Case No CO/4202/2007 CO/3405/2007

Neutral Citation Number: [2007] EWHC 2134 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 7th September 2007

B e f o r e:

MR JUSTICE BEATSON

THE QUEEN
on the application of
M M H

Claimant

− v −

Secretary of State for the Home Department

Defendant

and

THE QUEEN
on the application of
S R H

Claimant

− v −

Secretary of State for the Home Department

Defendant

_____

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Mr Hugh Southey and Ms S Tafador (7.9.07)
(instructed by the Refugee Legal Centre)
appeared on behalf of both Claimants
Miss Lisa Giovanetti and Mr Steven Kovatz (7.9.07)
(instructed by the Treasury Solicitor)
appeared on behalf of the Defendant

J U D G M E N T
(As Approved by the Court)

Friday 7 September 2007

MR JUSTICE BEATSON:

1. In this judicial review the claimants, two Iraqis, one from Kirkük, the other from Makhmur, challenge the decision of the Secretary of State to detain them, although removals to Kirkük and Makhmur are not being enforced at present and the Secretary of State has given no indication of when she might be in a position to do so.

2. There are two issues. The first is common to both claimants. It is the effect of a person's refusal to return voluntarily on the lawfulness of his detention in the light of the recent decision in R(A, Somalia) v SSHD [2007] EWCA Civ 204 (to which I shall refer as "A (Somalia)"). The second is the effect of the second claimant, SRH's mental health on the lawfulness of his detention.

3. SRH's application for judicial review was launched on 25 April 2007. MMH's application was launched on 22 May. Their cases are heard together as the result of an order by Ouseley J on 13 June, Ouseley J having previously ordered SRH's case to be heard on 6 September. Their current positions differ. SRH's application for bail was refused by Stanley Burnton J on 14 May, but he was released on bail on 3 July. MMH remains in detention. Although SRH's application was the first in time, the skeleton arguments describe MMH as the first claimant and SRH as the second claimant. I shall so refer to them.

The circumstances of the claimants

4. Before turning to the submissions, I summarise the circumstances of the two men. The first claimant's application for asylum made on 5 March 2003 was refused on 6 July 2004. No appeal was made in time and an application for permission to appeal out of time was refused. On 9 November 2005, he was convicted of an offence under section 20 of the Offences against the Person Act 1861 and sentenced to 33 months' imprisonment.

5. In a letter dated 27 July 2006, four days before the first claimant was entitled to release from his sentence, the defendant informed him that he would thereafter be detained under the Immigration Act. This was stated to be because he would not comply with conditions on temporary admission and because of the risk of his absconding. An appeal and an application for statutory review against this decision were unsuccessful. The letter dated 27 July states that the decision to detain was reached on the basis of two factors. The first is that the first claimant does not have enough close ties to make it likely that he will stay in one place. The letter states that the occupants or owners of the reception and discharge addresses given are unknown and it is not clear how the first claimant would be influenced to remain in contact or comply with any release restrictions.

6. The letter states that the second factor relied on is that the first claimant was an illegal entrant with no lawful basis to remain in the UK who is subject to a deportation order and as such will have little incentive to remain in touch with the authorities. Miss Giovanetti, on behalf of the Secretary of State, accepted that he did not enter illegally. She stated that the position was, in fact, that the first claimant remained in this country unlawfully after the exhaustion of his appeal rights against his refusal of asylum. No point is taken about the difference.

7. On 11 December 2006, the defendant served on the first claimant a deportation order made on 4 December. On 12 April 2007, the defendant informed the first claimant, by then detained for some eight months, that removals to Kirkük were not being enforced. An application for bail was made on 24 April and refused on 10 May. The immigration judge stated, inter alia, that the first claimant had chosen not to co−operate to avail himself of voluntary return, had deliberately obstructed the process of removal by failing to co−operate and there could be no confidence that he would co−operate with any bail conditions. The reference to refusal to co−operate and obstruction refers to his refusal to complete bio−data forms as requested. A bio−data form was first sent to him in January. On 20 February 2007 HMP Ranby, where he was then detained, informed the immigration service that he had been served with two copies of the bio−data forms and had torn them both up. He also refused to complete a bio−data form or have his fingerprints taken at an interview on 2 March. It was only six weeks after the launch of these proceedings, on 9 July, that he completed the forms (no doubt in the light of the advice of those who represented him). The defendant's position was and is that the first claimant is able to leave voluntarily and would be able to end his detention if he did so. The fist claimant is unwilling to return to Kirkük voluntarily.

