Case No: C4/2006/1210

Neutral Citation Number: [2006] EWCA Civ 1157
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE COURT
Mr Justice Sullivan
[2006] EWHC 1111 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 4th August 2006

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE BROOKE
Vice-President of the Court of Appeal (Civil Division)
and
LORD JUSTICE NEUBERGER

- -

Between :

S AND OTHERS	**Claimants/ Respondents**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**

- - - - - - - - - - -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Robert Jay QC (instructed by the Treasury Solicitor) for the **Appellant**
Rabinder Singh QC and Duran Seddon (instructed by **Hammersmith & Fulham Community Law Centre**) for the **Respondents**

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Judgment

Lord Justice Brooke:

This is the judgment of the court.

1. This is an appeal by the Secretary of State from paragraph 4 of an order made by Sullivan J in the Administrative Court on 12th May 2006. The Secretary of State does not challenge the remainder of the judge's order whereby he

   i) allowed the respondents' claim for judicial review (para 1);

   ii) quashed the Secretary of State's decision dated 3rd November 2005, which was to the effect that it was not "appropriate" to grant the respondents discretionary leave and that they should "remain on temporary admission" (para 2);

   iii) declared that the delay on the part of the Secretary of State in granting the respondents leave to enter this country was unlawful (para 3);

   iv) made a mandatory order that the Secretary of State grant the respondents a period of six months' discretionary leave to enter this country within seven days of the order being sealed (para 5);

   v) directed the Secretary of State to pay the costs of the respondents on an indemnity basis (para 6); and

   vi) directed a detailed assessment of the respondents' publicly funded Community Legal Service costs (para 7).

2. By para 4 of his order, which is under challenge on this appeal, the judge made a declaration to the effect that the following parts of the Secretary of State's policy relating to Discretionary Leave, issued on 30th August 2005, were unlawful:

   > "2.6 … unless Ministers decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted, the individual will be kept or placed on temporary admission or temporary release…"
   >
   > …
   >
   > "However Ministers may decide that it is inappropriate to grant any leave to a person falling within the excluded category in the light of all the circumstances of the case. Where it is decided that leave should not be granted the individual will be kept or placed on temporary admission or temporary release."
   >
   > …

> "… and may affect whether the person qualifies for Discretionary Leave at all…"
>
> …
>
> "… unless Ministers decide, in view of all the circumstances of the case, that it is inappropriate to grant any leave and instead place or keep the person on temporary admission or temporary release."
>
> …
>
> "5.1 … (unless Ministers decide in the light of all the circumstances of the case that it is inappropriate to grant any leave and instead keep or place the person on temporary release or temporary admission)."
>
> …
>
> "6.3 … Even if removal of a person falling into an exclusion category is not considered possible within six months, Ministers may decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted the individual will be placed on temporary release."

3. The reason why the Secretary of State is appealing this part of the judge's order is that, while he complied with para 5 of the order and granted the respondents a period of six months' Discretionary Leave to enter this country on 19th May 2006, this period ends on 19th November 2006, and he wishes to be able, if he sees fit, to decline to grant a further period of Discretionary Leave at the end of that period and to place the respondents thereafter on temporary admission, which he will be unable to do unless that part of the judge's order is set aside. More generally, he wishes to obtain confirmation from this court that his newly adopted policies for handling a rare type of case are not unlawful.

4. So far as the facts of the case are concerned, the respondents are Afghans, and on 6th February 2000 they hi-jacked a jet aircraft of the Afghan national airline on an internal flight from Kabul to Mazar-i-Sharif. They compelled the pilot to fly the aircraft to Stansted, via Tashkent (to refuel), Aktyubinsk in Kazakhstan (for minor repairs), and Moscow. The aircraft landed at Stansted at 2 am on the morning of 7th February 2000, and they remained in control of the aircraft for 70 further hours until the morning of 10th February 2000 when they surrendered to the British authorities.

