his exceptional leave expired. On 14 November 2000 he was convicted on 21 counts of dishonestly obtaining property by deception and on 8 January 2001 was sentenced to concurrent terms of 15 months' imprisonment, with a recommendation for deportation.

3. A deportation order was served on him on 6 July 2001. On 29 June 2001, on completion of his criminal sentence, he was detained under the Immigration Act powers. On 5 September 2001, after refusal of a further application for leave to remain, he was released on bail. His appeal against the refusal of leave was dismissed on 20 March 2004 and on 22 January 2004 his earlier application for indefinite leave, the one that had been made on 22 November 1999, was also refused. There followed a period during which he was for a time wrongfully detained in the criminal justice system as opposed to the Immigration Act powers. Then in 2007 he made a further application for leave to remain. That, however, was withdrawn. On 14 July 2008 the decision was taken not to revoke the deportation order. On 18 August 2008 directions were set for his removal to Sudan on 23 August, and on 19 August he was taken into immigration detention pending that proposed removal.

4. He has however not been removed, but has remained in detention since that date. Initially that was because of his application for an injunction preventing his removal. That was granted on 22 August 2008. Four days later, on 26 August, judicial review proceedings were issued on his behalf to challenge the removal directions, but before they came on to be heard further representations were made, including representations dated 20 February 2009, asserting that he would be at risk on return because of his alleged Darfuri ethnicity. On 20 April 2009 the Secretary of State resolved to treat those representations as a fresh asylum claim. At length, on 15 May 2009, the judicial review claim was withdrawn on the Secretary of State agreeing that the appellant would enjoy an in-country right of appeal against any refusal of the fresh claim.

5. A substantive asylum interview was conducted on 13 July 2009. The current judicial review proceedings, as I have said, challenging the legality of his continued detention, were issued in August 2009 and came before Mr Brennan on 27 August. As I have indicated, his judgment was handed down on 5 October. On 7 December 2009 (that is to say, not many days ago) the Secretary of State determined the fresh claim and refused it. The decision letter is before us. The appellant has the right to an in-country appeal, which, I think I may say, it is presumed he will exercise.

6. The case for the appellant, put to the deputy judge below and repeated before us, is that having regard to the passage of time, the appellant's continued detention was and is unreasonable in the sense explained by Woolf J, as he then was, in Regina -v- Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704. The Hardial Singh principles, as they are often called, were summarised by Dyson LJ in I v SSHD [2002] EWCA Civ 888 at paragraph 46 as follows:

> "The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
> ii. The deportee may only be detained for a period that is reasonable in all the circumstances;
> 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;
> iv. The Secretary of State should act with the reasonable diligence and expedition to effect removal."

7. It is accepted that the court is to be the judge of reasonableness of the detainee's continued detention: see A v SSHD [2007] EWCA Civ 804, paragraph 62 and paragraphs 71 to 72. As the deputy judge recorded, (judgment, paragraphs 26 and 32) the Secretary of State has provided the appellant with regular reviews and statements of the reasons for detaining him and on some of these reliance is placed by counsel for the Secretary of State in her skeleton argument. It is said that, in dismissing the claim, the deputy judge failed to have regard to all of the relevant factors and that his decision was irrational. However, in a case of this kind, in which the court below dealt with the matter on the papers just as this court does, we are in effect in as good a position as the judge below to assess the legal quality of the appellant's detention. Indeed we have the specific duty to do so. More time has passed and further information is before us. It is, however, useful in brief to see how the deputy judge analysed the matter. At paragraph 49 he said:

> "I start from the proposition that it is indeed disconcerting to find that a non-violent person subject to immigration control has been in detention, when not serving any sentence of imprisonment, for over 12 months while his status is assessed and his applications are dealt with. Such a period of incarceration requires justification and it is appropriate for the court to scrutinise it anxiously."

8. The deputy judge then enumerated five factors which he considered justified the continued detention. They were: (1) The appellant was a dishonest and intelligent man capable of manipulating matters to his advantage (paragraph 52). 2) There was some risk of further offending (paragraph 53). 3) He was obviously determined to stay in the United Kingdom if he possibly could, remaining here in the face of a deportation order (paragraph 54). 4) He had not put all his cards on the table in the first place. He only raised the assertions constituting his fresh asylum claim as late as February 2009. 5) The Secretary of State had overall acted with reasonable diligence and expedition. The deputy judge concluded at paragraph 57:

> "Accordingly, and in the light of the factors above taken cumulatively, I consider that the circumstances are such as to justify the continued detention of the Claimant while his current asylum claim is determined. I put considerable weight on his character and behaviour and his immigration history. He is, as the Defendant submits, now running out of options. He has made his asylum claim and if that fails, and if he appeals and the appeal fails, he will have nowhere left to turn. The risk that he will abscond, perhaps committing further offences having done so with no means of support, is a real one. In all the circumstances the period of detention to date and the likely period of future detention is reasonable."

9. I should note briefly one particular criticism which counsel levels at the learned deputy judge's reasoning. At paragraph 53 the judge had said that if released the appellant "…would have no obvious means of support and a clear temptation to turn to crime to support himself". This is not strictly accurate, as Mr Denholm points out. In such a circumstance the appellant would be entitled to asylum support, extremely modest though that is, and at all events I cannot think that this factor can, so to speak, swing the case that has to be made in the appellant's favour. The learned deputy judge clearly did not think, and nor do I, that the risk of re-offending would arise solely from the lack of means of support.