8. The second claimant arrived in the United Kingdom on 12 December 2002 and was given four years leave to remain, that is until 12 December 2006. On 26 September 2005 he was convicted of robbery and sentenced to 32 months' imprisonment. The robbery involved the use of a knife. The pre−sentence report states that the offence was committed after the consumption of both drugs and alcohol. It also states that he was deeply distressed about what he had done and was evidently vulnerable. It records that he had attempted to garotte himself on the night before he was interviewed by the probation officer. The report states that his risk of re−offending will depend on his reintegration into the community. Prison medical records show that he had attempted self−harm on three occasions between 29 November 2005 and 7 February 2007.

9. The second claimant was entitled to release on 30 October 2006. On 15 June he was told that he would not be released, but would be detained under the Immigration Act. On 19 June he was told of the defendant's intention to make a deportation order. The decision to detain him was said to rest on the likelihood that he would abscond if given temporary admission or release. The factors taken into account are similar to those in the case of the first claimant. It is stated that he does not have close enough ties to make it likely that he would stay in one place, and he has little incentive to remain in touch with the authorities. The factors do not include refusal to co−operate or obstruction, but include an absence of satisfactory evidence of identity, nationality or lawful basis to be in the UK.

10. The second claimant's appeal against the decision to detain him was dismissed in a determination promulgated on 18 September 2006.

11. On 16 November 2006 representations on his behalf were made seeking indefinite leave to remain in accordance with the then policy regarding Iraq, the "Rashid" policy.

12. On 13 December 2006 the second claimant made a further application for bail. This was refused on 18 December. The immigration judge stated that the application to remain under the "Rashid" exercise was made five months after the second claimant was served with notice

of intention to deport and seemed to be no more than a delaying tactic. It is also stated that there is no incentive for him to comply with any condition of bail and that no one appeared for him willing to act as surety, which suggests no strong ties in the United Kingdom. The deportation order was served on 13 February and a further application for bail was refused on 20 February, inter alia, because there was no change of circumstances. A progress report served on the second claimant on 6 March 2007 states that he is detained because there is reason to believe that he would fail to comply with conditions attached to temporary admission and to effect his removal.

13. On 11 April 2007 an application was made on his behalf for temporary admission. This application relied on a report by Dr McKee, a consultant psychiatrist. Dr McKee stated that the second claimant fulfilled the criteria for a diagnosis of PTSD, that his mental disorder is a risk factor predicting a risk of a completed suicide, and his mental state in prison increases the risk of self−harm and suicide. The defendant maintains that the psychiatrist's report was not enclosed with the letter. On 19 and 25 April the second claimant's representatives sent the defendant letters before action. A further application for bail listed for 23 April did not proceed because the second claimant was not produced.

14. On 30 April 2007, after the launch of the judicial proceedings, the deportation order made on 13 February was revoked because of the outstanding application made on 16 November 2006. A detention review dated 8 May 2007 states that the claim to be suffering from PTSD was not evident at his deportation appeal hearing in September 2006 when the immigration judge remarked that there was no evidence to say that he was not in good health. The review states that a medical report was to be obtained from the prison. This suggests that the assistant director conducting the review did not have a copy of Dr McKee's report. It is recorded in the review note that "while his mental condition is noted, there is nothing at present to suggest he is not fit for continued detention at this stage". A further letter was written on behalf of the second claimant to the defendant on 10 May. Dr McKee's report had been included in the judicial review bundle and appears to have been faxed with the bundle on 10 May. A further report by Dr McKee dated 25 May was served on the defendant on 29 May.

15. I have referred to Stanley Burnton J's refusal of bail on 14 May. His Lordship refused bail because of the second claimant's serious criminal conviction and because "the reasons given for refusal in the past were sustainable". In a letter dated 4 June the defendant stated that the original copy of Dr McKee's report had not reached the case work file, but that consideration had been given to the documents submitted by fax on 10 May. The letter states that, while Dr McKee indicated that prison medical staff had asked about the second claimant's risk of self−harm, it was confirmed that, although he was considered to be at risk between 7 February and 27 March and closely monitored, this is no longer the case. The defendant concluded that the prison were satisfied that he no longer posed a risk to himself. The letter states that Dr McKee's report does not indicate a history of self−harm and that the second claimant's activities while in the UK indicates he can deal with day−to−day issues. It is stated that it is believed that the second claimant's threat of self−harm arises from his reluctance to return to Iraq and is put forward as a basis for preventing his lawful removal.

