Neutral Citation Number: [2011] EWCA Civ 938

Case No: C4/2009/2614

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVSION
ADMINISTRATIVE COURT (Ian Dove QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2011

Before :

LORD JUSTICE THOMAS
LORD JUSTICE LLOYD
and
LORD JUSTICE RIMER

- -

Between :

R (Mark Andre Suckrajh)	**Appellant**
- and -	
(1)The Asylum & Immigration Tribunal and (2) The Secretary of State for the Home Department	**Respondents**

- -
- -

Mr Michael Fordham QC and **Mr Gordon Lee** (instructed by **Messrs Duncan Lewis & Co.**) for the **Appellant**
Mr Jeremy Johnson QC (instructed by **The Treasury Solicitor**) for the **Second Respondent**
Mr Tim Otty QC and **Mr Tom Hickman** (instructed by **Baker & McKenzie**) for the **Intervenor, UN High Commissioner for Refugees**

Hearing date: 4 March 2011

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Judgment

Lord Justice Thomas:

1. Introduction

1. Mr Suckrajh (the claimant) seeks by way of judicial review a declaration that he was unlawfully detained for 46 days in July and August 2009 by the UKBA on behalf of the second Respondent, the Secretary of State, and damages for false imprisonment and for breach of Article 5 of the Human Rights Convention. The UKBA had detained the claimant under the Detained Fast Track (DFT) procedure. The claimant contended that it had no right to do so. Under this procedure asylum seekers are detained at immigration detention facilities while their claims and any appeal are determined. The stated objective of the procedure is to enable straightforward claims to be determined speedily. Under the procedure, immigration officers of the UKBA are entrusted with making the decision on allocation to the DFT. There is a right to appeal to Immigration Judges to remove a case from the procedure or grant bail. The DFT procedure was considered as it operated in 2000-1 by the House of Lords in *Saadi* [2002] UKHL 41 and by the Strasbourg Court (2008) 47 EHRR 17.

2. The claim came before us in the form of an application for permission to appeal from a refusal to allow the judicial review proceedings to proceed. Following a hearing

before a single judge of this court, a consent order was agreed by this court, which provided that, if the court granted permission, then the court was to determine the judicial review proceedings in full. As we had no doubt that permission had to be granted, the hearing before us was in essence the determination of the judicial review and the claim for damages by a court of three judges, as that was what had been ordered. The hearing had some of the characteristics of a first instance hearing as two highly material documents were served in the course of the hearing as I explain at paragraph 15 below. The UN High Commissioner for Refugees applied to intervene, as I explain at paragraph 29 below.

3. As a result of the service of those documents, the claimant quite properly sought further disclosure. Despite pressure from the claimant's solicitors, this took a considerable time to provide. However, in the result and after discussions between the parties with a view to resolving what is essentially a claim for damages said to be £20,000, no further documents were put before the court, save a short submission. The court was therefore asked to determine the proceedings on the basis of what was before it at the hearing.

4. Although the issue before us related solely to a period of detention in July and August 2009, it is necessary to explain what happened in relation to an earlier period of detention in July and August 2008 after his first arrival in the UK which the Secretary of State agreed was unlawful and for which the claimant has received agreed damages.

2. The facts

(i) The first period of detention: June to August 2008

5. The claimant, a Jamaican national, entered the UK on 4 June 2008 intending to transit from Heathrow to Gatwick airports en route to China. He held a valid 30 day business visa for entry into China. He was prevented from transiting in the UK and detained by officers of the UKBA. When it became clear that the Secretary of State intended to remove him to Jamaica, the claimant claimed asylum on the basis he was homosexual. His screening interview took place on 5 June 2008 and his asylum interview on 9 June 2008. He made clear that, although he was not married, he had a girl friend at his home in Jamaica; she acted as a shield for him, but did not know he was homosexual. The basis for his claim for asylum was that as a homosexual male prostitute he feared persecution from state and non-state agents upon return to Jamaica.

