Mohebbi v Department of Labour

High Court Auckland CIV 2007-404-3710
23 August 2007; 5 November 2007
Potter J

Detention - detention for unreasonable period - whether detention in custody pending removal may become illegal if it continues for unreasonable period - Immigration Act s 60

New Zealand Bill of Rights Act - arbitrary detention - whether detention which is initially lawful could become arbitrary and unlawful if the purpose of detention under the legislation cannot be fulfilled - New Zealand Bill of Rights Act s 22

The appellant, a citizen of Iran was unlawfully in New Zealand and had been detained in custody since 20 January 2004 under a removal order and warrants of commitment issued under the Immigration Act 1987. He refused to co-operate by signing the papers necessary for a passport to be issued to enable his return to Iran. New Zealand did not have an agreement with the Iranian government for involuntary repatriation.

Section 60(6)(b) of the Act provided that where a person was detained under a warrant of commitment a Judge of the District Court could not order the release of such person "Unless the Judge considers that there are exceptional circumstances that justify the person's release". On an application for conditional release the District Court Judge held that there were no exceptional circumstances that justified release, reasoning that the length of time for which the appellant had been detained could not form exceptional circumstances justifying his release because his own conduct was the cause of his detention. On appeal to the High Court two submissions were made. First that the District Court Judge had failed to consider whether ongoing detention would be lawful and to apply or follow *Yadegary v Manager Custodial Services, Auckland Central Remand Prison* [2007] NZAR 436; and that in considering whether "exceptional circumstances" existed under s 60(6) of the Act, the Judge had misdirected herself in focussing on the appellant's non-compliant immigration behaviour with the result that the decision was made for an incorrect or improper purpose. In parallel judicial review proceedings the same grounds were advanced.

Held:

1. A right of appeal to the High Court against decisions of a District Court Judge under s 60 of the Immigration Act 1987 is available under s 72 of the District Courts Act 1947 (see paras [26] & [84(a)]).

2. The purpose of detention under s 60 of the Immigration Act 1987, including under s 60(6) is to enable execution of the removal order (see paras [45] & [84(b)]).

3. While diplomatic efforts genuinely continue to secure an agreement with the government of Iran that will enable removal orders for Iranian nationals to be executed, even in the face of non-co-operation, there is purpose served by the on-going detention of those who obstruct their own removal (see para [46]).

4. It was not possible to accept the submission that the simple effluxion of time whilst a detainee consistently frustrates the removal regime cannot constitute an exceptional circumstance justifying conditional release. Section 60(6) does not authorise indefinite detention. Detention for a purpose other than that authorised by the enactment is unlawful. Even when the purpose of the enactment is being served by ongoing detention, indefinite detention is impermissible because it constitutes inhuman and degrading treatment. Section 60 cannot authorise indefinite detention (see para [66]).

5. Had Parliament intended to sanction non-co-operative or obstructive conduct to prevail over all other factors, it could have stated its intention in unmistakable terms. It has not done

so. It has specifically in s 60(6) of the Act recognised that there may be exceptional circumstances notwithstanding non-co-operative or obstructive conduct by the detainee, where continuing detention is not justified. When human liberty is at stake very clear words would be required to effect the indeterminate curtailment of a person's liberty (see paras [67] & [68]).

Yadegary v Manager Custodial Services, Auckland Central Remand Prison [2007] NZAR 436; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC97 (PC) and *Al-Kateb v Godwin* (2004) 219 CLR 562 (HCA) referred to.

6. Obstructive conduct is in terms of s 60(6)(b) of the Act a significant factor for the Court to weigh when determining whether a person should be conditionally released pursuant to s 60(5). This is clear from the provisions of s 60. But it cannot trump all other factors. If it could, then Immigration New Zealand could detain a person indefinitely so long as the non-co-operation continued, regardless of the length of the period of detention. Thus the inquiry into "exceptional circumstances" would in such a situation, always resolve in favour of the Crown. Thus, the length of detention, if unreasonable, can amount to an exceptional circumstance, notwithstanding that the detainee deliberately obstructs his removal (see paras [70], [71] & [84(d)]).

7. Balancing the relevant factors of the length of the appellant's detention, the uncertainty as to when an agreement with Iran for the repatriation of involuntary nationals might be reached (which leaves open the prospect of an indeterminate period of detention), the adverse effects of continuing detention on the appellant and particularly on his family - against the absence of any evidence that he is at risk of absconding otherwise than by leaving New Zealand and that there is no basis on the evidence of his criminal history to suggest that he will re-offend, particularly violently, if released into the community, his ongoing-detention would be unreasonable (see paras [73], [75] & [84(e)]).

R (on the application of "I") v Secretary of State for the Home Department [2002] EWCA Civ 888 (CA) referred to.

8. However, that assessment must then be measured against the factor at which s 60(6)(b) is directed, his obstructiveness by refusing to sign papers that would enable the removal order to be executed. This factor must be accorded significant weight. But it cannot be allowed to become a trump card which will necessarily be treated as outweighing the unreasonableness of on-going detention, for Parliament has not so provided (see para [76]).

9. The appellant had been continuously in custody for approximately three years nine months. He had not been convicted of any criminal offence; he had not even been charged with an offence. Notwithstanding his undoubted obstructiveness (and accepting that his obstructiveness had been at the "high end"), in all the circumstances his on-going detention was unreasonable. Accordingly there were exceptional circumstances for the purposes of s 60(6) and the appellant was entitled to be released on appropriate conditions under s 60(5) of the Act (see paras [77] & [84(e)]).

10. The District Court Judge erred in finding that time alone cannot equate to exceptional circumstances to justify release. The factors she considered in determining whether there were exceptional circumstances were factors directed more to whether the appellant would be a good citizen than whether his continued detention was unreasonable. They were largely irrelevant to that question and led to a decision that was ultimately unreasonable (see para [78]).

11. Detention will be arbitrary if it is capricious, unreasoned, without reasonable cause. Detention which is initially lawful, would become arbitrary and unlawful if the purpose of detention under the Act could not be fulfilled and the detention was therefore otherwise indefinite or permanent. On the facts, the appellant's continuing detention had become unreasonable and arbitrary (see paras [80], [81], [82], [83] & [84(f)]).

Neilsen v Attorney-General [2001] 3 NZLR 433 (CA) and *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) referred to.

Appeal allowed. Order that Mr Mohebbi be released on conditions.

Other cases mentioned in Judgment

R v Governor of Durham Prison; Ex parte Hardial Singh [1984] 1 WLR 704 (QBD)
R v Secretary of State for the Home Department; Ex parte Khawaja [1984] AC 74 (HL)
Zadvydas v Davis 533 US 678 (2001)

Counsel

D Ryken for the appellant/plaintiff

AR Longdill for the Crown

[**Editorial note:** In earlier litigation reported at *Mohebbi v Minister of Immigration* [2003] NZAR 685 Mr Mohebbi successfully applied for a writ of habeas corpus as the then legislative provisions did not allow the lawful detention of a person for the purpose of forcing him or her to either produce a passport or to assist the immigration authorities in the application for a passport by signing all the necessary application forms for a new passport. However, section 60 of the Immigration Act 1987 was amended by the Immigration Amendment Act (No. 2) 2003, s 16 which came into effect on 9 September 2003. On 30 January 2004 Mr Mohebbi was served with a further removal order and taken into custody. >From that point he remained in custody until his conditional release was ordered by Potter J on 5 November 2007. For further background see para [5] of the Judgment given by Potter J.]

