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Case Nos. C4/2009/0772, C4/2009/0773
C4/2009/0774

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION, THE ADMINISTRATIVE COURT**
**MR JUSTICE CRANSTON**
**[2009] EWHC 1044 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2009

**Before :**

**LORD JUSTICE LAWS**
**LORD JUSTICE SEDLEY**
and
**LORD JUSTICE TOULSON**

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**Between :**

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| **THE QUEEN ON THE APPLICATION OF MS, AR & FW** | **Appellants** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

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**Mr Michael Supperstone QC, Mr Danny Bazini and Ms Grace Brown** (instructed by Ms Sheona York, Immigration Advisory Service) for the **Appellants**
**Mr Jason Beer** (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates: Thursday 5 November 2009

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# Judgment

**Lord Justice Sedley :**

1. These three cases raise, albeit with factual differences which may in some instances be critical, a legal question which affects a substantial number of individuals. Some of these have applications or appeals awaiting and likely to be dependent on the outcome of those now before the court, permission to appeal having been granted by the trial judge.

2. The issue arises and is important because it concerns the grant of temporary admission to people who have no affirmative right to remain in this country but cannot for particular reasons be removed. Such people do not have to be detained, but they have to exist in a half-world (Cranston J called it limbo, but theologians have recently decided that there is no such place) in which they have £5 a day to live on, cannot take work, must live where they are required to, have access only to primary healthcare, can obtain no social security benefits or social services assistance and can study only in institutions that require no payment. In these respects, which are determined by law and are not simply discretionary conditions imposed by the Home Office, they may be no worse off than asylum-seekers (which all three of the present appellants initially were) but are markedly worse off than if they had formal leave to remain. Their case is that they are entitled to the latter.

3. Temporary admission is a term of statutory art created by the combined effect of paragraphs 16 and 21 of Sch 2 to the Immigration Act 1971:

> 16(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> (2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions.
>
> 21(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from

time to time be notified to him in writing by an immigration officer.

4. This provision is glossed (it will become apparent why I use that word) by s.67 of the Nationality, Immigration and Asylum Act 2002:

> **Construction of reference to person liable to detention**
>
> (1) This section applies to the construction of a provision which—
>
> (a) does not confer power to detain a person, but
>
> (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.
>
> (2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that—
>
> (a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,
>
> (b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or
>
> (c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.
>
> (3) This section shall be treated as always having had effect.

5. By virtue of s.11 of the Immigration Act 1971, persons liable to detention or temporarily admitted in lieu of detention are deemed not to have entered the United Kingdom. The section as now amended sets out the various sources of the liability to be detained:

> (1) A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act or by Part III of the Immigration and

> Asylum Act 1999or section 62 of the Nationality, Immigration and Asylum Act 2002 or by section 68 of the Nationality, Immigration and Asylum Act 2002.
>
> ……..
>
> (5) A person who enters the United Kingdom lawfully by virtue of section 8(1) above, and seeks to remain beyond the time limited by section 8(1), shall be treated for purposes of this Act as seeking to enter the United Kingdom.

6. Cranston J, in a characteristically full and careful judgment, [2009] EWHC 1044 (Admin), held, in a passage which is now accepted as correct:

> 39. …..In my judgment, the power to grant temporary admission contained in paragraph 21 of Schedule 2 of the 1971 Act is to be interpreted by reference to section 67 alone. Paragraph 21 does not itself confer a power to detain but refers to a person "liable to detention". Thus section 67 applies. The relevant issue is simply whether there are practical difficulties impeding or delaying the making of arrangements for removal from the United Kingdom.….. .

7. The question for Cranston J, and now for this court, is what "practical difficulties" mean in law and whether the obstacles to removal in any of the present three cases fall within that meaning.

8. Although temporary admission is, as I have said, a term of legal art, "practical difficulties" is at first sight an ordinary English phrase. Applied, as it was without doubt intended to be applied, to cases in which a failed asylum-seeker is deliberately obstructing Home Office efforts to secure travel documents that would allow him to be returned to his country of origin, it fits unproblematically.

