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Case No: C4/2006/2680
C4/2006/2702

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
Calvert-Smith J
C0/5328/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2007

Before:

LORD JUSTICE KEENE
LORD JUSTICE LONGMORE
and
LORD JUSTICE TOULSON

- -

Between:

THE QUEEN ON THE APPLICATION OF A	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

Richard Drabble QC and Graham Denholm (instructed by **Community Law Clinic Solicitors**) for the **Appellant**
Nigel Giffin QC (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates: 17-18 July 2007

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Judgement
As Approved by the Court

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Lord Justice Toulson :

1. This case concerns the exercise by the Home Secretary of his power under the Immigration Act 1971, schedule 3, para 2(3) to make a detention order in support of a deportation order. On 7 December 2006 Calvert-Smith J gave judgment in judicial review proceedings brought by A. He held that A had been unlawfully detained from 4 December 2004 to 20 July 2006, but lawfully detained during the period between 21 July 2006 and the date of his judgment. He gave both parties leave to appeal. The Home Secretary contends that A's application for judicial review ought to have been dismissed. A contends that the judge ought to have held that his detention continued to be unlawful after 20 July 2006.

The facts

2. A was born in Mogadishu in Somalia on 8 December 1975. He left the area at the age of 16 and lived in Kenya for 2 years. In 1995 he entered the UK on a false Kenyan passport. His claimed date of entry was 7 May 1995.

3. On 24 May 1995 A claimed asylum. His application was rejected but he was granted exceptional leave to remain for an initial period of 12 months, which was later extended to 14 February 2000.

4. In February 1998 A raped and indecently assaulted a 13 year old girl. He was then aged 22. On 23 July 1998 he was convicted at Southwark Crown Court of rape and indecency with a child, for which he was sentenced to a total of 8 years' imprisonment.

5. The victim also came from the London Somalian community. The abuse happened at A's flat. According to the victim's statement, he told her that his friend downstairs had a gun and threatened to use it on her if she did not give him sex. He raped her anally. There was medical evidence of injuries which supported her account. He also forced her to perform oral sex on him by threatening her with a knife. It is some indication of the effect of A's crime on his victim that in March 2002 she expressed fears to a police officer for her future safety because she had heard rumours in the Somalian community that A had been released. She said that if that were true, she felt that she would have to leave the country. In fact, the rumour was incorrect.

6. On 17 December 1998 the Home Office served on A a notice to show cause why he should not be deported under s 3(5)(a). Under that provision a person who has no right of abode within the UK is liable to deportation if the Home Secretary deems his deportation to be conducive to the public good.

7. Home Office officials erroneously thought that A was due to be released from prison on 28 May 2002. In fact, that was the earliest date on which he could become eligible for consideration by the parole board for release on parole. From subsequent parole assessment reports it is plain that he had no realistic prospect of early release on parole.

8. On 21 May 2002 A was given notice that the Home Secretary had decided to make a deportation order against him, and on 27 May 2002 the Home Secretary ordered his detention under schedule 3, paragraph 2(2) pending the making of a deportation order.

9. On 2 July 2002 A appealed against the decision to make a deportation order and also made a fresh asylum claim.

10. In early 2003 A was interviewed, separately, by a probation officer at Maidstone prison and by a field probation officer for the purpose of parole assessment reports. Neither probation officer considered him to be suitable for parole. The prison probation officer noted that during his time in prison he had received 14 adjudications, 6 of which were for fighting. According to the Home Office Risk Matrix 2000, he was assessed as of high risk of sexual offending on release. Because he was continuing to deny guilt, he had not been on a sex offender treatment programme. The field probation officer recorded that throughout interview he continued to display values and attitudes which were entrenched and arrogant towards women generally, suggesting that he viewed his behaviour as "normalised" and "that all women would want to have sex with him". He said that he did not know the victim's age and it never occurred to him to ask. The probation officer concluded that the attitudes A presented to him suggested that he would continue to pose a risk to women. He also boasted about being involved in fights with enemies he had made within the Somalian community. The probation officer expressed the opinion that if he were released on parole with few concrete plans, he would present a high a risk of sexual offending, and at least a medium risk of general offending, with a concordant high risk of potential physical harm to the public.

11. On 26 June 2003 A's outstanding asylum claim was refused. He appealed against the decision.

12. On 3 September 2003 A's sentence reached the point at which he would have been automatically entitled to release.

13. On 25 November 2003 A's appeals against the decision to make a deportation order and the refusal of his asylum and associated claims under Articles 2, 3 and 8 of the Human Rights Convention were dismissed by an Immigration Adjudicator. A's time for any further appeal expired on 4 December 2003.

14. On 5 April 2004 the Home Secretary made a deportation order under s 5(1). The order included a paragraph authorising A's detention under schedule 3, paragraph 2(3) until his removal. It was served on A on 19 April 2004.