POTTER J

Introduction

[1] Mr Mohebbi is unlawfully in New Zealand and has been detained in custody since 20 January 2004 under a removal order and warrants of commitment issued under the Immigration Act 1987 ("the Act"). He refuses to co-operate by signing the papers necessary for a passport to be issued to enable his return to Iran of which he is a national. New Zealand does not have an agreement with the Iranian Government for involuntary repatriation.

[2] On 30 May 2007 Judge Bouchier in the District Court granted an application by the New Zealand Immigration Service ("INZ"), opposed by Mr Mohebbi, for further extension of the warrant of commitment under s 60 of the Act and dismissed Mr Mohebbi's cross-application for conditional release under s 60(5).

[3] Mr Mohebbi appeals against the District Court judgment on the ground of error of law and also seeks judicial review of the decision.

[4] Issues

a) Is there jurisdiction to appeal?

b) What is the purpose of detention under s 60?

c) Is that purpose being served by on-going detention?

d) Can the length of detention amount to an *exceptional circumstance* when the detainee deliberately obstructs his removal?

e) Are there *exceptional circumstances* within the meaning of s 60(6) of the Act that justify Mr Mohebbi's release?

f) Has detention become arbitrary and therefore in breach of s 22 of the New Zealand Bill of Rights Act 1990 ("Bill of Rights")?

[5] Background

• On 4 July 1997 Mr Mohebbi arrived in New Zealand without documentation. He subsequently applied for refugee status.

• On 3 April 1998 the Refugee Status Branch declined his refugee application. He appealed to the Refugee Status Appeals Authority.

• On 27 August 1998 his appeal was dismissed and his temporary permit was subsequently revoked.

• On 5 February 1999 Mr Mohebbi was served with a removal order under the Act. He subsequently appealed to the Removal Review Authority on the basis of a marriage to Jaran Ahmadian a New Zealand resident.

• On 27 September 1999 his appeal was allowed and a temporary permit was granted to him to enable him to apply for residence on the basis of his marriage to a New Zealand resident. That application was unsuccessful as Jaran Ahmadian withdrew her support and also obtained a protection order against Mr Mohebbi.

• On 25 March 2001 his permit expired. In May 2001 he again appealed to the Removal Review Authority against the requirement to leave New Zealand, in the meantime having met his current partner Marion Banawa.

• On 31 January 2003 the appeal was dismissed by the Removal Review Authority.

• On 11 March 2003 he was again served with a removal order and taken into custody. He could not be removed from New Zealand as he did not have a passport and refused to apply to the Iranian Embassy for a travel document. INZ subsequently brought Mr Mohebbi before a District Court Judge and obtained a warrant of commitment under s 60 of the Act. The warrant was extended every week.

• On 7 April 2003 Mr Mohebbi applied for judicial review of the INZ decision to serve a removal order on him. That application was dismissed on 9 April 2003 by Harrison J who considered the substantive challenge "doomed to failure".

• In June 2003, with the time limit for detention under s 60 (3 months) about to expire, INZ applied to the District Court to detain Mr Mohebbi under s 138A of the Act.

• In June and July 2003 orders made by District Court Judges at two subsequent hearings required Mr Mohebbi to produce a passport or sign all the necessary application forms. He failed to comply.

• On 7 August 2003 this Court issued a writ of habeas corpus on the application of Mr Mohebbi on the grounds that there was no just cause for detention. Section 138A(1) could only be exercised for the stated purpose of establishing identity. It could not be used to force a person to either produce a passport or assist INZ in the application for a new passport by signing all the necessary application forms so as to justify continued detention when the person's identity was established.

• In early September 2003 Parliament moved urgently to amend s 60 of the Act in reaction to Mr Mohebbi's release. The Immigration Amendment Act (No 2) 2003 came into force on 9 September 2003. It substituted subsection (6) and inserted subsection (6A) in s 60.

• On 10 November 2003 Mr Mohebbi sought intervention from the Associate Minister of Immigration. The Minister declined to intervene as he has on four subsequent applications made to him by Mr Mohebbi.

• On 30 January 2004 Mr Mohebbi was served with a further removal order and taken into custody. From this point Mr Mohebbi has been continuously in custody.

• From February to September 2004 Mr Mohebbi was detained pursuant to warrants of commitment issued by the District Court under s 60(6) of the Act. He continually refused to co-operate with INZ in signing an application form for a travel document.

• On 4 October 2004 Mr Mohebbi made a further application for refugee status which was declined in April 2005. He appealed to the Refugee Status Appeals Authority who declined the appeal in December 2005. (During the period of this second application – a period of 14 months - Mr Mohebbi could not have been removed from New Zealand because of the provisions of s 129X of the Act).

• From January 2006 to May 2007 Mr Mohebbi was detained under s 60(6)(b), consistently refusing to co-operate in signing an application form for a travel document.

• On 30 May 2007 Judge Bouchier in the District Court issued a judgment extending the warrant of commitment and refusing application for conditional release.

• In June 2007 the appeal and judicial review against the judgment of Judge Bouchier were filed. The warrant of commitment has been further extended pending determination of the appeal and the judicial review.

[6] The diplomatic situation regarding the involuntary repatriation of Iranian nationals who are unlawfully in New Zealand is also part of the background. The New Zealand Government over a number of years has been taking steps to secure arrangements with the Iranian authorities for involuntary repatriation. The evidence before the District Court in an affidavit of Gordon James MacRae, Immigration Officer, dated 29 May 2007, was that although he was aware of talks between the New Zealand Government and the Iranian authorities, he was unaware of any progress in removing Iranians without their co-operation.

[7] The Crown sought leave to adduce further evidence on appeal by way of an updating affidavit from Mr Aaron Baker of INZ who is the National Manager, Border Security and Compliance Operations which was admitted without opposition by counsel for Mr Mohebbi. The Crown has requested suppression orders in relation to Mr Baker's affidavit on the ground that the information provided is sensitive, which I make at the conclusion of this judgment. Suffice to summarise that the New Zealand Government through INZ and the Ministry of Foreign Affairs and Trade has actively engaged in diplomatic negotiations with Iran on the issue of involuntary returns of Iranian citizens who are unlawfully in New Zealand. Negotiations have been ongoing since mid-2004. Progress has been slow but there has been progress. However, there is no certainty as to whether or when any agreement may be concluded. While Mr Baker refers to a recent "major positive step in the diplomatic process" there appears to be no certainty as to when an acceptable outcome may be reached.

Jurisdiction to appeal

[8] Mr Mohebbi brings his appeal under s 72 of the District Courts Act 1947 which provides:

(1) This subsection applies to every decision made by a District Court other than a decision of a kind of which an enactment other than this Act-

(a) expressly confers a right of appeal; or

(b) provides expressly that there is no right of appeal.

(2) A party to proceedings in a District Court may appeal to the High Court against the whole or any part of any decision to which subsection (1) applies made by the District Court in or in relation to the proceedings.