9. But its meaning is by no means obvious when you try to apply it to the kind of facts we are faced with here. They are fully set out by Cranston J at §3-29, but in brief they are these:

> (i) AR is a Palestinian from the West Bank. Having failed in his claim for asylum he was given temporary admission in March 2004. Since then he has obtained a copy of his birth certificate, which includes the ID number that will have been on the identity card issued to him at birth. But he has been unable to obtain a travel document from the Palestinian General Delegation in London because these can only be issued in the West Bank or Gaza. For this, according to the Delegation, he needs either a relative or an agent with a power of attorney to go to the Ministry of the Interior in Ramallah and get a West Bank identity card and a travel document issued in his name. But the expert evidence is that even with a relative to make the application the chance of success is only about 10%, and that otherwise it is zero.
>
> (ii) FW was born in Ethiopia of an Eritrean father, long settled in Ethiopia, and an Ethiopian mother. The adjudicator who dismissed her asylum

and human rights claims accepted that she had never lived in Eritrea and had no known relatives there. Because of the recent history of annexation and secession, neither state is keen on accepting as its nationals persons who have ancestral links with the other state. But both, at least according to their embassies or consulates, will recognise a person as one of their nationals if one of that person's parents was one of their nationals. This means in theory that FW could obtain travel documents for return to either state.

In practice, Eritrea requires three Eritrean witnesses (of what is not clear), although it has now told the Home Office that it will interview any applicant needing documentation for removal. But Eritrea is in no true sense FW's country of origin: Ethiopia (for which fresh directions would have to be given) is. The Ethiopian embassy, however, has interviewed FW and has refused her a travel document on the ground that she is Eritrean. This appears to be contrary to the accommodation reached in 2003-4 for not treating Ethiopians of Eritrean descent as stateless; but it corresponds with the understanding of the US Department of Homeland Security that Ethiopia will only issue travel documents to people who prove, among other things, that both their parents were born in that country (which FW's father was not).

Cranston J at §23, however, cites a letter sent in February 2009 by the head of legal and consular affairs at the Ethiopian embassy, which says that "a person who was born to both or one Ethiopian parents is Ethiopian and entitled to have Ethiopian travel documents". The judge records, without comment, the Home Office's view that this letter "supersedes [FW's] previous dealings with the Ethiopian embassy" and enables her case to be resolved. Nothing is said about what the embassy will accept as proof that a parent is or was Ethiopian.

The day before we sat to hear these appeals the Home Office secured an interview for this appellant with the Ethiopian Embassy. We do not know the outcome.

(iii) MS is of Palestinian origin (which I take to mean was born in one of the occupied territories, but may mean that his parents or one of them was Palestinian) but has lived all his life in Saudi Arabia. His asylum claim, which was preceded by a history of sustained deceit, was rejected. It was part of his evidence that he still had family in Saudi Arabia and that he had been able to return there in 2002. He has Egyptian travel documents and Egypt is sometimes prepared to issue these to Palestinians who would otherwise be unable to travel, but they give the bearer no right of entry to or residence in Egypt. There appears, however, to be some possibility that Egypt will issue a visa, and the Home Office at the time of the hearing below was discussing the possibility of Egypt issuing MS with an emergency travel document.

10. Section 67 of the 2002 Act was introduced in rapid response to the decision of Crane J in *Khadir* [2002] EWHC 1597 (Admin) that "liable to detention" in §21 of Sch 2 to the 1971 Act meant actually and not merely potentially liable to detention. By the time the case reached the House of Lords s.67 had been enacted, making it clear – unnecessarily, it was ultimately held - that the liability extended to all cases where the only reason why the person concerned could not be detained was one of those described in subsection (2).

11. The argument before us is, in effect, that s.67 operates not, or not only, as a limit on the power of detention but as a limit on the power to grant temporary admission, so that any non-removal which falls outside its provisions must result in a grant of leave to remain. On the facts of each of these cases, it is submitted, the difficulties are legal, not practical; but even if that is wrong, the prospect of their being resolved is so remote that the difficulties are not "impeding or delaying" removal but are blocking it. These arguments may sound technical, but their thrust is that it is neither humane nor lawful to keep individuals indefinitely in a situation in which they can neither be removed nor lead a normal life in this country.

