Case No: CO/4012/2014

Neutral Citation Number: [2014] EWHC 4265 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2014

Before :

NEIL GARNHAM QC

- -

Between :

BCT	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Christopher Jacobs (instructed by **Leigh Day**) for the **Claimant**
John Paul Waite (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 11/12/14

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Judgment

Neil Garnham QC :

Introduction

1. At the commencement of the hearing of this application for judicial review, I granted the Claimant's request for an order for anonymity. In consequence, he will be known hereafter as "BCT".

2. BCT is a national of the Democratic Republic of Congo ("the DRC"). Between 16 January 2013 and 30 October 2014 he was held in immigration detention pursuant to the direction of the Secretary of State. He alleges that for some or all of that period his detention was unlawful. Central to this case is the relevance of the decision of Phillips J in P&R (DRC) v Secretary of State for the Home Department [2013] EWHC 3879 (Admin) (hereafter "P (DRC)") to removals of foreign national offenders (FNOs) to the DRC.

The History

3. BCT arrived in the United Kingdom on 23 January 2005. On the 23 November 2005 he applied for indefinite leave to remain which was granted on 29 September 2009.

4. Since his arrival in this country, BCT has been found guilty of a number of criminal offences. On 12 February 2009 he was convicted of threatening behaviour. On 2 August 2010 he was convicted of an offence of possession of cannabis. On 14 June 2011 he was convicted of possession of a class A drug with intent to supply. On 25 October 2011 he was convicted of possession of class B and C drugs. On 17 November 2011 he was convicted of a failure to comply with a community order. On 23 January 2012 he was convicted of a second offence of failing to comply with a community order.

5. BCT was convicted of 2 counts of attempted theft on 27 March 2012 and sentenced to 25 days imprisonment. On 7 August 2012 he was convicted of robbery and sentenced to 20 months imprisonment. On 5 October 2012 the Claimant was notified of his liability for automatic detention. On 9 January 2013 the Claimant was told of the Secretary of State's intention to detain him upon completion of that sentence with a view to his deportation. As noted above, on 16 January 2013 the Claimant was detained under immigration powers.

6. The Claimant applied for asylum on 22 January 2013 and on 18 March 2013 was made the subject of a deportation order. His asylum claim was refused on 19 March and the deportation order served. The Claimant appealed against that deportation order, but on 6 August 2013 the appeal was refused. On 23 September the Claimant applied to revoke the deportation order. On 6 June 2014 the Secretary of State refused to do so.

7. These proceedings were commenced on 26 August. Permission to apply for judicial review was granted by Andrews J on 24 September. On 17 October 2014 the appeal against the refusal to revoke the deportation order was allowed on asylum and Article 3 ECHR grounds following the findings in P(DRC). The Secretary of State has been granted permission to appeal by the Upper Tribunal. On the 30 October the Claimant was released from detention.

8. It is also of note that in February 2014 the Secretary of State commissioned a Country Policy Bulletin on the DRC. That bulletin recorded a meeting on 15 January 2014 at the Home Office between an official from the Foreign & Commonwealth Office and the Directeur Central de la Chancellerie at the Direction General de Migration ("DGM"). The DGM is responsible for border control and is part of the Ministry of the interior in the DRC.

The Law

9. The fundamental legal principles that underlie this challenge are not in dispute.

10. The Secretary of State's power to detain pending removal is set out at Schedule 3 of the Immigration Act 1971 at paragraph 2(2):

> "*Where notice has been given in accordance with regulations under section 105 of the Nationality Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.*"

11. That statutory power is not subject to any express limitations of time. However, since the decision of Woolf J in R v Governor of Durham Prison, Ex p Hardial Singh [1984] 1 WLR 704 certain implicit limitations have been recognised. Those limitations were summarised by Dyson LJ in R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888, [2003] INLR 196 as follows:

> "*(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*
>
> *(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;*
>
> *(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;*
>
> *(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.*"

12. It is agreed that the burden is on the Secretary of State to prove the legality of detention throughout the period: ***R (I) v Secretary of State*** [2003] INLR 196 at [28], and that when considering the ***Hardial Singh*** factors, the Court acts as primary decision-maker in determining what period of detention is reasonable: ***LE (Jamaica)*** [2012] EWCA Civ 597 at [29].