15. Attempts were made to obtain from A the information necessary to obtain the travel documentation for arranging his removal, but those efforts were frustrated by A's refusal to cooperate. In November 2004 he refused a formal request to sign a document to the effect that he was prepared to return to Somalia voluntarily.

16. Calvert-Smith J found that until then A's detention was lawful, and there is no appeal

against that finding. He found that A's detention became unlawful after 3 December 2004, that being the date of the first departmental review of his case after his formal refusal to cooperate in his removal.

17. Throughout the period of A's detention which the judge found to be unlawful, that is from 4 December 2004 to 20 July 2006, the Home Secretary was unable to enforce the deportation order because there was no carrier willing to take "enforced returns" to Somalia. Throughout the same period airlines would have been willing to carry A if he had signed a document expressing his consent. The situation changed in July 2006, when the government concluded an agreement with African Express Airlines which made enforced removals to Somalia once again possible. The judge found that A's detention became lawful once more from that time.

18. In recent years conditions in Somalia have been volatile. Carriers were willing to provide transport for enforced removals between February and August 2004. The evidence before the judge was that for some time after August 2004 the government considered it unrealistic to seek to persuade carriers to undertake enforced returns. It did not abandon hope of being able to re-establish a transport route, but it was not until around April 2006 that the prospects were thought sufficient to begin an active search for routes into Somalia.

19. On 3 occasions between November 2004 and October 2005 misleading statements were made on behalf of the Home Secretary about enforced removals to Somalia.

20. First, on 25 November 2004 the Minister of State wrote a letter to A's MP, stating that enforced removals to South Central Somalia were not currently taking place but that enforced removals to Somaliland remained practicable. This was no longer so. (Somaliland is an autonomous region in North West Somalia).

21. Secondly, in other litigation before Calvert-Smith J in 2005 a witness statement was filed on behalf of the Home Secretary which wrongly said that returns to Somaliland were taking place (and implied that this applied to enforced removals), and also wrongly said that the problems relating to removals to other areas of Somalia were in the process of being resolved through negotiations.

22. Thirdly, and of greatest concern in relation to A's detention, in September 2005 A applied to an immigration judge for bail. His application was refused by the judge on 11 October 2005 for reasons which included "Removal is imminent". It is apparent from a note of the hearing that this information was given to the judge by the presenting officer. It was wrong.

23. On 28 June 2006 A issued the claim for judicial review which led to the judgment under appeal.

The statute

24. It is not disputed that A was liable to deportation under s 3(5) on the ground that the Home Secretary deemed his deportation to be conducive to the public good.

25. Section 5 (1) provides:

> "Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom…"

26. The deportation order made against A on 5 April 2004 reflected the language of the statute in that it required him to leave and prohibited him from entering the UK so long as the order was in force.

27. Schedule 3, paragraph 2(3) provides:

> "Where a deportation order is in force 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 judgment

28. In a full and careful judgment Calvert-Smith J examined a number of authorities to which we have also been referred, including *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704, *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, *R (I) v Secretary of State for the Home Department* [2003] INLR 196 and *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207.

29. The judge found that A had evinced, and continued to evince, "a single objective, namely to stay in this country by hook or by crook". He added:

> "If granted bail I am confident that he will make every effort to remain here, including, if he believes it necessary to achieve that objective, absconding, and removing or disabling any electronic device designed to assist in locating him. In short, he has no motive to comply with bail conditions which will only last until his eventual removal and every reason not to."

He also noted that the probation officers' reports in 2003 indicated a high risk of re-offending sexually.

30. Dealing with the period during which he found A's detention to have been unlawful, the judge observed, first, that the previous arrangement for enforced removals to Somalia had become a dead letter, and secondly, that "there were no actual moves towards re-establishing a route to Somalia until late 2005 and no actual possibility of such until an agreement was signed with a commercial carrier in late July 2006".

31. The judge recognised that during this period A could have consented to his removal and he described A's refusal as "a very powerful factor". However, he considered that its strength as a point against A was mitigated by "the admitted continuing chaotic state of Somalia". He said:

> "If self-induced detention is to be the ground, and in this case the sole ground, to justify detention, then the alternatives that are open to the detainee must be a relevant consideration. In this case, although, of course, he was unable to satisfy the high standard required to show a case for asylum as a refugee or in connection with his human rights under the European Convention, he is a man who has now been out of his homeland for more than 11 years, since he was 19 ½ years old."

