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Case No: CO/9361/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 19th December 2008

Before :

THE HONOURABLE MR JUSTICE DAVIS

- -

Between :

Hassan Abdi **Cyrus Ashori** **Malik Madani** **Kadian Mighty** **Walumba Lumba**	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Miss Shivani Jegarajah (instructed by **Dare Emmanuel**) for **Cyrus Ashori**
Mr Ian Macdonald QC and **Miss Nabila Mallick** (instructed by **Duncan Lewis & Co. Solicitors**) for **Malik Madani**
Mr Ian Macdonald QC and **Mr Andi Pretzell** (instructed by **Lawrence Lupin**) for **Kadian Mighty**
Mr Raza Husain and **Mr Alex Goodman (**instructed by **Fisher Meredith LLP**) for **Walumba Lumba**
Mr Robin Tam QC, Mr Charles Bourne and **Mr Jeremy Johnson** (instructed by **Treasury Solicitors**) for the **SSHD**

Hearing dates: 11th – 14th November 2008

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Judgement

Mr Justice Davis :

Introduction

1. Whatever the correct legal outcome for these cases, there is no doubt that they raise matters which are in some respects unedifying and in other respects disquieting.

2. Each of the claimants is what in argument was called a foreign national prisoner ("FNP"): that is, an individual being a foreign national who has been convicted of a crime in a court in England and Wales and sentenced to a term of imprisonment. In some of the cases, the court had previously made a recommendation of deportation. In all cases the defendant has made a decision to deport.

3. The issue common to these five cases is the validity of a Government policy relating to the detention of FNPs pending their deportation from the United Kingdom. Until April 2006 the published policy with regard to FNPs, as well as others, who it was proposed should be deported involved (putting it shortly) a rebuttable presumption in favour of release. However, after that date there was introduced a policy with regard to FNPs which (putting it shortly) involved a presumption in favour of detention – whether rebuttable or irrebuttable being in issue. It is the contention of each claimant that each was detained, or as the case may be continued to be detained, under the later policy, which policy is said to be unlawful: either because such policy was contrary to the provisions of paragraph 2 of schedule 3 of the Immigration Act 1971 as amended; or because such policy, and its operation, was insufficiently open and accessible and, indeed, contrary to the previously published policy; or both. It is further said in consequence that the detention or continued detention of each claimant, being made under an unlawful policy, constituted unlawful detention; and that the claimants are entitled to damages for unlawful detention accordingly. Some (but not all) of the claimants claim exemplary damages.

4. The defendant Secretary of State disputes that the policy introduced in April 2006 was or is unlawful in any respect. It is further said that in any event it is not shown that the claimants were unlawfully detained so as to be entitled to claim damages, and it is said that the claimants could properly have been and would have been detained under the, admittedly lawful, previous policy.

5. It is important to stress at the outset two matters which were not in debate for the purpose of these proceedings. First, it is not disputed for the purpose of these proceedings that the defendant was entitled to decide to deport these claimants. Second, it is not asserted that the defendant would have no entitlement, in any circumstances, to detain FNPs pending deportation.

6. The claimant Abdi was represented at the hearing before me by Mr Raza Husain and Miss Dubinsky; the claimant Ashori by Miss Jegarajah; the claimant Madani by Mr Macdonald QC and Miss Mallik; the claimant Mighty by Mr Macdonald QC and Mr Pretzell; and the claimant Lumba by Mr Raza Husain and Mr Goodman; The defendant was represented by Mr Tam QC, Mr Bourne and Mr Johnson.

7. The five cases were taken together as lead cases. Previous carefully prepared timetables and directions made in these proceedings by other judges of the Administrative Court were not precisely complied with. It is not profitable to

rehearse the mutual recriminations as to how that came about. During the hearing, some of the claimants sought leave to amend their grounds (which application for the most part was unopposed). I rejected an application on behalf of the claimants Abdi and Lumba made on the last day of the hearing for further specific disclosure from the defendant.

8. I am grateful to all counsel for their very detailed written and oral arguments. At the same time I have done my best to try and distinguish between woods and trees.