13. Referring to his judgment in ***R (I) v Secretary of State***, Lord Dyson said, at paragraph 104 in R (Lumba) v Secretary of State for the Home Department [2012] 1 A.C. 245, that it is*:*

> "*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 pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971 . But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he*

> *will abscond; and the danger that, if released, he will commit criminal offences.*"

14. As to the risk of absconding, in *R (A) v. SSHD* [2007] EWCA Civ 804 at [54] Toulson LJ said 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.*"

15. As to the risk of reoffending, he said at [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.*"

16. In Lumba, Lord Dyson said at [121]

> "*The risk of absconding and reoffending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place*."

The competing arguments

17. Mr Christopher Jacobs, for the Claimant, argues that the detention of the Claimant has been unlawful, as contrary to the principles in Hardial Singh, since 16 January 2013 when he was first detained under immigration powers. In the alternative, he argues that the detention became unlawful on 9 December 2013 when Phillips J handed down his judgment in P (DRC). In the further alternative, Mr Jacobs argues that the detention was unlawful from 30 January 2014, the date on which the Secretary of State abandoned her appeal in P (DRC).

18. The basis of the alleged unlawfulness is the alleged inability of the Secretary of State to effect deportation within a reasonable period. That inability is said to flow from the conditions pertaining in DRC as recognised in P (DRC).

19. In his oral submissions, Mr Jacobs argued, albeit somewhat faintly, that from 5 July 2012, it has become impossible lawfully to remove foreign national offenders ("FNOs") to the DRC and therefore unlawful to detain them. 5 July 2012 was the date of an order of Collins J restraining removal of a criminal deportee to the DRC on the basis of the report of comments made by the DRC ambassador to the UK. Mr Jacobs argues that the Secretary of State made

no proper assessment of whether the Claimant could be removed during the first year of his immigration detention. He says that from October 2013 the periodic detention reviews conducted by the Secretary of State acknowledged that the Claimant could not be removed pending the outcome of P (DRC).

20. The bulk of Mr Jacobs' submissions orally were directed to the detention following the decision of the Secretary of State not to pursue an appeal against the judgment of Phillips J. He said that the Claimant had not been removable within a reasonable period from the time of that decision and that the Secretary of State acted in breach of the Hardial Singh in failing to release him.

21. At the centre of Mr Jacobs case is the decision in P (DRC) and it is necessary to consider that decision closely. I set out below, at a little length, the relevant passages of the judgment. The learned Judge began by identifying the question raised by the proceedings and the factual backgrounds. I set out that which was relevant to Mr P.

> "*1 These proceedings raise the question of whether persons returned to the Democratic Republic of Congo ("the DRC") against their will are at real risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights simply by reason of their status as either (a) failed asylum seekers or (b) criminal deportees…*
>
> *7. P is also a national of the DRC, born in 1987. He arrived in the United Kingdom in 2001 to join his parents and was granted indefinite leave to remain in 2003. Between July 2003 and May 2004 he was convicted of offences of street robbery, affray and assault on a police officer. In June 2006 he was convicted at Blackfriars Crown Court of robbery, sentenced to detention for public protection with a minimum term of 2 years 6 months and placed in a young offender institution. On 14 March 2011 a deportation order was made against P. His appeals against that order and against the refusal of his claim for asylum were unsuccessful. On 14 May 2012 an emergency Travel Document was agreed with the DRC authorities. P was detained on 28 June 2012 and deportation arrangements were set for 5 July 2012.*
>
> *8 On 3 July 2012 Mary Glindon MP sent an e-mail to Halliday Reeves Solicitors, who were acting for a DRC national who was about to be returned to that country on the same flight as R and P. The e-mail included the following passage:*
>
> > *Last week I attended a meeting organised by the All Party Parliamentary Group, which was addressed by the [DRC] Ambassador, Barnabe Kikaya Bin Karubi. I raised the issue of the failed asylum seekers plight.He type-cast all of these people saying that they have come to this country as members of the former oppressive regime in the DCR, are here because we have a good benefit system and having committed terrible crimes in this country have to be suitably punished when they return to the Congo. As Ambassador, he signs the deportation papers!"…*
>
> *12 On 16 August 2012 the DRC Ambassador wrote to Mary Glindon MP, copied to the UKBA among others, stating that he had been*