16. With regard to a request to be released because he would be happier if moved closer to Manchester because he had nobody to visit him, it is said that the bail application had not

been supported by family in the United Kingdom. It was unclear from the evidence that the second claimant has the support of family here or that they are willing to provide him with accommodation. Of the addendum medical report and treatment plan, the letter states that this was forwarded to the prison for consideration of the medical staff who have the responsibility for assessing his need for medical treatment. The letter states that medical treatment is not a matter on which the Border and Immigration Agency is qualified to comment. The letter refused the application for indefinite leave to remain. The second claimant was, however, released on bail from prison on 3 July 2007.

The Secretary of State's Evidence

17. The Secretary of State served his evidence on the afternoon before the hearing. The evidence consisted of statements by two officers of the Border and Immigration Agency, Hannah Honeyman and Ronal Patel. Ms Honeyman dealt with the Home Office's position on enforced returns to Iraq. Mr Patel dealt with the voluntary assisted return and reintegration programme. It was, however, accepted that the claimants would not be eligible for assistance under this scheme, so his evidence has not been of assistance. This was not, however, of significance because it was not disputed by the claimants that there are other mechanisms to enable them to return voluntarily.

18. Ms Honeyman states that the Home Office announced an intention to commence an enforced returns programme to Iraq in February 2004. She states that enforced returns have taken place by means of charter and scheduled flights. She gives details of three charter flights all to the northern part of Iraq and states that plans are in place to carry out enforced returns to northern Iraq using scheduled services via Jordan. She states that with respect to Baghdad and the south of Iraq, those who are willing to return can be returned on scheduled flights. Those who do not would ordinarily be escorted to their destination; but at present, as a result of advice by the Foreign and Commonwealth Office that its staff cannot fly to Baghdad on scheduled aircraft, the Home Office has taken the view that it cannot ask its escorts to do so. This is because the Foreign Office advice applies to British Nationals and the escorts are British Nationals. Ms Honeyman states that the sole obstacle to enforced returns to the south is the concern about safety of escorts. Arrangements have been made between the British and Iraqi governments for the reception of enforced returnees. The fact that voluntary returns on scheduled flights take place shows there is a route into southern Iraq. Nothing is said to suggest that there would be difficulties in using those scheduled services for compulsory returns if the concerns about the safety of the escorts are removed. The position therefore is that, since the announcement of an enforced returns programme in February 2004, there had been no enforced returns to southern Iraq. The only impediment is the safety of escorts and the advice of the Foreign Office.

The Legislative Framework

19. It is not disputed that, in the light of the exhaustion of their appeals, the claimants were liable to deportation on the ground that the Home Secretary deemed their deportation to be conducive to the public good. Section 5(1) of the Immigration Act 1971 empowers the Secretary of State to make a deportation order against a person who is liable to deportation. Section 5(5) states that the provisions of Schedule 3 to the Act apply to persons against whom deportation orders are in force and with respect to the detention or control of such persons in connection with deportation. Paragraph 362 of the Immigration Rules provides that "a deportation order requires the subject to leave the United Kingdom and authorises his

detention until he is removed".

20. Paragraph 2 of Schedule 3 to the Act empowers the detention of those who have been served with notice that they are liable to deportation and empowers the detention of those in respect of whom a deportation order has been served. Paragraph 2(3) provides:

> "Where a deportation order is enforced against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom ...."

The submissions and discussion

21. It is common ground that it is for the court to determine whether detention is lawful. It was also not contentious that where a claim to refugee status has been rejected and there is no suggestion that there has been any change on that issue, the fact that a person (here these claimants) does not wish to return (here to Iraq) because the situation is in the words of Toulson LJ in A (Somalia) "volatile and chaotic" is not relevant to the assessment of whether continued detention is lawful: see [2007] EWCA Civ 204 at 56 and 57.

22. My starting point on the lawfulness of detention pending "removal or departure" is the decision in R(I) v SSHD [2002] EWCA Civ 888. At paragraphs 46 and 47 of the judgment Dyson LJ accepted that the following principles emerged from the decisions:

> "(i) 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."

In paragraph 47 Dyson LJ stated:

> "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."

