OUTER HOUSE, COURT OF SESSION

[2010] CSOH 8

P1435/08

OPINION OF
TEMPORARY JUDGE J. GORDON
REID Q.C., F.C.I.Arb.

in the Petition of

MR KM (FE)

Petitioner;

For

Judicial Review of decisions of the
Secretary of State for the Home
Department to detain the petitioner

—

Petitioner: O'Neill Q.C., Komorowski; Drummond Miller LLP
Respondent: Murphy Q.C., Lindsay; Office of the Solicitor to the Advocate General

21 January 2010

Introduction

General Background

[1] In 2000, a foreign national, possibly from Iran, enters the United Kingdom, probably via Turkey and France. He makes three claims for asylum under different names. One is granted; another two are refused. In 2002, he is arrested, but granted Temporary Admission and released from custody subject to reporting conditions which he breaches. In 2004, he is convicted of robbery and sentenced to four years

imprisonment. The trial judge recommends deportation noting that there is a high risk of re-offending. On conclusion of his sentence in 2006, the Secretary of State issues a deportation notice and subsequently a deportation order. The individual remains in custody pending his deportation. He has no documents establishing his identity. He has no close ties with the United Kingdom. He does not co-operate sufficiently with the authorities to obtain them. Until he obtains them, the Iranian authorities (if he is indeed an Iranian national) will not accept him back. All his statutory rights of appeal have been exhausted or waived.

[2] The Secretary of State says there is a high risk that he will re-offend and/or abscond and so cannot be released. He will be deported as soon as he co-operates and obtains emergency travel documentation. The Petitioner says the Secretary of State has been operating illegal immigration policies and his continued detention is flawed procedurally. In any event, the time has long passed since the Petitioner was reasonably and properly detained and so is entitled to be released.

[3] These are the bare bones of the factual background and arguments which gives rise to this First Hearing in the Petitioner's application for judicial review in which he seeks declarator that his detention is unlawful, liberation, *interim* liberation, reduction of various decisions, and damages (including vindicatory damages).

Procedural History

[4] First Orders were pronounced on 5 August 2008 and a First Hearing Fixed for 14 November 2008. That diet was discharged as were further such diets fixed for 5 and 27 February 2009. A further diet was fixed (for 7 July) and parties were ordered to produce *inter alia* adjusted Notes of Argument and a joint bundle of Authorities. The pleadings meantime remained open. On 7 July 2009, the First Hearing was again

discharged, and further adjustment of the pleadings authorised. On 10 July 2009, a motion for *interim* liberation was refused. By October 2009, numerous inventories of productions had been lodged by the parties together with a joint bundle of authorities extending to a little under 2000 pages. Various statements of issues were also produced but counsel did not refer to or adhere to them in the course of their submissions. On 27 to 30 October 2009 a First Hearing took place.

[5] The pleadings are lengthy, and contain much detailed argument and reference to case law. One or two infelicities in the text were pointed out at the outset. In addition, a set of adjustments had been tendered on behalf of the Petitioner at or shortly before the July First Hearing. Their status was somewhat uncertain but I was prepared to proceed on the basis that they formed part of the Petitioner's pleadings. In the event, counsel made little reference to the pleadings apart from identification of the Orders sought.

Issues

[6] The central issue is whether the Petitioner should now be granted his liberty. All other issues are embraced within that over-arching question. These "subsidiary" issues include the legality of the underlying basis of his continued detention, which in turn raises questions as to the legality of various policies adopted by the Secretary of State; the procedural propriety of the process by which the Petitioner has been detained since 24 February 2006; and the relevance and weight to be attached to a detainee's continued lack of co-operation. The parties agreed that the question of damages, were it to arise, should be deferred meantime.

Factual Background

[7] The factual background is not seriously in dispute. The following narrative is based on the pleadings, the voluminous productions and to some extent, additional non-contentious statements made by counsel at the Bar in the course of the Hearing.

[8] The Petitioner arrived in the United Kingdom on 26 January 2000. In the pleadings, it is admitted that he is a citizen of Iran, although some doubt about this was cast by counsel in the course of the Hearing. While there are some minor discrepancies in the documents, it appears that the Petitioner claimed asylum and stated his date of birth to be 1 January 1979. In July 2000, he made another application for asylum giving a different date of birth. In July 2001 one of his two outstanding claims was granted by the Secretary of State. On 29 May 2002, the other asylum claim was refused and directions were issued for the Petitioner's removal to Iran. On the following day he was arrested on suspicion of being an illegal entrant. He gave a different identity (claiming to be Iraqi), and date of birth, and claimed asylum; but fingerprint checking revealed his previous asylum claims. His third asylum claim was withdrawn. He was granted Temporary Admission to the United Kingdom (subject to reporting conditions) and released from custody.

[9] He breached those conditions in November 2002. On 24 April 2004, the Petitioner was convicted at Birmingham Crown Court of Robbery. On 24 June 2004, he was sentenced to four years imprisonment. The trial judge also recommended deportation. The trial judge also noted that (a) the Petitioner had used three separate identities, (b) in 2001 he was convicted of criminal damage, (c) in May 2002 he was convicted of a series of offences including assaulting a police officer, criminal damage and failing to surrender himself to custody for all of which he received a short prison sentence, (d) he had not at any stage attempted to behave responsibly, (e) his pre-trial claim to have

a serious psychiatric problem was fictitious and, in the main, a sham, (f) the Petitioner had informed his probation officer that he might re-offend, (g) the risk of harm to the public from his activities was high, (h) there was a strong risk or likelihood of repetition of offences in the event of his being released.

[10] In June 2005, he signed disclaimers waiving his rights to appeal against the Secretary of State's decisions to implement the judge's recommendation, and to refuse the Petitioner asylum. There was no dispute that the Petitioner has exhausted or waived all statutory rights of appeal which might enable him lawfully to remain in the United Kingdom.

[11] On 24 February 2006, the Petitioner's prison sentence was completed. On that day, he was served with a decision notice indicating that the Secretary of State had decided that the Petitioner should be deported. The Petitioner did not timeously appeal against that decision. Thereafter, the Petitioner was detained under the authority of the Secretary of State pending his deportation.

[12] It appears from facts revealed in a number of English cases (*R Hassan Abdi & Ors* [2008] EWHC 3166 (Admin) per *Davis J* at paragraphs 27, 36-38, and 44, *Ashori [*v *SSHD* [2008] EWHC 1460 (Admin) per *Mitting J* 22 May 2008] and *Lumba [*v *SSHD* [2008] EWHC 2090 (Admin) per *Collins J,* 4 July 2008], that in April 2006, the then Secretary of State adopted the policy, which was not published, that save in exceptional circumstances, foreign national prisoners were to be detained on completion of their prison sentences with a view to deportation. That policy was subsequently declared to be unlawful by *Davis J* in *R (Hassan Abdi & Ors)* D19/12/08 2008 EWHC 3166 (Admin). A revised policy on the release of foreign national prisoners was subsequently released in January 2009.

[13] A deportation order was signed on 13 March 2007 and served on the Petitioner on 2 May 2007. By that stage, it had become clear (from facts emerging in other Immigration cases in the form of affidavits and other documents produced by government officials (see for example *Abdi* referred to below) that enforced removal to certain countries such as Iran was becoming problematic and procedurally difficult to carry into effect.