misquoted as to what he had said to the All Party Parliamentary Group. The Ambassador stated that:

> *"… at your question regarding the return of asylum seekers to the [DRC] who, allegedly are arrested, tortured and humiliated, I responded by saying that it was not the case. Congolese citizens who failed to acquire asylum in the United Kingdom are reunited with their families upon arrival…*
>
> *Nevertheless, people who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the congolese justice system to clarify their situation".*"

22. The Judge then described the evidence from the Home Office and the position adopted by the Secretary of State:

> "*13 In the meantime, between 18 and 28 June 2012, the Country of Origin Information Service of the UKBA had undertaken a Fact Finding Mission ("the FFM") to Kinshasa, DRC, to acquire information about the procedure for and treatment of Congolese nationals returning to the DRC from the United Kingdom and western Europe. The results of the FFM were published in November 2012 in a report running to 107 pages, setting out information obtained from a large number of interlocutors…*
>
> *14 In the light of the FFM report, the UKBA issued a Country Policy Bulletin ("the Bulletin") dated November 2012 to confirm its policy in relation to returns to the DRC. The Bulletin also considered the* Unsafe Return *report, but noted (paragraph 5.2.6) that the UKBA had not been provided with details of the individuals making the allegations, despite the fact that they were stated to have been in the asylum process and therefore known to the UKBA. The Bulletin further noted that the United Nations (which had facilitated 206,541 voluntary returns to the DRC in 2004 to 2010), Amnesty International, Human Rights Watch, the 11 states participating in the Intergovernmental Consultation on Migration, Asylum and Refugees (which had undertaken over 419 enforced returns to the DRC in the period 2009–2012) had all reported that they were not aware of any mistreatment of returnees. Three European Embassies in Kinshasa (Belgium, Switzerland and France) also reported no awareness of the mistreatment or detention of returnees, save that the French Embassy reported that the DRC authorities would detain a known foreign national offender…*
>
> *16 As for the risk of detention of returnees, the Bulletin stated as follows (paragraph 11.1):*
>
> > *"In [the FFM report] the weight of evidence is that detention occurs only under certain circumstances; for example the French Embassy stated 'DGM [Direction Generale de Migration] do not detain people for immigration matters. This happens if you have committed crimes here or for example a returnee has committed a crime [the example given was murder] in the country the person has been returned from. In*

> *which case, the DGM will be looking out for their arrival. Therefore people are not detained for being returned but for their crimes. DGM does not have detention facilities at the airport. They detain people in town at their headquarters'".*

and concluded that (paragraph 11.7 and 11.8):

> *"The consensus within the FFM is that returnees per se do not face a risk of detention, unless they committed a known offence, or have a recognised profile of opposition to the DRC government. ... Whilst in general prison conditions in the DRC are severe and likely to reach the Article 3 threshold ... consideration needs to be given to the individual facts, in particular (a) the reasons for any possible detention, (b) the likely length and type of detention and the individual's gender, age and state of health"...*

44 It is clear, and Mr Blundell did not dispute, that the position with regard to criminal deportees is significantly different from that of failed asylum seekers. In the first place, the starting point is different because the position of criminal deportees was not considered in BK (although certain of the evidence may have related to "deportees"). Further, the following two propositions are not seriously in dispute:

> *i)First, that criminal deportees to the DRC, if identified as such, will be detained on arrival for an indeterminate period. The DRC Ambassador's official statement makes the unequivocal statement that "people who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the Congolese justice system to clarify their situation" . Further, there is ample evidence in the FFM report, most convincingly in the response from the French Embassy (see paragraph 16 above), that the DRC Ambassador's statement reflects what occurs in practice. Another interlocutor reported that returnees with a criminal record "are taken straight to prison" . It is clear that the 'detention' referred to in this content is not merely a short period of administrative detention at the airport for immigration purposes (several interlocutors confirming that there are no detention facilities at the airport), but incarceration in a prison or detention facility in or around Kinshasa.*
>
> *ii) Second, such detention is likely to be in conditions which contravene Article 3 of the ECHR . The Bulletin acknowledges (paragraph 11.8) that prison conditions in the DRC are severe and likely to reach the Article 3 threshold. This was more than confirmed by a US State Department Report dated 19 April 2013 which records that conditions in most prisons remained severe and life threatening: "Serious threats to life and health were widespread and included violence, particularly rape; food shortages; and inadequate food, potable water, space, sanitation, ventilation, temperature control, lighting and medical care. Death from starvation or disease was not uncommon" . Mr Blundell*

> *advanced an argument that such concerns do not extend to DGM detention facilities in which deportees are likely to be held. However, the same Report goes on to state: "Even harsher conditions prevailed in small detention centres, which were extremely overcrowded; had no toilets, mattresses, or medical care; and provided detainees with insufficient amounts of light, fresh air and water"*
>
> *45 Given the above, it is not surprising that the Defendant appeared to accept in the decision letter in R's case (see paragraph 21 above) that those who had been convicted of a criminal offence in the UK "may be at risk" on return to the DRC.*
>
> *46 The Defendant's reasoning for entirely discounting that acknowledged risk in the case of P (and criminal deportees more generally) is that the UKBA's re-documentation process does not identify a returnee as a criminal deportee, so there is no real risk to them unless the criminal offences in question had generated publicity identifying the offender as a DRC national. This reasoning was advanced in the Bulletin, in P's decision letter and in Mr Blundell's skeleton argument for these proceedings, in which Mr Blundell argued that P was not therefore in the position of having to lie to avoid his status being revealed.*
>
> *47 However, it was recognised in BK that returnees from the UK "will be questioned with a view to determining what type of expellee they are; and in particular whether they are either a failed asylum seeker or a deportee" (paragraph 188) and almost all of the interlocutors cited in the FFM report confirmed that returnees are questioned on arrival by the DGM. Because of such questioning, the UKBA, in paragraph 9.11 of the Bulletin, advised that case owners should review each case to determine whether the applicant falls into the risk categories identified in Country Guidance, whilst taking into consideration appropriate evidence which post dates BK .*
>
> *48 Acknowledging that the above material demonstrated that it was highly likely (if not inevitable) that P would be questioned about his status, Mr Blundell's fall-back position was that a realistic view should be taken as to how P would answer such questions. Given that he has been held to have lied in immigration proceedings in this country, it could safely be assumed, Mr Blundell argued, that he would lie to hide the fact of his convictions rather than face the potentially serious consequences of admitting them.*"

23. The Judge considered the Supreme Court's decision in RT (Zimbabwe) v. Secretary of State for the Home Department [2013] 1 AC 152 on the question whether an asylum seeker can reasonably be expected to lie to authorities on his return to his country of origin in order to avoid persecution, and concluded:

> "*52 In the case of criminal deportees to DRC, it is clear that they will be interrogated on arrival, no doubt by professional, skilled and experienced immigration officials. According to the French embassy, those officials are specifically looking out for criminal deportees and no doubt able to probe for information and look for signs which would demonstrate that a returnee has been imprisoned in the United*

Kingdom. There would seem to be an obvious and serious risk that a criminal deportee such as P would not be able to hide the fact of his convictions in the face of interrogation designed to elicit that very fact.