[9] The Crown accepted that by her judgment of 30 May 2007 Judge Bouchier made a *decision* within the definition in s 71 of the District Courts Act, but contended that s 72(1)(a) applies to exclude that decision from the right of appeal conferred generally by s 72. When viewed in context, the s 60 decision to extend a warrant of commitment is a decision *of a kind* in respect of which the Act, *being an enactment other than* the District Courts Act, *expressly confers a right of appeal*. Therefore the Crown contended, s 72 which provides a general right of appeal is not triggered.

[10] Part 2 of the Act which is headed **Persons in New Zealand unlawfully** was substituted by the Immigration Amendment Act 1999. The Crown contended that Part 2 of the Act provides a code governing compulsory removal of persons unlawfully in New Zealand and that Parliament only intended one right of appeal from the compulsory removal regime, namely the right of appeal in s 47 to the Removal Review Authority.

[11] The Crown argued that a decision to extend a warrant of commitment under s 60 of the Act is an integral step in that regime and therefore only the route of appeal under s 47 is available.

[12] By s 45 persons unlawfully in New Zealand have an obligation to leave New Zealand unless subsequently granted a permit. Section 46 imposes a duty on the Chief Executive of the Department of Labour to communicate the obligation to leave and the consequences of failing to do so.

[13] Section 47 provides a right of appeal to the Removal Review Authority against the requirement to leave. It provides:

Appeal against requirement to leave New Zealand

(1) A person who is unlawfully in New Zealand may appeal to the Removal Review Authority against the requirement for that person to leave New Zealand.

(2) The appeal must be brought within 42 days after the later of –

(a) The day on which the person became unlawfully within New Zealand;

Or

(b) The day on which the person received notification under section 31 of the confirmation of the decision to decline to issue a permit, in the case of a person who, while still lawfully in New Zealand, had lodged an application under section 31 for reconsideration of a decision to decline another temporary permit.

(3) An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

(4) For the purposes of subsection (3), the mere fact that a person's circumstances are such that the person would meet any applicable Government residence policy requirements for the grant of a residence permit does not in itself constitute exceptional circumstances of a humanitarian nature.

(5) The following persons may not appeal under this section:

(a) A person who is unlawfully in New Zealand by reason of having returned to New Zealand while a removal order is in force in respect of the person:

(b) A person who is unlawfully in New Zealand by reason of the expiry of a limited purpose permit:

(c) A person who is unlawfully in New Zealand following the revocation of their residence permit being confirmed by the Deportation Review Tribunal:

(d) A person unlawfully in New Zealand to whom section 63 applies (which section relates to persons granted temporary permits for the purpose of the Mutual Assistance in Criminal Matters Act 1992); or

(e) A person unlawfully in New Zealand to whom section 114K(4)(b) applies (which provision relates to a person in respect of whom a security risk certificate has been confirmed).

[14] Sections 48-52 set out the procedural provisions applying to appeals and the powers of the Removal Review Authority when an appeal is allowed. Relevantly, s 49(2) provides:

The function of the Authority is solely to determine appeals brought under section 47 against the requirement to leave New Zealand.

[15] The removal provisions follow in ss 53-63. Under s 53 a person unlawfully in New Zealand may be the subject of a removal order. Sections 54-58 relate to the making, content and effect, service, currency and cancellation of removal orders.

[16] Under s 59 the Police may arrest without warrant and detain a person on whom a removal order has been served, for the purpose of executing the removal order -

… by placing the person on craft that is leaving New Zealand.

Detention is limited to 72 hours without further authority.

[17] Section 60 provides for the situation where a craft is unavailable within the 72 hour period. Section 60 provides:

Release or extended detention if craft unavailable, etc, within 72-hour period

(1) Where a person is arrested and detained under section 59 and it becomes apparent that -

(a) No craft will be available within the 72-hour period specified in that section; or

(b) A craft that was available is no longer available; or

(c) It is not practicable for the person to be placed on a craft within the 72-hour period; or

(d) For some other reason the person is unable to leave New Zealand within the 72-hour period,-

then, unless the person is released, an immigration officer must arrange for the person to be brought before a District Court Judge for the purpose of obtaining a warrant of commitment.

(2) Subject to any extension of it under subsection (4) or subsection (6A), a warrant of commitment issued under this section authorises the detention of the person named in it for a period of 7 days or such shorter period as the Judge thinks necessary to enable the execution of the removal order.

(3) A Judge may issue a warrant of commitment on the application of an immigration officer if satisfied on the balance of probabilities that the person in custody is the person named in the removal order and that any of the following applies:

(a) A craft is likely to be available, within the proposed period of the warrant of commitment, to take the person from New Zealand:

(b) The practical difficulties that meant that the person could not be placed on an available craft within 72 hours are continuing and are likely to continue, but not for an unreasonable period:

(c) The other reasons the person was not able to leave New Zealand within the 72-hour period are still in existence and are likely to remain in existence, but not for an unreasonable period:

(d) In all the circumstances it is in the public interest to make a warrant of commitment.

(4) If at the expiry of a warrant of commitment made under this section the person has still not left New Zealand, then, unless released, the person must be again brought before a Judge for an extension of the warrant of commitment, in which case subsections (2) and (3) (and, if appropriate, subsection (6A)) apply.

(5) If a person is brought before a Judge under subsection (4) for a second or subsequent time the Judge may, where it seems likely that the detention may need to be extended a number of times, and where satisfied that the person is unlikely to abscond otherwise than by leaving New Zealand, instead of extending the warrant of commitment for a further period of up to 7 days, order that the person be released subject to—

(a) Such conditions as to the person's place of residence or as to reporting at specified intervals to an office of the Department of Labour or a Police station as the Judge think fits {sic ? thinks fit}; and

(b) Such other conditions as the Judge may think fit to impose for the purpose of ensuring compliance with the residence and reporting conditions.

(6) Unless the Judge considers that there are exceptional circumstances that justify the person's release, a Judge may not order the release of a person under subsection (5) if –

(a) the person is currently a refugee status claimant who claimed refugee status only after the removal order was served; or

(b) a direct or indirect reason for the person being unable to leave New Zealand is or was some action or inaction by the person occurring after the removal order was served.

(6A) Where a Judge determines not to order the release of a person to whom subsection (6) applies, the Judge may—

(a) extend the warrant of commitment for a further period of up to 30 days, in which case—

(i) the warrant authorises the detention of the person named in it for the period specified in the extension of the warrant; and
(ii) subsections (3) to (6) and this subsection apply at the expiry of the extension of the warrant; and

(b) make any orders and give any directions that the Judge thinks fit.

(7) No person may be detained under 1 or more warrants of commitment under this Part for a consecutive period of more than 3 months, unless the person is a person to whom subsection (6) applies.

(8) In making any decision under this section a Judge is to seek to achieve an outcome that ensures a high level of compliance with immigration laws.

(9) No release of a person under this section in any way affects their liability for later detention and removal.

[18] Mr Mohebbi was brought before Judge Bouchier under s 60(4). The Judge extended the warrant of commitment for a further 28 days.

[19] The Crown submitted that Parliament has deliberately "streamlined" the compulsory removal regime by providing one right of appeal only, that under s 47. The Crown referred to the long title of the Immigration Amendment Act 1999 which introduced the new Part 2 into the Act:

An Act to –

(a) Improve the effectiveness of the removal regime for persons unlawfully in New Zealand by streamlining the procedures involved, so ensuring -

(i) A higher level of compliance with immigration laws; and

(ii) That persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do comply; and

(iii) . . .