5. The respondents had four firearms in their possession (although they were to maintain that these had all been unloaded before the aircraft landed at Stansted), and two loaded hand grenades were found on the plane after they left it. The evidence at their second criminal trial showed that the respondents had used the firearms threateningly as part of the means of keeping the crew and passengers on board. A photograph

produced at the trial showed a hi-jacker apparently pointing a gun at a passenger who had been ejected from the aircraft and made to kneel on the tarmac at Stansted. Longmore LJ, giving the judgment of the criminal division of this court, said that there could be no doubt that the events at Stansted must have been as terrifying for the innocent passengers as any of the respondents' previous activities.

6. Some of the passengers on the aircraft were relatives or colleagues of the respondents, but about a hundred of them were not. The respondents and a number of those who fell into the former category claimed asylum in this country. The other passengers flew back to their homes in Afghanistan.

7. The respondents were all charged with one offence of hi-jacking an aircraft, two offences of false imprisonment, one offence of possessing firearms with intent, and one offence of possessing explosives (the two loaded hand grenades).

8. None of the respondents disputed the main thrust of the facts alleged against them, but they all relied on the defence of duress of circumstances. They said that they all acted under an imminent threat of death or serious injury against them or those for whom it was reasonable for them to accept responsibility. They were all members of the organisation of Young Intellectuals of Afghanistan ("the YIA"). The Taliban, who were then in power in Afghanistan, had discovered this organisation and identified it as a political opponent. They had arrested and tortured four of its members, and these members between them knew the names of the respondents and most of the organisation's other members. The Taliban customarily used torture to extract information. They would therefore have discovered all these names, and these people and their families would all have been at risk of capture, torture and death.

9. In turn they would have been forced to reveal the names of other members of the YIA, so that the risk of capture, torture and death extended to all the members of the organization. There was also evidence to the effect that a specific list of 35 members of the YIA had fallen into the Taliban's hands.

10. The respondents maintained that they had no alternative but to act as they did. The actions they took after the plane landed at Moscow and Stansted continued, they said, to be the result of duress, because there was then an imminent threat of their being removed by the relevant authorities directly to Afghanistan, or indirectly via Pakistan (with the risk of death or serious injury because Pakistan would return them to Afghanistan).

11. The respondents were all charged with five serious criminal offences. At their first trial, the jury failed to agree. At a second trial, they were convicted on all counts, but were given comparatively light sentences on account of the mitigating circumstances. Their convictions were set aside in June 2003 by the Criminal Division of this court because it concluded that the second Trial Judge had given the jury a misdirection of law in relation to the problematic defence of duress of circumstances. Because most

of the respondents had by then served their sentences in full, the court did not direct a re-trial.

12. The way was then open for the consideration of their applications for asylum. These were refused by letters dated 25th June 2003, supplemented by further letters dated 14th October 2003. In the refusal letters there was no challenge to the credibility of their claims in relation to their political involvement with the YIA, to the exposure of that organisation to the Taliban, or to their admission that they had hi-jacked an aircraft. Issue was taken with the claims some of them had made about their previous history, but the main part of the refusal letters was concerned with the general position in Afghanistan in 2003.

13. Reference was made to the developments in that country since the Bonn Agreement in December 2001, the outcome of the Loya Jirga in June 2002, the establishment of the transitional administration under Hamid Karzai, and the steps taken by that administration towards stabilising Afghanistan, and in particular Kabul. These considerations led to the Secretary of State's conclusion that it would be safe for the respondents to return to Afghanistan, where they would receive sufficiency of protection. Their claims under both the Refugee Convention and Article 3 of the European Convention on Human Rights ("ECHR") were therefore rejected. The supplementary refusal letters dealt more specifically with the individual claims made by each of the respondents in statements they had filed in conjunction with their appeal to an adjudicator.

14. The appeals were heard, unusually, by a panel of three adjudicators, who heard evidence for eight days in April-May 2004 and issued their determination on 8th June 2004. In a very long and detailed determination the panel in essence accepted the respondents' account of the events that led up to the decision to hi-jack the aircraft. Since 1998, when the Taliban occupied Mazar-i-Sharif, their organisation had had to operate in secret. It had 1,841 members when they left Afghanistan, and it had been in consequence of their desire to expand the organisation, particularly in Herat and Kandahar provinces, that they had invited 35 people to a meeting in Kabul, ostensibly to study the Holy Q'ran. It was this list of 35 names that had come into the possession of the Taliban.