6. For this first period of detention, the Secretary of State subjected his claim to another form of fast track procedure - the Detained Non-Suspensive Appeals (DNSA) procedure. This fast track procedure applies to applicants from certain states where, if asylum is refused, the Secretary of State can issue a "clearly unfounded certificate" under s.94 of the Nationality Immigration and Asylum Act 2002 which prevents an in-country right of appeal. On 16 June 2008 the Secretary of State refused his asylum claim. In the refusal letter, his claim that he was homosexual and that he had a girl friend who did not know he was homosexual was not questioned. The refusal was based on his ability to relocate to avoid any problems relating to his sexuality. As the claimant was from a state to which s.94 applied, the Secretary of State, after a review of the evidence, certified his claim as "clearly unfounded". Removal directions to

Jamaica were set for 24 June 2008. The claimant immediately issued judicial review proceedings challenging the certification and legality of his detention under the DNSA procedure; the Secretary of State cancelled the removal directions on 23 June 2008.

7. The claimant disputed the finding that he could relocate internally in Jamaica and avoid future persecution; he relied on the Country Guidance case on this issue, *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG* [2005] UKAIT 00168 which addressed the issue of re-location. It was argued on his behalf that "it may be an issue which requires full argument or a definitive view from the Secretary of State". On 5 August 2008, Goldring J granted permission on the papers**.**

8. The claimant was released from detention three days later, having been detained for just over two months. On 21 August 2008 the UKBA withdrew by letter the "clearly unfounded" certificate under s.94. It was made clear that the case would be returned to the case worker for the decision to be reconsidered. The letter concluded:

> "A further letter detailing the outcome of the reconsideration will be issued in due course and accordingly, if your client's claim falls to be refused, he will be given an in-country right of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002. He would be entitled to remain in the United Kingdom whilst the appeal is pending."

(ii) His time at liberty in the UK August 2008 to July 2009

9. Over the following months:

   i) His claim was progressed in the normal way. For example, although the claimant's solicitor asked on 6 March 2009 when the claimant's more detailed interview would be scheduled, the Treasury Solicitor replied on instructions some weeks later on 2 April 2009:

      > "My instructions are that my client will not agree to a timeframe for assessing the [claimant]'s asylum claim."

   ii) The appellant was required to live at a named address and to report to the UK Immigration Service every month.

   iii) His solicitors put forward to the Treasury Solicitor the claimant's claim for compensation for unlawful detention, supported in January 2009 by a detailed document. Sometime prior to June 2009, there were discussions on figures for the settlement of the claim.

10. On 23 June 2009, the claim was settled by an agreement to pay the claimant £13,000 in damages in respect of the unlawful detention claim. In the statement of reasons, accompanying the form of consent giving permission to withdraw the judicial review proceedings for which Goldring J had granted permission as set out at paragraph 7

above, it was acknowledged that the Secretary of State had agreed that the detention be declared unlawful.

(iv) The detention of the claimant on 6 July 2009

11. On Saturday 4 July 2009 the Metropolitan Police, following a short investigation, issued him with a Penalty Notice for Disorder following an allegation that the claimant had caused alarm harassment or distress on Streatham Common on 29 June 2008 contrary to s.5 of the Public Order Act 1986. He should have reported on 4 July 2009 in accordance with the conditions imposed on him, but was dealing with the Penalty Notice for Disorder.

12. When the claimant went to report to the UKBA on the next working day, Monday 6 July 2009, he was detained by an immigration officer. The Notice, IS.91R, given to him setting out the reasons for his detention had two of the standard form boxes ticked as reasons:

> "Your release is not considered conducive to the public good."
>
> "I am satisfied that your application may be decided quickly using the asylum fast track procedures".

The form had two further boxes ticked to show that the factors taken into account were:

> "On initial consideration, it appears that your application may be one that can be decided quickly.
>
> "Your unacceptable character, conduct or associations.

The contemporary correspondence from the claimant's solicitors recorded that he was told that he was being detained under the DFT procedure.

13. Before this court at the commencement of the hearing of the appeal, the documentation that pointed to his unacceptable character was the Penalty Notice for Disorder dated 4 July 2009. There was also reference in the refusal letter issued on 17 July 2009, as I set out at paragraph 18 below, to convictions for sexual offences in Jamaica. There was, however, nothing to explain why suddenly on 6 July 2009, the UKBA had decided, after he had been at liberty in the UK for several months, to invoke the DFT procedure.