12. The nub of Cranston J's reasoning is to be found at §41-3.-

> 41. In my view, even if cases involving legal difficulties fall outside the terms of section 67(2)(b), they would have to be legal difficulties arising from the law of one of the jurisdictions of the United Kingdom. Legal difficulties could not be constituted by the law of a foreign country. Quite apart from anything else, that is because of the forensic difficulties which would occur from the need to obtain expert evidence about the law of a foreign country. Expert evidence would be needed because as a matter of English law foreign law is a question of fact. But even if I am wrong in this and legal difficulties include legal difficulties constituted by foreign law, in my view there is no reason that those legal difficulties can not be at the same time practical difficulties within section 67(2)(b). It must surely often be the case that practical difficulties derive from legal difficulties. In my view the reference in section 67(2)(a) to the legal impediment constituted in the very specific way identified there does not detract from that conclusion.
>
> 42. The result is that, if I am satisfied that there are practical difficulties impeding or delaying the making of arrangements for the removal of these claimants from the United Kingdom, they are to be taken to be liable to detention by virtue of paragraph 16(2) of Schedule 2 of the 1971 Act. In other words, the grant to the claimants of temporary admission, and the detriments attached to it, would be lawful.
>
> 43. Assume, however, that this is not correct and that it is necessary to apply paragraph 16(2) of Schedule 2. In other words, the power to grant temporary admission is contingent on the Secretary of State satisfying me that each claimant's removal is "pending". It is pending in the terms Lord Brown's speech in Khadir if the Secretary of State intends to remove each claimant and there is "some prospect" of that claimant's removal.

13. I do not think much help is to be derived from the provision of s.67(2)(a), which covers cases where removal is legally prevented by the UK's treaty obligations. That most obviously relates to judicial enforcement of the UK's obligations under the Covenant Against Torture. What s.67(2)(b) has in mind, as it seems to me, is

difficulties which in one way or another are preventing removal from taking place. That is a perfectly good description of the difficulties in all three of the present cases. I therefore agree with what Cranston J held in §41.

14. But I have some difficulty in following this through to the two succeeding paragraphs which I have quoted. The proposition in §42 that practical difficulties impeding or delaying removal would make detention, and therefore temporary admission, lawful is unproblematical. But the need to decide whether this is the situation in any of the three present cases arises not as an alternative under §16(2) of the Schedule but as a necessary final step in deciding whether s.67(2) applies.

15. The reason for this is that s.67(2)(b) itself makes it necessary to determine whether the material difficulties are simply "impeding or delaying" removal or have, at least for the present, frustrated or prevented it. If the latter is the case, it is submitted by Michael Supperstone QC on behalf of the appellants that, by analogy with the doctrine of *Hardial Singh* [1984] 1 WLR 704, a point of time has to come at which a temporary status becomes either permanent or indefinite and the power to impose it accordingly becomes spent. Has that happened here?

16. Cranston J considered that it had not. He did so having taken careful note of Lord Brown's speech in *Khadir* [2005] UKHL 39, to which I will return. Temporary admission was there being noted as a benign alternative to detention. The reasoning which followed on the permissible duration of detention was predicated on the word "pending" in §16 of Sch 2 to the 1971 Act ("may be detained … pending … removal"). Although the word does not reappear in §21, however, Cranston J adopted it, together with their Lordships' exegesis of it, as an aid to the construction of §21.

17. What Lord Brown said in this regard was:

> 32. The true position in my judgment is this. "Pending" in paragraph 16 means no more than "until". The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be "pending", still less that it must be "*im*pending". So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (ie throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains "liable to detention" and the ameliorating possibility of his temporary admission in lieu of detention arises under para 21.

18. Cranston J went on to test the evidence by this standard. He concluded that in all three cases there was some prospect, albeit slender in two of the three cases, of removal becoming feasible in the foreseeable future.

19. Was the test he borrowed from *Khadir* materially the same as the test to be met under s.67(2)(b)? I can see little difference. If there is some prospect that the difficulty preventing removal is going to be resolved, then it can properly be said that, while the difficulty is impeding or delaying removal, it is not frustrating or preventing it. But

there is danger in treating an explanatory synonym as a term of art and building legal doctrine on it. What s.67(2)(b) is concerned with is not people who cannot be *removed* because of various kinds of difficulty: it is concerned with people who, for such reasons, cannot be *detained* – in other words, for whom the permissible period of detention contemplated by Woolf J in *Hardial Singh* has run out.

20. The consequence of this seems to be that, where s.67(2) does not bite, rather than promoting the claimant's status from temporary admission to leave to remain, he or she reverts to a liability to be detained. This, in fact, is precisely what was envisaged by Lord Brown: temporary admission, he said, is an "ameliorating possibility … in lieu of detention".

21. It is necessary for these reasons to turn to the case of *Khadir* in some detail. The appellant was an Iraqi Kurd who had no right to enter or remain here but could not be returned because of the dangerously unstable situation in his homeland. There was therefore power to detain him pending removal and a derivative power to grant him temporary admission, which was done in or shortly after November 2000. In May 2002, when it was still too risky to return him, he applied for exceptional leave to enter (as it was then called) and, when it was refused, sought judicial review of the refusal.