15. The panel described the events of January and early February 2000 in some detail. It was on 12th January that it was learned that the Taliban had detained four members of the organisation, and it was later understood that these men had been tortured and had disclosed the names of the 35. Towards the end of January the dead body of one of them was delivered to his family home bearing marks of torture. The homes of two of the respondents were searched and, although on 1st February the idea of hi-jacking an aircraft (proposed by someone who worked for the airline) had been rejected, three days later it was learned that 17 further members of the organisation had been arrested. It was then decided to go ahead with this idea. Tickets on the aircraft, and the facility to bring guns onto the aircraft, were secured through bribery of two officials.

16. The adjudicators considered that the respondents had disqualified themselves from any entitlement to asylum by virtue of Article 1F(b) of the Refugee Convention which provides that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

> "he has committed a serious non political crime outside the country of refuge prior to his admission to that country as a refugee."

17. The panel expressed their conclusion on this part of the case in these terms:

> "91. Having heard the evidence of the appellants and the experts, and having read the objective evidence, we are satisfied that the borders of Afghanistan are and were at the relevant time porous relative to many countries. We find that these appellants could have attempted an alternative means of escape to a neighbouring country. There were routes through the mountains and unmanned border posts. We find that despite all of the appellants' statements to the contrary there was not such an immediacy of danger of arrest or lack of opportunity to move away from the Kabul area such that they could not have found an alternative to the hijacking. The appellants could have chosen to travel to Pakistan, although there was a strong Taliban and radical Islamic Movement presence there. If they had gone to Pakistan, it was most unlikely they would have experienced any particular difficulties moving on from there. The further they travelled away from Afghanistan and the Peshawar area the less likely they would have been in danger. They could have remained elsewhere in Pakistan or if they still felt in danger of persecution they could have travelled on to claim asylum in another country. They could have claimed asylum in Tashkent or in Moscow but chose not to do so.
>
> 92. For the reasons set out above we find that there were some mitigating circumstances leading to the decision to hijack the aircraft. However, we find also that there are no serious grounds for concluding that the appellants were placed in such a position that they were compelled to carry out the hijacking nor were they under such pressure as to justify the hijacking. Thus there is insufficient reason to counter our finding that there are serious grounds for considering that all of these appellants have prior to their arrival and claim to refugee status committed a serious non-political crime outside the United Kingdom, namely the hijacking of the Ariana Afghan Airways Boeing 727.
>
> 93. Accordingly all the appellants are excluded from the protection of the Refugee Convention."

18. They then went on to consider the claim that ECHR Article 3 precluded the respondents' return to Afghanistan. On this aspect of the case they said:

> "219. To summarise, we find that the appellants are in a unique position because of their role in the hijacking and the very high level of notoriety and publicity which the hijacking was given in Afghanistan and the level of interest it still generates. We accept that the Taliban condemned the appellants to death and that in principle they see them as enemies of Islam. This is supported by their numerous utterances at the time and by the terms in which they convicted the appellants. We also accept the evidence that the Taliban have the capacity to carry out targeted attacks. Although their attacks have primarily been in the south-east they have clearly been able to carry out a number of high profile attacks in Kabul and have been re-grouping with a view to carrying out more attacks and have uttered many threats. We also accept the evidence of the experts that although the Taliban's efforts to date have been directed against foreign aid workers and those associated with the TA, the unique position of the appellants would make them of interest to the Taliban because of the damage they did to the Taliban regime at the time of the hijack. We also take into account that because of the appellants' high profile it would be an enormous public relations coup for the Taliban to show that they could still take revenge against their enemies. For all these reasons we find that there is a real risk that the appellants would be targeted for assassination by the Taliban which clearly would be treatment contrary to Article 3.
>
> 220. We also wish to make it clear that our view that the Taliban would target individuals whom they consider to be enemies is not a precedent applicable to the generality of Afghans who left Afghanistan in fear of the Taliban regime. We specifically point out that the reason why we find these appellants are at risk is because of their particularly high profile and their unique position as the main actors in the hijacking who have been convicted and sentenced to death [in] their absence."