[20] It was submitted that s 60 provides in-built safeguards for those detained - detention must be revisited by the District Court every 7 days, or in the case of those who have acted to prevent removal occurring, at least every 30 days and more typically every 28 days. Also, continued detention can be challenged by way of habeas corpus if considered prima facie unlawful, or by judicial review (as has been done in this case in conjunction with the appeal).

[21] The Crown's contention cannot, in my view, be correct. The right of appeal to the Removal Review Authority under s 47 is only against the requirement for the appellant to leave New Zealand. Section 49(2) emphasises that determination of such appeals is the sole function of the Removal Review Authority.

[22] Thus, if the Crown were correct, there would be no right of appeal against a decision of a District Court Judge under s 60. Ms Longdill accepted this was so, but submitted that in the context of the streamlined procedures to enhance the effectiveness of the removal regime as stated by Parliament in the long title to the 1999 amending Act, the safeguards provided by s 60 for detentions under Part 2 to be revisited by the District Court at intervals of 7 or 30 days obviate the need for appeal.

[23] Further, the limited right of appeal to the Removal Review Authority under s 47 against a substantive decision that a person be required to leave New Zealand, may be brought only on the grounds stated in s 47(3):

… exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

[24] A decision under s 60 to extend a period of committal and to refuse a release on conditions, is a quite different kind of decision and involves consideration of factors not expressly including and not limited to, circumstances of a humanitarian nature. Broader considerations apply. Such a decision is not a decision of a kind in respect of which the Act expressly confers a right of appeal as contemplated by s 72 of the District Courts Act.

[25] The Crown's acceptance that the interpretation it advanced would preclude a right of appeal from decisions under s 60, highlights the flaw in its argument. Section 72 of the District

Courts Act provides a general right of appeal except where another enactment expressly confers a right of appeal or provides expressly that there is no right of appeal. The Act does neither. It would require a very clear contrary expression to exclude from the general right of appeal conferred by s 72 of the District Courts Act, decisions of the District Court under s 60 which impact directly on the liberty of the persons subject to such decisions.

[26] I conclude that a right of appeal against decisions under s 60 of the Act is available under s 72 of the District Courts Act.

Grounds of appeal/judicial review

[27] The grounds of appeal and judicial review were advanced in tandem in submissions for Mr Mohebbi and I shall consider them together. The various stated grounds overlap to some extent and may conveniently be summarised under two heads:

a) The Judge failed to consider whether ongoing detention would be lawful and to apply or follow *Yadegary v Manager Custodial Services, Auckland Central Remand Prison and Chief Executive of Labour* [2007] NZAR 436.

b) In considering whether exceptional circumstances existed under s 60(6) the Judge misdirected herself in focusing on Mr Mohebbi's non-compliant immigration behaviour with the result that the decision was made for an incorrect or improper purpose.

The judgment in Yadegary

[28] In the recent judgment in *Yadegary* Courtney J addressed the same difficult issue that arises in this case, namely how long a person who deliberately obstructs his removal under the Act can lawfully be detained under the Act.

[29] Mr Yadegary's background was in many respects similar to that of Mr Mohebbi. Mr Yadegary is an Iranian national who was subject to a removal order. At the time his application for judicial review of a decision of the District Court which extended a warrant of commitment and refused his cross-application seeking conditional release pursuant to s 60(5) was heard, he had been in custody for just over two years. He had destroyed his passport and refused to apply for a new one.

[30] After considering the relevant statutory provisions and authorities, Courtney J concluded at [67]:

a) The purpose of detention under s 60 of the Act is to enable the execution of removal orders.

b) The principles enunciated in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 apply generally to detention under s 60, namely that:

i) detention can only be for the purpose authorised by s 60;

ii) the length of detention must be limited to the period reasonably necessary for the statutory purpose;

iii) what is a reasonable period depends on the circumstances of the particular case;

iv) the State must take the steps necessary to achieve removal within a reasonable time;

v) if it becomes apparent that removal cannot be achieved within a reasonable period the detainee must be released.

c) There is nothing in the language of s 60 that could operate to exclude the *Hardial Singh* principles. Accordingly the phrase "exceptional circumstances" in the opening words of s 60(6) is to be construed so as to include detention that would be unreasonable under those

principles.

d) In determining what a reasonable period is, the detainee's own conduct in obstructing the removal process is to be given significant weight. However, it cannot have the status of a trump card. Had Parliament intended the sanctioning of obstructive conduct to prevail over other factors it could have stated its intention in unmistakable terms but has not done so (at [65]).

e) The ongoing detention of Mr Yadegary in the light of all the relevant circumstances was unreasonable and therefore "exceptional circumstances" existed.

[31] The decision of the District Court was quashed and an order made that Mr Yadegary be released on conditions to be fixed by the District Court.

[32] Both counsel in this case were also involved in *Yadegary*. The Crown contends that *Yadegary* is wrongly decided and has appealed that judgment. (I am advised the appeal has a fixture in the Court of Appeal in March 2008). Mr Ryken for Mr Mohebbi maintains that Courtney J's decision is right. He says that while Judge Bouchier quoted a relevant passage from the *Yadegary* judgment, she failed properly to apply the principles determined by this Court to the circumstances of this case.

The District Court decision

[33] Judge Bouchier delivered an oral judgment on 30 May 2007. She identified two issues upon which she said she must be satisfied:

a) Whether Mr Mohebbi will not abscond otherwise than by leaving New Zealand (s 60(5)); and

b) Whether there are exceptional circumstances that justify his release – in particular whether his detention had become unreasonable and therefore there were exceptional circumstances to justify his release (s 60(6)).

[34] The Judge found on those issues:

Certainly there is presumptive evidence generally that in situations like this people often abscond but there is no specific evidence before this Court that the respondent will not abscond otherwise than by leaving New Zealand … (at [47]).

Time alone cannot, in my view, equate to exceptional circumstances to justify release (at [48]).

[Mr Mohebbi] has created his own family situation, he cannot work in this country, he is not of blameless character, he has for a substantial length of time obstructed the administration of the Immigration Act in this country and cost this country a significant amount of money in so doing, that does not form any exceptional circumstances that justify his release on conditions (at [54]).

[35] At [12] the Judge referred to the judgment in *Yadegary*. She recorded advice that the Crown has appealed that decision but conceded that it was currently the law. The Judge did not consider in any detail the judgment in *Yadegary* although she quoted from it at [34] and [35], but essentially found on the facts that Mr Mohebbi's case could be distinguished from *Yadegary*. She held there were no exceptional circumstances that justified the release of Mr Mohebbi under s 60(6).

[36] She said at [53]:

It seems to me that even the length of time involved here cannot form exceptional circumstances to justify Mr Mohebbi's release because of his own conduct and his unique immigration history, because in effect he would then be thumbing his nose at the laws and

government of New Zealand in a way which I do not consider the decision in *Yadegary* could possibly have expected to sanction.

Purpose of detention under s 60

[37] The purpose of detention is important because, as the Crown accepts, in accordance with the *Hardial Singh* principles, to be lawful, detention must be for the statutory purpose and the length of detention must be limited to the period reasonably necessary for the statutory purpose.