53 Further, it must be assumed that immigration officials in the DRC are able to conduct internet searches in relation to a person they are interrogating. There must be a real and substantial risk that an offence which attracted a custodial sentence of 12 months or more (so as to give rise to automatic deportation) will have been reported in some form, even if the case did not generate substantial publicity. It would not seem to matter whether DRC nationality was mentioned in any report if the person was named. It is also relevant to note in this context that the FFM report recorded evidence from the police in Kinshasa that the DGM sends a team to the United Kingdom to identify Congolese who are to be returned to the DRC and that "the same team who had identified them abroad (including the UK) welcome them here" .

54 In the light of the above discussion, and with considerable regret given the nature and extent of P's criminal record in this country, I am satisfied that P's application to revoke the Deportation Order made against him cannot be considered to be clearly unfounded. As the Defendant's decision to the contrary was based on the same undisputed evidence of the attitude of the DRC authorities which I have considered, it necessarily follows that I find that decision to be irrational. Indeed, in my judgment there is a real and substantial risk that P, in common with other criminal deportees (who have served the sentences imposed on them for their crimes in this country), would be subjected to further imprisonment and ill-treatment if returned to the DRC."

24. Mr Jacobs argued that on the basis of that decision it was clear that FNO's returned to the DRC would be detained on arrival. The detention would be in a prison or detention facility in or around Kinshasa. Such detention would be likely to contravene Art 3 ECHR. FNOs would be questioned upon return by skilled officials and there was an obvious risk that they would not be able to conceal their criminal activities, nor could the courts expect them to do so. There was then a real and substantial risk that FNOs would be subjected to further imprisonment and ill-treatment if returned to the DRC.

25. Mr Jacobs made a number of additional points.

26. First, he said that the effect of P (DRC) had been to bring to an end enforced removals to the DRC. He referred to the first witness statement of Ms Anne Brewer dated 15 October 2014. Ms Brewer said that between 1 July 2012 and 31 December 2013, 16 FNOs were removed from the UK to the DRC, 10 of whom were enforced returns. By contrast, in the first three quarters of 2014 there were no FNO enforced returns. She went on to say that the Home Office continued to seek to return DRC nationals. One FNO was returned voluntarily on 13 October 2014. That return was witnessed by officials from the British Embassy. Enforced returns of two FNOs in October 2014 failed for differing reasons. In her second statement dated 11 November 2014, Ms Brewer says that on 16 October 2014 a FNO enforced return took place, but, as the letter she attaches to her statement makes clear, that return was closely supervised by British officials.

27. Mr Jacobs says that, in effect, there were no returns during the period of the Claimant's detention in 2014 to which the Secretary of State could point to justify a conclusion that returns were practicable.

28. Second, Mr Jacobs says that the Secretary of State was adopting what amounted to a *policy* of not returning during this period. He refers to an observation of the Claimant in his bail application of 13 January 2014. He said "*I have been detained for 13 months and my removal from the UK cannot happen soon because the UK is currently operating a policy of non-removal of people with criminal records to DRC*". In her bail summary the Secretary of State responded

> "*It is claimed that the UK is currently operating a policy of non-removal of people with criminal records to DRC. In the light of the High Court judgment in the case of P& R (DRC) the Home Office and Foreign & Commonwealth Office are urgently liaising with officials in the Democratic Republic of Congo to address the concerns raised in the judgment in respect of foreign national offenders. It is noted that the Secretary of State for the Home Department has permission to appeal against the judgment to the Court of Appeal. Whilst removal may not be currently happening once all appeal rights are exhausted on both sides, which will happen within a reasonable timescale removal will be addressed.*"

29. Third, Mr Jacobs said that the Secretary of State's reliance on the February 2014 bulletin referred to at paragraph 8 above is misconceived. That is a matter to which I return below.