19. The panel then considered the Secretary of State contention that there would be sufficient protection for the respondents if they were returned to Kabul. On this issue the panel said:

> "240. Taking all this into account, and bearing in mind our findings about the risk on return to the appellants from the Taliban who have the capacity to carry out attacks in Kabul, we conclude that on return the appellants' connection with the hijacking and all that it stands for in the Taliban conscience, if not in the national Afghan conscience, will place them at risk of being killed or seriously injured or ill-treated by the Taliban.

> On the evidence before us, there is little, if any, likelihood that the system of protection currently or in the foreseeable future likely to be in place in Kabul or elsewhere in Afghanistan could offer any of the appellants a reasonable sufficiency of protection given their notoriety. We therefore find that there would be no sufficiency of protection in accordance with the principles enunciated in the cases of *Horvath* http://www.bailii.org/uk/cases/UKHL/2000/37.html[2000] Imm AR 552 and *Bagdanavicius* available to the appellants in Kabul.
>
> 241. The rights protected by Article 3 are unqualified or absolute so that the assessment of risk in an Article 3 claim is not restricted by reference to the appellants' conduct. In the light of our findings that there is a real risk that the appellants' rights under Article 3 would be violated on return and that there is an insufficiency of protection, the appeals of all the appellants under the European Convention are allowed."

20. On 23rd July 2004 the Deputy President of the Immigration Appeal Tribunal refused an application by the Secretary of State for permission to appeal. He said that the determination appeared to him to be a careful and proper examination of all the evidence in its proper context. It could not be said that the evidence compelled the findings, but looking at them generally and in the light of the grounds of appeal he could see no error of law. The Secretary of State did not seek to set aside this ruling by an application for statutory review in the High Court.

21. The way was therefore open to the Secretary of State to give effect to the adjudicators' findings by implementing the relevant part of his published policies in favour of the respondents. For this purpose it is necessary to consider the powers available to the Secretary of State at that time.

22. Section 3A(1) of the Immigration Act 1971 gave the Secretary of State power by order to make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom ("leave to enter"). The Immigration (Leave to Enter) Order 2001 was made under this power. Article 2 is in these terms:

> "(1) Where this article applies to a person, the Secretary of State may give or refuse him leave to enter the United Kingdom.
>
> (2) This article applies to a person who seeks leave to enter the United Kingdom and who –
>
> (a) has made a claim for asylum; or
>
> (b) has made a claim that it would be contrary to the United Kingdom's obligations under the Human Rights

> Convention for him to be removed from, or required to leave, the United Kingdom.
>
> …
>
> (4) In deciding whether to give or refuse leave under this article the Secretary of State may take into account any additional grounds which a person has for seeking leave to enter the United Kingdom.
>
> (5) The power to give or refuse leave to enter the United Kingdom under this article shall be exercised by notice in writing to the person affected or in such manner as is permitted by the Immigration (Leave to Enter and Remain) Order 2000."

Article 3 in effect substitutes the Secretary of State for references to the immigration officer in (*inter alia*) paragraphs 2, 8 and 21 of Schedule 2 to the 1971 Act.

23. The Secretary of State has published from time to time the principles on which he will exercise this power. We need not be concerned with the principles on which he granted exceptional leave to enter (or to remain) prior to 1st April 2003, because on that date he introduced a new system. This was explained in the first paragraph of the new Asylum Policy Instruction ("API") that took effect from that date:

> "The system of granting leave exceptionally outside the Rules (ELE/R) has been changed. In any case decided on or after 1 April, where asylum is refused consideration should be given to granting Humanitarian Protection, details of which are set out in this instruction. There will, in addition, be a limited number of cases which do not qualify for Humanitarian Protection, but for which a period of discretionary leave is merited. For these cases see the API on Discretionary Leave."