[38] In *Yadegary* Courtney J found the purpose of detention under s 60 to be expressly stated in s 60(2), i.e. to enable the execution of the removal order. She considered that was clearly a wider purpose than the purpose under s 59(2) which is to execute the removal order by placing the person on a craft that is leaving New Zealand (within 72 hours).

[39] Courtney J rejected arguments by the Crown that detention under s 60(6) (as distinct from under s 60 generally) serves even broader purposes, in that it:

• Applies a more stringent standard to those who obstruct removal;

• Provides an incentive to the detainee to co-operate with removal measures and a sanction for not doing so; and

• Prevents persons who obstruct removal from obtaining the benefit of de-facto residence.

[40] In this case, the Crown invites the Court not to follow the reasoning of Courtney J. It was submitted that in applying the much more stringent standard of exceptional circumstances to those who obstruct release, compared with non-obstructive detainees who may be considered for conditional release under s 60(5), s 60(6) effectively reinforces the importance of state sovereignty in the immigration context; the state has a sovereign right to control its borders, and individual non-cooperation in removal cannot trump this. This is a broader purpose for detention under s 60(6).

[41] The Crown referred to the statements of the Minister of Immigration at the introduction and third reading of the Immigration Amendment Bill which became the Immigration Amendment Act (No 2) 2003 and came into force on 9 September 2003, substituting s 60(6) and inserting s 60(6A), as expressing the legislative intent. (The amendment to s 60 was introduced as a direct result of this Court's decision on 7 August 2003 to issue a writ of habeas corpus on the application of Mr Mohebbi brought in response to INZ's attempt to detain him under s 138A of the Act):

… the New Zealand Immigration Service has been unable to remove Mr Mohebbi. Why? Because it cannot get a travel document from him. Why? Because he has refused to request one from his own country's embassy. … I cannot recall even discussing the possibility of such wilful non-co-operation leaving New Zealand exposed to the release from detention of such an individual. The Supplementary Order Paper will enable a judge, not the Immigration Service, to extend the warrant of commitment where the person's own action or inaction either directly or indirectly results in the person being unable to leave New Zealand (New Zealand Parliamentary Debates, first Session, Forty-Seventh Parliament, 8255, 2 September 2003).

Section 60 came into force in 1999, when National was changing the rules around removals from New Zealand. The 3-month limitation was believed to be a sufficient balance between the time needed to obtain travel documents and the amount of time someone would be detained. No one contemplated someone holding out for 3 months – effectively, preventing that person's removal and effecting that person's freedom.

… [t]his amendment is [not] indefinite detention. … It is a warrant of commitment that can be renewed on a 30 day basis by a Court. The Court retains the ability to consider exceptional circumstances, even though it is through the action or inaction of the individual concerned that

means he or she cannot be removed. If the particular individuals concerned had signed their application, they would not be in detention – they would be gone … (New Zealand Parliamentary Debates, first Session, Forty-Seventh Parliament, 8406, 4 September 2003).

[42] Section 60(6) as substituted by the 2003 amendment provides a significant constraint on the elegibility (sic) for conditional release under s 60(5) of those who obstruct their removal from New Zealand. Thereby, it provides an incentive to cooperate. But that does not change the purpose of detention pursuant to a warrant of commitment as expressed in s 60(2), namely to enable execution of the removal order. That expressly stated purpose remained unchanged by the 2003 amendment.

[43] The Crown suggested there is a further argument in favour of the broader purpose of detention under s 60(6) it advocates, which applies in the case of Mr Mohebbi but was not present in the case of Mr Yadegary. For 14 months subsection (6)(a) as well as subsection 6(b) applied to Mr Mohebbi because in October 2004 he made a further application for refugee status which was declined and ultimately failed on appeal in December 2005. During that period s 129X of the Act prevented his removal. So, argued the Crown, it could not be said that Mr Mohebbi's detention was for the purpose of executing a removal order, when that could not happen.

[44] I disagree. The *purpose* of detaining Mr Mohebbi remained unchanged through this period. His second application for refugee status simply meant that during the 14 month period, under both limbs (a) and (b) of subsection (6) he was not eligible for conditional release under s 60(5) absent exceptional circumstances.

[45] I conclude, as did Courtney J in *Yadegary* that the purpose of detention under s 60, including under s 60(6), is to enable execution of the removal order.

Is the purpose served by on-going detention?

[46] I accept that while diplomatic efforts genuinely continue to secure an agreement with the Government of Iran that will enable removal orders for Iranian nationals to be executed, even in the face of non-co-operation, there is purpose served by the on-going detention of those who obstruct their own removal.

Can length of detention amount to an exceptional circumstance when the detainee deliberately obstructs his removal?

[47] In *Yadegary* Courtney J reviewed relevant overseas authorities in [17] to [25] of the judgment. She referred particularly to *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. *Tan Te Lam* concerned Vietnamese boat people who were refused refugee status and were subject to removal orders under the Hong Kong Immigration Ordinance. They could apply for voluntary repatriation but refused to do so. They complained that their ongoing detention was unlawful because the period for which they had been detained was unreasonable.

[48] The Privy Council applied the principles enunciated by Woolf J in *Hardial Singh* (at 706):

Although the power which is given to the Secretary of State … to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained … pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not 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. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable

expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.

[49] Importantly, with relevance to the interpretation of s 60(6) of the Act, the Privy Council recognised that the *Hardial Singh* principles could be excluded by express provisions. Lord Browne-Wilkinson said (at 111):

Section 13D(1) confers a power to detain a Vietnamese migrant "pending his removal from Hong Kong". Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J in the *Hardial Singh* case [1984] 1 W.L.R. 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain "pending removal" their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.

Although these restrictions are to be implied where a statute confers simply a power to detain "pending removal" without more, it is plainly possible for the legislature by express provision in the statute to exclude such implied restrictions. Subject to any constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the *Hardial Singh* principles. But in their Lordships' view the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances.

[50] The Hong Kong Immigration Ordinance with which the Privy Council was concerned in *Tan Te Lam*, expressly envisaged by s 13D(1A), that the exercise of the power of detention conferred by s 13D(1) will be unlawful if the period of detention is unreasonable:

… What section 13D(1A) does is to provide expressly that, in deciding whether or not the period is reasonable, regard shall be had to all the circumstances including (in the case of a person detained pending his removal from Hong Kong) "the extent to which it is possible to make arrangements to effect his removal" and "whether or not the person has declined arrangements made or proposed for his removal". Therefore the subsection is expressly based on the requirement that detention must be reasonable in all the circumstances (the *Hardial Singh* principles) but imposes specific requirements that in judging such reasonableness those two factors are to be taken into account.

The two additional factors specifically mentioned in section 13D(1A) reflect the delays in arranging with the Vietnamese authorities to accept repatriation and the fact that detainees in refusing to be repatriated under the voluntary scheme are declining to take advantage of a scheme which could effect their repatriation, and therefore their release, much more speedily.