32. The judge expressed his conclusion in para 49 of his judgment as follows:

> "Putting all these factors for and against together and marrying them to the principles set out by Dyson LJ at paragraph 48 of *I,* I conclude that from 3 December 2004, which was the date of the first review following this claimant's refusal to accept voluntary removal up to 30 June 2006, his detention was unlawful because of its sheer length, the impossibility during that period of achieving removal, and the misleading statements which misled decision makers both inside and outside the department. I have also borne in mind the fact that from July 2005, so I was informed during the hearing, the additional, albeit by no means fool-proof, safeguard of electric tagging has been available as a result of the implementation of section 36 of the Asylum and Immigration [(Treatment of Claimants, etc.)] Act 2004. The admittedly powerful argument on self-imposition is not, in my judgment, sufficient to displace the other factors."

33. Dealing with the period from July 2006 onwards, the judge considered that the critical difference in determining the lawfulness of A's detention was that "on 20 July an agreement was reached with a commercial carrier which removed the last impediment to enforced removals to Somalia" and so there was "a prospect of immediate return".

The arguments

34. Mr Giffin QC submitted on behalf of the Home Secretary :

> 1. On the judge's finding, A was determined to avoid complying

> with the order for his deportation "by hook or by crook", and if at liberty he would take whatever steps were necessary to achieve that ambition, including by absconding and removing or disabling any electronic tag.
>
> 2. There was not only a high risk of A absconding if he were at liberty, but also a high risk to the public from re-offending.
>
> 3. Throughout the relevant period transport to Somalia was available at no cost to A, the only obstacles being his wilful refusal to do as required by the deportation order made under s 5 and the unwillingness of any carrier to transport him without his consent.
>
> 4. In those circumstances it was within the power of the Home Secretary, and a lawful exercise of that power, to keep A in detention "pending his removal or departure" from the UK; the resulting loss of liberty to A was self-induced.

35. Mr Giffin accepted that for the power to exist there had to be "some prospect" of A being able to be removed within a reasonable period (taking the words "some prospect" from the speech of Lord Brown of Eaton-under-Heywood in *Khadir* at [32]), but as to this he made three submissions. First, there was throughout the period an available transport route for A's return; so the possibility of his removal remained open notwithstanding A's continuing refusal to accept it. Secondly, although during the relevant period there was no means available for A's enforced removal, and the Home Secretary had no way of predicting with confidence when he would be able to negotiate a resumption of arrangements for enforced removals, there nevertheless remained a real prospect that this would be achieved and a continuing intention on the part of the Home Secretary to achieve it. Thirdly, in deciding whether A's continuing detention in such circumstances was lawful, the court had to take into account not only the prospects of removing A but also the degree of risk that he would abscond and re-offend if he were not detained. In support of the last proposition Mr Giffin relied on the judgment of Simon Brown LJ in *I* at [37]:

> "Given, as stated, that the appellant had by then been in administrative detention for nearly 16 months and that the Secretary of State could establish no more than a hope of being able to remove him forcibly by the summer, substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period."

Implicit in this passage was the recognition, in a case where there had been a lengthy period of administrative detention and the Home Secretary had no more than a hope of being able to remove the deportee within the coming months, that it might be lawful to continue to detain him for "an indeterminate further period" if the risk of absconding and re-offending was such as to justify it.

36. The critical factor in causing the judge to determine that A's detention between December 2004 and July 2006 was unlawful must have been the uncertainties surrounding his enforced removal, since it was the re-establishment of arrangements for enforced removals which caused the judge to decide that his detention became lawful in July 2006. Mr Giffin submitted that the judge was wrong to regard the lack of such arrangements during the period prior to July 2006 as making his detention unlawful for the reasons set out above.

37. Mr Giffin also criticised the judge's other reasons given in paragraph 49 of his judgment for concluding that A's detention was unlawful from December 2004 to July 2006 – its length, the making of misleading statements by Home Office officials during that period and the safeguard of electronic tagging. The length of the detention resulted not from a lack of availability of transport but from A's refusal to comply with the order. The misleading statements made by Home Office officials were deeply regrettable, but could not be said to have made his detention unlawful. Insofar as the judge considered that the misleading statement given to the immigration judge who dealt with A's bail application in October 2005 may have resulted in detention being wrongly continued on a false basis, Mr Giffin submitted that the decisive question on the bail application was the risk of A absconding. Since this was very high, as the judge found, bail ought to have been refused in any event. The safeguard of tagging was no safeguard in the light of the judge's finding that A would remove or disable it, if he believed that to be necessary.

38. Mr Giffin further submitted that although the judge described the self-imposition argument as powerful, he failed to give it the significance which it merited and he wrongly treated the chaotic state of Somalia and A's length of time away from Somalia as offsetting factors. A's asylum and human rights claims had been rejected by an adjudicator in November 2003. It was not suggested before the judge that there had been a material change of circumstances since that date. Neither the fact that the situation in Somalia was difficult nor his length of absence from Somalia was relevant to the assessment whether his continuing, self-induced detention was lawful.