23. These principles were restated as two core principles by Toulson LJ, with whom Longmore LJ agreed, in A (Somalia). Toulson LJ stated at paragraph 43:

> ".... the Home Secretary's exercise of the statutory power to detain a prospective deportee until the making of the deportation order or until his removal or departure is not unfettered. It is limited in two fundamental respects. First, it may be exercised only for the purpose for which the power exists."

This purpose is to secure deportation by removal or departure. The second limitation is that:

> ".... it may be exercised only during such period as is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the case."

Toulson LJ considered that the third proposition in Dyson LJ's judgment is a facet or a consequence of the two core principles and not a third principle: see paragraph 45.

24. In deciding what period is reasonable in all the circumstances, the court must take into account a number of factors. The first is the risk of absconding. If there is no risk of absconding, as Keene LJ observed at paragraph 79 in A (Somalia), how could detention be justified in order to achieve deportation?

25. The assessment of the risk of absconding is one that is regularly conducted in the criminal courts of this country. Setting aside the second claimant's mental health, it was not suggested by Mr Southey that the approach taken in relation to these claimants is flawed. In my judgment the reasons given for detaining them justify the decision that there is a risk that they will abscond if released. Both had essentially been detained and refused bail because

they had no family or other community ties, they had no incentive to comply with immigration control, and indeed an incentive not to comply given the deportation orders and their unwillingness to depart. In the first claimant's case, his non−co−operation and obstruction in destroying the bio−data forms and not completing them after several requests until long after the launch of these proceedings is an additional factor.

26. Mr Southey submitted that the risk of the claimants' absconding was lower than in A (Somalia). There the risk was stated to be very high. The judge at first instance, Calvert−Smith J, said A would make every effort to remain here and Toulson LJ at paragraph 58 stated the risk to be "as high as it could be". It may be true that the risk of these claimants absconding is lower than that in A (Somalia), but in my judgment, in the circumstances of their cases there was a significant risk of them, in particular the first claimant, absconding. Leaving out of consideration whether the Secretary of State is able to effect deportation within a reasonable period, this risk fully justified their detention.

27. The second factor in deciding what period is reasonable in all the circumstances is the background of the individual and the risk of further offending. Both claimants were convicted of serious crimes, although far less serious than the rape and indecent assault of a 13 year old for which the claimant in A (Somalia) had been convicted. The second claimant's pre−sentence report links his risk of re−offending to the question of his re−integration into the community. I have referred to his inability to demonstrate family or community ties in the context of the risk of absconding. In the light of this comment that inability must be seen as also affecting his risk of re−offending. Miss Giovanetti did not put the defendant's case on the basis that there was a very high risk of re−offending, as it was in A (Somalia). She submitted that the second claimant's criminal background, his use of alcohol and drugs and the contents of his report mean that there is some risk and the position of the first claimant was similar. I accept that submission. The present case in this respect is significantly different from A (Somalia).

28. The third factor the court must take into account in deciding what period of detention is reasonable in all the circumstances is a person's willingness to comply with the requirements of immigration control and to avail himself of facilities for voluntary departure once there is no longer any lawful basis for him to remain in this country. The Immigration Rules in paragraph 362, which I have set out, require such a person to leave the United Kingdom.

29. In A (Somalia) Keene LJ stated at paragraph 78 that the refusal of a detainee to return voluntarily when it is possible to do so is not some sort of trump card rendering the detention lawful. Toulson LJ, with whom Longmore LJ agreed, however, stated at paragraph 54 that a risk of absconding and a refusal to accept voluntary repatriation are very important and "likely often to be decisive factors" in determining the reasonableness of a person's detention provided that deportation is the genuine purpose of the detention. Keene LJ, agreed in paragraph 79 of his judgment with what Dyson LJ had said in R(I), and stated that the main significance of a refusal to accept voluntary repatriation often lies in the evidence it provides of a likelihood of absconding. He, however, also stated that it is not wholly irrelevant in its own right. Toulson LJ stated that the refusal of voluntary repatriation is important not only as evidence of the risk of absconding but also because of what is described as "a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in

circumstances where he could return there at once". Toulson LJ stated that in the latter case "the loss of liberty involved in the individual's continued detention is a product of his own making".