[51] Lord Browne-Wilkinson continued (at 113):

Their Lordships do not exclude the possibility that, by clear words, the legislature can confer power on the executive to determine its own jurisdiction. Say, for example, the power to detain were expressly made exercisable during such period as in the opinion of the director removal from Hong Kong was pending. In such a case the court's only power would be to review the director's decision on *Wednesbury* principles. Where human liberty is at stake, very clear words would be required to produce this result. As was emphasised by all their Lordships in the *Khawaja* case (*Reg. v Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74), in cases where the executive is given power to restrict human liberty, the courts should always "regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language relied on:" [1984] A.C. 74, 122, Lord Bridge of Harwich. Such an approach is equally

applicable to everyone within the jurisdiction of the court, whether or not he is a citizen of the country: see per Lord Scarman, at pp. 111-112.

[52] In addressing the issue of the length of detention their Lordships observed that if the Vietnamese boat people were to have applied for voluntary repatriation most of them would be repatriated in a comparatively short time, thereby regaining their freedom. Therefore they were only detained because of their own refusal to leave Hong Kong voluntarily, such refusal being based on a desire to obtain entry to Hong Kong to which they had no right. At 114 it is stated:

In assessing the reasonableness of the continuing detention of such migrants, section 13D(1A)(b)(ii) requires the court to have regard to "whether or not the person has declined arrangements made or proposed for his removal". 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.

[53] Courtney J also referred to the case of *Al-Kateb v Godwin* (2004) 208 ALR 124; (2004) 219 CLR 562, a decision of the High Court of Australia. The statutory provision in question was s 196 of the Migration Act 1958 which required that an unlawful non-citizen:

… must be kept in immigration detention until he or she is … removed from Australia … deported … or granted a visa.

[54] Section 196(3) provided:

To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or detention) unless the non-citizen has been granted a visa.

[55] The majority of the High Court Bench of Australia held that the language of s 196 was sufficiently clear to override any implied limitation on detention for a potentially unlimited period, as required by the *Hardial Singh* principles.

[56] Kirby J in a dissenting judgment referring to H*ardial Singh, Tan Te Lam* and *Zadvydas v Davis* 533 US 678 (2001) said at [161]:

Likewise, in *Tan Te Lam* the approach to the judicial function of statutory interpretation adopted by the Privy Council in a Hong Kong appeal can only be explained by reference to the same judicial resistance to unlimited executive detention. In different courts the resistance leads to different techniques of decision-making and to different powers and outcomes. But the common thread that runs through all these cases is that judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law. Hence, judges regard such unlimited detention with vigilance and suspicion. They do what they can within their constitutional functions to limit it and to subject it to express or implied restrictions defensive of individual liberty.

[57] Gleeson CJ, also part of the minority, said at [19]:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

[58] Hayne J, who was part of the majority, said at [241]:

There is a relevant general principle to which effect must be given in construing the provisions now in question: legislation is not to be construed as interfering with fundamental rights and freedoms unless the intention to do so is unmistakably clear. General words will not suffice.

[59] Hayne J found, however, that the statute made clear that detention was mandatory and must continue until removal or deportation or the grant of a visa – the words of the statute were "intractable".

[60] Courtney J then turned to consider New Zealand authorities, noting that the question whether s 60(6) ousts the *Hardial Singh* limitations in relation to persons to whom s 60(6) applies, appeared never to have been argued.

[61] The Judge started from the fundamental position stated in *Tan Te Lam* and *Al-Kateb* that absent clear legislative intent the *Hardial Singh* principles apply in New Zealand to the power to detain under s 60. She observed that s 60(5) clearly intends that unless it is inappropriate because of the risk of offending or absconding, persons should not be detained longer than necessary. Aside from s 60(6) there is nothing that could possibly be viewed as a clear intention to permit prolonged and possibly indefinite detention. She said:

[29] This leaves the question whether, either alone or coupled with the change to s 60(7), the wording of s 60(6) is sufficiently clear to oust the implied requirement for detention to be reasonable in the circumstances. Clearly, s 60(6) was intended to alter the way in which specified categories of persons are dealt with by refusing them the benefit of conditional release under s 60(5). Section 60(6) takes away the power of conditional release in respect of them unless exceptional circumstances exist. But for the opening words "Unless the Judge considers that there are exceptional circumstances that justify the person's release", s 60(6) would be couched in absolute terms that would leave no room for doubt that Parliament intended to preclude absolutely the release of the specified categories of persons.

[30] So the question comes down to whether the opening words of s 60(6) detract from that meaning sufficiently to conclude that, even in relation to those specified in s 60(6), detention must be still be limited to what is reasonable in the circumstances. The construction of these words must be undertaken against the obvious intention that the categories of persons specified in s 60(6) are to be treated less favourably than others to whom s 60 applies. However, the decision to add the opening words to s 60(6) when, without them, the intention to allow prolonged detention would have been clear, can only have been intended to limit the effect that s 60(6) would otherwise have had.

[31] The opening words of s 60(6) specifically envisage that there will be people to whom s 60(6) applies who should nevertheless be entitled to conditional release. In adding these words Parliament has drawn back from the kind of unmistakable language used by the Australian legislature. I find that the opening words must have been intended by Parliament to ensure that there was a safety net that would prevent the literal effect of s 60(6) being implemented. The result is that the *Hardial Singh* principles apply to those detained under s 60(6) as to any other person detained under s 60.

[62] The Crown submitted that the approach of Courtney J was wrong because it subsumed *exceptional circumstances* into a broad reasonableness test:

a) It failed to appreciate the significant differences between the broad, unfettered powers of detention in the overseas legislation with the structured, regulated regime of s 60 generally;

b) It failed to appreciate the importance of s 60(6)(b) as a specific legislative response to the problem of obstructive detainees.

[63] The Crown differentiated s 60 from the legislative provisions in cases such as *Hardial Singh* and *Tan Te Lam* which empowered detention "pending removal". In contrast s 60 contains legislative safeguards to protect against arbitrary detention; the maximum period of detention absent judicial oversight is 72 hours (s 59); from that point on detention needs to be authorised by a District Court Judge; there is a three month time limit on detention where s 60(6) does not apply.

[64] It was submitted that because the New Zealand legislation has provided statutory protections there was no need to supplement the language of s 60 with principles from other

jurisdictions which were developed to protect individuals in situations of broad open-ended and unregulated powers of detention. The Crown submitted that Courtney J read down *exceptional circumstances* in s 60(6) from a high threshold by introducing a test of reasonableness. This interpretation, it was said, has the effect of directly countering the legislative intent as identified in the long title to the Immigration Amendment Act 1999 in enacting s 60(6) to alter the detention regime for those who obstruct removal, and has the effect of incentivising prolonged non-compliance.

[65] In summary, the Crown submitted that the simple effluxion of time whilst a detainee consistently frustrates the removal regime cannot constitute an exceptional circumstance justifying conditional release, and the District Court Judge was correct so to hold. The reason for the length of detention to date is Mr Mohebbi's own conduct. It would be contrary to the legislative scheme for a detainee to be in effect rewarded for exceptional obstinancy (sic) in obstructing his removal.

[66] I am unable to accept the Crown's submissions. Section 60(6) does not authorise indefinite detention. Detention for a purpose other than that authorised by the enactment is unlawful. The Crown accepts that (though contending for a broader purpose for detention under the Act than I have found). Even when the purpose of the enactment is being served by ongoing detention, indefinite detention is impermissible because it constitutes inhuman and degrading treatment. The Crown accepts that also, and that s 60 cannot authorise indefinite detention. The claim is, however, that Courtney J read down *exceptional circumstances* in s 60(6) from the high threshold intended by Parliament by introducing the concept of reasonableness.