39. Mr Drabble QC submitted on behalf of A that the judge had adopted a proper approach in arriving at his conclusion that the period of detention from December 2004 to July 2006 was unlawful, and he was entitled to reach that conclusion. The key factors were the length of the detention and the absence throughout that period of any firm prospect of the Home Secretary being able to enforce A's deportation. Mr Drabble did not suggest that it could have been said at any stage that the Home Secretary had no prospect at all of being able to enforce A's removal, but the prospect of doing so was dependent on future events which were beyond the Home Secretary's control or his ability confidently to predict. So he had no way of knowing if or when an enforced removal might become practicable. The situation was analogous to *I*, where the appellant had been in custody for nearly 16 months and there was no indication when enforced removal might become possible, beyond the fact that the Home Secretary was in the process of negotiations and was hoping (without any assurance) that an enforced removal would be possible within the next few months. In those circumstances, this court held that the prospective deportee's continued detention had become unlawful.

40. Mr Drabble recognised that there were some arguably distinguishing features in the

case of *I.* The possibility of voluntary departure only arose on the day before the appeal hearing, and the risks of absconding and re-offending were lower than in the present case. But he submitted that those were factors which the judge properly took into account in arriving at a balanced judgment.

41. On the subject of A's refusal to go back to Somalia, Mr Drabble submitted that the way in which Mr Giffin sought to present the case was artificial and unrealistic. Conditions in Somalia were highly volatile. It was unsurprising that A was unwilling to return there voluntarily. The prospect of removal to Somalia was very different from removal to a stable democracy.

42. As the oral arguments developed, it became plain that the key disputed issues were the significance of A's refusal to go back to Somalia, taken in conjunction with the risks of absconding and re-offending, and whether it was a relevant consideration that conditions in Somalia were chaotic and volatile. There was also disagreement about the role of the court, but neither counsel suggested that this was likely to make a difference to the outcome of the present case. Before considering those issues in further detail, it is right to set them in the context of the core principles.

Core principles

43. There is no dispute that the word "pending" in schedule 3, paragraph 2 (2) ("…pending the making of the deportation order") and paragraph 2(3) ("…pending his removal or departure from the United Kingdom") simply means "until". (Compare *Khadir.*) However, 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. Secondly, 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.

44. Those principles were first established by Woolf J in his judgment in *Hardial Singh* (at 706), which has been cited with approval in subsequent cases including *Tan Te Lam* and *I.* After stating those principles, Woolf J continued:

> "What is more, if there is a 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, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."

45. In some later judgments that sentence has been treated as a third principle. It seems to me that it is really a facet or consequence of the first and second. Be that as it may, a pertinent question in this case is whether, and to what extent, a risk of the individual absconding and a risk of him re-offending may be taken into account in considering what may be a reasonable time for attempting to bring about his removal or departure.

The way I would put it is that there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty. Counsel for both parties agreed with that approach as a matter of principle.

Refusal to return by consent

46. There are two ways in which a person against whom a deportation order is made may leave the country. He may accept that he is required to leave and do so, or he may refuse to go and be forcibly removed. The departure of a person in the former category is voluntary in a limited sense, and it was in that sense that the phrase "voluntary repatriation" or "voluntary removal" was used in argument in the present case. Schedule 3, paragraph 2(3) contemplates either involuntary or voluntary repatriation because it includes the words "pending his removal or departure from the United Kingdom".

47. In *Tan Te Lam*, at 1145-115, Lord Browne-Wilkinson said that:

> "In their Lordships' view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable."

48. Mr Giffin naturally relied on that passage. Mr Drabble on the other hand pointed out, correctly , that the Privy Council was concerned in that case with a Hong Kong ordinance which required the court to consider whether an individual had refused to take part in a voluntary scheme of repatriation in considering the reasonableness of his detention. He referred us to the legislative history and its social and political setting, all of which he submitted were material to a proper understanding of why the refusal of voluntary repatriation should in that case have been considered a factor of fundamental importance.

49. The significance of a refusal to accept voluntary repatriation was considered by this court in *I*, without a clear unanimity of view.

50. Counsel for *I* submitted that his refusal to accept voluntary repatriation was an irrelevant consideration, because the question under consideration was the legality of his continuing detention pending an enforced removal, and the premise to that question was his unwillingness to go. Simon Brown LJ rejected that argument. He noted that in *Hardial Singh* it had been regarded as a factor in the applicant's favour that he was willing to return voluntarily, and he could see no reason why the converse should not be relevant. He said at [31]:

> "Clearly, of course, the position here is not as it was in Hong Kong where, because of the express provisions of the Immigration Ordinance 1981, it was regarded as "of

> fundamental importance" that the applicants' detention was "self-induced by reason of the failure to apply for voluntary repatriation". But that is not to say that the court should ignore entirely the applicant's ability to end his detention by returning home voluntarily."