The Legislative and Policy Background

9. The statutory starting points are sections 3(5) and 3(6) and section 5 of the Immigration Act 1971 (as amended).

> "3.(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –
>
> (a) the Secretary of State deems his deportation to be conducive to the public good;
>
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (6) Without prejudice to the operation of subsection (5) above, a person who is not [a British citizen] shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.
>
> …
>
> 5.(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

(Further extended powers of detention are conferred by subsequent legislation, which are not relevant for present purposes). Particularly important for this case, however, is paragraph 2 of Schedule 3 of the 1971 Act:-

> "2. (1) Where a recommendation for deportation made by a court is in force in respect of any person, [and that person is not detained in pursuance of the sentence or order of any court], he shall, unless the court by which the recommendation is made

otherwise directs, [or a direction is given under sub-paragraph (1A) below,] be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary or State directs him to be released pending further consideration of his case [or he is released on bail].

[(1A) Where –

(a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and

(b) he appeals against his conviction or against that recommendation,

the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.]

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

(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless [he is released on bail or] the Secretary of State directs otherwise)."

10. Also relevant is Article 5 of the European Convention on Human Rights. In the relevant respects that provides, as is all too well known, as follows:-

"Article 5: 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:

…

(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.
>
> …
>
> 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."

11. Power is conferred by the 1971 Act for the grant of bail. There is also, of course, the right to apply to the courts for habeas corpus or for judicial review by way of challenge to decisions continuing detention.

12. By Rule 9 of the Detention Centre Rules 2001, which came into force on 2 April 2001, it is provided, among other things, that every detained person must be provided by the Secretary of State with written reasons for his detention at the time of his initial detention and thereafter monthly.

13. So far as policy is concerned the Government had over the years issued relevant White Papers. For present purposes two may be noted. In "Fairer, Faster, Firmer", issued in 1998, a particular chapter – Chapter 12 – deals with detention. In paragraph 12.3 of Chapter 12 it was noted that:-

> "The Government has decided that, while there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances: where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release; initially to clarify a person's identity and the basis of their claims; or where removal is imminent …"

In paragraph 12.10 it is stated:-

> "In addition to any consideration of bail through the judicial process, the Immigration Service will continue its periodic administrative review of detention in each case. Individuals should only be detained where necessary."

In paragraph 12.11 it is stated:-

> "Detention should always be for the shortest possible time, but the Government is satisfied that there should be no legal maximum period of detention …"

14. In "Secure Borders Safe Haven" (2002) under the heading Detention Criteria this is said at paragraph 4.76:-

> "4.76 Although the main focus of detention will be on removals there will continue to be a need to detain some people at other stages of the process. Our 1998 White Paper set out the criteria by which Immigration Act powers of detention were exercised and confirmed that the starting point in all cases was a presumption in favour of granting temporary admission or release. The criteria were modified in March 2000 to include detention at Oakington Reception Centre if it appeared that a claimant's asylum application could be decided quickly. The modified criteria and the general presumption remain in place …"

15. This is in effect repeated in the Operations Enforcement Manual which, ostensibly at least, remained in effect for the periods relevant to the cases up until June 2008. In Chapter 38, which relates to detention and temporary release, it was stated in the introductory section that the 1998 White Paper confirmed that "there was a presumption in favour of temporary admission or release and that, whenever possible we would use alternatives to detention". That was further expressly confirmed by, for example, paragraph 38.3. This is expressly said:-

> "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."

In paragraph 38.3 various relevant factors, for and against detention, are set out. In paragraph 38.6.3 a detailed exposition of the applicable requirements for reasons for detention is given. Such reasons include, amongst others, a risk of absconding; removal from the UK being "imminent"; and release not being considered "conducive to the public good". The Operations Enforcement Manual is, in fact, of general application with regard to immigration detention but one section does potentially relate specifically to FNPs. That is paragraph 38.5.2:-

> "38.5.2 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)."

This is then supplemented by paragraph 38.11.3.

16. On 19 June 2008 Enforcement Instructions and Guidance 2008 came into effect, superseding the Operations Enforcement Manual. Chapter 55 is the part dealing with Detention and Temporary Release (and so corresponds to Chapter 38 of the former Operations Enforcement Manual). Chapter 55 likewise starts 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 reflected also 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) says this at the outset:-

> "55.20 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."