14. It is clear that before a person can be detained under the DFT procedure a detailed process should be followed and reasons recorded. This process acts as a safeguard to try and ensure that, as relatively junior officers are entrusted with the power to detain, there are proper grounds for detention before a decision is made to detain. One of the grounds for the intervention of the UN High Commissioner was that records showed that reasons are not recorded in many cases.

15. Although no documents in relation to how this process had been carried out in respect of the claimant had been made available in these proceedings, it was obvious there must have been documents. As the court was, for the reasons I have explained, in reality hearing an application for judicial review and not an appeal, it pressed counsel

for the Secretary of State to explain. After the midday adjournment, the UKBA produced an internal e-mail dated 5 June 2009 which explained what had happened:

> "I need your collective help with the above case.
>
> [The claimant] was refused entry in transit last June and subsequently claimed asylum. He was detained at Oakington and his claim certified. He lodged a JR against the certificate and T/Sols advised to withdraw the certificate. Having done that, he lodged an unlawful detention claim which we are in the process of settling to the tune of £10,000-£13,000.
>
> His claim is that he is a homosexual but on arrival he claimed to have a girlfriend in [Jamaica] and since his release he's posted on facebook that he's married to a Brit Cit and is madly in love – copies of fb are on file. His claim, therefore should be easy to consider.
>
> Since his initial refusal we have subsequently found out that he was convicted in [Jamaica] of rape of a minor. The police want him registered on the sex offenders list and we clearly want him off the streets as he is a publicity nightmare waiting to happen. He does not know that we know this.
>
> My proposal
>
> Is to detain on his next reporting – which is 04/07/09 at CEU, which is where you come in Mags.
>
> Have him accepted into and dealt with under DFT – Steve/Naomi
>
> In reality we only have 1 shot to do this. We suspect that once he gets his settlement money he will disappear. T/Sols are agreeing to drag payment out as long as possible but it will be tight so I'm giving plenty of notice so we can get all our ducks in a row and make sure this happens.
>
> Can you let me know if you're all on board and if there's anything you need from me.
>
> Thanks in advance."

Among the other documents produced by the Secretary of State was a print of the *facebook* entry by the claimant which stated that he was married to Claire Collins; that he was happy with Claire and enjoying his life with Claire.

16. On 6 July 2009, the claimant's solicitors set out their view why it was wrong to detain the claimant and use the DFT procedure. The UKBA responded on 7 July 2009. It made clear that the case was being considered under the DFT procedure in accordance with the Secretary of State's policy *DFT & DNSA –Intake Selection*. The letter did not give the explanation set out in the internal e-mail of 5 June 2009, but stated:

> "The document (IS.91R) made it clear that your client's release is not considered conducive to the public good. It is also considered that his asylum application may be decided quickly using the asylum fast track procedures. On initial consideration, it appears that your client's application may be one which can be decided quickly. Lastly but not the least your client's unacceptable character, conduct or associations is one of the many reasons why his claim is suitable for the fast track process. I am naturally disappointed that you could not find anyone to speak to or take responsibility for the decision to detain your client. I have however noted that the notice to your client detailing the reasons for detention clearly stated the name of the officer who signed the document. May I assure you that the decision to detain your client was properly taken."

It was made clear that any appeal would be dealt with in accordance with Asylum and Immigration (Fast Track Procedure) Rules 2005 (the DFT Rules); any appeal would be heard within 4 working days of the decision

17. The claimant was interviewed on 10 July 2009.

(v) The decision on 17 July 2009

18. The decision to refuse asylum was set out in the UKBA's letter of 17 July 2009. In summary, the reasons were that (a) his claim was not credible as the claimant was not homosexual and (b) even if he was, that would not put him at risk in Jamaica. He had three criminal convictions in Jamaica, two of which were for carnal abuse. His explanation had been that a female friend had accused him of rape following an argument and he had been convicted and sentenced for imprisonment for one year. His claim that he was homosexual was not credible for a number of different reasons; these included his explanation for coming to the UK, a *facebook* entry in which he had claimed he was married to Claire and happy with her, and the fact that he lived with her in the UK. He was given a notice of the decision to remove him and a new notice of detention (IS.91R) which gave as reasons for his detention:

> "You are likely to abscond if given temporary admission or release."
>
> "I am satisfied that your application may be decided quickly using the asylum fast track procedure."