30. Mr Jacobs argues that, these points notwithstanding, the Secretary of State has relied on the February 2014 bulletin in detention reviews during 2014 and has failed to have proper regard to the effect of the judgment in P (DRC).

31. Finally, Mr Jacobs dealt with the risk of harm to the public and the risk of absconding. He says that the risk of harm to the public was low to medium. He says that the Claimant was at a low/medium risk of absconding from February to April 2013 and a low/medium risk, at the highest, from 19 September 2013. He says it is difficult to see how the Claimant could have posed any risk of absconding after the judgment in P (DRC). He argues that the assessment in August 2014 that the Claimant posed "*a high risk of absconding as he has been served with his deportation Order, is ARE [appeal rights exhausted]; the ETD [emergency travel documentation] is with the DRC authorities"* was unjustified.

32. Mr Waite, for the Secretary of State, submits that unlike many other cases which turn on the prospects of removal, in BCT's case there was no logistical obstacle in the path of the Claimant's deportation. He says that until the judgment of Phillips J in P (DRC) there was no case law to the effect that removal of FNO to the DRC would infringe the individuals article 3 rights.

33. He points out that the issue in P (DRC) was whether the article 3 claim was "clearly unfounded", an issue that was decided without the Judge hearing oral evidence. He submits that the decision was obiter as to the question of whether there is in fact a real risk of ill-treatment upon return. He says that, in any event, matters have moved on since that decision was heard and that new evidence has been obtained and removals have resumed.

34. He argues that the Secretary of State was entitled to proceed on the basis that removal was possible within a reasonable period even if that had to await the provision of country guidance by the Tribunal in 2015. Mr Waite also drew my attention to the decision of the Court of

Appeal in R (Muqtaar) v SSHD [2012] EWCA Civ 1270, an important case to which I return below.

Discussion

35. The Claimant is a foreign national with a string of previous convictions, the last of which was for an offence of robbery for which he received a prison sentence of 20 months. The task of assessing his risk of reoffending and his risk of absconding falls to me. I must do so on the basis of the information available to the Secretary of State during the period under review. In my judgment, the views of the Defendant's officials during their various detention reviews are informative, but cannot be determinative.

36. The Claimant was convicted of three drug offences in the space of 15 months from the time he was granted indefinite leave to remain. He was twice convicted of failures to comply with community orders in a period of three months from November 2011. Within two months of being subjected to curfew requirements and electronic tagging on 23 January 2012, he was convicted of two counts of attempted theft. Within five months of that conviction he was convicted of robbery. It seems to me that the likelihood of reoffending were he to be released was high.

37. It was suggested on behalf of the Claimant that, with the exception of the last offence, the Claimant's offending was not of the most serious kind. I accept that submission. But I see no reason why the public should accept the risk of a foreign national, with no rights to remain in the UK, offending repeatedly, whatever the nature of the offence. And when, as here, an FNO's past offending suggests a pattern of behaviour getting worse over time, the weight to be attached to the risk of reoffending increases.

38. If the risk of reoffending was high, it seems to me that the risk of absconding was also high. The Claimant was unlikely simply to hand himself in after committing another offence. The relevance of the likelihood of reoffending to the likelihood of absconding was acknowledged by the Supreme Court in Lumba [2011] UKSC 12 where at 109 Lord Dyson said:

> "*But the risk of reoffending is a relevant factor even if the appellants are right in saying that it is relevant only when there is also a risk of absconding. As Lord Rodger of Earlsferry JSC pointed out in argument, if a person re-offends there is a risk that he will abscond so as to evade arrest or if he is arrested that he will be prosecuted and receive a custodial sentence. Either way, his reoffending will impede his deportation.*"

39. I do not accept Mr Jacobs' submission that the risk of absconding was low once the Claimant knew of the decision in P (DRC). The Claimant could not be confident of the effect of that decision on the Secretary of State's policy on returning FNOs, nor of the outcome of further enquiries by the British government of the Congolese government. In any event, for the reasons just explained, if he were to reoffend, there was a substantial risk he would abscond. Furthermore, it seems to me that the Secretary of State's assessment in August 2013 was reasonable; service of a deportation order, the fact that his appeal rights were exhausted at that time, and the fact that the emergency travel documentation was with the DRC authorities were all factors that would tend further to increase the risk of the Claimant absconding.