22. Crane J, [2002] EWHC 15997 (Admin), held that the duration of the dual power was limited to the time required to effect removal, and that since this time had expired the Home Secretary was obliged to consider granting the appellant exceptional leave to enter. The Home Office simultaneously appealed on the ground that Crane J was mistaken and secured legislation – the new s.67 - premised on the correctness of Crane J's ruling. In this court (Kennedy, Chadwick and Mance LJJ, [2003] INLR 426) the Home Office's counsel placed no reliance on what had by then become s.67 but was required by the court to address argument to it. The court concluded that Crane J had been right on the legislation as it then stood but that s.67 had retrospectively produced the result for which the Home Secretary contended. The rationale was in substance that s.67 now introduced into the exercise of the power to grant temporary admission the same tests as Woolf J had set out in *Hardial Singh* [1984] 1 WLR 704 as governing the power of detention, and that these gave greater administrative latitude than Crane J's construction of the 1971 Act.

23. This court might well have taken the same path to the same conclusion in the present cases had the correct path not been delineated when *Khadir* reached the House of Lords. In the single fully reasoned speech Lord Brown held that Crane J had been wrong and that s.67 was therefore unnecessary. It was and had always been the law that temporary admission was not time-limited but could last as long as there was "some prospect" of removal. A terminal point would come, correspondingly, if and only if it became clear – as it had in *Tan Te Lam* [1997] AC 97 – that there was "simply no possibility" of repatriation.

24. Mr Supperstone has felt obliged by *Khadir* to abandon a potentially interesting argument (albeit one which he accepts was not advanced to Cranston J) that s.3 of the Human Rights Act 1998 requires s.67 to be interpreted so as not to permit temporary admission to become a disproportionate interference with private life by keeping someone on temporary admission for excessively or indefinitely long – conceivably,

if the Home Secretary is right, even decades. It may be that this will require consideration in another case or context.

25. Instead it is argued for the appellants

(a) that legal difficulties fall outside s.67(2)(b) altogether; and

(b) that a point may come, short of sheer impossibility, when the prospect of removal is too remote to be regarded as merely a practical difficulty impeding or delaying removal.

26. The first of these submissions I would reject without hesitation. As Cranston J pointed out, foreign law is in legal principle a matter of fact. It is also the case that the obstacles to return are commonly an amalgam of fact, governmental practice and policy, international law and local law, often in a form which is impossible to disentangle. The present cases illustrate this. I would hold that any difficulty, whatever its nature or origin, which has the effect of impeding return is a practical difficulty within the meaning of s.67(2)(b).

27. If we were construing s.67 afresh, I would have much sympathy with a construction which gave value to the verbs "impede" and "delay", neither of which suggests a more than temporary difficulty. But in my judgment the decision in *Khadir* puts this beyond our reach. It compels us to treat s.67(2)(b) as embracing all circumstances in which there remains, in Lord Brown's words, some prospect of removal, ending only when there is "simply no possibility" of it. The corollary, as Baroness Hale put in a short concurring speech, is that the legal situation may change only "when the prospects of the person ever being able safely to return … are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here" (one notes the echo of Art. 8 jurisprudence).

28. It is, however, not inconceivable that in two of the three cases before us this will turn out to be the case. We have not yet heard argument on the facts. Mr Supperstone has realistically accepted that in the case of AR a tipping point has not been reached. He reserves his position in the other two. In one of these cases, that of FW, the outcome of the interview with the embassy may prove decisive one way or the other. If not, it will be for counsel to decide whether it is appropriate to restore her appeal or that of MS in order to argue that the facts are such as to carry the case outside the twin powers of detention and temporary admission and make it incumbent on the Home Secretary (as Jason Beer on his behalf accepts would follow) to give conscientious consideration, if asked, to a grant of discretionary leave to remain.