10. The appellant, through Mr Denholm, says that there are points that tell in his favour which should have been and should now be taken into account as such. Thus, it is said that the appellant has generally complied with conditions to which he was subject when he was at large. Some of his claims, says Mr Denholm, possess some merit. He laid particular emphasis in his submissions to us on the fact that the Secretary of State accepted that his representations amounted to a fresh asylum claim in 2009 and this entailed the proposition, under the Immigration Rules, that the Secretary of State further accepted that the claim had a reasonable prospect of success. The reference is to Rule 353 of the Immigration Rules. It is said that the Secretary of State should have had in mind the passage of time entailed by the Appellant's various applications and appeals including the time likely to be taken up (two months, maybe more) by any appeal against the latest decision refusing him asylum. It is also said that some assessment was and is required of the probable length of his detention in the future.

11. It is, I think, useful to quote two pieces of material which were quoted by the deputy judge. First McCombe J, delivering the judgment of the Court of Appeal Criminal Division on the appellant's appeal against the 15-month sentence passed on him in January 2001, said this:

> "8… In the learned judge's view, with which we agree, the accounts submitted showed a carefully calculated course of persistent dishonesty and not simply a one-off stupid mistake. The applicant had previous convictions for dishonesty. …
>
> 9. The judge took into account the fact that the applicant was an intelligent man who had deliberately chosen a dishonest path. … the learned judge, in our view, quite rightly concluded that offending on this scale with deliberation and forethought behind it, as revealed by these offences, was so serious that only custody could be justified.
> …
> 12. … The judge concluded that he was a deliberate offender who was not prepared to make any worthwhile contribution to society and was merely using his wife as a prop in times of need such as this.
>
> 13. The judge was satisfied that the applicant's continued presence in the United Kingdom would be of potential detriment and that, if he stayed, he would continue to offend. He therefore made the recommendation for deportation.

> …
> 19. … this was a determined course of dishonesty and deception and was not the first with which the applicant had been involved. The sentence passed was not manifestly excessive and the deportation order made by the judge, only after careful consideration, was fully justified."

12. Then in addition it is to be noted that on 20 March 2003 the adjudicator, who had to deal with the appellant's appeal against the Secretary of State's rejection of his second application for leave to remain, said this:

> "On the totality of the documentary and oral evidence I have concluded that this appellant is an incurable liar who has shown deliberate and persistent dishonesty. He claims to have learnt his lesson and he told me more than once that he had learned his lesson and would not repeat his offences. He claims to have been worried that he would lose everything if he were to go astray again. However, having heard the appellant give evidence and having carefully watched his demeanour, I did not believe a word of what he said. In my view the motivation for the apparent change in the appellant's behaviour is due to the threat of deportation and I have no doubt whatsoever, in my mind, that once the threat is removed he will return to his previous behaviour pattern of dishonesty. He has never had any regard to the welfare of his wife or his child and in my view he is simply putting on a performance because of the threat of removal. He had been unfaithful to his wife and had lied to her. He had created a separation between him and his family by his conduct. I simply do not believe the change in the appellant is genuine and I do not believe that he has learnt any lessons."

13. These comments were of course made some considerable time ago, a circumstance which Mr Denholm rightly emphasises. Nevertheless, to my mind they serve to underline the force of the Secretary of State's reasons for maintaining the appellant's detention. The Secretary of State says that this is a man who persistently and consistently has been dishonest, concerned only to look after his own interests, and has made repeated attempts through courts and tribunals to remain here, culminating in his latest asylum claim which has, as we know now, been refused. This in particular is a factor, as it seems to me, that we are bound to consider. The reasons for refusal tend to support earlier views taken of the appellant. The decision letter demonstrates inconsistency after inconsistency in the appellant's case, which was comprehensively rejected. It is not of course,

for us to pre-empt the outcome of any appeal, and indeed Mr Denholm says there are certain points, not least relating to Article 8 of the Human Rights Convention, in the appellant's favour; but in my judgment, any perception of the appellant's chances of success or otherwise suggest a strong motive for his absconding.

14. More than this it is right to bear in mind the contents of certain recent detention reviews which have troubled the Secretary of State. In her skeleton argument prepared for the Secretary of State Miss Busch instances the following. It is said that the appellant has spent time in segregation due to his disruptive behaviour, and some detail is given of his having engaged himself in providing advice to fellow detainees as to how to "stop/halt/delay the removal process" There is also a reference, at one point, to the appellant's own low expectations for the outcome of his case. I take it that is a reference to the then undetermined asylum application.

15. There is a further point to bear in mind. This is not straightforwardly a Hardial Singh case. Mr Denholm may very well be right in submitting that Hardial Singh principles are to be applied; but it is to be remembered that it is not a case in which the Secretary of State has been prevented from deporting the appellant because of any difficulties over the home State receiving him. The only reason the appellant has not been deported is because of the procedures instituted by himself: judicial review and further applications, including the fresh asylum claim. These, of course, he was entirely entitled to embark upon, but it seems to me that the fact that these, rather than any external difficulty, are the genesis of his continued detention is properly to be regarded as a relevant consideration in the assessment of the reasonableness of that continued detention. See R(Abdi) v SSHD [2009] EWHC (Admin) 1324 *per* Davies J at paragraph 36.

16. Lastly, Mr Denholm referred also to certain passages in the Secretary of State's enforcement instructions and guidance. Some of these are cast, however, in general terms. Thus they show necessity as the test of detention, and public protection is the key. No doubt that is entirely right.

17. Overall, on the specific facts of this case (and I emphasise that this judgment travels no further), it is, as I would conclude, impossible to categorise the continued detention to date of this appellant as being unreasonable so as to deprive that detention of the colour of law. It is perhaps obvious that it is desirable that any appeal lodged by the appellant against the latest asylum claim should be dealt with as expeditiously as the Asylum and Immigration Tribunal are able to achieve. For all these reasons, I for my part would dismiss the appeal.

**Lord Justice Etherton**:

18. I agree.

**Lord Justice Waller**:

19. I also agree.

**Order**: Appeal dismissed