The boxes for factors taken into account were:

> "On initial consideration, it appears that your application may be one that can be decided quickly."
>
> "You have used or attempted to use deception in a way that leads us to consider that you may continue to deceive."
>
> "You have not provided satisfactory evidence of your identity, nationality or lawful basis to be in the UK."

19. The letter enclosing the decision also provided a response to an earlier letter from the claimant's solicitor. Although it made clear the reasons for the detention were those set out in the letter of 17 July 2009, it went on to explain that the claimant's application:

> "had been dealt with under the Detained Non Suspensive Appeal process because he is a Jamaican national. You will be aware that Jamaica is a country which is listed in s.94(4) of the [2000 Act]….."

It was contended on behalf of the claimant that this showed that the procedure followed had not been the DFT process, but the DNSA process; the UKBA had agreed that this process was not to apply and had withdrawn the "clearly unfounded" certificate in the circumstances set out in paragraphs 6-8 above. Mr Johnson on behalf of the Secretary of State explained to the court that the claimant had been detained under the DFT procedure (as was apparent from the earlier correspondence). The reference in the letter to the DNSA procedure was a reference to the administrative process that applied to the claimant as a Jamaican, because the Secretary was required to certify the appeal as unfounded under s.94 unless satisfied that it was not clearly unfounded. The court was told that this meant that the claim was subject to additional scrutiny. Whatever may be the reason for the statement in the letter that he was subject to the DNSA procedure, the letter was simply wrong. He was not so subject. I am satisfied that he was subject to the DFT procedure throughout.

(vi) The continuation of detention: 17 July to 21 August 2009

20. The claimant immediately appealed against the refusal. The appeal hearing took place on 28 July 2009 before Immigration Judge Lingard. In her decision made on 31 July 2009, the Immigration Judge dismissed the claimant's appeal on asylum and human rights grounds; she found he was not a credible witness. She recorded her refusal of an application, made at the outset of the hearing, for the claimant's case to be transferred out of the fast track procedure:

> "I did not consider the immigration history, judicial review proceedings or any other aspect of the case provided the claimant with any proper reason for having his matter taken out of the Fast Track Process into which he had been legitimately placed by the respondent."

21. Reconsideration was granted by Senior Immigration Judge Eshun on 11 August 2009. She agreed that the judge was right not to take the claim out of the fast track procedure. On 14 August 2009, the claimant applied for bail which was granted on 21 August 2009.

(vi) The determination of the asylum appeal

22. The reconsideration hearing was adjourned and not heard until 10 February 2010. By a determination dated 23 February 2010 Immigration Judge Neyman dismissed the appeal. He rejected the claimant's account that he was homosexual and rejected the corroborative evidence that he had provided.

(vii) The application for judicial review of his detention in July 2009

23. Judicial review proceedings were issued on 27 July 2009 in which the claimant sought to challenge the decision to include the claimant in the DFT procedure. Permission was refused by Lord Carlile QC and by Ian Dove QC sitting as Deputy Judges. The claimant then sought permission to appeal against the decision of Ian Dove QC, but permission was refused by an order of Pill LJ dated 26 March 2010. On 29 June 2010 Sir Scott Baker granted permission to appeal commenting that "in essence this is an attack on the appropriateness in the present case of the fast-track procedure"; that the claimant "has an arguable case that this was not an appropriate case for the fast-track procedure and that accordingly the consequent detention of the applicant was indeed arbitrary".

3. The issue and the submissions

24. It was common ground that the only basis on which the claimant could have been lawfully detained on 6 July 2009 was if the Secretary of State was entitled to allocate the claimant's claim to the DFT procedure. As I have said, no challenge was made to the lawfulness of the DFT procedure or the policies issued in respect of it. The sole issue was therefore whether the claimant had lawfully been allocated to and detained within the DFT procedure.