29. So far as the underlying question of law goes, I would uphold the decision of Cranston J. For the rest, I would dismiss the appeal of AR for the reason indicated above but would grant liberty to restore the appeals of MS and FW so that they may be either pursued on their facts if counsel considers these viable, or dismissed by consent

**Lord Justice Toulson:**

30. If a person cannot be immediately detained under paragraph 16 of schedule 2 to the 1971 Act (ie pending a decision whether to give removal directions or pending

removal in pursuance of such directions) for one of the reasons specified in s 67(2) of the 2002 Act, is it material to his eligibility for temporary admission under paragraph 21 of schedule 2 to the 1971 Act to consider whether there is any prospect of his future removal? Cranston J gave the answer no; but, for the sake of completeness, he went on to consider whether on the evidence there was some prospect of the appellants' removal and he concluded that there was. Mr Supperstone QC challenges the judge's ruling on the construction issue and his factual conclusion in relation to two of the appellants, FW and MS. He no longer disputes the finding that there is some prospect of the removal of AR, but he submits that s 67 is incompatible with Article 8 of the ECHR if construed in such a way that AR may remain subject to temporary admission for an unlimited period in circumstances where there is little prospect of his removal. We heard oral argument from Mr Supperstone and from Mr Beer, for the respondent, on the construction issue and the Article 8 point, but because of time constraints we have not yet heard oral argument on the prospects of removal of FW and MS.

31. Without a statutory definition, the expression in paragraph 21(1) "A person liable to detention…under paragraph 21(1) above" might be interpreted in two ways. It might be read as limited to a person who could *at the present time* be lawfully detained under paragraph 21(1); or it might be read as including a person who might *at some future date* be detained under paragraph 21(1).

32. In *Khadir* Crane J adopted the narrower interpretation and the Court of Appeal held that he had been right to do so. The House of Lords adopted the broader interpretation. They held that a person was liable to detention within the meaning of paragraph 21 so long as there was the *possibility* of his detention under paragraph 16. As Lord Brown put it at paragraph 32:

> "So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delay of removal (i.e. throughout the whole period until the removal is finally achieved). But that does not mean that the power has lapsed. He remains "liable to detention"…"

33. Lord Brown went on to say that the *Hardial Singh* line of cases were for the most part relevant only to the question when the power to detain might properly be *exercised* and not to the question whether the power had ceased to *exist*. An exception was *Tan Te Lam* [1997] AC 97, where the Privy Council had held that the power itself had ceased to exist. But Lord Brown explained that this was because in that case there was "simply no possibility" of the applicants' repatriation and it had been effectively conceded that removal was no longer achievable. Once that prospect had gone, detention could no longer be said to be "pending removal".

34. It is an integral part of this reasoning that the existence of the power of detention under paragraph 16, and consequential eligibility for temporary admission under paragraph 21, requires there to be "some prospect" of the person's removal.

35. I agree with Laws LJ that this "residual requirement" requires no more than the possibility of removal. The prospect of removal may be distant, but must not be so

remote as to be unreal. In *Khadir* Lady Hale referred, at paragraph 4, to the possibility of a time coming "when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would [be] irrational to deny him the status which would enable him to make a proper contribution to the community here". She clearly had in mind an exceptional case. Similarly Lord Brown observed, at paragraph 35, that "by section 67 Parliament has manifested its clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime".

36. That brings me to s 67. Lord Brown described it as an unnecessary enactment, because what it provided for had in any event always been the law (paragraph 36). Mr Beer submitted that this was not entirely right, because in the residual case where there was no possibility of a person being removed at some future date, and therefore the person would not be liable to detention within the meaning of paragraph 21 on the reasoning of the House of Lords, s 67 would cause the person concerned to come within its definition of a person liable to detention.

37. I am not persuaded by this argument.

38. Section 67(1) refers to:

> "…a provision which
>
> a) does not confer power to detain a person, but
>
> b) refers…to a person who is liable to detention under a provision…"

It thus refers to two different provisions.

39. Paragraph 21 contains the first provision. This provision does not confer a power to detain, but it refers to a person who is liable to detention under another provision. Paragraph 16 is the second provision.

40. Section 67(2) begins:

> "The reference [ie to a person who is liable to detention] shall be taken to include a person if the only reason why he cannot be detained under the provision is that…"

41. "The provision" here referred to must be paragraph 16. For the person could not be detained under paragraph 21: that paragraph does not create a power of detention.

42. So the question of construction is whether, in the case of a person in respect of whom no power of detention exists (in the sense explained in *Khadir*) because there is no possibility of his removal, the "only reason why he cannot be detained" is one of the reasons specified in s 67(2) (a) - (c). Mr Beer submitted, rightly in my view, that Parliament was there looking only at the present state of affairs. This is emphasised in the explanatory notes to the Act. Paragraph 190 states:

> "What it [s 67] does is define what a reference in immigration legislation to being "liable to detention" means, making it clear

> that the term includes cases where the only reason the person cannot be detained *at that precise moment* is one of those specified in subsection (2)." (My italics)

43. In a case where there is no prospect of the person ever being removed, the reason why he cannot be detained under paragraph 16 is more fundamental than the fact that he cannot practicably be removed "at that precise moment". Applying the reasoning in *Khadir*, the absence of any possibility of his future removal negates the very existence of any power to detain.