[14] Between about the end of December 2007 and early April 2008, the Petitioner was detained in Hartwood Hospital, which has a secure Psychiatric Unit. There was and is a question mark as to whether the Petitioner has truly suffered from any significant form of mental illness.

[15] In June 2008, an application for bail was refused. The Immigration Judge, who had before him a comprehensive bail summary in chronological form, expressed the view, in his decision dated 16 June 2008 that there was nothing before him to indicate that the Petitioner would co-operate with the authorities and comply with the requirements of the authorities if bail were granted; the Judge's view was that the Petitioner presented *a high risk of absconding and could not be trusted to comply with bail conditions if and when he perceived removal likely*.

[16] In August 2008, a petition for judicial review was presented on his behalf. In April 2009 another application for bail was refused by an Asylum and Immigration Tribunal Judge. The Judge records the Petitioner's representative as submitting that the Petitioner did not wish to return to Iran. The Judge thought it was clear that the Petitioner was not prepared to co-operate in the Facilitated Return Scheme. The Judge, in refusing bail, concluded that the Petitioner had demonstrated a clear disregard for the immigration laws of the United Kingdom; that it was *highly likely*

that the Petitioner would fail to observe bail conditions, abscond and make further use of false identity.

[17] In August 2009, the Petitioner's application under the Facilitated Return Scheme was withdrawn because he failed to provide the relevant original or certified copy documentation in order to support an application for a travel document. However, because of recent changes to the Scheme, the UK Border Agency, by letter dated 19 10 09, invited him to apply once more. It is not clear whether the Petitioner has done so. However, the same documentation difficulties may arise. The Secretary of State has produced an Affidavit (dated 16 06 09) of an official setting out in detail the efforts which have been made to establish the Petitioner's true identity and to encourage him to obtain documentation. The affidavit records that the Petitioner has given at least five different names and provided three different dates of birth. It states that on occasion, the Petitioner has indicated to staff at Dungavel that he would try to obtain the necessary documents to enable him to return to Iran which he claimed to be willing to do. Whether he has actually done so and whether he currently wishes to return to Iran or is reconciled to doing so is not clear. It seems that his attitude and the extent of his apparent co-operation have varied from time to time.

[18] The Petitioner's detention was reviewed on numerous occasions. These reviews are recorded in *Detention Review* documents and *Monthly Progress Reports*, the latter being sent to the Petitioner. These documents have been produced. There are, however, gaps in the records, and it seems to be accepted that a detention review has not been carried out every month since February 2006. Thus, Monthly Progress Reports between April 2006 and October 2009 (with the exception of June, October, November and December 2006, September and October 2007, and February 2008) have been produced. Until about October 2008, the Detention Reviews consistently

recorded recommendations by case workers and consequent decisions by more senior officials that detention be maintained. Over that period, the Detention Reviews recorded apparent lack of co-operation on the part of the Petitioner in obtaining essential travel documentation needed to facilitate his removal from the United Kingdom. Essentially, what was required was some form of certified identification from the relevant authorities in Iran, such as a birth certificate, passport, driving licence or military I/D. I was informed that this was something which the Secretary of State's officials could not obtain, but the documents could be obtained by the Petitioner or his solicitor writing to the Iranian authorities in Iran and requesting a copy of an appropriate document. Alternatively, someone such as a family member in Iran could obtain the document direct from the Iranian authorities and post it back to the United Kingdom. *Ashori* v *SSHD* 2008 EWHC 1460 (Admin) paragraphs 13 and 18, for example, records the applicant's solicitors writing to the Iranian Embassy and the Iranian Department dealing with identification documents.

[19] On 20 October 2008, a caseworker reported that no progress had been made in recent months; there would be a struggle to remove the Petitioner in the near future; there were very limited prospects of removal; and that it might be pragmatic to give consideration to the Petitioner's release. An inspector considered the caseworker's proposal and expressed the view that there was not the remotest prospect of removing the Petitioner; that a pragmatic view should be taken and consideration should be given to releasing the Petitioner with electronic tagging. An Assistant Director supported this proposal noting that little progress had been made toward obtaining a travel document and expressing the view that it was likely that removal would not be effected within a reasonable time. On 23 October 2008, a Director decided to maintain detention. Similar views were expressed in the November 2008 Detention Review

with the same result. Thereafter, the Detention Reviews recommended that detention be maintained and that the Petitioner should continue to be encouraged to apply for the necessary travel document. These Detention Reviews recorded that little progress towards obtaining a travel document was being made.

[20] In the Detention Review of 15 September 2009, it is noted that no timescale for the Petitioner's removal is known. The Secretary of State's current position is probably best summarised in the Monthly Progress Report dated 16 10 09 which says this:-

> "Your case has been reviewed. It has been decided that you will remain in detention because:
>
> - You are likely to abscond if given temporary admission or release

This decision has been reached on the basis of the following factors:

> - You have not produced satisfactory evidence of your identity, nationality or lawful basis to remain in the United Kingdom.
> - You have previously failed to comply with conditions of your stay, temporary admission or release.
> - You have used or attempted to use verbal deception to gain leave or to enter/remain or evade removal, having made multiple asylum claims, and it is considered likely that you might do so again.
> - You do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place.
> - You have shown a lack of respect for United Kingdom law as evidenced by your conviction for a serious crime, namely Aggravated Robbery.
>
> Consideration has been given to all relevant factors in favour of release but in the light of the above, it is considered that detention for the purposes of deportation are (sic) reasonable"

[21] Throughout his period of detention, the Petitioner has been encouraged to obtain a travel document and participate in the Facilitated Return Scheme ("FRS"). On

24 June 2009, the Petitioner was interviewed by immigration officials with the aid of an interpreter in connection with his application to return to Iran under the FRS for which he had applied. The Petitioner apparently confirmed that he was in regular contact with his family in Iran. He confirmed in the course of the interview that he would co-operate with his removal to Iran. In particular, in the course of that interview the Petitioner is recorded as having stated that (i) he had never held an original Iranian Passport, (ii) having travelled to Turkey, apparently using a forged passport, he fled to France, (iii) he could not remember whether he used a document to gain entry to the United Kingdom, (iv) his father but not his mother was alive and he had seven surviving brothers and two sisters, (v) he had spoken by telephone to various family members regularly; and to his brother three days ago; his details had been passed on to his father, (vi) his father had sent documents in a package but the package had been tampered with and the documents were not in the package (the Petitioner appeared to make excuses about not being able to obtain copies). Finally when asked whether he was currently willing to return home he was indecisive but when pressed stated that he would co-operate with his removal to Iran.

[22] During the Hearing, I sought further details about the Petitioner's position in relation to the obtaining of the necessary travel document which it appears would enable the necessary arrangements for him to be returned to Iran to be carried into effect. Senior counsel for the Petitioner informed me that the Petitioner had made an application under the FRS in July 2009, and had co-operated but still had no travel documents. His application was accepted but subsequently that acceptance was withdrawn because he failed to provide documentation to support an application for a travel document. This was explained to the Petitioner in a letter dated 19 October 2009 from the UK Border Agency. That letter described the FRS,

explained its benefits, which included payment of £500 in cash on arrival in the home country, and specified the type of document needed to prove identity (Expired passport, National Identification Book, National ID Card, Military ID Card or Driving Licence).