However, he considered that the factor was of relatively limited relevance in the particular circumstances of *I,* since the option of voluntary repatriation only arose on the day before the hearing of the appeal.

51. Mummery LJ was in a minority in holding that *I'*s continued detention was lawful. He considered that *I's* refusal of voluntary repatriation was a factor leading to the conclusion that he would probably abscond if released, and that this was a good ground for his detention while the Home Secretary continued his negotiating efforts for an agreement by which *I* could be forcibly removed.

52. From A's viewpoint, the most helpful observations came from Dyson LJ (at [51] to [53]). He said:

> "…In my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable."

He accepted that if it was right to infer from the refusal of voluntary repatriation that a detained person was likely to abscond on release from detention, then the refusal was relevant to the reasonableness of the duration of detention. But he said that:

> "…The relevance of the likelihood of absconding, if proved, should not be over stated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake."

53. During the course of argument, there was some narrowing of the ground between Mr Giffin and Mr Drabble. Mr Giffin accepted that if there was no risk of an individual absconding and no risk of him offending, in the ordinary way there would be no obvious reason for the Home Secretary to exercise his power of detention. Mr Drabble accepted that a refusal to agree to voluntary repatriation could suggest a risk of absconding. He also accepted that a refusal to accept voluntary repatriation could have additional relevance in that in a case where a person was likely to abscond the Home Secretary might reasonably take into account, in deciding whether and for how long it was reasonable to exercise his power of detention, that the person concerned had the option of voluntary repatriation, so ending the need for his detention. Mr Drabble preferred not to use the word "self-induced", but that seems to me to be essentially a matter of semantics. The real differences between the parties were about the degree of

significance which could or should be attached to A’s refusal to accept voluntary repatriation, and about whether the judge was right to take into account A’s concern regarding conditions in Somalia as an offsetting factor. I will come back to the question of the relevance of A’s reasons for not wishing to return to Somalia.

54. I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, 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. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is 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. In the latter case the loss of liberty involved in the individual’s continued detention is a product of his own making.

55. A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure.

Relevance of A’s reasons for not wishing to return to Somalia

56. It would have been wrong for the Home Secretary to order A’s detention pending his removal or departure to Somalia if at the relevant time he was a refugee within the meaning of the Refugee Convention or a person whose rights under the European Convention on Human Rights would be infringed by returning him to Somalia. But his claims under the Refugee Convention and the European Convention had been rejected, and it was not suggested at the time of the hearing before the judge that there had been any subsequent material change in his position.

57. In those circumstances, I accept the submission on behalf of the Home Secretary that A’s desire not to return to Somalia because the situation was volatile and chaotic was not relevant to the assessment whether his continuing detention was lawful. It is understandable that he did not wish to return to Somalia, but his legal position was that he had no right to remain in the United Kingdom and was the subject of an order under s 5 of the Act requiring him to leave. A separate point was made by Mr Drabble that the consent form which A was asked to sign was worded in a way which made his refusal to sign it reasonable, but, if that had been A’s substantial ground of refusal, it

should not have been difficult to agree on an acceptable form of language.

Conclusion

58. The period of A's detention after he would otherwise have been entitled to release at the end of his custodial sentence was lengthy. However, throughout that period it would have been possible for him to be transported to Somalia, if he had not refused to go, and there was moreover some prospect of the Home Secretary being able to carry out his enforced removal, although there was no way of predicting with confidence when this might be. In the meantime, on the judge's findings, the risk of A absconding if he were at liberty was as high as it could be. There was also a high risk of him re-offending, and, given the nature of his previous offending, this would have been a very worrying prospect. For the reasons already given, it was in my view wrong in principle to offset against those factors A's reasons for not wishing to return to Somalia. These were irrelevant to the lawfulness of his detention in circumstances where his return would not have involved a breach of the Refugee Convention or the European Convention. I accept also the argument on behalf of the Home Secretary that the misleading statements made by Home Office officials, to which I have referred, cannot be said to have made A's detention unlawful.

59. I would hold that the period of A's detention, despite its length, was in the circumstances reasonably necessary for the purposes of the deportation order and so lawful. I would therefore allow the Home Secretary's appeal. It was accepted by Mr Drabble that in that event A's appeal would necessarily fail.

The role of the court

60. My conclusion as to the disposal of this appeal would be the same whether it is for the court to decide if A's detention for the period in question was reasonably necessary or whether the court's role is limited to reviewing on a narrower basis the reasonableness of the Home Secretary's decision to exercise his power of detention during that period.