44. For those reasons, which I believe accord in substance with those of Laws LJ, I agree with Mr Supperstone's submission that it was necessary for the judge to consider whether there was some prospect of the appellants being removed, once that issue was raised, although my reasons differ from the way in which Mr Supperstone presented his argument. But in considering whether there is "some prospect" of a person's removal, the test is of an entirely different nature from that which arises in the *Hardial Singh* line of cases, where the court is concerned with the reasonableness of the exercise of the power to detain. I would also not accept Mr Supperstone's argument to the effect that s 67 in some way narrows the power which the Secretary of State would otherwise have to grant temporary admission under paragraph 21.

45. I can deal briefly with the Article 8 argument. Sedley LJ has referred to the far reaching restrictions on those who are temporarily admitted. I would not exclude the possibility that there might be a case in which the combination of a decision of the Secretary of State to grant temporary admission on the usual conditions and other statutory or bureaucratic provisions might result in a breach of Article 8; but I am not persuaded that such a stage has arisen in any of these cases, and the possibility that it might arise does not make s 67 or paragraphs 16 and 21 of themselves incompatible with the ECHR.

46. I agree with Sedley and Laws LJJ that the appeal of AR should be dismissed, but that the appeals of MS and FW should be restored so that they may be either pursued on their facts, if counsel considers these viable, or dismissed by consent.

**Lord Justice Laws:**

47. I have had the pleasure of reading my Lords' judgments in draft. I gratefully adopt Sedley LJ's account of the facts and of the material statutory provisions. I agree with him that the appeal of AR should be dismissed, but that we should grant liberty to restore the appeals of MS and FW so that they may be either pursued on their facts if counsel considers these viable, or dismissed by consent. However my reasons for arriving at this conclusion differ somewhat from those of Sedley LJ. I would express them shortly as follows.

48. S.67(1)(b) makes reference to paragraph 21(1) of Schedule 2 to the 1971 Act. The opening words of s.67(2) also cross-refer to paragraph 21(1). S.67 was enacted because it was thought, after Crane J's judgment in *Khadir* [2002] EWHC (Admin) 1597, that a person who was *prima facie* liable to detention pursuant to paragraph 16, but could not lawfully be so detained because of *Hardial Singh* considerations ([1984] 1 WLR 704), could not lawfully be granted temporary admission either. The

reasoning was that such a person was not "liable to detention" within paragraph 21(1), and so the temporary admission power could not be applied to him.

49. On that footing, what s.67 did was to preserve the temporary admission power in such a case, in effect by deeming ("[t]he reference shall be taken to include…" – s.67(2)) the person to be "liable to detention". Thus someone whose case fell within the *Hardial Singh* principle could still be subject to temporary admission. All the matters in s.67(2)(a) – (c) are *Hardial Singh* considerations. Their language does not in my judgment imply any substantive test or limitation of temporality; they merely recognise that the practical possibility of detention, while ruled out for the present, may be reinstated.

50. Had the matter been free from authority that is the approach which with great respect I would have taken to the relationship between s.67 and paragraph 21(1). It treats "liable to detention" as importing the possibility of a lawful detention, and not merely the existence of the power to detain; accordingly the phrase had to be stretched to cover the case, for the purpose of temporary admission, where (because of *Hardial Singh*) there was no such legal possibility. It is, however, not consistent with the analysis advanced by Lord Brown of Eaton-under-Heywood in *Khadir*. Lord Brown (their other Lordships assenting) held that "liable to detention" refers merely to the *existence* of the power to detain, not its *exercise*, and so applies even in a *Hardial Singh* case. Thus a person whose case falls within the *Hardial Singh* principle may be lawfully detained under paragraph 21 without the aid of s.67, which is therefore surplusage.

51. Lord Brown acknowledged, however, that "liable to detention" requires that there remain "some prospect" of removal. That requirement applies both to paragraph 16 (detention) and to paragraph 21 (temporary admission). But in my judgment it means no more than that the possibility of removal is not altogether ruled out; and that is also reflected by the language of s.67(2)(a) – (c).

52. In the result the temporary admission power is subject only to that residual requirement, whether available through paragraph 21 without more (the *Khadir* approach) or, were it open to us to go down this route, through paragraph 21 qualified by s.67. In either case the underlying issue of law in these appeals falls to be resolved against the appellants.