[23] Overall, what the Petitioner had done in the past to obtain an emergency travel document was not clear; a detailed affidavit from the Petitioner might have helped on this matter. Nevertheless, it was said on his behalf that he was willing to co-operate; that he had contacted his father in Iran but as his father was not physically fit he was unable to help, which I took to mean he was unable to travel to the appropriate building with a view to obtaining a copy of a document which would enable the Petitioner's deportation to be expedited. These explanations, given by counsel, were vague and unsatisfactory. It seemed plain that either nobody on the Petitioner's side had sat down with the Petitioner and an interpreter and taken a detailed statement from him, or if they had attempted to do so, had been unable to obtain a coherent and plausible account from the Petitioner. For the Respondent, it was asserted that while the Iranian authorities would not respond to requests by the UK Immigration authorities for travel documents, a response would be obtained if the Petitioner's solicitor made the request on the Petitioner's behalf. This was said to be quite common practice. It seems difficult to believe that, if the Petitioner were fully co-operating, the necessary document could not be obtained or that it would take months or years to obtain.

[24] On the material provided, the only conclusion I can reach is that the Petitioner has vacillated on the question of co-operation and seems to be maintaining a facade of co-operation without actually proceeding to do or instruct his solicitor to do what seems to be the essential first step (or possibly the only step) in the process of

obtaining a travel document. As matters currently stand, the necessary steps might be taken tomorrow or next week; on the other hand they might not be taken until next year; or they might never be taken. The Petitioner currently resides at Dungavel Detention Centre. Senior counsel for the Petitioner informed me that the Petitioner has access to a telephone and to the Internet. He is able to contact relatives and has availed himself of these facilities from time to time.

[25] Were he to be released he would regarded as being temporarily admitted to the United Kingdom pending his removal and would (Senior Counsel for the Petitioner informed me) be eligible for support under the National Asylum Support Service.

[26] There was some discussion of the Petitioner's mental health. However, there is no up to date report before me. There is a suggestion in a report dated 29 01 09 that the Petitioner might have exaggerated or feigned symptoms of mental illness. However, I heard no detailed submissions on the terms of this or any other report. There was also no up to date statement by or about the Petitioner generally. Such a statement might have included details of his general behaviour and demeanour while in detention and an assessment of the risk of re-offending or absconding to rebut the inferences which might be drawn from his history of deception and crime.

Legal Framework

Statutory Provisions

[27] The Immigration Act 1971 (as amended) provides the statutory basis for deportation of foreign nationals. A person who is not a British Citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good (section 3(5)(a)). Moreover, such a person, who is at least seventeen, is liable to deportation if he has been convicted of an offence

punishable with imprisonment and on conviction is recommended for deportation by an appropriate court (section 3(6)). In such circumstances, a deportation order may be made. Where a deportation order is in force, such a person may be detained, or if already detained, will continue to be detained unless released on bail (schedule 3 paragraph 2(3)).

[28] The statutory power to detain has been construed by the courts as being subject to limitations. These are known as the *Hardial Singh* principles and are set out by *Woolf J* (as he then was) in *R* v *Governor of Durham Prison ex p Hardial Singh* 1984 1 WLR 704 at 706. They have been distilled into four principles by *Dyson LJ* in *R(I)* v *Home Secretary* 2002 EWCA Civ 888 2003 INLR 196 at paragraph 46 which are 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."

[29] These principles have been applied in recent cases in England and Scotland (e.g. *TP* v *AG for Scotland* 2009 CSOH 121 Lord Pentland at paragraphs 12-15). It has also been noted that the terms of paragraph 2 of Schedule 3 to the 1971 Act do not create a presumption in favour of detention upon completion of the sentence (*R (Sedratti)* v

Secretary of State for the Home Department 2001 EWHC Admin 418 per *Moses J* at paragraphs 1 and 4 *of a very short judgment* (the point was a matter of concession).

The Detention Centre Rules 2001 SI 2001/238

[30] Rule 9(1) provides that:-

> Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention and thereafter monthly.

European Convention on Human Rights

[31] Article 5 was referred to in the Petitioner's written submissions. It provides *inter alia* that:

> "**Right to Liberty and Security**
>
> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purposes of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or where it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

[32] The Strasbourg Court has noted that any deprivation of liberty under Article 5 1(f) will be justified only for as long as extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision (*Eminbeyli* v *Russia* 26/2/09 paragraph 42).

Policy

[33] Chapter 38 of the Secretary of State's *Operations Enforcement Manual* (applicable until June 2008) noted that the 1998 White Paper (Fairer, Faster, Firmer) confirmed that "there was a presumption in favour of temporary admission or release

and that, whenever possible we would use alternatives to detention". This was expressly confirmed at paragraph 38.3 which stated:

> "1. There is a presumption in favour of temporary admission or temporary release.
>
> 2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 3. All reasonable alternatives to detention must be considered before detention is authorised.
>
> 4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.
>
> 5. Each case must be considered on its individual merits."

[34] In paragraph 38.5.2 the following is noted:

> **"Authority to detain persons subject to deportation action**
>
> The decision as to whether a person subject to deportation action should be detained under Immigration Act powers is taken at senior caseworker level in CCD. Where an offender, who has been recommended for deportation by a Court or who has been sentenced to in excess of 12 months imprisonment, is serving a period of imprisonment which is due to be completed, the decision on whether he should be detained under Immigration Act powers (on completion of his custodial sentence) pending deportation must be made at senior caseworker level in CCD in advance of the case being transferred to CCD. It should be noted that there is no concept of dual detention in deportation cases (see 38.11.3)."

[35] Paragraph 38.8 provided that:

"Continued detention ... must be subject to administrative review at regular intervals. At each review robust and formally documented consideration should be given to the removability of the detainee .... A formal and documented review of the detention should be made after 24 hours by an Inspector and thereafter as directed at the 7, 14, 21 and 28 day points....."

[36] On 19 June 2008 *Enforcement Instructions and Guidance 2008* came into effect, superseding the *Operations Enforcement Manual*. Chapter 55 deals with "Detention and Temporary Release" (and so corresponds to Chapter 38 of the previously applicable *Operations Enforcement Manual*). Chapter 55 similarly begins with a reference to the 1998 White Paper and the presumption in favour of temporary admission or release and with a statement that, whenever possible, alternatives to detention would be used. That is also reflected in paragraph 55.3. Paragraph 55 11 3 gives general guidance in respect of immigration detention in deportation cases. Paragraph 55.20, which relates to temporary admission, release on restrictions and temporary release (bail) provides *inter alia*:-

"**Temporary admission, release on restrictions and temporary release (bail)**

Whilst a person who is served with a notice of illegal entry, notice of administrative removal, or is the subject of deportation action is liable to detention, such a person may, as an alternative to detention, be granted temporary admission or release on restrictions. The policy is that detention is used sparingly, and *there is a presumption in favour of granting temporary admission or release on restrictions*. Another alternative to detention is the granting of bail, which is covered separately in Chapter 57. The fundamental difference between temporary admission/release on restrictions and bail is that

the former can be granted without the person concerned having to be detained, while the latter can only be granted once an individual has been detained and has applied for bail."