24. Because the respondents were held not to be entitled to asylum through the operation of Article 1F(b) of the Refugee Convention, the Secretary of State's Humanitarian Protection policy did not apply. At the material time para 2.5 of that policy provided that:

> "A person who falls under the eligibility criteria listed above should not be granted Humanitarian Protection if there are serious reasons for considering that the person:
>
> …
>
> has committed a serious crime in the United Kingdom or overseas;
>
> …

> Where a person is excluded from Humanitarian Protection, consideration should be given to whether they qualify for Discretionary Leave (see the API on Discretionary Leave)."

25. The Discretionary Leave API starts, for its part, in these terms:

> "… Exceptional leave has been replaced by leave granted on the basis of Humanitarian Protection, details of which are set out in the API on Humanitarian Protection, and by Discretionary Leave for a limited number of cases which do not qualify for Humanitarian Protection but qualify for a period of leave. This instruction explains the limited circumstances in which it would be appropriate to exercise this discretion to grant leave outside the Rules."

26. Paragraph 2.6 of the policy stated, under the heading "Applicants excluded from Humanitarian Protection":

> ""Where a person would have qualified for Humanitarian Protection but for the fact that they were excluded from such protection (see paragraph 2.5 of the API on Humanitarian Protection) they should be granted Discretionary Leave."

27. The exclusion criteria in relation to Humanitarian Protection cases are then set out (para 2.7), and the policy continues:

> "Although the same exclusion criteria are to be used in considering Discretionary Leave cases their application is necessarily different. In particular, a person whose removal, notwithstanding their actions, would breach the ECHR and who does not qualify for any other form of leave should normally (unless the option of deferred removal is taken - see paragraph 5.4) be granted a limited period of Discretionary Leave even if they fall within the exclusion criteria."

There was no question of deferred removal in this case.

28. Paragraph 5 deals with the duration of grants of Discretionary Leave. It states:

> "Subject to paragraphs 5.2, 5.3, 5.4 and 5.5, it will normally be appropriate to grant the following period of Discretionary Leave to those qualifying under the categories set out in paragraph 2. ...
>
> Paragraph 2.6 (excluded from HP) - 6 months."

Paragraphs 5.2, 5.3, 5.4 and 5.5 have no application in the present case.

29. Paragraph 8 of the Discretionary Leave API provided that those with Discretionary Leave would normally be eligible for consideration for settlement in the United Kingdom after six years' continuous Discretionary Leave. However, those in the excluded categories were not eligible for consideration for settlement until they had completed ten years of Discretionary Leave. After ten years Ministers could still decide that it would be "conducive to the public good" to deny settlement (see para 8.4).

30. It follows that the respondents unquestionably qualified under paras 2.6 and 5.1 of the Discretionary Leave API for a grant of six months' Discretionary Leave.

31. Although the Secretary of State filed no evidence in answer to the respondents' application for judicial review, it appears that he did not want to implement his policy. Instead, he prevaricated for over a year in a way that is fully set out in Sullivan J's judgment. He then promulgated different policies on 30th August 2005. His new Humanitarian Protection policy did not differ from its predecessor in any material respect, but the new Discretionary Leave policy contained the features which the judge declared to be unlawful. Para 2.6 of the new policy provides as follows (with the new elements of the policy italicised):

> " Where a person would have qualified for Humanitarian Protection but for the fact that they were excluded from such protection, they should be granted Discretionary Leave *unless Ministers decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted, the individual will be kept or placed on temporary admission or temporary release.*
>
> ...
>
> Although the same exclusion criteria are to be used in considering Discretionary Leave cases, their application is necessarily different. In particular, a person whose removal, notwithstanding their actions, would breach the ECHR and who does not qualify for any other form of leave should normally (unless the option of deferred removal is taken - see section 5.3) be granted a limited period of Discretionary Leave even if they fall within the exclusion criteria. *However Ministers may decide that it is inappropriate to grant any leave to a person falling within the excluded category in the light of all the circumstances of the case. Where it is decided that leave should not be granted the individual will be kept or placed on temporary admission or temporary release*."