40. It seems to me that the risk of reoffending and absconding were relevant throughout the period of the Claimant's detention. They certainly justified detention whilst the Secretary of State awaited judgment in P (DRC), and considered the prospects of an appeal.

41. That, it seems to me, is the answer to the submission somewhat tentatively advanced by Mr Jacobs in respect of the period prior to the Secretary of State's decision not to appeal the judgment of Phillips J in P(DRC). The decision of Collins J to restrain removal of the detainee "D" was not a direction that all DRC detainees should immediately be released. Collins J's judgment indicated that the ambassador's statement should be investigated and that the removal of the detainee concerned could not go ahead at that time, nothing more. The Secretary of State was entitled to reconsider the evidence, seek to obtain further information and consider her position. That was what she was doing when this Claimant was detained and, in my judgment, it was perfectly reasonable for her to continue doing so up until the time of the handing down of the judgment in P(DRC), and thereafter whilst she was contemplating an appeal. In my judgment, the challenge to the lawfulness of the detention of this Claimant up to 30 January 2014 is hopeless.

42. Different considerations apply, however, after that date. In abandoning the proposed appeal, the Secretary of State indicated (in the statement of reasons) that she accepted that Philips J's decision was correct. It is right, as Mr Waite submits, that the issue in the case was whether the Secretary of State's certificate to the effect that P's claim was "clearly unfounded" was flawed; it was not a decision on the merits of P's Article 3 EHCR argument. Technically, Mr Waite is right to assert that the decision was obiter as to the question of whether there was, in fact, a real risk of ill-treatment upon return.

43. Nonetheless, it seems to me that the findings by the judge and the concessions made by the Secretary of State mean that in reviewing the possibility of return to the DRC, and therefore the lawfulness of any continued detention, the Secretary of State first, and now I, should proceed on the basis that, absent new evidence, certain assumptions about DRC would need to have been made. Absent new evidence, it would be necessary to assume that P would be detained on return to DRC, that he would be imprisoned or detained in or near Kinshasa and that such detention would be in conditions that offended Article 3 ECHR. If that were right, removal would be unlawful.

44. The issue, therefore, is first whether the Secretary of State has obtained new evidence of sufficient weight to make a reassessment of the conditions on likely return possible and justifiable, and second, whether the delay in obtaining that evidence, assessing it and applying it to the Claimant's case is such as to render detention in the meanwhile unlawful.

45. The Secretary of State relies primarily on the February 2014 DRC Policy Bulletin.

46. Mr Waite says that extensive discussions have taken place with the Directeur Central de la Chancellerie at the Congolese DGM during 2014. This has resulted in the Defendant concluding (for a sound evidential reason, she says) that

> "*there is no evidence of any difference in the management of the returns process by the DRC authorities of FAS [former asylum seekers] and FNO returnees. The DRC authorities have no interest in criminal proceedings outside of the DRC, only in outstanding criminal offences committed within the DRC*"

47. The Secretary of State says that a survey of member states of the Intergovernmental consultations on migration, asylum and refugees in December 2013, after the judgment in P was handed down, revealed that other states (with the exception of Canada) have continued with the removal of FNOs. None are recorded as expressing any concerns about their treatment following removal. He says that UK returns to the DRC resumed in October 2014. He points out that Ms Brewer says in her third statement that one enforced return took place on 13 November 2013 and two more on 5 December 2014.

48. In response, Mr Jacobs makes five points. He says first that the source at the DGM is anonymous which precludes the reader of the report from knowing how senior he was. Second, he says that the unnamed source gave no explanation as to whether he was saying that the other sources were wrong or whether things have changed materially since 2013. Third, he says that the source provides no reason why the ambassador was wrong. Fourth, he says that the DGM source conflicts with the evidence not only from the ambassador but also from NGOs and the French Embassy. Fifth, he says the DGM source's views have never been tested.