[37] On 9 September 2008 Chapter 55 of the Enforcement and Instructions Guidance was altered. It again recites the general policy presumption (that is, in favour of temporary admission or release). With regard to Foreign National Prisoners (such as the Petitioner) the following is now stated in paragraph 55.1.2:-

"**Criminal Casework Directorate Cases**

Cases concerning foreign national prisoners - dealt with by the Criminal Casework Directorate (CCD) - are subject to a different policy than the general policy set out above in 55.1.1. Due to the clear imperative to protect the public from harm and the particular risk of absconding in these cases, the presumption in favour of temporary admission or temporary release does not apply where the deportation criteria are met. Instead the person will normally be detained, provided detention is, and continues to be, lawful. The deportation criteria are:-

For non-EEA cases - a sentence of at least 12 months as either a single sentence or an aggregate of 2 or 3 sentences over the past five years; or a custodial sentence of any length for a serious drugs offence (see list below);

For EEA cases - a sentence of at least 24 months;

A recommendation from the sentencing court

...

Due to the clear imperative to protect the public from harm, *the presumption of temporary admission or release does not apply in cases where the deportation criteria are met. In CCD cases concerning foreign national*

prisoners, because of the higher likelihood of risk of absconding and harm to the public on release, there is a presumption in favour of detention as long as there still is a realistic prospect of removal within a reasonable time scale"

[38] Paragraph 55.3 provides:-

"Public protection is a key consideration underpinning our detention policy. Where an ex-foreign national prisoner meets the criteria for consideration of deportation the presumption in favour of temporary admission or temporary release will not apply ... the public protection imperative means that there is a presumption in favour of detention. However this presumption will be displaced where legally the person cannot or can no longer be detained because detention would exceed the period reasonably necessary for the purpose of removal. ..."

[39] In the case of serious criminal offences the text indicates that "in practice" release is likely to be appropriate "only in exceptional cases".

[40] The policy was revised in February 2009. Paragraph 55.3.2.1 provides:-

"Where a time served foreign national prisoner has a conviction for an offence in the list below, particularly substantial weight should be given to the public protection criterion in 55.3.1 above, when considering whether release on restrictions is appropriate. In cases involving these serious offences, therefore, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling, because of the significant risk of harm to the public posed by those convicted of violent, sexual, drug-related and other serious offences. *In practice,* release is likely to be appropriate only in exceptional cases."

Submissions

Petitioner

[41] Counsel for the Petitioner produced very lengthy and detailed written submissions. They are rich in erudition and display an admirable expertise and familiarity with all aspects of this area of law. However, they contained so much detail that they have lost some of their force as persuasive documents making it difficult for the court to see the woods for the trees. In summary, the arguments for the Petitioner distilled to their essentials were (i) non-co-operation cannot ultimately be used as a justification for continued detention; it may be relevant but it is not determinative (*A* v *Secy of State for the Home Dept* 2007 EWCA Civ 804 per *Keene J* at paragraph 79) R(I) at paragraph 32, *R(FR Iran)* v *Secy of State for the Home Dept* 2009 EWHC 2094 at paragraphs 69-73), (ii) detention cannot be used to secure co-operation (*R (ex p Bashir)* v *Secy of State for the Home Dept* 2007 EWHC3017 (Admin) at paragraph 16)*;* any lack of clarity on the Petitioner's current lack of co-operation places the onus on the Respondent to show that the Petitioner is not co-operating; the Petitioner has not been convicted of non-co-operation under section 35 of the asylum (Treatment of Claimants etc) Act 2004, an example of which is to be found in *FR(Iran* v *SSHD* 2009 EWHC 2094 paragraph 58), (iii) the purpose of detention was to ensure enforcement of the deportation order, not to encourage co-operation or to prevent crime (*Abdi* v *Secy of State for the Home Dept* 2009 EWHC (No 2) per *Davis J* at paragraph 41), (iv) if there is, as here, no reasonable or foreseeable prospect of removal then continued detention is unlawful (*Hardial Singh* at page 706*; I* v *Secy* at paragraph 46 (ii), (v) here, the facts (particularly through the Detention Reviews) show that the continuing detention was to put pressure on the Petitioner and to encourage him to co-operate and obtain the necessary travel

documents, (vi) in Scots law there was a strong presumption in favour of liberty, (vii) the risk of re-offending and absconding may be factors but they cannot be the primary reasons for continued detention (R (I) at paragraphs 50-56). The respondent has produced no reports or assessments of the claimed risks of the likelihood of re-offending or absconding, (viii) the use of immigration detention powers for public safety reasons would infringe Article 5 ECHR, the inability of the Respondent to remove the Petitioner to Iran and his refusal to release him from detention was an abuse of power; the detention reviews form part of the procedural safeguards of Article 5 and not just the *Hardial Singh* principles. Reference was also made to *Saadi* v *The United Kingdom* 2008 ECHR 29/1/08 paragraphs 83-85.

[42] (ix) Reasons justifying the lawfulness of detention would be expected to appear in the Detention Review documents. If no good reason was expressed one may presume there is no good reason to detain. It was artificial to draw a distinction, as the Respondent does, between the form and substance of the decisions. Having regard to the Detention Review documents no weight should be attached to the Secretary of State's views on the question of detention, (x) notwithstanding the risks of re-offending, and absconding and notwithstanding the Petitioner's lack of co-operation the period of detention, some 44 months, was now so long that he must be released (*R(Wang)* v *Secy of State for the Home Dept* 2009 EWHC 1578 (Admin) paragraphs 27, 34-36; *Abdi* v *Secy of State for the Home Dept* 2009 EWHC 1324 (No 2) paragraphs 40, 41, 76-78).

[43] Counsel also presented an elaborate argument that between about April 2006 and February 2009 all decisions to keep the Petitioner in detention were based on a blanket policy which disregarded the *Hardial Singh* principles, and which for the reasons set out by *Davis J* in *R (Hassan Abdi & Ors)* v *SSHD* 2008 EWHC 3166

(Admin) at paragraphs 115-116 were unlawful. This has, it was said, been conceded on behalf of the Home Secretary. The same concession was made before Lord Pentland in *TP* at paragraph 16. Declarator of that unlawfulness should therefore be granted (*Davis J ibid* at paragraphs 210-211; *Chester* v *Afshar* 2005 1 AC 134 per Lord Hope of Craighead at paragraph 87).

[44] It was also submitted on behalf of the Petitioner that there were many periods in respect of which there was no express or proper review of, authorisation for and due notification of the Petitioner's continued detention which rendered that continued detention unlawful (*R(SK)* v *SSHD* 2008 EWHC 98 (Admin) per *Munby J* at paragraphs 45 and 68; *R(Limbu)* v *SSHD* 2008 EWHC 2261 per *Blake J* at paragraph 44; *Roberts* v *CC of Cheshire Constabulary* 1999 1 WLR 662 per *Clarke J*). Reliance was also placed on ECHR Article 5(1) under reference to *Nadarajah* v *Amirthanathan* v *SSHD* 2003 EWCA Civ 1768 at paragraph 54 and *SK (Zimbabwe)* v *SSHD* 2009 1 WLR 1527 at paragraph 25.