32. The duration of leave is dealt with in para 5.1 of the new policy, where the material change is in these terms (with the new elements of the policy again italicised):

> "Excluded from Humanitarian Protection - six months *unless Ministers decide in the light of all the circumstances of the case that it is inappropriate to grant any leave and instead keep or place the person on temporary release or temporary admission.*"

33. In para 6.3 of the new policy ("Curtailment/variation of leave on the grounds of character or conduct (including deception)") the following new provision appears:

> *"Even if removal of a person falling into an exclusion category is not considered possible within six months, Ministers may decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted, the individual will be placed on temporary admission or release."*

34. On 3rd November 2005 the Secretary of State broke his long silence. He told the respondents' solicitors he had given careful consideration to all the circumstances of their clients' cases. In making his decision, he had had regard (among other matters) to the Adjudicators' analysis of the application of Article 1F(b) at paras 40 to 93 of the determination; the judgment of the Court of Appeal of 6th June 2003; the matters raised in the Detailed Statement of Grounds for judicial review and the accompanying documentation; and the public interest in deterring acts such as hijacking. In view of all the circumstances of the case he had decided that Discretionary Leave was not appropriate and that the respondents should remain on temporary admission.

35. Whether he was legally empowered to make a decision of this kind depends on whether he was entitled to include in the new API the passages we have italicised above. The reason why the judge declared them to be unlawful was because he considered that the status of "temporary admission or temporary release" was one which had no parliamentary sanction in this context. He also considered that the wording gave ministers an arbitrary, unfettered power to interfere with the respondents' rights under ECHR Article 8(1) in a manner that was at odds with the rules most recently explained by Lord Bingham in his speech in *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12; [2006] 2 WLR 537:

> "*D. Lawfulness*
>
> "31. The expressions 'prescribed by law' in article 5(1), 5(1)(b), 10(2) and 11(2) and 'in accordance with the law' in article 8(2) are to be understood as bearing the same meaning. What is that meaning?
>
> 32. The claimants relied on a number of authorities such as *Malone v United Kingdom* (1984) 7 EHRR 14, paras 66-68, *Huvig v France* (1990) 12 EHRR 528, *Hafsteinsdóttir v Iceland* (Application No 40905/98), (unreported), 8 June 2004, paras 51 and 55-56 and *Enhorn v Sweden* (2005) 41 EHRR 633, para 36,

> to submit that the object of this requirement is to give protection against arbitrary interference by public authorities; that 'law' includes written and unwritten domestic law, but must be more than mere administrative practice; that the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions; that the scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised; and that there must be legal safeguards against abuse…
>
> 33. The defendants did not, I think, challenge the principles advanced by the claimants, which are indeed to be found, with minor differences of expression, in many decisions of the Strasbourg court. But they strongly challenged the claimants' application of those principles to the present facts…
>
> 34. The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

36. The concept of “temporary admission” stems from paras 16 and 21 of Schedule 2 to the Immigration Act 1971, which are in these terms:

> "16 (1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter."
>
> (2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending –
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions."

> "21 (1) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer.
>
> (2) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or released from detention; but this shall not prejudice a later exercise of the power to detain him."

37. Judicial uncertainty as to the meaning of the word "pending" in para 16(2) of Schedule 2 was resolved by the House of Lords *R (Khadir) v Secretary of State for the Home Department* [2006] UKHL 39, http://www.bailii.org/uk/cases/UKHL/2005/39.html[2006] 1 AC 207. The claimant in that case was an Iraqi Kurd whose claim for asylum was refused by the Secretary of State and whose appeal was dismissed by an adjudicator in August 2001. Following the dismissal of the appeal his solicitors had asked the Secretary of State to grant him exceptional leave to enter (the concept that was replaced by the 2003 policies on Humanitarian Protection and Discretionary Leave). In May 2002 the Secretary of State refused to do so, on the grounds that a safe route for Iraqi Kurds to return to the autonomous region of Iraq was still being investigated, and he kept the claimant on temporary admission which was periodically extended. The claimant applied for judicial review.