(i) The claim as it stood at the opening of the hearing

25. At the outset of the hearing, Mr Fordham QC's primary argument on behalf of the claimant was put with elegant simplicity. The DFT procedure could not be invoked with a view to a decision on his imminent removal, as there was no rational basis for concluding that (i) his asylum claim was straightforward and (ii) it could be determined within a matter of days:

i) The Court in *Saadi* had been considering a case where the applicant in 2001-2 had been detained for 7 days on his arrival in circumstances where there was an escalating flow of large numbers of asylum seekers and there were reasons why detention would result in a speedy interview and decision.

ii) The Secretary of State had accepted that the period of his detention in 2008 was unlawful. The credibility of his claim that he was homosexual had not been challenged in the refusal letter of 16 June 2008; the refusal had been based on relocation.

iii) He had been at liberty from 8 August 2008 and co-operating with the authorities. When requested to give a date for a further interview in March 2009, the Secretary of State had refused to set a timeframe. Nothing had then happened until he was detained on 6 July 2009, 11 months after his release from the first period of detention.

iv) Nothing had therefore occurred which entitled a rational decision maker to decide on 6 July 2009 that his claim was a straightforward one which could be determined in days, given the time he had already been at liberty in the UK and the refusal to set a time frame for interview.

v) The claimant's credibility in relation to his homosexuality which formed the basis on which the claimant's claim for asylum was refused under the DFT procedure in the decision letter of 17 July 2009 was not an issue that could be decided quickly or on a straightforward basis.

vi) There was therefore no basis on which his claim could be allocated to the DFT procedure. The decision to detain him on 6 July 2009 had been arbitrary and unlawful.

(ii) The effect of the e-mail of 5 June 2009

26. Mr Fordham QC accepted that the court could not ignore the e-mail of 5 June 2009, but did not seek an adjournment. He re-formulated his argument:

i) The real reason for his detention was to place the claimant in detention as he was perceived to be a risk to the public. This and the avoidance of the "publicity nightmare" referred to was not a basis for the use of the DFT procedure, as the officer of the UKBA appeared to accept in her e-mail.

ii) The DFT procedure could only be used for claims that were straightforward and could be determined quickly. The case remained neither straightforward nor one that could be determined quickly.

27. In the alternative to his primary argument, Mr Fordham QC contended that the DFT procedure could not be used other than at a stage of the initial claim for asylum. It was not permissible for the UKBA to leave a person at liberty and then suddenly detain him when ready to proceed to a final interview.

28. Mr Johnson for the Secretary of State contended that the detention was lawful. (i) The conditions for the exercise of the statutory power had been satisfied, as he was detained to examine him pending a decision on whether to grant him leave to enter. (ii) There was no basis for saying that power was not exercised for a proper purpose. (iii) The exercise of the power was not arbitrary in that it was compatible with *Hardial Singh* principles. (iv) The power was being exercised compatibly with the policy of the Secretary of State. (v) Although a *Wednesbury* challenge could be made in the exceptional case, this was not such a case. (vi) The exercise of the power was subject to review by the Asylum and Immigration Tribunal which confirmed that the case should stay in the fast track, but did grant bail.

(iii) The intervention of the UNHCR

29. The court granted leave for the UN High Commissioner for Refugees to intervene; the Commissioner was represented *pro bono* by Mr Otty QC. The submissions, accompanied by a supporting bundle, were served very shortly before the hearing. In outline, it was contended that there was insufficient clarity about UKBA policy for applying DFT procedures with the consequence that safeguards against arbitrariness were not adequate; the allocation of more complex cases to the procedure made this deficiency more serious. A review of the operation of the DFT procedures showed that significant and repeated errors were made; a review of the files showed that in many cases no proper reasons were recorded for the allocation to the DFT procedure.

The periods of detention were much longer than had been the case at the time of the decision in *Saadi.*

30. It was clear that, if these issues were to be addressed properly, the Secretary of State would require an adjournment, not least to file evidence explaining what actually was taking place. In the light of the fact that Mr Fordham QC did not want an adjournment, was not challenging the legality of the DFT procedure and wanted a determination of lawfulness on the facts of his particular case, it was clear that there should be no adjournment and that the court should not consider the wider issues raised by the UNHCR.

31. The important concerns of the UNHCR will have to be addressed on another occasion, unless they are resolved. It is manifest from what happened in this appeal and the disclosure of the e-mail of 5 June 2009 in the course of the hearing, that at least one of the concerns, the failure properly to record reasons, is well founded, depending on whether this is an isolated case or not.

4. The conditions for the lawful exercise of the power to detain

32. As I have set out, it was common ground that the claimant could only have been lawfully detained on 6 July 2009 if there were lawful grounds for allocating his claim to the DFT procedure. It is for the Secretary of State to show that there was lawful power to detain him; see for example, *R (WL Congo) v Home Secretary* [2011] UKSC 12, [2011] 2 WLR 671 at 65.