30. Mr Southey submitted that in the present case the detention of both claimants is unlawful because there is no realistic prospect of removal within a reasonable period (see paragraph 3.53 of his skeleton argument). This is, he submits, because the Secretary of State is unable to remove people to the areas of Iraq from which the claimants come and has not been able to do so since the decision to commence an enforced return programme to Iraq three−and−a−half years ago. That, together with the absence of evidence that the situation will change and no reason to believe that it will do so, means that the third of the propositions accepted by Dyson LJ and set out above applies. The detention becomes unlawful even if the reasonable period has not yet expired.

31. Mr Southey submitted that the position in relation to compulsory removal is of relevance in such a context. He submitted that if there is a time limit of reasonableness for detention which is fact−sensitive and which in the end will make detention unlawful, it is necessary to look at the possibility of enforcement in determining how long the period is. This is because it is necessary that at the end of that period there is a prospect of either removal or departure. That, however, does not fit comfortably with the analysis and approach in A (Somalia). In particular Toulson LJ, with whom Longmore LJ agreed, stated that in circumstances where an individual could return to his country of origin at once, the loss of liberty involved in his detention is a product of his own making. In that case, as recognised by Toulson LJ, it was accepted that there was some prospect of the Home Secretary being able to carry out his enforced removal to Somalia, although there was no way of predicting with confidence when this might be.

32. Miss Giovanetti submitted that it is apparent both from what was said by Toulson LJ and from the facts of A (Somalia) that it is not necessary for there to be a foreseeable timescale in which compulsory removal can be effected. The case shows that considerable periods of uncertainty do not preclude there being a realistic prospect of compulsory removal. She also submitted that it is important to see the third proposition accepted by Dyson LJ in its context. It is derived from the judgment of Woolf J (as he then was) in R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704 at 706. Woolf J addressed the situation where it is apparent to the Secretary of State "that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period". He was therefore dealing with a situation in which the Secretary of State knew that the machinery cannot be operated within a reasonable period.

33. Miss Giovanetti also submitted that the facts in A (Somalia) show that the circumstances in the present case are not inconsistent with there remaining a realistic prospect of removal.

34. In A (Somalia) A's release date was 3 September 2003. Enforced removals to Somalia were possible before August 2004, but thereafter until July 2006 they were not possible because commercial carriers were not willing to participate. Until April 2006 the British government considered it unrealistic to seek to persuade the carriers to do so. It was only in April that they began an active search for routes into Somalia: see [2007] EWCA Civ 804 at 17−18. Calvert−Smith J had held that A's detention became unlawful after 3 December

2004, the date of the first review of his case by the defendant after he formally refused to co−operate in his removal. The Court of Appeal held that the defendant acted lawfully in detaining A between 4 December 2004 and 20 July 2006 when arrangements with commercial carriers for compulsory removals were made and (in Calvert−Smith J's words) removed the last impediment to compulsory removal.

35. Miss Giovanetti submitted that since between August 2004 and April 2005 the government considered it unrealistic to begin an active search for routes into Somalia or to persuade carriers to undertake enforced returns, a very considerable period of uncertainty need not preclude there being a realistic prospect of removal.

36. Mr Southey submitted that the assessment in that case has to be seen against he background of the fact that until August 2004 there had been removals to Somalia. He submitted that an assessment of the prospects of removal depended on the position in the past as well as an assessment of the future. In the present case there has never been an enforced removal to southern Iraq.

37. If, in A (Somalia) there was a realistic prospect of enforced removals throughout the period August 2004 to July 2006, it does not appear that the requirement of a realistic prospect is a high hurdle. The position in relation to enforced removals to Somalia was more open−ended than it is in relation to southern Iraq. Almost a year after the start of A's administrative detention there were no arrangements whatsoever in place. For some eighteen months it was not even considered worth attempting to make such arrangements. In the present case, by contrast, there are arrangements in the form of an agreement between the British and Iraqi governments as to the reception of returnees and available routes. I do not accept Mr Southey's submission that the fact that there had been enforced removals to Somalia prior to August 2004 provides a significant distinction. Since the decision to institute a programme of enforced removals to Iraq in 2004, arrangements have been put in place for all parts of the country. The only inhibiting factor in relation to southern Iraq is the Foreign Office's advice. If the lack of a viable route into Somalia between August 2004 and July 2006, and the failure until April 2006 to take any positive steps with commercial carriers did not prevent there being a realistic prospect, neither does the Foreign Office advice in the present case, where all the other arrangements are in place.