[45] The bail decisions were said not to be relevant as a different test was used based on summaries prepared by the Respondent. Bail presupposes detention is lawful.

[46] It was also argued that recent ECHR jurisprudence showed that specific periods of detention must now be set (*Abdolkhani & Anr* v *Turkey* ECHR 22/9/09 paragraphs 125-139).

Respondent

[47] Counsel for the Secretary of State also produced Notes of Argument and submitted that the essential question was the lawfulness of the Petitioner's detention. If his detention was lawful and the onus lay on the Secretary of State, procedural irregularities made no difference. It is for the court to determine in substance whether

the decision to maintain the Petitioner in detention is correct (*A* v *SSHD* 2007 EWCA Civ 804 paragraph 62).

[48] On the facts counsel emphasised that (i) all the Petitioner's appeal rights had been exhausted or waived, (ii) he has no close ties in the United Kingdom, (iii) the Petitioner has no incentive not to abscond or offend (iv) the Petitioner's lack of co-operation and inconsistent attitude as described in the affidavit dated 16 06 09 of Miles Matthews, a senior executive officer employed by the United Kingdom Border Agency , (v) the Petitioner's serious disrespect for the law, (vi) the three refused bail applications before Immigration Judges dated 16 06 08, 27 03 09 and 22 04 09 (see *Hussein* v *SSHD* 2009 EWHC 2506 (Admin) paragraphs 52, 54, 57 and 108). (vii) the risk of absconding was tantamount to a certainty, (viii) the Respondent had lodged all relevant documents and had produced an up to date affidavit from an official (7/81 of process). The onus was on the Petitioner to show that some steps were being taken in good faith to identify himself and obtain the necessary documents to facilitate his removal.

[49] Counsel accepted the applicability of the *Hardial Singh* principles but submitted that the *court* should now apply them and form its own view as to whether detention was unlawful. Government policy or its misapplication did not matter if the detention was lawful under those principles (*TP* v *The Advocate General for Scotland* 2009 CSOH 121 paragraph 11). *SK (Zimbabwe*) v *SSHD* 2009 2 AER 365 at paragraph 35, followed by Lord Pentland in *TP. v AG* at paragraph 18, *Abdi* v *SSHD* 2008 EWHC 3266 (Admin) and *Shylolbavan* v *SSHD* 2009 EWHC 1067 (Admin) demonstrated that failure to comply with the Detention Rules or the policy and provisions set forth in the Operations Manual did not of themselves mean that an individual was being unlawfully detained if there was compliance with the *Hardial Singh* principles. The

current policy was lawful (*Abdi* v *SSHD* 2009 EWHC 1324, paragraphs 6 and 9 *Davis J; TP* v *AG* at paragraphs 19 and 20). The risk of re-offending, absconding and the fact of non-co-operation were all material considerations in applying the *Hardial Singh* principles (*R(A)* v *SSHD* 2007 EWCA Civ 804 at paragraph 54; *Hussein* v *SSHD* 2009 EWHC 2506 (Admin) at paragraphs 93-102; *A* v *SSHD* 2007 EWCA Civ 804 paragraph 80). In the present petition, there had been averments about the Petitioner suffering mental health problems but these had been deleted without explanation.

[50] Counsel also submitted that there is no automatic cut-off point after which continued detention becomes unlawful (*MAS* v *SSHD* 2009 CSOH 32 paragraph 41, TP at paragraph 25 *Jamshidi* v *SSHD* 2008 EWHC 1990 (Admin) at paragraph 35. A reasonable period can be regarded as a specific period (*Addolkhani* v *Turkey* ECHR 22 09 09 at paragraphs 133-135). The Turkish case does not, in any event, require the setting of time limits. Detention continues to be lawful and proportionate therefore the Petitioner's Article 5 ECHR rights have not been interfered with. Given the inconsistent and contradictory signals from the Petitioner in relation to co-operation, it has never been apparent that he could not be removed within a reasonable period. His current position indicates willingness to co-operate which the Secretary of State is entitled to treat as genuine and to rely on him to obtain the necessary documents.

[51] Finally, counsel submitted that should interim liberation be considered, then residence, reporting and other conditions should be imposed.

Discussion

The Function of the Court

[52] The function of the Court is not to review, on 'Wednesbury' or rationality

principles, the decision to detain the Petitioner that is to say the form, manner and rationality of the decision making process. The Court is now the decision maker and decides for itself whether the Petitioner's detention was justified at the outset and whether his detention continues to be justified, taking into account all relevant circumstances (*R(A)* v *SSHD* 2007 EWCA Civ 804 at paragraph 62,70-75; *SK (Zimbabwe)* v *SSHD* 2009 2 AER 365 at paragraphs 33, *TP* v *Advocate General for Scotland* 2009 CSOH 121 paragraph 11, *R(Hussein)* 2009 EWHC 2506 (Admin) at paragraph 80, *Youssef* v *The Home Office* 2004 EWHC 1884 (QB) paragraph 62) *Tan Te Lam* v *Tai Chau Detention Centre* 1997 AC 97 at 113E-114E). This approach is consistent with the function of the court where, as here (as set forth in article 7.17 of the Petition) an infringement of a Convention right is alleged (*R (Nasseri)* v *Home Secretary* 2009 2 WLR 1190 at 1194 paragraphs 12-18 per Lord Hoffmann).

Presumption of Liberty and Onus

[53] It was accepted by the parties that there is a presumption in favour of liberty at common law in Scotland as well as in England and no doubt other jurisdictions (*Singh* v *SSHD* 1993 SLT 950, *TP* at paragraph 33; *D* v *Home Office* 2006 1 WLR 1003 at paragraphs 69-70 and 76; see also *R* v *SSHD* 1923 AC 603 at 645-6). This has not been removed by paragraph 2 of Schedule 3 to the 1971 Act which does not create a presumption in favour of detention on completion of a sentence of imprisonment (*R (Sedrati*) v SSHD 2001 EWHC Admin 418, per *Moses J* at paragraphs 1 and 4). The onus lies on the Secretary of State to justify detention and continued detention pending removal (*R(I)* v *SSHD* 2002 EWCA 888 at paragraph 37, *R (SK)* 2008 EWHC 98 (Admin) per *Munby J* at paragraph 5-7; *R(SK Zimbabwe)* v *SSHD* 2009 2

AER 365 at paragraph 35, *I* v *Secy of State for the Home Department* 2002 EWCA Civ 888 per *Simon Brown LJ* at paragraph 37).

Hardial Singh Principles

[54] These have been applied, as summarised by Dyson LJ in *R(I)* v *SSHD* 2003 NILR 196 at paragraph 46, in several cases in Scotland (*MAS* v *SSHD* 2009 CSOH 32, *K* v *SSHD* 2009 SLT 525, and *TP* v *AG for Scotland* 2009 CSOH 25), as well as in England (*R (Qaderi)* v *SSHD* 2008 EWHC 1033, *R (Ashori)* v *SSHD* 2008 EWHC 1460, and *R (Jamshidi)* v *SSHD* 2008 EWHC 1990). They are part of our jurisprudence and I must therefore follow them.