38. Crane J concluded that the claimant's temporary admission was no longer lawful, because he could no longer be detained since removal was not "pending". He therefore allowed the application. This court affirmed the reasoning of the judge, but applied s 67 of the Nationality, Immigration and Asylum Act 2002, which had been enacted since the judge's decision. This section is in these terms:

> "67(1) This section applies to the construction of a provision which -
>
> (a) does not confer power to detain a person, but
>
> (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.
>
> (2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that –
>
> (a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,

(b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or

(c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.

(3) This section shall be treated as always having had effect."

39. The House of Lords dismissed the claimant's appeal, but for different reasons. The main speech was given by Lord Brown of Eaton-under-Heywood, who said:

"31. For my part I have no doubt that Mance LJ was right to recognise a distinction between the circumstances in which a person is potentially liable to detention (and can properly be temporarily admitted) and the circumstances in which the power to detain can in any particular case properly be exercised. It surely goes without saying that the longer the delay in effecting someone's removal the more difficult will it be to justify his continued detention meanwhile. But that is by no means to say that he does not remain 'liable to detention'. What I cannot see is how the fact that someone has been temporarily admitted rather than detained can be said to lengthen the period properly to be regarded as 'pending ... his removal'.

32. The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be 'impending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (i.e. throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under paragraph 21.

33. To my mind the *Hardial Singh* line of cases says everything about the exercise of the power to detain (when properly it can be exercised and when it cannot); nothing about its existence. True it is that in *Tan Te Lam* [1997] AC 97 the Privy Council concluded that the power itself had ceased to exist. But that was because there was simply no possibility of the Vietnamese Government accepting the applicants' repatriation; it was effectively conceded that removal in that case was no longer

> achievable. Once that prospect had gone, detention could no longer be said to be 'pending removal'."

40. Lord Brown then considered and rejected a submission that the Secretary of State had failed to give proper reasons for refusing Exceptional Leave to Enter ("ELE"). He said (at para 35):

> "ELE means what it says: it is exceptional. The Secretary of State's discretion is a very wide one and it is hardly surprising that he found nothing exceptional about this case when he refused to grant ELE a mere 18 months after the appellant's unlawful entry into this country. Nor should the fact that the appellant has now been here for a further five years occasion any particular optimism for the future: by section 67 Parliament has manifested its clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime."

41. *Khadir* was an entirely different case from the present. Mr Khadir had no entitlement to be in this country, and no ruling in his favour to the effect that his Article 3 rights would be violated if he were to be sent back to his country of origin. The autonomous region of Iraq was a safe place for him, and the only matter that delayed his departure was the difficulty faced by the authorities in devising a safe route by which he might return there. The Discretionary Leave APIs both state in terms that Discretionary Leave is not to be granted on the basis that there is, for the time being, no practical way of removing a person, e.g. an absence of route. In these circumstances Mr Khadir fell fairly and squarely within the language of para 16(2) of Schedule 2 to the 1971 Act. He was a person liable to be detained pending his removal. He thus qualified for temporary admission and no more.

42. Mr Robert Jay QC, who appeared for the Secretary of State, valiantly sought to identify a route by which the present respondents might be similarly caught by the provisions of para 16(1): he disavowed any intention to rely on para 16(2). He could only do so if each of them could properly be identified as "a person who may be required to submit to examination under paragraph 2" of the schedule. He accepted that the examination which had led up to the June 2003 refusal to grant leave to enter had long since ended. He relied instead on para 2(3) which provides that:

> "2(3) A person, on being examined under this paragraph by an immigration officer … may be required in writing by him to submit to further examination…"

43. He will not, however, be a person who may be required to submit to further examination unless and until a notice in writing is given to him requiring him so to submit. This might occur, for instance, if there was some change in circumstances into which it was considered expedient to conduct a further examination. It would be very far-fetched, however, to regard everyone who has an entitlement to discretionary

leave as being *ipso facto* a person who may be required to submit to further examination, even when no change of circumstances was in question. Such a person could hardly be detained pending his examination when no examination was in prospect.

44. In these circumstances the judge was right to hold that it was not open to the Secretary of State to determine, without obtaining the necessary authority from Parliament, that someone in the position of the respondents could be kept or placed on temporary admission. Parliament created that status (by which someone who has in fact entered this country is deemed not to have entered: see s 11 of the 1971 Act) for those persons identified in para 21(1) of the schedule. For the reasons we have given they do not include persons in the position of the respondents.