38. In A (Somalia) it was A's refusal to go voluntarily which was crucial to all three members of the court. Keene LJ stated (at paragraph 82) that, while it was exceptional to regard lengthy detention as lawful when there is some prospect of removal but no clearly predicted date for it, when one added to the assessment that the detainee could have returned voluntarily but refused to do so "the answer has to be that his continued detention was still reasonable. He had it in his own hands to secure his release from detention by choosing to return voluntarily". In that case the period of administrative detention from August 2004 to July 2006 was 23 months. In the present cases the periods of administrative detention are nine months in the case of SRH (the second claimant) and thirteen months to date in the case of MMH (the first claimant). It is true that in A (Somalia) the risk of A's absconding was assessed to be very high. For the reasons I have given, I consider the risk in this case of these claimants absconding to be significant in the light of the information furnished by them and their circumstances, and, in the case of the first claimant, his behaviour.

39. The difference between the case concerns the risk of re−offending. The risk of A's re−offending was high and, in the context of sexual offences against child victims this was, as Toulson LJ stated (at paragraph 58), a very worrying prospect. Keene LJ stated (at paragraph 82) that it was the combination of these two factors (the risk of absconding and the risk of re−offending) that justified the defendant having a substantially longer period of time within which to arrange removal. For his Lordship it appears that it was only at that stage that he took into account A's refusal to return voluntarily to Somalia. Toulson LJ, with whom Longmore LJ agreed, stated (at paragraph 54) that a refusal to go voluntarily is likely often to be decisive. He gives this as the first factor in his conclusion (paragraph 58), although he also refers to the high risk of absconding and of re−offending. There appears to be some difference as to the relative importance of a refusal to go voluntarily, but if there is any such difference it did not affect the result in that case and in my judgment is not material in the present case.

40. In the present case there is a significant risk of absconding, but a risk of re−offending which the defendant accepts is not very high. Leaving aside the second claimant's mental condition, I would hold that the period of their detention (thirteen months to date for the first claimant, and nine months for the second claimant) is, despite its length, in the circumstances reasonably necessary for the purposes of the deportation order and so lawful. This degree of risk of absconding in my judgment, together with the claimants' refusal to go voluntarily, so that their detention was a product of their own making, justified the defendant a substantially longer period of time within which to arrange removal. These factors do not, however, necessarily justify a period as long as that in A (Somalia), given the different levels of risk. It is incumbent on the Secretary of State to keep the position of the first claimant under review both in relation to the risks he poses and in relation to the position of enforced returns to southern Iraq. He has a lower risk of re−offending than A had and the evidence before me does not enable me to express myself in the way Calvert−Smith J and Toulson LJ did about A's risk of absconding.

41. For those reasons, however (leaving aside the second claimant's mental health), the applications of both claimants are refused.

The second claimant's mental health

42. The Home Office policy on detention is contained in chapter 38 of its policy document. Paragraph 38.1 states that in all cases detention must be used sparingly and for the shortest period necessary. Paragraph 38.3 lists the factors to be taken into account when considering the need for initial or continued detention. It does so after setting out five principles. These are:

(1) a presumption in favour of temporary admission;

(2) strong grounds for believing that a person will not comply with conditions of temporary admission;

(3) a consideration of all reasonable alternatives to detention;

(4) a close review of detention, once authorised, to ensure that it continues to be justified; and

(5) a consideration of cases on their individual merits.

I do not list the factors which are set out and which must be taken into account when considering the need for detention. Among those listed under the heading "Against detention" is: "has the subject a history of physical or mental ill health?"

43. Paragraph 38.10 is headed "Persons considered unsuitable for detention". It states that "certain persons are normally considered suitable for detention in only very exceptional circumstances". It then lists the category of those who are normally considered suitable for detention in only very exceptional circumstances. One of the categories is "those suffering from serious medical conditions or the mentally ill".

44. Miss Giovanetti also referred me to paragraph 38.4 concerning fast track processes. That lists as unsuitable for the fast track those with medical conditions requiring 24 hour nursing, those presenting with acute psychosis, or presenting with physical or learning difficulties requiring 24 hour nursing care. She urged me to take into account the overall context in these guidelines of the sorts of conditions considered when I come to analyse Mr Southey's submissions.