17. But 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). But specifically with regard to FNPs this is now said, in paragraph 55.1.2:-

> "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 …"

This is expanded upon in the following pages. Thus it is said, for example, that:-

> "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 …"

Caseworkers are then instructed to have regard to specified matters which "might make further detention unlawful"; and it is then said that "substantial weight" should be given to the risk of further offending or harm to the public indicated by the subjects' criminality. Where the offence which triggered deportation is included on the list at paragraph 55.3.1 [essentially serious crimes, including violence, sexual offences and drugs offences] it is said that the weight to be given to the risk of further offending or harm to the public is "particularly substantial".

In paragraph 55.3 it is then stated that:-

> "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. …"

In the case of serious criminal offences it is indicated that "in practice" release is likely to be appropriate "only in exceptional cases"; a point then developed in paragraph 55.3 at considerable length.

18. Thus, at all events by September 2008, the published policy had changed. Before it had been a policy in which there was a presumption in favour of release. Now in the specified cases relating to FNPs dealt with by the Criminal Casework Directorate

there is an express presumption in favour of detention. The claimants make no challenge to the former policy. They do challenge the validity of the new (published) policy.

19. But that issue is not solely, or even principally, what these cases are about. For what the claimants say is that, in reality, from April 2006, such a policy had in practice already been operated by officials on behalf of the defendant: and that was done in a way which was never made public or announced in any accessible way, whether by a White Paper or a published revision of the Operations Enforcement Manual or formal statement to any Immigration Lawyers' Association or the like. Indeed, the claimants go further. They say that the policy so adopted was not simply a policy presumptive of detention; they say that it was a policy which positively mandated detention (what in argument was called a "blanket" policy).

20. The discovery of this allegedly "secret" policy came about, so far as these claimants are concerned, in the following way. But it should be made clear at the outset that it is accepted by the defendant that from April 2006 a policy different from that set out in the 1998 and 2002 White Papers and from that set out in Chapter 38 of the then Operations Enforcement Manual was intended to be operated on behalf of the defendant.

The So-called Secret Policy

21. In the course of these cases in their earlier stages of litigation those involved on behalf of the defendant had appeared to proceed on the footing that the policy set out in Chapter 38 of the Operations Enforcement Manual had continued to apply. This is, for example, explicit and implicit in the separate witness statements of Hannah Honeyman, a senior executive officer in the Criminal Casework Directorate of the UK Border Agency, dated 1 April 2008 in the proceedings relating to, for example, the claimant Lumba and the claimant Abdi. In the course of those statements she had referred to Chapter 38 (subsequently replaced by Chapter 55) of the Operations Enforcement Manual and the presumption in favour of release; and to the proposition that detention may be justified if there were strong grounds for believing that a person would not comply with the conditions of release.

22. Ms Honeyman went on, however, to refer to supplementary guidance relating to FNPs (called "the Cullen Criteria") which had been issued to staff. As it later emerged, the first of such criteria (Cullen 1) was – although not published to practitioners generally - issued to caseworkers in November 2007. That sought to identify those who posed the lowest risk to the public and the lowest risk of absconding: in other words, to assist in the decision as to whether to release FNPs. Serious offences, such as sexual, violent and drugs cases which were identified in a list, were specifically excluded from consideration under such criteria. Cullen 1 was then modified in March 2008 (although some caseworkers were told of it earlier) with particular reference to less serious cases (again excluding serious offences) by an amended guidance (Cullen 2): the change being made, it was subsequently stated in a statement of Mr David Wood, Strategic Director of the Criminality and Detention Group of the UK Border Agency, of 26 June 2008, "in the light of our assessment of the types of cases in which the AIT was releasing ex-foreign national prisoners on bail and was intended to further ensure the legality of our decisions on detention and continued detention …". It was all the same stated that consideration of release of FNPs should stop (even if not convicted of

serious criminal offences) if, amongst other things, removal was "imminent"; or, if removal was not imminent, if the subject was considered an above average risk of absconding.