61. Mr Giffin advanced a subtle argument in support of the latter, based on certain passages in *Tan Te Lam* and *Khadir*, although I am not entirely clear what is the suggested scope of the court's power of review. Mr Giffin said that the test would be broader than whether the Home Secretary's decision was *Wednesbury* unreasonable and would involve "strict scrutiny", but it is less clear what strict scrutiny would connote in this type of case.

62. I intend no disrespect by not going into the refinements of Mr Giffin's argument but dealing with the matter on a broader basis. Where the court is concerned with the legality of administrative detention, I do not consider that the scope of its responsibility should be determined by or involve subtle distinctions. It must be for the court to determine the legal boundaries of administrative detention. There may be incidental questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself, and the court will no doubt take such account of the Home

Secretary's views as may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court at common law and does not depend on the Human Rights Act (although Human Rights Act jurisprudence would tend in the same direction).

A's name

63. A was not named in Calvert-Smith J's judgment. At the hearing of the appeal an application was made on behalf of the Press Association that the judgment of this court should give A's full name. It was submitted that it was in the public interest that the full facts should be able to be published, including A's identity, and that a failed asylum seeker who has been convicted of rape and ordered to be deported should enjoy no greater anonymity than a British citizen who is convicted of rape.

64. Publication of A's name in reporting of the criminal proceedings and publication of his name in these proceedings are different things and involve different considerations. In the criminal proceedings, A's position was no different (as far as we are aware) from that of any other defendant in a rape case. His name and what he did could be fully reported (so long as the identity of the victim was not revealed).

65. Whether his full name should be given in the judgment in these proceedings is another matter. Practice Note (Court of Appeal; Asylum and Immigration Cases) [2006] 1 WLR 2461 states as follows:

> "The Court of Appeal has decided to follow the universal practice observed by other European jurisdictions and to anonymise its judgments in cases involving asylum seekers. It is satisfied that the publication of the names of the appellants may create avoidable risks for them in the country from which they have come."

66. Since the date of the judgment under appeal, the Asylum and Immigration Tribunal has allowed an appeal by A on human rights grounds against a refusal by the Home Secretary to revoke the deportation order. A is now at liberty and was present in court during the hearing of this appeal. However, reconsideration of the Tribunal's decision has been ordered on the application of the Home Secretary, so the position may yet change. In one way or another, A's asylum and human rights claims have been going on since 1995. The matter has been protracted partly because for five and a half years he was serving a prison sentence, but it is in the public interest to avoid creating any further complications which could prolong the process. Publication of A's identity in this judgment could have that effect, because it could give rise to further arguments about the risks to him if he were now removed to Somalia. I am not persuaded that in this instance the court should depart from the Practice Note.

Lord Justice Longmore:

67. I agree with the judgment of Lord Justice Toulson.

Lord Justice Keene:

68. I agree, but since we are dealing here with the liberty of the individual and because we are disagreeing with part of the judgment of the court below, I propose to add a few comments of my own. I gratefully adopt the summary of the facts set out by Toulson LJ.

69. The power given by Parliament to the Secretary of State, by means of Schedule 3, paragraph 2(3) of the Immigration Act 1971, to detain a person "pending his removal or departure from the United Kingdom" only exists when and for so long as there is some prospect of achieving that removal or departure. That is clear from paragraph 32 of Lord Brown of Eaton-under-Heywood's speech in *Khadir*. It is, however, important to emphasise that the *existence* of that power in the present case is not in issue, even during the period from 4 December 2004 to 20 July 2006, despite Mr Justice Calvert-Smith's finding at paragraph 49 that it was impossible to achieve removal during that period. Mr Drabble, Q.C., on behalf of A has made it clear during the hearing that he accepted that there was sufficient prospect of achieving removal to Somalia, even during that period, for the power to detain to exist. This court can only proceed on that basis.

70. That means that the principal issue which arises on the Secretary of State's appeal concerns the *exercise* of the power during that period to which I have referred and in particular whether the detention was for a reasonable period of time. There is also another issue, logically arising at an earlier stage, as to whether it is for the court or for the Secretary of State to determine whether the detention was for a reasonable period and therefore lawful. It has been submitted on behalf of the Secretary of State that the role of the court is simply to review his exercise of power on the usual principles applicable in judicial review, albeit that the court's scrutiny would be more intensive than usual. Mr Giffin Q.C. has contended that the court should not itself determine whether the period of detention exceeded that which was reasonable in the circumstances, but rather should ask whether it was open to the Secretary of State to regard detention as appropriate in the circumstances. It is accepted that Article 5 of the European Convention on Human Rights is engaged in such a case, but it is said that Article 5(1)(f) allows for the lawful detention of a person against whom action is being taken with a view to deportation, and that that particular provision does not involve considerations of proportionality.