45. Mr Southey's submission is that the Secretary of State failed to comply with this policy. Both the review in May and the consideration given in the 4 June letter, which I have summarised, make no reference to exceptional circumstances or to any of the matters referred to in the guidance. Mr Southey did not submit, nor could he, that a decision will be flawed where it does not expressly refer to guidance and policy. He submitted, however, that, on examination of the way the decisions concerning the second claimant were made, it is apparent that the policy was not applied. He relied on a statement in the judgment of the Court of Appeal in Nadarajah v Secretary of State for the Home Department [2003] EWCA Civ 1768, in which the court indicates (at paragraph 72) that an approach which is not flawed in the absence of a policy may become flawed because of the publication of the policy. It is important for policies to be followed.

46. There are similar statements (albeit in a different context) in R v Secretary of State for the Home Department, ex parte Stafford [1998] 1 WLR 503, 521, per Buxton LJ, with whom Lord Bingham CJ agreed on this point at 517. Buxton LJ referred to the need to apply policy consistently and transparently where decisions made affect the subject's liberty. In the present case the second claimant is not a citizens but his liberty was affected.

47. The review of detention on 8 May 2007 does not consider the applicability of the policy. However, I consider that the position of the defendant was sustainable until the receipt of the copy of Dr McKee's report on 10 May. I do not consider that the fact that the report was included together with the claim form on 25 April suffices. Accordingly, the review on 8 May is, in my judgment, in the light of the evidence then available to the defendant, not flawed on public law grounds.

48. I also agree with Miss Giovanetti that it is implicit that, in the reference in paragraph 38.10 to those suffering from serious medical conditions or the mentally ill, there is a level of seriousness required to engage the policy for mental illness as well as for physical medical

conditions. Her submission is that the policy was not engaged because the second claimant's mental condition was not serious enough and did not cross that threshold. However, it is necessary for a Secretary of State who takes that position to have engaged with the policy. (I hesitate to use the word, used in a number of contexts, that a decision−maker must "grapple" with the matter.) But the letter of 4 June does not indicate that any consideration was given to the implications of the diagnosis. It does not state that the level of illness is insufficient. It does not address the diagnosis at all, for example, by questioning it or saying that this level of PTSD is not sufficiently serious. It simply says that there was at that time no risk of suicide. That is, in the light of the policy, insufficient. The letter states that Dr McKee's report does not refer to a past history of self−harm. The prison records to which the defendant would, however, have access would have informed him of the position.

49. I conclude that, once the issue of the claimant's mental health was squarely raised and evidence of the diagnosis was submitted and brought to the defendant's attention, the failure to apply the policy in paragraph 38.10 is a flaw susceptible to judicial review. Accordingly, I conclude that from 4 June, when the decision was made, until 3 July when he was released, the second claimant's detention was not lawful. In the circumstances of the case, as he has been released, the claim for mandatory and coercive relief is not appropriate. Subject to any submissions that either party may wish to make, I propose to make a declaration that the detention after 4 June was unlawful. To that extent the second claimant's application is allowed.

MISS TAFADOR: My Lord, I have a few applications. First of all, I would like to ask for permission to appeal in relation to the first matter. The basis of that is that it is an important issue and there are compelling reasons for granting permission. The Iraq policy or the issues that arose in this case are issues that arise in a number of other cases that are still waiting to come before the courts and it has significant implications in those cases.

MR JUSTICE BEATSON: I appreciate that. I am not going to grant you permission to appeal. The reason is that the issue came before the Court of Appeal which gave its decision as recently as the end of July. It should be for the Court of Appeal to consider whether it wishes to revisit the effect of a refusal to accept voluntary return in the context of Iraq as opposed to Somalia.

MISS TAFADOR: My Lord, in relation to costs I would ask that no order be made. I would also ask for an assessment for the Legal Services Commission.

MR JUSTICE BEATSON: I do not need to bother Mr Kovatz on the last of those. You are entitled to that. But I will hear what he has to say about costs.

MR KOVATZ: My Lord, we are content with that. There is no application by the Secretary of State.

MR JUSTICE BEATSON: There will be no order as to costs and you are entitled to your detailed assessment.

MISS TAFADOR: My Lord, I am grateful. My Lord, I would ask for an expedited transcript of the judgment.

MR JUSTICE BEATSON: Well, you have no doubt taken a note. If you had been in court for the previous matter, you would know that this is my last day here. I will be back at the beginning of term. If I happen to be in this building between now and then and there is a transcript for correction waiting for me, I will correct it.

MISS TAFADOR: My Lord, there is nothing further.