23. At all events, so far as these cases are concerned, the true position as to the policy brought in in April 2006 only came to be revealed in the light of applications to secure release and to challenge the lawfulness of continued detention.

24. Thus in the case of the claimant Ashori, the matter came on for decision by Mitting J on 22 May 2008: [2008] EWHC 1460 (Admin). He came to the view that the decision to maintain detention until 29 February 2008 (when Mr Ashori had been released on bail) was not unlawful and dismissed the claim. However, certain remarks made by Mitting J in the course of his judgment caused counsel then appearing for the defendant to make reference to the new policy reflected by the Cullen criteria. There was discussion and Mitting J then expressed concern about there being an unpublished policy, which had never featured in argument before he gave his decision. Miss Jegarajah then, as now, appearing for Mr Ashori, likewise understandably expressed concern. There were further exchanges, with counsel for the defendant, after taking further instructions, saying the matter could affect other cases and investigations "will inevitably take time and will go up, as I have said, to the highest level." In such circumstances, Mitting J withdrew the Order he had just pronounced.

25. In the case of the claimant Lumba, he too challenged the legality of his detention. The matter was decided by Collins J on 4 July 2008: [2008] EWHC 2090 (Admin). The Judge referred to the statement of Ms Honeyman of 1 April 2008, and the presumption in favour of release. But by then Ms Honeyman had put in a further statement (no doubt because of the Ashori case) dated 23 June 2008, submitted the day before the hearing. That indicated that clarification would be needed as to whether her previous statement in relation to the approach to the detention of FNPs was correct. Counsel appearing for the defendant then told the court at the hearing that he was unable to inform the court precisely what the policy was (a situation the Judge described as "extraordinary"). After the hearing, and before judgment was given, the statement of Mr Wood of 26 June 2008, which I have already mentioned, was produced (as it was in other cases also). In such circumstances Collins J felt able to decide for the future whether the continued detention of Mr Lumba was lawful: he decided that it was, essentially on the grounds of risk of absconding and the public good, in the context of a return within a reasonable time being possible, as the Judge concluded. But he was not, in the light of the new information, able to decide the position for the past – a matter which thus comes before me.

26. So it is that there became revealed in all these cases the change in the former policy (as enshrined in Chapter 38 of the former Operations Enforcement Manual): which changed policy operated from April 2006 until 9 September 2008, when the revised Enforcement and Instructions Guidance was promulgated.

27. The way in which such a policy, whatever it was, first came into existence in April 2006, and the way in which the policy as published in the revised Enforcement and Instructions Guidance of 9 September 2008 came to be so published, is sought to be set out in the statement of Mr Wood dated 26 June 2008 and a second, detailed, witness statement of Mr Wood dated 31 October 2008. In addition, there has been

disclosure by the defendant of a number of internal minutes, e-mails and draft submissions relating to the formulation and operation of the new policy: although, it seems, there has been disclosure of no such documents postdating September 2007. Mr Husain invited me to draw adverse inferences from the failure to disclose documents after that date: although quite what adverse inferences I was meant to draw was unclear. For his part, Mr Tam assured me that all documents relevant to the fair disposal of these cases had been disclosed.

28. It is a point of comment that the individual fielded on behalf of the defendant to deal with this matter by way of witness statement is Mr Wood. He, while of course of appropriate seniority and position to make such important statements, had no personal involvement in or first hand knowledge of the change to, or formulation of, the policy relating to FNPs, given that he took up post as Strategic Director only on 5 May 2008 – a point that, perhaps understandably, he emphasises. No individual having such first hand knowledge or involvement has produced a witness statement in these respects on the part of the defendant.

The evidence of Mr Wood

29. The first statement of Mr Wood, undated but faxed on 26 June 2008, and not in conventional form for a witness statement, is headed "Statement of Detention Policy in regard to Foreign National Prisoners since April 2006".

30. He explained that it had come to light by April 2006 that a number of FNPs, convicted of serious criminal offences, who met the then criteria for deportation, had been released from prison without consideration of deportation. There was considerable publicity in the media. According to him caseworkers were "verbally" instructed by senior managers that, contrary to the presumption of release set out in the then Operations Enforcement Manual, no FNP should be released prior to consideration of deportation and that detention should be maintained until deportation occurred, an appeal was successful or bail granted: it was considered that would be reasonable, unless there were exceptional circumstances, in order to protect the public from risk of harm and because of the increased risk of absconding. It is asserted that this policy was "clearly understood" throughout the Criminal Casework Directorate (CCD).