71. It is to my mind a remarkable proposition that the courts should have only a limited role where the liberty of the individual is being curtailed by administrative detention. Classically the courts of this country have intervened by means of *habeas corpus* and other remedies to ensure that the detention of a person is lawful, and where such detention is only lawful when it endures for a reasonable period, it must be for the court itself to determine whether such a reasonable period has been exceeded. That has been

the approach adopted in practice in the domestic cases to which we have been referred: *Hardial Singh, R (I) v. Secretary of State for the Home Department* and, to my mind, *Khadir.* In addition, this issue fell to be considered explicitly in the case of *Youssef v. The Home Office* [2004] EWHC 1884, where Field J held that the court was the primary decision-maker as to the reasonableness of the length of detention: see paragraph 62.

72. The Privy Council seems to have adopted a similar approach in *Tan Te Lam*, finding that the facts which had to be found for the power to detain to exist were jurisdictional facts and hence for the court to determine. Mr Giffin has pointed out that the decision went to the existence of the power rather than to its exercise, which is true, but the reasoning in that decision seems to be of broader significance. As was said by Lord Browne-Wilkinson, giving the judgment, at page 114 B-C:

> "If a jailor could justify the detention of his prisoner by saying 'in my view, the facts necessary to justify the detention exist' the fundamental protection afforded by a *habeas corpus* would be severely limited. The court should be astute to ensure that the protection afforded to human liberty by *habeas corpus* should not be eroded save by the clearest words."

If the Secretary of State were to be entitled to determine what weight should be attached to, say, the risk of the detainee absconding if released, as compared to the weight to be attached to other factors, and so to decide whether the length of detention was reasonable, with the court only intervening if his decision was not one properly open to him, the erosion of the protection of human liberty referred to by Lord Browne-Wilkinson would be very substantial indeed.

73. The Privy Council in *Tan Te Lam* was expressing itself in terms of jurisdictional fact, one of the accepted bases for a court having the power, in public law cases, to determine facts in pre-Human Rights Act days. But the situation has changed with the coming into force of that statute. A court of law is a "public authority" within the meaning of s 6 of the Human Rights Act, 1998, as s (3)(a) expressly states. It is therefore unlawful for it to act

> "in a way which is incompatible with a Convention right."
> Section 6(1)

74. It was this provision which led the House of Lords in *Huang v. Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 WLR 581 to conclude that on a statutory appeal to the appellate immigration authorities the task of those authorities was to make its own decision as to whether a refusal of leave to enter or remain in this country was compatible or not with a Convention right and thus lawful or unlawful. Its task was not that of secondary review of another's decision. In the present case we are not, it is true, concerned with a statutory appeal. Nonetheless, this court is still required by s 6(1) to decide whether or not the detention of this individual is compatible or not with his rights under Article 5, because only by so doing can the court ensure that it is acting lawfully. It cannot do that merely by asking whether it was open to the Home Secretary to decide that the length of detention was reasonable, as opposed to whether it was actually reasonable in the eyes of the court. The Strasbourg jurisprudence indicates

that it is not enough that detention is lawful under domestic law, though that is a requirement for compliance with Article 5. To comply with Article 5 it must also be proportionate. As Lord Hope of Craighead put it in *R v. Governor of Brockhill Prison, ex parte Evans (No.2)* [2001] 2 AC 19 at 38 E:

> "The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate: *Engel v The Netherlands (No 1) (1976)* 1 EHRR 647, para 58 and *Tsirlis and Kouloumpas v Greece* (1997) 25 EHRR 198, para 56."

75. That principle applies to Article 5(1)(f) as it does to the other provisions of that Article. If the detention is not proportionate, it is in breach of Article 5, and it must be for the court to decide whether or not there is such a breach, as s 6(1) requires. Of course, the court will in most cases attach considerable weight to any assessment emanating from a government department about the progress of negotiations with foreign governments or with airlines about securing the return of deportees. But the ultimate decision is, in my judgment, for the court. I therefore would reject the Secretary of State's submission as to the limited role of the court in cases such as this.

76. I turn therefore to the question of whether the detention of A during this "middle period" from early December 2004 to late July 2006 was in excess of a reasonable period. The mere stating of those dates must instinctively cause concern, involving as they do a period in detention of almost 20 months. Moreover, this period followed on a period of 15 months detention found by the judge below to have been lawful, a finding not challenged on this appeal. Even so, the combined total of nearly three years in administrative detention is undoubtedly very lengthy and requires clear justification.