[55] It also follows from these principles that there is no single period which when reached, automatically leads to the conclusion that the period of detention has become unreasonable.

[56] It is, perhaps, worth noting the context from which these principles have been derived. *Hardial Singh* was a decision at first instance of Woolf J (as he then was) dating from December 1983 (1984 1 WLR 704). There, an Indian national lawfully entered the United Kingdom and was given indefinite leave to remain. However, he committed two offences of burglary for which he served a term of imprisonment. There was no judicial recommendation that he be deported but, while in prison, the Secretary of State decided to make a deportation order. The applicant did not appeal. He absconded but was re-arrested. A deportation order was duly made and served on the applicant while he was living in distressing conditions in Durham prison, so distressing that he attempted suicide.

[57] The first principle appears to be derived from an earlier case in 1971 where it was clear that the purpose of the detention was to enable the detainees to give

evidence at a forthcoming criminal trial, because if they were released, nothing might ever be seen of them again.

[58] The second and third principles appear to be derived from the facts of the case itself and a contrasting unreported decision in 1975 where, in relation to an illegal immigrant, the court expressed satisfaction that everything had been done by the Secretary of State to urge the Indian High Commission to produce a travel document. The court in the 1975 case was informed that the High Commission would reply to the application within ten days. It is to be inferred that in those circumstances the claimant was not released. There, the focus was on the conduct of the Secretary of State.

[59] By contrast, Woolf J noted that the applicant before him was not an illegal immigrant and moreover, he was not satisfied that everything that could reasonably be done by the Secretary of State had been done (707G-H; 708H). The problem seemed to lie in the hands of Durham police who had or had the means of obtaining further information requested concerning the district of birth of the applicant (708B-C) but had not sought to obtain it. Again, the focus was on the conduct of the Secretary of State or others in circumstances where it was appropriate for him or them, rather than the applicant, to take some positive action. Woolf J expressly found that the applicant had been taking what steps he could to achieve a satisfactory resolution to his problem; he was quite prepared to return to India.

[60] The fourth principle (706F) appears to be derived from the facts of the case and the two earlier cases; again the focus was on the Secretary of State taking steps which would bring about removal.

[61] These principles offer guidance on a question of statutory interpretation. Whether as stated by Woolf J or as re-formulated by Dyson LJ, they are guidance; they are not

words of a statute. Plainly, Woolf J did not have in mind the precise or even the general factual base which underlies the instant application for judicial review. In particular, he did not have in mind the effect of self induced detention through non-co-operation (nor was it a significant issue in *R(I)* v *SSHD* although the point was discussed (see paragraphs 12, 14, 37, 50, 51, 54). In such a situation, and, no doubt, others, these general principles require to be fleshed out in order to determine where the bounds of a reasonable period in all the circumstances lie. Although, the principles might be said to be conceptually distinct, the second third and fourth are all linked by reference to what is reasonable in the circumstances. That is the overarching element which requires each case to be considered on its own particular facts (*R (Abdi)* v *SSHD* 2009 EWHC 1324 (Admin) at paragraph 22).

Effect of Failure to comply with Detention Rules or Policy

[62] In *R(SK Zimbabwe)* v *Home Secretary* 2008 EWCA Civ 1204 detention reviews were not carried out with the required frequency. There were very significant gaps over a period of some 22 months. The judge at first instance attached very considerable weight to the combined facts that there was a substantial risk of SK absconding coupled with his refusal to accept voluntary repatriation (paragraph 17). He held that the infringement of the Detention Centre Rules 2001 and certain parts of Chapter 38 of the Home Office Operations Enforcement Manual demonstrated that the claimant's detention was unlawful in domestic law and also demonstrated a violation of his rights under Article 5 of the Convention (paragraph 20). Before the Court of Appeal, it was not disputed that any of the limitations given by *Ex P Hardial Singh* were exceeded (paragraph 22). The Court of Appeal held that whether compliance with the Detention Centre Rules 2001 and the Manual was a *sine qua non*

of the lawful exercise of the statutory power to detain was a question of statutory construction; the court held that it was not, as there was no express or implied reference to the Rules or Manual in paragraph 2 of Schedule 3 to the 1971 Act (paragraphs 21, 23 and 25 and 35). Neither compliance with the Rules and Manual nor the fulfilment of any comparable specific procedures is a condition precedent to the legality of the detention (*SK* paragraph 35 and 36; 48 and 49). The same approach is to be found in *TP at paragraph 18*, and *Abdi & Ors* v *SSHD* 2008 EWHC 3166 (Admin) at paragraphs 129-144 (the sequel relating to Mr Abdi and the Secretary of State's policy introduced in 2009 is to be found in Davis J's decision at 2009 EWHC 1324 (Admin) at paragraphs 9-11), *Anam* v *SSHD 2009* EWHC 2496 (Admin) at paragraph 42 and *R (Hussein)* 2009 EWHC 2506 at paragraph 120.

[63] It seems to me that I must follow the approach in these authorities unless there is a compelling reason to do otherwise. I detect no such reason. The approach is consistent with the view that it is for the court to decide whether in law the continued detention of the Petitioner is justified. That question falls to be answered by reference to the 1971 Act construed in the light of the *Hardial Singh* principles. If these principles are not infringed then as a matter of statutory interpretation it is difficult to see how the detention can be unlawful. Put another way, compliance with policy and the Detention Centre Rules is not a condition precedent to the legality of detention. Formal non-compliance does not matter where the substance of the matter shows that the period of detention is reasonable. In this, as in most areas of the law, the court looks to substance rather than form.

Arbitrariness

[64] It is plain under domestic law and Convention jurisprudence that any measure

depriving a person of his liberty should issue from and be executed by an appropriate authority and should not contain arbitrary reasons (*SK Zimbabwe* paragraph 27). There, the Court of Appeal held that the *Hardial Singh* principles saved a detention from the vice of arbitrariness (*SK* paragraph 33).

[65] In *Abdolkhani & Anr* v *Turkey* 2009 ECHR 22/9/09, the applicants were refugees who arrived in Turkey from Iraq. They were arrested, produced false passports, detained and charged with illegal entry; they were convicted in the Magistrates' court. The Applicants complained *inter alia* that their detention was unlawful. The Court in Strasbourg emphasised the fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (paragraph 128). The Court noted that Turkish law did not provide any details as to the conditions for ordering and extending detention with a view to deportation or set time-limits for such detention; thus the applicant's detention did not have a sufficient legal basis. The deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness (paragraphs 132-135). Counsel for the Petitioners founded on the reference to the setting of time limits and pointed to their absence in the 1971 Act. However, the *Hardial Singh* principles construe the 1971 Act as imposing reasonable time limits by implication. That is enough to comply with observations of the Court in *Abdolkhani.* Plainly, as the many cases to which I was referred demonstrate, what is an appropriate period of detention for a foreign national prisoner will vary. I therefore reject the argument that a specific period such as six months or two years must be set forth in the legislation to be ECHR compliant.