(i) Paragraph 16 of Schedule 2 of the Immigration Act 1971

33. The power to detain for the purposes of the DFT procedure is granted under paragraph 16 of Schedule 2 to the Immigration Act 1971.

> "(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."

34. It was submitted by the Secretary of State that the power exercised on 6 July 2009 was contained in sub-paragraph (1) to enable the claimant to be examined and a decision taken under the DFT procedure. The power exercised on 17 July 2009 after the decision was made to refuse entry as set out in paragraph 18 above was contained in sub-paragraph (2).

(ii) The conditions for the exercise of that power

35. In *Saadi,* it was made clear that the power had to be exercised in a manner that was not arbitrary. The proper exercise of the power to prevent arbitrariness was examined in *Saadi* by considering the approach at common law and under the Convention. In the House of Lords, Lord Slynn considered the issue from both perspectives; in considering the common law approach, he made clear at paragraphs 22-26 that the power given under paragraph 16(1) to detain pending examination and a decision was a power to detain for a period up to the time the examination was concluded and a decision taken. Although there was no need for the Home Secretary to show that it was necessary to detain for the purposes of examination in that the applicant might abscond, the powers of detention had to be exercised reasonably. The power to detain was not a power to detain for examination whenever it might take place. The power could not be exercised arbitrarily. The analogous principles applicable to detention for removal under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 set out in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 constrained the exercise of the power.

36. The *Hardial Singh* principles were summarised by Dyson LJ in a case relating to the power to detain a convicted person prior to deportation, *R(I) v Secretary of State for the Home Department* [2003] INLR 196 at paragraph 46 and were approved by the Supreme Court in *R (WL Congo)* at paragraphs 22-30, 171-4, 189 and 250:

    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.

37. Although Lord Slynn also considered the issue from the perspective of the Human Rights Convention, it is only necessary to refer to the judgment of the Strasbourg Court. That court made clear that the power had to be exercised compatibly with Article 5 to ensure "freedom from arbitrariness" in circumstances where Article 5(1)(f) allowed for detention as a control over entry (see paragraph 66). Although freedom from arbitrariness encompassed adherence to substantive and procedural rules, such adherence was not of itself necessarily sufficient to protect from arbitrariness (paragraph 67). It would be arbitrary despite compliance with the letter of the law, if there was an element of bad faith or deception or if the exercise of the power did not genuinely conform with its permitted purpose (paragraph 69). As long as the person was detained with a view to deportation, it did not have to be shown that detention was necessary to prevent the person committing an offence or absconding. However the length of the detention must be reasonable and not exceed that reasonably required for its purpose (paragraph 74).

38. As Lord Brown and Lord Hope pointed out in *R (SK Zimbabwe) v Home Secretary* [2011] UKSC 23 and [2011] 1 WLR 1299 at paragraphs 58-9 and 94-5, the approach of the common law may be more favourable.

39. In *R (SK Zimbabwe)* the Supreme Court held that the requirement that the detention is not arbitrary requires the continued detention of the claimant to be in accordance with the rules and published policies applicable to the detention. The court must ask whether the published policy is sufficiently closely related to the authority to detain to provide a further qualification to the power that is granted by the statute (paragraph 51).

40. The policy applicable to the DFT procedure, *DFT & DNSA – Intake Selection,* made clear at paragraph 2 that a case should only be allocated to DFT where a quick decision could be made. The indication of timescales given as applicable in ordinary circumstances was 10-14 days in DNSA cases and considerably quicker in DFT cases; it was made clear in the light of a ministerial statement that the period must be reasonable and judged on the facts of each case. Cases should not be assigned where further enquires would be necessary by the UKBA or the applicant. As the policy is very closely related to the power to detain as it describes the type of case suitable for allocation to the DFT procedure, it qualifies, in my view, the power as it is a necessary guide to the cases that can be allocated to the DFT procedure.

5. The lawfulness of the claimant's detention under DFT procedure

41. The issue in relation to the period of detention in July and August 2009 must primarily be considered by reference to the first and second of the *Hardial Singh* principles - was the power exercised for the purpose for which it was given and whether at the time of the detention the period of detention was anticipated to be reasonable in all the circumstances. In determining the way in which the power was exercised, the policies to which I have referred are clearly relevant.