[67] However, as Courtney J observed, had Parliament intended to sanction non-co-operative or obstructive conduct to prevail over all other factors, it could have stated its intention in unmistakable terms (at [65]). It has not done so. It has specifically in s 60(6) recognised that there may be exceptional circumstances notwithstanding non-co-operative or obstructive conduct by the detainee, where continuing detention is not justified.

[68] As was stated by the Privy Council in *Tan Te Lam* and by the High Court of Australia in *Al-Kateb*, when human liberty is at stake very clear words would be required to effect the indeterminate curtailment of a person's liberty.

[69] In my view, Courtney J did not apply the principles she deduced from the long line of authority to which she referred, to read down the provisions of s 60(6). Rather, she called them in aid to establish the principles that should properly apply in interpreting the provisions of s 60(6) in determining the difficult question of how long a person who deliberately obstructs his removal can be detained.

[70] Obstructive conduct is in terms of s 60(6)(b) a significant factor for the Court to weigh when determining whether a person should be conditionally released pursuant to s 60(5). That is clear from the provisions of s 60. But it cannot trump all other factors. If it could, then INZ could detain a person indefinitely so long as the non-co-operation continued, regardless of the length of the period of detention. Thus the inquiry into *exceptional circumstances* would in such a situation, always resolve in favour of the Crown.

[71] I conclude that length of detention, if unreasonable, can amount to an exceptional circumstance, notwithstanding that the detainee deliberately obstructs his removal.

Are there exceptional circumstances within the meaning of s 60(6) that justify Mr Mohebbi's release?

[72] Mr Ryken submitted that the Judge entered upon an immigration decision, namely whether Mr Mohebbi should be allowed to remain in New Zealand, which was not a question before the Court. The question before the Court was whether it was unreasonable for him to continue to be detained. It was submitted that the Judge has seen herself as a "gatekeeper", whereas those functions under the Immigration Act remain with others, including immigration officers, the Minister of Immigration and statutory tribunals such as the Removal Review

Authority.

[73] In *The Queen (on the application of "I") v Secretary of State for the Home Department* [2002] EWCA Civ 888 Lord Justice Dyson said at [48] that it was not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation under the Immigration Act 1971 (UK). He provided a list of non-exhaustive factors which I now consider in the light of the circumstances of this case:

a) The length of the period of detention - Mr Mohebbi has been detained for approximately three years nine months since January 2004, unarguably a long period of detention. (By comparison Mr Yadegary's period of detention was approximately two years seven months).

b) The nature of the obstacles, which stand in the path of deportation – an obstacle is the inability of the New Zealand Government to agree with the Iranian authorities an arrangement for the involuntary repatriation of Iranian nationals. However, the process has some current momentum, albeit that an outcome has not been achieved since negotiations commenced in 2004. It cannot be said that there is a real possibility for early resolution on the basis of information presently available.

A significant obstacle in the path of deportation is Mr Mohebbi's obstructive conduct. This is a factor that must be attributed significant weight in the balancing of all relevant factors because of the provisions of s 60(6).

c) The diligence, speed and effectiveness of steps taken by the Secretary of State - I accept that the New Zealand Government seems to be taking all reasonable steps to negotiate an agreement with the authorities in Iran.

d) The conditions of detention - Mr Mohebbi in his affidavit sworn 23 August 2006 filed in the District Court proceedings, refers to his psychological condition deteriorating consistently since he was detained and to having been assaulted in prison on a number of occasions. A report completed by Dr Greig McCormick, a psychiatrist at the Bexley Clinic dated 25 July 2006 says the situation has resulted in Mr Mohebbi suffering from an Adjustment Disorder with associated psychological morbidity. There is no more recent evidence before the Court. While Dr McCormick's report was made over a year ago, there is no evidence which contradicts it.

e) The effect of detention on the prisoner and his family – both Mr Mohebbi and his partner Marion Banawa who made a declaration in the District Court proceedings dated 30 June 2006, refer to the stress and difficulty occasioned for Ms Banawa in caring for four children on her own, two of whom are children of Mr Mohebbi. Dr McCormick describes her as having developed a bona fide psychiatric disorder, Major Depressive Episode and says that the current situation is causing serious emotional harm for all the parties involved (although he had not individually assessed the children). He describes the relationship between Mr Mohebbi and Ms Banawa as "… a consistent stable and loving relationship" and that they "… operated as a stable and functional family unit".

f) The risk of absconding – the Judge considered this aspect because, as she noted in her judgment, before a conditional release may be granted under s 60(5) the Judge has to be satisfied that the person is unlikely to abscond otherwise than by leaving New Zealand. She said there was "presumptive evidence generally" that people in Mr Mohebbi's situation often abscond and there was no specific evidence that Mr Mohebbi would not abscond.

The Judge appears to have assumed an evidential burden on Mr Mohebbi to satisfy the Court that he will not abscond. Mr Mohebbi has a loyal partner who appears to have remained steadfast to him and to the family throughout his lengthy period in custody. It would no doubt be a condition of his release that Mr Mohebbi resides with his family at a specified address. Since the stable family background is likely to be a significant, if not his greatest asset in any further attempts to gain permanent residency in New Zealand, it has to be considered unlikely that he would attempt to abscond otherwise than by leaving New Zealand.

The reasons stated in Mr MacRae's affidavit of 24 April 2007 filed in support of the further extension of warrant of commitment, included that Mr Mohebbi did not voluntarily depart New Zealand when his appeal to the Removal Review Authority was dismissed on 31 January 2003, that he has admitted working unlawfully in New Zealand since the expiry of his last permit on 25 March 2001, that he has made no attempt whatsoever to leave New Zealand, that he has refused to co-operate to obtain a travel document and that he had stated that he has no intention of leaving New Zealand. None of those reasons seems to me to provide evidence that Mr Mohebbi is likely to abscond otherwise than by leaving New Zealand. They seem to be directed at his refusal to leave New Zealand. I consider irrelevant to this inquiry the matter apparently taken into account by the Judge that Mr Mohebbi's "stable and acknowledgedly firm relationship and two children", is a situation he cannot claim to his advantage because it is a situation he himself created "in the shadow of immigration difficulties".

g) The danger of re-offending – it is relevant at this point to refer to an observation of Courtney J at [60] of the judgment in *Yadegary*:

I am mindful of the fact that the concerns sparked by the Mohebbi case seem to arise as much from the fact that Mr Mohebbi had convictions for violence as from the fact that he was obstructing the removal process.

The reference to convictions for violence appears to be incorrect. I was advised that Courtney J's information on this aspect was limited to the judgment of this Court on Mr Mohebbi's application for a writ of habeas corpus.

As recorded in the District Court judgment, Mr Mohebbi has convictions for bigamy and for breach of a protection order. The conviction for bigamy arose because he married his second wife in New Zealand without first obtaining a dissolution of his first marriage which had taken place in Iran. His evidence in an affidavit dated 23 August 2006 filed in the District Court proceedings is that he believed a divorce had been obtained in Iran but subsequently found out that the dissolution went through the Courts in Iran in 1999, after his marriage to Jaran Ahmadian in New Zealand. He was sentenced to three months periodic detention for bigamy.