77. It is conceded on A's behalf that, in deciding whether the period in question was reasonable, one is entitled to have regard to the risk of the detainee absconding if released and also to any risk to public safety which would then result, though Mr Drabble submits that the latter can only carry limited weight, since the purpose of detention under Schedule 3, paragraph 2(3) is not a public safety purpose. I accept that the underlying purpose of the statutory power is not, first and foremost, the prevention of criminal offences which may be committed by such a person if released: the principal purpose is undoubtedly the facilitation of implementing the deportation order. To my mind, that makes the risk of absconding in any given case a matter of the greatest importance, since if the person in question were to abscond and it were to prove difficult to trace him, the whole purpose of the deportation order would be frustrated. To that extent I respectfully disagree with that part of the judgment of Dyson LJ in *R (I)* at paragraph 53, where he stressed the need not to overstate the importance of the risk of absconding. It is, in my judgment, a factor which in most cases will be of great importance.

78. But the risk to public safety, were the detainee to be released, is not irrelevant, and Mr Drabble does not argue that it is. It may not be the principal purpose of the power to detain, but like Toulson LJ I bear in mind that the statutory power to deport in the present case only existed because the Secretary of State had concluded, under s 3(5)(a)

of the 1971 Act, that the deportation of this man was conducive to the public good. That in many cases may well be the result of a risk of offences being committed and certainly was the situation in the present case. Moreover, it is clear that Simon Brown LJ in *R (I)* regarded the risk of re-offending as being potentially an important consideration: see paragraph 37.

79. I am not persuaded by Mr Giffin that the refusal by this detainee to return to Somalia voluntarily when it was possible to do so is some sort of trump card. On this I see the force of what was said by Dyson LJ in *R (I)*at paragraph 52, namely that the main significance of such a refusal may often lie in the evidence it provides of a likelihood of the individual absconding if released. After all, if there is in a particular case no real risk of his absconding, how could detention be justified in order to achieve deportation, just because he has refused voluntary return? The Home Office in such a case, ex hypothesi, would be able to lay hands on him whenever it wished to put the deportation order into effect. Detention would not be necessary in order to fulfil the deportation order. Having said that, I do not regard such a refusal to return as wholly irrelevant in its own right or as having a relevance *solely* in terms of the risk of absconding. It is relevant that the individual could avoid detention by his voluntary act. But I do not accept that such a refusal is of the fundamental importance contended for by the Secretary of State.

80. In the present case the facts are remarkably different from those in the cases cited to us in argument. This was a man who was, on the judge's findings, very likely to abscond if released from detention. Calvert-Smith J put it thus at paragraph 37 of his judgment, when dealing with bail:

> "The claimant evinced then and evinces now a single objective, namely to stay in this country by hook or by crook. If granted bail I am confident that he will make every effort to remain here, including, if he believes it necessary to achieve that objective, absconding, and removing or disabling any electronic device designed to assist in locating him."

That puts this case into a very different category from that of *Hardial Singh* and *R (I)*, in neither of which was there a finding of any significant risk of absconding. Indeed there was an important difference of views on the degree of such risk in *R (I)*, with Mummery LJ seeking in his dissenting judgment to uphold the lawfulness of detention because he concluded that the detainee would, if released, "probably abscond" (paragraph 41) and Dyson LJ not being satisfied that he would abscond and ruling that the detention was unlawful. This difference serves to highlight the significance in any particular case of the degree of risk of absconding. In the present case it was patently a very high risk. In those circumstances the very objective of the detention order was likely to be undermined.

81. To that there has to be added the risk to the public, were this man to be at large in the community. As Toulson LJ has indicated, this man had been assessed in 2003 in a parole report as presenting a high risk of sexual re-offending and a medium risk of violent offending. That too distinguishes this case from that of *R (I)*. The detainee there had been convicted of indecent assault and sentenced to three years'

imprisonment, but there does not seem to have been any evidence that the risk of sexual re-offending in his case was high, and the gravity of the offences was markedly different. The offences of rape and indecency with a child of 13 years in the present case resulted in an 8 year term of imprisonment.

82. The combination of these two factors, namely a very high risk of absconding if released and a high risk of sexual re-offending, must be seen as justifying allowing the Secretary of State, in the words of Simon Brown LJ in *R (I)*, "a substantially longer period of time within which to arrange the detainee's removal abroad". (paragraph 29). Whether the length of detention up to and including the "middle period" was nonetheless so long as to be unreasonable and thus unlawful is far from easy to determine. I recognize that it must be exceptional to regard lengthy administrative detention as lawful when there is some prospect of removal but no clearly predicted date for it. However, when one adds to the assessment the fact that this detainee could have returned voluntarily to Somalia but had refused to do so, it seems to me that 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.

83. When I put all those considerations together, I am persuaded that the Secretary of State acted lawfully in detaining this man in the period from 4 December 2004 to 20 July 2006 and that the judge below was wrong to find otherwise. It is conceded by Mr Drabble that, if the Secretary of State's appeal succeeds, his own appeal must fail. It follows that I too would allow the Secretary of State's appeal and dismiss that of A.