The relevant circumstances

[66] In *R(I)* v *SSHD* 2002 EWCA civ 888, the Court of Appeal, in what was in effect an application for liberation, indicated that the Strasbourg jurisprudence, and in particular Article 5(1) ECHR, added nothing to the domestic law (paragraph 8). In considering the *Hardial Singh* principles, it is notable that the Court of Appeal quoted with apparent approval the following passage in the speech of Lord Brown-Wilkinson in *Tan te Lam* v *Tai A Chau Detention Centre* 1997 AC 97 (a Privy Council case in which a Hong Kong Ordnance made non-co-operation by the detainee was a statutory circumstance to which regard was to be had in deciding whether the period of detention is reasonable):-

> 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.

[67] The fact that detention is self induced is part of the circumstances of the case I have to consider. It is a relevant consideration. Guidance on the weight to attach to it has been given by Lord Brown-Wilkinson. The fact that, in *Tan te Lam,* it was a statutory consideration does not detract from the application of his Lordship's *dictum* although the Court of Appeal in *R(I)* appeared to think that this reduced its weight (paragraph 31 and 50 to 51). Dyson LJ considered that the (*mere fact, without more*) *that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be reasonable* (paragraph 50-51; and 54). In that case the option of voluntary repatriation only arose on the day before the appeal hearing and so was of very limited relevance (paragraph 32).

[68] I am however, unable to agree with Dyson LJ's observation. In my view, it attaches much too little weight to the fact of self-induced detention, and does not take sufficient account of the force of Lord Brown- Wilkinson's observation. In any event, in the present petition there is "more". It is not just the self-induced detention that is relevant but the inconsistent attitude on the part of the Petitioner as set forth in Mr Matthews' affidavit. It seems to me that, at the very least, an inconsistent attitude and the consequent self- induced detention are weighty considerations in the present case. That view is consistent with the views of a differently constituted Court of Appeal in *R(A)* v *SSHD* 2007 EWCA Civ 804 paragraph 54-55.

[69] Further support for attaching significant weight to the fact of refusal of voluntary repatriation comes from *Tawonezwi* v *SSHD* 2008 EWCA Civ 924. There, the appellant committed fraud related offences in connection with his illegal presence in the United Kingdom for which he received a prison sentence of eighteen months. He refused to accept voluntary repatriation to Zimbabwe. His asylum claims and appeals had also been rejected. He was refused bail on several occasions. The argument on appeal was essentially that the appellant was being punished for refusing to return to Zimbabwe voluntarily (paragraph 7). The court observed that the length of detention was a response to the refusal of the detainee to be removed voluntarily (paragraph 9). The appellant remained in prison only because he would not accept voluntary repatriation. The appellant was urged to accept that *the only way out of prison is by voluntary repatriation to Zimbabwe. That, rather than any legal recourse, (was) the only solution to his continued imprisonment* (paragraph 11). The court attached considerable weight to self induced detention along the lines of the majority in *R(A).* The court however did observe that *the sheer length of detention may at some stage become such that it outweighs in proportionality the reasons for it* (paragraph 9).

While that may, in theory, be true, as a legal principle it offers no guidance whatsoever as to how one determines when that *stage* arrives. It is particularly difficult to apply in a self induced detention case in the light of the court's observations in paragraph 11 referred to above.

[70] The recent decision of Sales J in *R (Hussein)* 2009 EWHC 2506 (Admin) on 14 10 09 also provides similar support for the view that self-induced detention is a weighty consideration (see paragraphs 87-93). This can also be seen from *R (Jamshidi)* v *SSHD* 2008 EWHC 1990 (Admin) at paragraphs 29-34 and 38. Lord Brodie adopted a similar approach when refusing *interim* liberation in *TP* v *AG* 2009 CSOH 25 at paragraph 15.

[71] Furthermore, it does not seem to me to make any significant difference whether a non-co-operating detainee has been prosecuted under the Asylum and Immigration (Treatment of Claimants etc) Act 2004. What is important is the fact of non-co-operation or feigning co-operation. That fact can be proved by whatever evidence is available. The absence of a conviction does not necessarily make that fact any less compelling or persuasive.

[72] The risk of absconding and the danger of re-offending are obviously relevant considerations in determining whether continued detention pending removal is lawful (see e.g. *R(I)* at paragraphs 29 and 48, 49; *R(Qaderi*) v *SSHD* 2008 EWHC 1033 (Admin) paragraph 38). Their weight was again diluted in *R(I)* because the asylum process, unlike the present case, had not been exhausted. It was, however, recognised that in many cases the court will be persuaded to infer from a refusal of an offer of voluntary repatriation that a detainee will abscond if released (*R(I)* paragraph 54).

[73] In the light of the lengthy narrative of facts and the detailed arguments including reference to almost two thousand pages of authorities and written submissions, it

seems to me necessary to stand back and take stock of what is truly important in this case. This might be described as a reality check. I have identified the essential facts at the outset of this opinion. A detailed examination of all the facts and circumstances does not cause me to add anything. A foreign national has entered the United Kingdom illegally. He claims asylum under various identities. He lies to immigration officials. He commits a number of offences culminating in robbery for which he is sentenced to four years imprisonment. He is the subject of a deportation order which cannot be carried out because he declines to co-operate for long enough to enable his departure to be processed with the necessary documents. For aught yet seen, he could do whatever is necessary to enable him to return to Iran. He has no close ties in the United Kingdom. Indeed, he has no ties whatsoever in the United Kingdom. He has no outstanding statutory rights of appeal. His history implies at the very least a significant risk of absconding and re-offending. If released he may simply disappear into a shadowy underworld and might be difficult to trace. Electronic tagging or monitoring (presumably in accordance with section 36 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004) in Scotland is not, I was informed, effective (see also *M.A.S.* v *SSHD* 2009 CSOH paragraph 28). If such an individual is released, then it must mean that any foreign national who enters this country and simply sits on his hands long enough in detention, must be released into the community even although he has committed a serious offence and shown a complete disregard for the laws of the land. This can hardly be described as conducive to the public good. It seems to me that it is reasonable to continue the Petitioner's detention while these risks still obtain and while it still appears to be the case that co-operation on his part will lead to his speedy deportation.

[74] While I readily acknowledge that there is a presumption for liberty, even a strong presumption, that presumption is readily rebutted by the historical facts in this case from the date on which the Petitioner first set foot in the United Kingdom until the present date. The Petitioner and his advisers have either chosen not to or are unable to present up to date facts and circumstances which at the very least might neutralise the somewhat damning facts on which the Secretary of State relies. Reliance on sophisticated, elaborate and lengthy legal arguments cannot elide the basic factual material which exists in this case.

[75] The facts in *R(Qaderi)* v *SSHD* 2008 EWHC 1033 (Admin) bear some similarity to the present case. There, the claimant had made an asylum application using a false identity for which he received eight months imprisonment (paragraph 3). Thereafter, he waxed and waned about voluntary repatriation to Iran (see paragraphs 13,15, and 17). The judge concluded that there was a very real risk that the claimant would have absconded had he been at liberty; the nature of his offence was a clear indicator that he would go to significant lengths to avoid his deportation to Iran and seek to remain in this country (paragraph 38). Even although there was some evidence to indicate that the Secretary of State had not acted as expeditiously as he should have done, the judge concluded that period of detention (some 19 months) was not yet unreasonable (paragraph 39); the claimant's detention was not unlawful and would not become lawful in the immediate future (paragraph 41).