42. I therefore turn to the three matters that arise on the facts of this claim.

(i) The purpose for which the power was exercised in detaining the claimant

43. It is a condition of the exercise of the power to detain under Schedule 16(1) that the claimant was detained for the purpose of examining and reaching a decision. It is apparent that a quick decision could only be made if the claim was a straightforward one, to adopt the language used in *Saadi* and other cases.

44. It is evident, in circumstances where the claimant's solicitors have been given the opportunity of examining the entire file, that the facts relating to the actions of the UKBA and the grounds for the detention can only be determined by reference to the documents and other evidence actually before the court.

45. The e-mail of 5 June 2009 makes clear that the reason why the officers acted as they did was to make a quick decision on the basis of the new information that they had obtained about the offences in Jamaica and his *facebook* entry which could be put to him on examination. It is clear that they were also motivated by the desire to avoid the risk that he might commit further offences and to avoid the risk he might abscond. Nonetheless, it is necessary also to take into account the fact that the documents

which showed the underlying reasons why the power was exercised were kept from the claimant, the UNHCR and the court. They were also kept from Counsel. Indeed the Secretary of State's case on the reason why the decision was made to detain was set out in these terms in the skeleton argument in responding to the claimant's case that it was not permissible for the Secretary of State to wait until he was in a position to assess it speedily:

> "here there was no question of the Secretary of State "wait[ing]" to deal with the [claimant]'s case. The effect of the consent order of 23rd June 2009 was that the Secretary of State had then to re-determine [the claimant]'s asylum claim. It was at that point that the Secretary of State had to make a decision as to how to deal with the claim. That was therefore the appropriate time to consider whether to apply the detained fast track process. And it was at this point that the decision was made.
>
> The reason for the application of the fast track is set out in detail in the extensive contemporaneous documentation. It was a DFT case based on an assessment that the application could be decided quickly – see the letter of 7th July 2009."

There was nothing in the documents disclosed prior to the hearing that indicated a rational basis for the decision to invoke the procedure, as nothing explained why the decision could be reached quickly or the case had become straightforward.

46. Although it is clear that the officials acting for the Secretary of State considered that the new information provided strong grounds for considering that his claim he was homosexual was untrue and that therefore his claim could be determined speedily, they were also motivated by the wish to protect the public from someone they had discovered had a previous conviction for rape and might abscond. Although the motivation of protecting the public could not have justified the exercise of the power to allocate to the DFT procedure, I am satisfied and find that the officials acted in good faith and exercised the power for the purpose for which it was given, namely properly to allocate his claim to the DFT procedure.

47. In all the contemporary correspondence with the claimant's solicitors the UKBA made clear that the claimant had been detained under the DFT procedure so that his claim could be decided quickly. The importance of the e-mail of 5 June 2009 is that it set out for the first time the reasons why this could be done quickly. Although the real reason why it could be done quickly was not disclosed until half way through the hearing, I am satisfied that on the totality of the evidence before the court the position of the officers of the UKBA had been throughout that the power was exercised by them in good faith on the basis that the decision could be made speedily. The UKBA remains open to the serious and justified criticism that the real reasons should have been disclosed at the outset and certainly no later than the Secretary of State's grounds for contesting the claim, but this does not impugn the good faith of the officers. Nor, in my view, does the fact that the UKBA did not give the real reasons impugn the validity of the exercise of the power: see *Saadi* at paragraph 48.

48. I am satisfied that once the information had been obtained about the claimant's previous conviction and his *facebook* entry, there were in fact good grounds for considering that his claim was straightforward, as the powerful new evidence could be put to him in an interview within days and once interviewed, as the decision depended on the credibility of his answers to the new evidence, a decision could be reached speedily. The *facebook* entry provided powerful evidence that, although he had explained living with a female was a cover in Jamaica, such an explanation could not apply to his position in the UK. On the new evidence, the claim would be very straightforward, as, if he was not homosexual as the new evidence suggested, there could be no reason to grant him asylum; the issue of safety on return would no longer arise. Thus on the totality of the evidence not only did the officials of the UKBA consider they had good grounds for determining that the case could be allocated to the DFT, but there were in fact good grounds for allocating it The power was on the totality of the evidence exercised for the purpose for which it was granted.