31. He referred in paragraph 4 to statements in the House of Commons and, subsequently, to the Home Affairs Committee made in 2006 by Dr Reid MP, then Home Secretary, to the effect that FNPs who ought to be considered for deportation would be detained until such consideration had been completed. (It will be noted that such statements do not, on their face, address the position of FNPs after "consideration" of deportation had been "completed"). Mr Wood asserts in paragraph 4 that the public protection objectives in the Home Secretary's statements "had the effect of displacing the presumption of liberty in the [Operations Enforcement Manual] by one of detention in FNP cases, save where there were exceptional circumstances which would make further detention unlawful". It may here be noted that in fact the statements of Dr Reid which Mr Wood quotes in paragraph 4 of his statement nowhere refers to any exceptional circumstances.

32. Mr Wood then refers to a number of internal documents (also discussed in his later witness statement); and to the Cullen criteria. He asserts in paragraph 13: "Public

protection is a key consideration underpinning our detention policy". That sound bite is later followed by a statement that: "The public protection imperative has the effect that the starting point is that there is a presumption in favour of detention". He goes on to set out suggested circumstances where the presumption may be displaced. He states, in quasi-legal language: "In assessing what is a reasonable period [of continued detention] in any individual case the caseworker must look at all relevant factors to that case, including the particular risks of re-offending and of absconding which the individual poses." He later says, by reference to the Cullen criteria, that "those convicted of serious offences are not considered for release under these broad criteria because, by definition, these serious offences are outside the broad categories of lower risk cases which the criteria encapsulate". He says that, even in those cases, "that does not mean detention is automatic or indefinite … rather that given the relatively higher risk of harm and absconding that is likely to be present in such cases, detention can generally be justified for a longer period on public protection grounds."

33. This was followed by a further witness statement dated 31 October 2008, made in these five cases.

34. In that witness statement he again refers to the background before April 2006 and to the "political imperative (in the context of very intense public scrutiny)". He goes on "Thus the focus on consideration of deportation was driven by the way in which the issue had arisen".

35. In paragraph 8 of his witness statement Mr Wood says this:-

> "Senior officials (mainly based in London) from UKBA (the Immigration and Nationality Directorate ("IND") as it then was) had frequent discussions with the then Home Secretary, the Right Honourable John Reid. On such occasions the intention to maintain detention until deportation was made very clear by John Reid. No records of these discussions are now available."

36. Quite why records of those discussions are not "now" available is not explained. Who those "senior officials" were is not stated. Exactly when these discussions took place is not specified. But the reported effect of such discussions is clearly a further clarification or advance: because it sets out an intention to maintain detention until deportation: rather than, as previously stated by Dr Reid in the quoted public statements to the House of Commons and Home Affairs Committee, until "consideration" of deportation.

37. Mr Wood goes on to explain the inquiries of caseworkers which he caused to be made. He says that it was now clear that staff in the CCD in Croydon frequently sought "clarification … of the ministerial imperative in respect of this policy". He says, in paragraph 11, that "some members" of the CCD expressed their understanding that the policy to be implemented was a "blanket" or "near blanket" policy. He asserts that this reflected the change from a policy in favour of a presumption in favour of release to a presumption in favour of detention. He also asserts that the new policy presumption was rebuttable and was not a blanket policy "in the sense of permitting no exception".

38. In support of this last statement, Mr Wood says that he has identified 16 cases ("and there may well be others", he says) where the FNP in question was released. Only three, however, seem, on the information available, to have been released as soon as the custodial term had been served. Most, moreover, seem to involve cases of mother and child or medical reasons or the like. None, on their face, seem to involve release by reason of the application of principles involving, for instance, the lack of prospect of removal within a reasonable time.