[76] The Secretary of State's officials consider that there is a significant risk that the Petitioner will abscond. I am entitled to and do take this into account (*R(A)* v *SSHD* 2007 EWCA Civ 804 paragraph 62). Several Immigration Judges have refused bail, albeit in a different statutory context. Another judge sitting in the Outer House has also refused to grant *interim* liberation. The decisions of these judges cannot be

faulted and apart from the passage of time, the Petitioner's circumstances and attitude do not appear to have changed significantly. If the Petitioner were to take genuine, positive steps with a view to obtaining adequate evidence of his identity, his deportation could be carried into effect. His continued detention is largely self induced. These, either individually or in combination are very weighty factors to which there are no countervailing considerations of any substance.

[77] Thus, the considerations which seem to me to be relevant in determining whether the decisions to detain the Petitioner from 24 February 2006 to date and whether he should continue to be detained include the following:-

> First, the Petitioner has shown no respect whatsoever for the United Kingdom Immigration laws. He gave false names, false dates of birth, breached the terms of temporary admission and absconded.
>
> Second, he has shown no respect for the laws of the land. He has committed several offences at least one of which was sufficient to justify a significant prison sentence. It involved violence. The trial judge concluded that the Petitioner's presence was not conducive to the public good. The Petitioner appeared to have feigned mental illness. There is a hint of that in the present process where averments of mental illness were made but subsequently removed from the pleadings. There is no material before me to suggest that while in prison or even while in detention he has become a reformed character who is likely to behave responsibly if released.
>
> Third, there is nothing to displace the inference from his history that there must be a very high risk of absconding and a significant risk of re-offending. He has no family ties in the United Kingdom. He has no outstanding statutory

appeals which would give him any hope of being allowed to remain in the United Kingdom. He thus has no incentive to remain in any one place.

Fourth, his vacillation over co-operation concerning travel documents makes it very difficult for the Secretary of State and for the court to conclude that there is no prospect whatsoever of his removal within a reasonable period. For aught yet seen his prolonged detention is largely, if not entirely, self induced. The Petitioner must know his own identity; he has telephone and possibly internet access to family members in Iran. He has through his counsel produced no satisfactory explanation at all as to why he has not been able to obtain the necessary travel documents.

Fifth, I take into account the views of the various Immigration Judges (bearing in mind the different statutory context and basis of assessment as noted by Davis J in (*R (Abdi)* v *SSHD* 2009 EWHC 1324 (Admin) at paragraph 32; c.f. *R (Hussein* v *SSHD* 2009 EWHC 2506 (Admin) at paragraph 108) and the views of the Secretary of State's officials as set forth above.

Sixth, it cannot be a correct construction of the 1971 Act in accordance with the *Hardial Singh* principles that self induced detention must eventually lead to the release of a detainee who has shown no respect for the immigration and other laws of the land and for aught yet seen continues to be of such a mindset. That seems to me to give the word *reasonable* a meaning which it will not bear. Any other conclusion would undermine fair and effective immigration control (*Hussein* v *SSHD* 2009 EWHC 2506 (Admin) at paragraph 93). Senior counsel for the Petitioner relied on *Ashori* v *SSHD* 2008 EWHC 1460 (Admin), submitting that almost every factor deployed by the Respondent here could have been used in that case to retain that claimant in detention. In *Ashori*

the claimant had been released by the Secretary of State and was seeking a declarator with a view to obtaining damages for unlawful detention. The answer to this submission by senior counsel is the word *almost.* The facts are not identical and it is quite inappropriate to compare and contrast immigration cases as if one were considering an award of solatium in an action of damages for personal injuries. In any event, *Ashori* is readily distinguishable. The claimant's prison sentence related to his deception in attempting to remain in the United Kingdom. He did not pose a serious risk at all to the public of criminal activity beyond deception, if necessary, to remain in the United Kingdom (paragraph 26). It was also clear in *Ashori* that the claimant, unlike the Petitioner, was expressly found to be willing to return to the country which he claimed as his own (paragraph 30). Accordingly reliance by the Petitioner on *Ashori* is misplaced.

Application of the Hardial Singh Principles

[78] Returning to these principles as distilled by Dyson LJ in *R(I)* v *Home Secretary* 2002 EWCA Civ 888 2003 INLR 196 at paragraph 46, I reach the following conclusions insofar as they offer guidance to the resolution of the issues before me:-

1. The Secretary of State clearly intends to deport the Petitioner as soon as he can. That is the purpose for which the Petitioner is being detained. Were he to be released there is a high risk that the Petitioner, given his history of deception and crime, will abscond and thwart that purpose.

2. The continued detention of the Petitioner is largely if not entirely self induced. His apparent willingness to co-operate followed by failure to obtain the necessary documents either directly or with the assistance of others such as

family members, particularly in recent months and as exemplified by statements made on his behalf at the Bar, have made it difficult for the Secretary of State to assess whether he has been detained for a period that is reasonable in all the circumstances. Nevertheless, it seems to me that the more the Petitioner asserts willingness to co-operate, the easier it will be for the Secretary of State to conclude that the Petitioner's continued detention is reasonable. The court is faced with the same difficulties. I take the Secretary of State's view into account as well as all the other facts and circumstances referred to above. If the *Hardial Singh* principles are principles of construction of the statutory provisions in the 1971 Act enabling the Secretary of State to detain a foreign national prisoner, then I find it very difficult to construe those provisions, in the light of these principles, in a way which self induced detention causes the period of detention to be unreasonable and thus an infringement of the second *Hardial Singh* principle. That seems to me to give the word *reasonable* a meaning which it will not, in this context, bear.

3. The third principle may, in practice, overlap with the second principle (*R (Abdi) v SSHD 2009 EWHC 1324 (Admin) at paragraph 51*). It requires the Secretary of State to exercise a degree of foresight. Currently, the Petitioner appears to be willing to co-operate. There appears to be no bar to actual co-operation leading to actual deportation. It seems to me that there must still be a reasonable prospect of the Petitioner's removal.

4. It seems to me that the Secretary of State has been acting with reasonable diligence and expedition to effect the removal of the Petitioner. The Petitioner has been encouraged to participate in the FRS. He has been informed what needs to be done. He has access to a solicitor and various lines of

communication with family members. Nothing discussed or produced in this Hearing suggests to me that the Secretary of State is dragging his feet or has made any serious administrative errors or acted in an inefficient manner in conflict with general principles of sound public administration.

[79] In my opinion, the *Hardial Singh* principles have not been infringed. The period of detention is and continues to be reasonable in all the circumstances. Were a materially different set of circumstances to be presented to the court or the Secretary of State then it is quite possible that the period of detention may no longer be considered to be reasonable.

Result

[80] In the light of my opinion, no question of *interim* liberation or damages arises.

[81] I shall sustain the second, third, fourth and fifth pleas-in-law for the Respondent, repel the Petitioner's pleas-in-law and refuse the orders sought in article 3 of the Statement of Facts. All questions of expenses are, meantime, reserved.