45. That the statutory scheme of immigration control postulated that someone who successfully maintained that their removal would constitute a violation of their ECHR rights should be entitled to leave to enter, for however limited a period, became apparent from the clear submissions addressed to the court by Mr Rabinder Singh QC, who appeared for the respondents. In short, the essence of his argument is that those who do not have the "right of abode" here must obtain "leave" in order to enter the country (see 1971 Act, s 3(1)). Asylum and human rights applicants (like everyone else who does not possess the right of abode) are subject to the same statutory controls on entry. This is reflected by the terms of the 2001 Order (see paragraph 22 above) which provides that both categories of applicant may be granted "leave to enter", even if in the latter case all they may have established is that they cannot lawfully be removed without an infringement of their ECHR rights.

46. Mr. Singh pointed out that, where such applicants are refused leave to enter, they have a right of appeal. If their appeal succeeds, on asylum or human rights grounds, they are entitled to leave to enter and to remain here, in the latter case, until they can be safely returned without violation of their ECHR rights. This status cannot be taken away from them by the Secretary of State conferring on them a new status which does not in this manifestation form any part of the statutory scheme. We accept Mr. Singh's submission.

47. Nothing in this judgment should be interpreted as meaning that it would not be open to Parliament to confer power on the Secretary of State to introduce a regime similar to the regime he sought to introduce through the August 2005 Discretionary Leave API (so long as the arbitrary elements of it are removed). If it is considered that a person (or a group of persons) has by his conduct disentitled himself to any discretionary leave at all, then it would be open to Parliament, if it thought fit, to create a new statutory category to accommodate him. The present twilight zone occupied by persons entitled to temporary admission was not designed for him. The only effect of the present judgment is that it was beyond the powers of the Secretary of State to introduce this new category of "persons temporarily admitted" of his own motion without Parliamentary sanction.

48. Because we have reached this clear conclusion, it is unnecessary to consider Mr. Jay's submissions in any detail, because they all revolve around the legality of arrangements whereby the Secretary of State may enlarge the category of the "temporarily admitted" without Parliamentary sanction. A new API in January 2006, which conferred a status of temporary admission unless the Secretary of State considered that Discretionary Leave was appropriate, also suffered from the defect that reliance was placed on the same recourse to "temporary admission" for a purpose never prescribed by Parliament. The August 2005 API, as the Judge held, undoubtedly possessed many of the defects identified by Lord Bingham in his speech in *Gillan.* The draftsmen of any new API will need to take care to avoid these defects.

49. Our conclusion is supported by the fact that it is not easy to understand how the Secretary of State, having once granted discretionary leave, as he did in this case for a six-month period following the judge's order, could then change the respondent's status to one of "temporary admission" especially in the light of the provisions of s 3C of the 1971 Act. That section provides that a period of leave may be extended if the application for an extension is made before the current period of leave has expired. The period of extension would then continue until the application is decided (or withdrawn) and while any appeal against the decision is still pending.

50. For these reasons we dismiss this appeal. We commend the judge for an impeccable judgment. The history of this case through the criminal courts, the immigration appellate authority, and back into the civil courts has attracted a degree of opprobrium for those carrying out judicial functions. Judges and adjudicators have to apply the law as they find it, and not as they might wish it to be. In his judgment in the Criminal Division of the court in this case, (*R v Safi (Ali Ahmed)* [2003] EWCA Crim 1809 at [26]; [2004 1 Cr App R 157) Longmore LJ observed that

> "In 1999 this Court, for the fourth time in five years emphasized the urgent need for legislation to define duress with precision."

51. So far as the powers of the Home Secretary are concerned, the challenges created by the respondents' presence in this country have been apparent ever since they landed here over six years ago. There has been ample time for the Home Secretary to obtain appropriate Parliamentary authority, if he wished to be clothed with the powers he gave to himself without parliamentary sanction in the August 2005 Asylum Policy Instructions.