The charges relating to the breach of protection order arose from events in 2001 when the applicant and his wife were involved in a bitter custody dispute over their daughter. He apparently left messages on his wife's telephone relating to his proposed contact with their daughter. She complained and he was charged. Mr Mohebbi was convicted of breaching the protection order and fined $300 and ordered to pay Court costs of $130. There was no violence involved. The Judge recorded in her judgment at [45] that the convictions did not involve violence. She also referred to community support as evidenced in letters received from the Catholic community and Catholic Priests. The Judge expressed concern about the conviction for bigamy because it involved a false declaration which showed that Mr Mohebbi was prepared to falsify official documents to his own advantage (at [50]).

In affidavit evidence filed by INZ in the District Court there was also reference to a complaint of sexual harassment against Mr Mohebbi and a complaint by a female passenger of assault by him as a taxi driver. Neither of these allegations were substantiated. Mr Mohebbi says they were false.

The Judge refers to these matters in [9] to [11] of her judgment and also to a charge of taking a document for pecuniary advantage in the year 2000, which was withdrawn by leave. Quite properly, she stated that she did not place weight on them and that it was important to distinguish them from the two charges of which he had been convicted.

It cannot be said on the available evidence, that Mr Mohebbi's criminal history gives rise to concerns that there is a high risk of reoffending, let alone violent offending.

This is in marked contrast to the circumstances in a case such as *The Queen (on the application of A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 where

A from Somalia was unlawfully in the United Kingdom having been declined asylum. In 1998 he had been convicted of the rape and indecent assault of a 13 year old girl. He was issued with a deportation order by the Home Office. He was detained in custody because repatriation to Somalia was not possible. During his time in prison he had received 14 adjudications, six of which were for fighting. He was assessed as of high risk of sexual offending on release because he was continuing to deny guilt and had not been on a sex offender treatment programme.

I refer to the case of *A* by way of contrast with the circumstances in this case. The criminal history of *A* presented the Court with the necessity to factor into the balancing exercise, both a high risk of serious re-offending and of absconding, neither of which is present in the case of Mr Mohebbi. *A* was not being obstructive to his deportation; the opportunity for voluntary return to Somalia had passed.

In balancing the relevant factors the Court noted that the risk of reoffending was high and that given the nature of his previous offending this would have been a very worrying prospect. Further, that the risk of A absconding if he were at liberty was as high as it could be. The detention was found to have been unlawful for nearly three years. But the Court held that A's detention, despite its length, was in the circumstances reasonably necessary for the purposes of the deportation order and so, lawful. While the risk to public safety were the detainee to be released might not be the principal purpose of the power to detain, the statutory power to deport was exercised because deportation was determined to be conducive to the public good.

[74] I have already concluded that if detention of a person to whom s 60(6) applies would be unreasonable then exceptional circumstances will exist for the purpose of s 60(6).

[75] Balancing the relevant factors of the length of Mr Mohebbi's detention, the uncertainty as to when an agreement with Iran for the repatriation of involuntary nationals might be reached (which leaves open the prospect of an indeterminate period of detention), the adverse effects of continuing detention on Mr Mohebbi and particularly on his family - against the absence of any evidence that he is at risk of absconding otherwise than by leaving New Zealand and that there is no basis on the evidence of his criminal history to suggest that he will re-offend, particularly violently, if released into the community, I conclude that his on-going detention would be unreasonable.

[76] However, that assessment must then be measured against the factor at which s 60(6)(b) is directed, his obstructiveness by refusing to sign papers that would enable the removal order to be executed. This factor must be accorded significant weight. But it cannot be allowed to become a trump card which will necessarily be treated as outweighing the unreasonableness of on-going detention, for Parliament has not so provided.

[77] Mr Mohebbi has been continuously in custody for approximately three years nine months. He has not been convicted of any criminal offence; he has not even been charged with an offence. I find that, notwithstanding Mr Mohebbi's undoubted obstructiveness (and accepting that his obstructiveness has been at the "high end" as submitted by the Crown, although it relates solely to his refusal to re-enter Iran), in all the circumstances, his on-going detention is unreasonable. Accordingly, I find there are exceptional circumstances for the purposes of s 60(6). Mr Mohebbi is entitled to be released on appropriate conditions under s 60(5) of the Act.

[78] I hold that the Judge erred in finding that time alone cannot equate to exceptional circumstances to justify release. Further, I find that the factors she considered in determining whether there were exceptional circumstances, which are summarised at [34] above, were factors directed more to whether Mr Mohebbi would be a good citizen than whether his continued detention was unreasonable. They were largely irrelevant to that question, and led to a decision that was ultimately unreasonable.

[79] It is important to note that this judgment is concerned with the issue of Mr Mohebbi's continued detention in custody. It is not concerned with his right to be or remain in New

Zealand. I express no view on that. As stated at the start of this judgment, Mr Mohebbi is unlawfully in New Zealand.

Has detention become arbitrary?

[80] Section 22 of the Bill of Rights affirms that everyone has the right not to be arbitrarily detained.

[81] Detention will be arbitrary if it is "… capricious, unreasoned, without reasonable cause": *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [34].

[82] Detention which is initially lawful, would become arbitrary and unlawful if the purpose of detention under the Act could not be fulfilled and the detention was therefore otherwise indefinite or permanent: *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [88].

[83] In this case, while the purpose of the Act may still be served by ongoing detention, I have found that Mr Mohebbi's detention has become unreasonable, which gives rise to exceptional circumstances under s 60(6). I consider it also renders his detention arbitrary. Under either head, Mr Mohebbi is entitled to conditional release.

[84] Summary of conclusions

a) A right of appeal to the High Court against decisions of a District Court Judge under s 60 of the Act is available under s 72 District Courts Act.

b) The purpose of detention is that stated in s 60(2): to enable execution of the removal order.

c) That purpose is being served by the on-going detention of Mr Mohebbi while the New Zealand Government continues to advance the diplomatic process towards an agreement for involuntary repatriation of Iranian nationals. However, there is no certainty as to whether or when an agreement may be concluded to enable the repatriation of persons who obstruct their removal, such as Mr Mohebbi.

d) The length of detention can amount to an *exceptional circumstance* under s 60(6) justifying release, although the detainee deliberately obstructs his removal. Deliberate obstruction is a factor to be accorded significant weight, but it cannot override or trump all other relevant factors.

e) A balancing of all relevant circumstances in the case of Mr Mohebbi, including particularly the length of his detention – 3 years nine months continued detention preceded by a previous five months detention under the Act – leads to the conclusion that exceptional circumstances exist which justify his conditional release under s 60(5).

f) Mr Mohebbi's continuing detention has become unreasonable and arbitrary.

Relief

[85] The appeal is allowed. The decision of the District Court is quashed. I order that Mr Mohebbi be released on conditions under s 60(5). I do not have the information on which to establish the appropriate conditions. I remit the matter to the District Court for conditions to be set. The conditional release of Mr Mohebbi should now be implemented as a matter of urgency.

Non-publication order

[86] The affidavit of Arron Christian Baker sworn 15 August 2007 filed in this proceeding is not to be published or available for search on the Court file without the leave of a Judge of this Court.

Solicitors for the applicant: *Ryken & Associates* (Auckland)

Solicitors for the defendants: *Meredith Connell* (Auckland)