49. The fact that the UKBA stated in their letter of 17 July 2009 that the DNSA procedure applied is not material, in the light of my conclusion set out at paragraph 19 that he had been detained under the DFT procedure and that the letter was simply wrong. The fact that an error was made in that letter makes no material difference to the analysis; it had been made clear in every other communication that he was detained under the DFT procedure. To the extent that a mistake in one letter may be thought material, it is clear the giving of a wrong reason does not affect the legality of the detention – see paragraph 49 of the opinion of Lord Slynn in *Saadi* to which I have referred. It is simply another example of the ways in which these procedures are operated and which have given rise to the concerns of the UNHCR.

(ii) The reasonableness of the period of the claimant's detention

50. As it is clear that the person can only be detained for a period that is reasonable in all the circumstances, the power to detain under paragraph 16(1) can only be used where the person making the decision to detain reasonably considers that the asylum seeker's examination and a decision on his claim can be made in a reasonable time and the time taken is reasonable. What time is reasonable must depend on an examination of all the circumstances on 6 July 2009 when the decision was made to detain for those purposes and the time taken for a decision.

51. In considering these issues, I have had regard to the policies which I outlined at paragraph 40 and the timescales indicated for the ordinary case. The claimant was detained on Monday 6 July 2009, interviewed on Friday 10 July 2009 and the decision made on Friday 17 July 2009. The period was therefore in the result 11 days. In my view, such a period should have been anticipated, given the time necessary to organise the interview which his solicitor attended and to write the reasoned decision. The period was in my view a reasonable one and not outside the terms of the policy.

(iii) Compliance with policies

52. The secondary argument advanced by Mr Fordham QC, as I have outlined at paragraph 27, was that it was not permissible to use the DFT procedure where the Secretary of State had taken some months to make enquiries and then invoked the DFT procedure when he was in a position to make a decision quickly. There is no

authority on the point as *R (Kpandang) v SSHD* [2004] EWHC 2130 (Admin) was a case where asylum was claimed some time after entry.

53. The published policy was contained in *DFT and DNSA - intake selection.* Paragraph 2.2 made no express reference to the procedure being used at a stage subsequent to arrival or, if the claim for asylum was made after arrival, when that claim was made; it was plainly anticipated that consideration should be given after screening. Although there is therefore no express reference to the procedure being used at a subsequent stage where, as in this case, fresh evidence emerges to show a claim can be decided quickly, I cannot see any reason in principle why allocating a claim to the DFT at that stage was not in accordance with the policy. The fact that a policy had not spelt out or anticipated all the circumstances where a power might be used does not mean that a power cannot be used if it accords with the expressed principles of the policy and is within the statutory power. On the facts of this case, it seems to me to accord entirely with the policy of reaching a speedy decision on a straightforward case that the DFT procedure can be applied to a claim that has become straightforward as a result of new evidence. It is not necessary to express any view as to whether the procedure can be applied to circumstances where routine enquiries have taken place and, as a result of those, a speedy decision can be made.

54. Nor can I accept the submission that because it had been determined in 2008 that this was not a straightforward claim and was not then suitable for the DNSA procedure, the case had not changed on the obtaining of evidence from Jamaica in relation to his criminal convictions. A speedy and expeditious assessment could be made.

(iv) Detention of the claimant after 17 July 2009

55. The Secretary of State submitted that even if the initial detention was unlawful the detention after 17 July 2009 was lawful. As I have concluded that the detention on 6 July 2009 was lawful, I can deal with this issue briefly. There plainly was a power to detain under paragraph 16(2) given the risk of absconding.

Conclusion

56. In my view therefore, the detention of the claimant was lawful and, although I would grant permission, the claim must fail on the facts of the case. There is therefore no purpose in assessing damages.

57. I would therefore allow the appeal against the refusal of permission, but dismiss the claim. I would add that the facts of this case have illustrated that the concerns of the UN High Commissioner for Refugees as to the way in which processes are recorded may be well founded, depending on whether this is an isolated case or not. The questions raised therefore need the attention of the Secretary of State and the Chief Executive of the UKBA.

Lord Justice Lloyd:

58. I agree.

Lord Justice Rimer:

59. I also agree.