39. Mr Wood said that a questionnaire was sent out to CCD caseworkers. Of the approximately 235 responses received, out of nearly 400 sent as I was told, a "significant majority" of those responding "correctly understood the policy, in that there was a presumption in favour of detention but that individual factors had to be considered". Leaving aside those who did not respond, that suggests that a significant minority did *not* "correctly understand" the policy. Mr Wood also noted the further relaxation of the policy in the Cullen criteria. I might add that the questionnaire extended to caseworkers involved in decision making in these five cases – the responses varied widely for those.

40. In paragraph 15 Mr Wood says this:-

> "It was recognised from the outset that it would be necessary to publish the new policy."

He ends the paragraph by saying:-

> "In the event however for a number of reasons (which are explained more fully below) the policy was not published until 9 September 2008."

41. Mr Wood then sets out at length extracts from various documents to explain subsequent events and the asserted reasons for failure to publish until 9 September 2008. I say here and now my conclusion is that there is no acceptable explanation for the failure to publish the new policy – whatever it was – until 9 September 2008, when the revised Enforcement and Instructions Guidance finally was published. Indeed the documents show a continuing unease over very many months in the interim on the part of a number of officials at the situation that was being allowed to subsist. Mr Wood in effect admits (in paragraphs 83 and 84 of this statement) that the eventual publication of the policy was in fact occasioned by the revealed "inaccurate" statements of Ms Honeyman in the Abdi and Lumba litigation. Mr Wood also says in paragraph 86 that:-

> "There was never a decision not to disclose the policy. Throughout the period from April 2006 until September 2008 it was intended that the policy should be formulated in a written document and published."

He claims initial drafts did not reflect the ministerial intention and that for various reasons the matter was not given "the deserved priority". My reading of the papers, bluntly, is that the formulation and publication of the new policy eventually was simply "parked".

42. It was accepted by Mr Wood that there may have been cases in the courts or tribunals postdating April 2006 when "there may well have been a failure to disclose the presumptive detention policy" – it is said that a team had been set up to identify such cases. It was accepted (paragraph 99) that in these particular five cases that, at least until Mr Wood's statement of 26 June 2008, neither the courts nor these claimants were aware of the details of the policy being operated and that until that statement the courts and these claimants were misled into considering that the published policy, as set out in the Operations Enforcement Manual (perhaps subject to the Cullen criteria), was the policy that was being applied in these cases. In answer to a written question posed by the lawyers for some of the claimants "Why did the detention decisions not mention the undisclosed policy?" the answer in part reads (paragraph 104): "As the policy formulation was not complete nor had formal publication of a written policy document taken place, there was no available written source to which reference could be made … ."

43. It is necessary to refer to extracts from a selection of some of the disclosed internal documents of the defendant to get the flavour of what was happening and not happening.

43.1 An e-mail of 25 April 2006 stated that detention must be in accordance with policy and case law restraints and the lawfulness must be "assessed on a case by case basis".

43.2 On 25 May 2006 it was stated, with regard to detention of FNPs convicted of crimes which were not serious crimes:-

> "LAB advised us earlier today that the practice of detaining people in this way was unlawful and that we are particularly vulnerable to challenge."

43.3 "Urgency" is recommended on 5 June 2006 because "at the moment CCD are pretty much just detaining all FNPs without proper consideration/review process …".

43.4 On 8 June 2006 the FNP Task Force FNP Secretariat states that "it is difficult to use the standard lines" because they set out a requirement to decide whether detention is necessary on a case by case basis, and this is "not quite correct as in (sic) it is not happening". The e-mail also says:-

> "… it seems to me that detention is assumed for task force cases. That may or may not be correct but that seems to be what is happening. If it is then, as well as the issue of the standard lines not being appropriate, then we may be in danger of practising an unwritten policy."

Another e-mail of that date (from the Detention Services Policy Unit) confronts the legal issue:-

> "It might be that the CCD should move to a position where the issue of detention in para 2(1) cases is handled in line with the envisaged post-Sedrati process … That would provide for as close as it is possible to get to a presumption in favour of detention without actually being a presumption. Such a move would have to be expressed publicly in order to be lawful …".

A response to that on 13 June 2006 indicates a view that there should be a presumption in favour of detention, but referring to legal advice that might be contrary to Sedrati principles.