49. In my judgment Mr Waite's submissions are compelling. Since the quashing of the certificate in P's case, the Secretary of State has obtained what amounts to assurances at a senior level in the Congolese government that the management of returning FNOs is no different from the management of returning failed asylum seekers, (about whom there had previously been no concerns). What the Directeur Central de la Chancellerie has said to the Foreign and Commonwealth Office about the lack of Congolese interest in criminal offences abroad precisely contradicts what the ambassador said. And the experience of other democratic states who have continued returning FNOs to the DRC supports the Directeur's position.

50. Even if, which I do not accept, it could once have been said that the UK had adopted "a policy" of not returning FNOs, it is plain from the evidence of Ms Brewer that that is no longer the case.

51. The fact that the senior Congolese official has not been named is, in my judgment, of marginal relevance given that the conversation took place at the Home Office between an official of the FCO and a high ranking official of DRC. The absence of commentary on the ambassador's statement seems to me entirely unsurprising; it was hardly likely that a senior official would volunteer either a critical observation about the ambassador's remarks or an analysis of change of Congolese policy. Plainly the effect of the February 2014 evidence is different from that which went before, but that does not undermine it when the former comes from a credible source. And it is no longer possible to maintain that the new evidence has not been tested given both the experience of other countries and the recent experience of the United Kingdom.

52. What is apparent, however, is that uncertainty or concern about the position in the DRC resulted in a prolonged pause in the practice of returning FNOs to the DRC. And the question arises as to whether that lengthy pause itself rendered unlawful the Claimant's continued detention, even taking into account the likelihood of his reoffending or absconding on release.

53. On that topic, in my judgment, the decision of the Court of Appeal in R (Muqtaar) v SSHD is important. Mr Muqtaar was a Somali national with convictions for a number of criminal offences in the UK, including two counts of robbery for which he had been sentenced to 2 years imprisonment. He was described by the Court of Appeal as "*a chaotic recidivist*". On 8 February 2008 he was eligible for release from prison but was detained under immigration powers pending the making of a deportation order against him. The deportation order was signed and on 2 June 2009 removal directions were set. On the day before those directions were due to take effect they were cancelled following receipt of a rule 39 indication from the ECtHR. On 28 June 2011 the ECtHR gave judgment in favour of the Claimant's position in a case called Sufi and Elmi v UK.

54. The Deputy Judge in Muqtaar held that although the applications in Sufi and Elmi had "*reasonable to good prospects of success, that did not prevent there being a realistic prospect of the Secretary of State deporting the appellant within a reasonable time*". The Court of Appeal upheld that conclusion. Richards LJ said at paragraph 36:

> "*at the time of receipt of the rule 39 indication there was a realistic prospect that the ECtHR proceedings concerning removal to Somalia would be resolved within a reasonable period: it was not apparent that they would drag on as in practice they did. Nor was it apparent that the ECtHR's final decision would be such as to prevent the appellant's removal. I stress "apparent", because that is the word used in the approved formulation of Hardial Singh and in my view it is important not to water it down so as to cover situations where the prospect of removal within a reasonable period is merely uncertain.*"

55. In my judgment, the same analysis applies here. The judgment in P(DRC) meant that the Secretary of State had to reconsider her position and reassess the evidence as to the consequences of a return to the DRC. Within a relatively short period of time new material emerged, notably the discussion between the Foreign Office and the Directeur Central de la Chancellerie at the DGM, which suggested that the position may not be as concerning as the Ambassador had described. Thereafter, there was a realistic prospect of effecting removals to the DRC and, in fact, in October 2014 such removals commenced.

56. In those circumstances, there was a reasonable prospect of removing the Claimant to the DRC throughout the relevant period and accordingly his detention was lawful. This application is dismissed.