43.5 After more e-mail debate, a draft policy submission document was prepared on 14 June 2006. It refers to the current published policy set out in the 1998 and 2002 White Papers and the presumption in favour of release. It says:-

> "In recent weeks to maximise public protection we have been detaining all task force and flow criminal cases where it is decided to pursue deportation. We have also been opposing all grants of bail. We do not think that this position is tenable much longer …"

It is then proposed that there should exist a presumption in favour of detention for FNPs in respect of whom the courts have recommended deportation.

43.6 On 20 June 2006 it was noted that:-

> "So far as announcing the policy change is concerned, this would need to be done in order to ensure that the revised policy was lawful (it would be unlawful to operate an unwritten detention policy or one that differed from a publicly stated position) …"

43.7 On 20 July 2006, there is a consideration of detention spaces at centres and projected demand. "This is based on the current policy that we detain everybody …". That position is reflected by other e-mails at this time. There is frequent reference to legal "vulnerability". One e-mail (of 5 July 2006) refers to "the current position on detention which we all agree is untenable".

43.8 A further draft policy submission was prepared on 18 September 2006. The proposal is ministerial agreement to "amend our published policy … so that it clearly states we will detain someone pending removal on the grounds of public protection". The body of the submission states that:-

> "In recent months … we have been detaining all [underlined in the original] criminal cases where it is decided to pursue deportation. We do not think that this position is still tenable … For those that are removable, detention may well be held to be unlawful and at odds with our published policy or if we have failed to consider the particular circumstances."

Reference is made to vulnerability to legal challenge and the advice is that to reduce legal and reputational risks "we need to amend both our current practice and published policy".

43.9 Nothing much seems to have happened in consequence of that. On 21 December there is an e-mail stating:-

> "The Home Secretary has been very clear in his statements that there will be a presumption of detention in all FNP cases until removal. We need to ensure that all staff are applying that."

It is unexplained how the Home Secretary, at least in his public statements, had been "very clear" on that. On 22 January 2007, however, an e-mail records: "we are under strict orders to detain all [task force] cases without exception". There was further debate. There was also debated what the Home Secretary had meant by continued detention until deportation had been fully "considered": which, it was appreciated, did not necessarily mean until they had actually been deported.

43.10 An e-mail of 10 February 2007 recorded that:-

> "… given the lack of categorical policy instructions over this issue, many people are understandably concerned."

43.11 On 26 February 2007 an e-mail from the CCD bluntly states among other things:-

> "Previous advice has always been to detain in all circumstances even though this was against published detention policy."

By a separate e-mail of that date, it was again noted that ministerial statements only refer to detention up to consideration of deportation: "however whilst not in a ministerial statement it has been confirmed that ministers want detention to continue until deportation".

43.12 In May 2007 a further draft policy submission document was prepared (this being nearly a year after the first effort of 14 June 2006) and widely circulated. This draft again refers to "our current

published policy" of a presumption in favour of temporary admission or release. It states that:-

> "Since the foreign national prisoner issue first broke in April 2006 we have been detaining all [underlined] criminal cases where it is decided to pursue deportation."

It refers to cases where there is no realistic prospect of removal in a reasonable period of time and the prospect of legal challenge in such cases. The draft submission goes on to state in paragraph 7 that:-

> "legal advice is that those statements [viz. made to the House of Commons] were insufficiently unambiguous to constitute such a change of policy and that we would therefore almost certainly lose any challenge if this were our defence."

The draft then makes this comment as cynical as it is unedifying:-

> "If we were to lose a test case, we could present any change in FNP detention practice as having been forced on us by the courts."

That may or may not be good politics: but it is deplorable practice, especially when it is seen that almost from day one the new unpublished policy was perceived in virtually all quarters within the department to be at least legally "vulnerable" and in some quarters positively to be untenable and legally invalid. The tone of this draft is further confirmed by the subsequent comments that the longer the delay the more likely it would be that a court judgment "would force us to pay out significant sums in compensation to FNPs whose detention was held to be unlawful" as well as exposing the department to criticism in the media and to reputational damage.

43.13 A further revised draft policy submission of May 2007, again widely circulated, included in paragraph 7 this comment in square brackets "[Have we also not been stating since in witness statements that we have not changed our policy?]". It may be noted that, given the course of events in at least the cases of Mr Abdi and Mr Lumba, if not other cases also, that pertinent query seems to have been left unresolved up to the middle of 2008.

43.14 There was further debate about not detaining FNPs where there was no prospect of removal. There was in this context some particular discussion about FNPs from Somalia and Iran.

43.15 On 24 May 2007 a yet further revised draft policy submission was circulated. By this time, it was now stated that since April "we have been detaining most time served FNPs where it is decided to pursue

deportation". So the word "all" has now been replaced by the word "most". What prompted that is not explained. Annexed was a draft process communication setting out suggested procedures to be followed by caseworkers with regard to FNPs where removal was not likely to be imminent. A comment on the draft claimed that "the published policy on detention hasn't caught up with" the new priority and also asserts that "we have been acting in line with a clear statement of government policy". Another, separate, comment on the draft is to the effect that the "do-nothing" option is not an option "as we are going to get sued and have to pay out a lot of compensation which will no doubt cause a lot of public disquiet". As will have been seen, that viewpoint was not heeded: since not until 9 September 2008 (although presaged by Mr Wood's statement of 26 June 2008) was the new policy published.

43.16 At all events, the draft submission went through further revisions. A significantly reworked draft was circulated on 7 June 2007. That includes these sentences:-

> "In May 2006 you [Home Secretary] promised that no FNP would be released from detention without being considered for deportation. The promise has been maintained but in addition we have interpreted this as meaning that where detention [sic] is being pursued FNPs should normally be detained until they have been deported".

43.17 A further draft was produced in July 2007. An e-mail of 17 July 2007 records among other things:-

> "The Home Secretary has asked whether we recommend changing the practice on FNP detention because of a specific legal vulnerability or because the detention estate is full of FNPs. I think the reality is that it is a mixture of the two … ."

Legal advice at that time from the Home Office Legal Advisers' Branch continued to take the view that "there is ongoing legal vulnerability". On 17 August 2007 a (quite widely copied) submission to the Minister recorded that CCD had been "routinely detaining the vast majority of FNPs subject to deportation beyond their custodial sentences".

43.18 On 22 May 2008 a policy statement was agreed by the Chief Executive of the Border and Immigration Agency that continued to refer to Chapter 38 of the Operations Enforcement Manual (now Chapter 55 of the then Enforcement Instructions and Guidance) and continued to refer to a presumption in favour of release: while suggesting it would be displaced in FNP cases by the individual's

criminality, consequent increase in the risk of absconding and so on. Reference is made in that statement to the statements made in the House of Commons and to the Home Affairs Committee in 2006 by the then Home Secretary; and to the Cullen criteria.

43.19 As noted by Mr Wood in his witness statement of 31 October 2008, revisions were made to that policy statement on 30 May 2008. It was also noted that in a case then before the courts called "A" a witness statement had been filed which was inconsistent with the latest version of the policy statement.

43.20 Further consideration then led to Mr Wood's first statement of 26 June 2008 and, ultimately, to the revised policy eventually being published on 9 September 2008.

44. I make no apology for setting out selected extracts from some of the disclosed documents at some length, because in my view they are very revealing. They reveal the following things, amongst others. First, anxiety was being expressed within the Home Office almost from the outset as to the lawfulness of the new policy. Second, there is an almost consistent appreciation of the legal need to publish the new policy in the light of the then published different policy. Third, difficulty in understanding and formulating what the new policy actually was was repeatedly expressed in a number of quarters. Fourth, there are numerous statements to the effect that *all* FNPs, where it is decided they should be deported, are detained pending deportation: although that is on some occasions modified to saying that "most" of them are to be detained and that the practice of detention is not invariable. Fifth, the new policy was only eventually published, as effectively conceded by Mr Wood, on 9 September 2008 – and that because the true position, so far as it was understood, had become revealed in the Ashori and then Lumba litigation.

The underpinning legal principles

45. There are authoritative legal cases which set out the principles to be applied in cases of detention under paragraph 2 of Schedule 3 to the 1971 Act. In R v Governor of Durham Prison, ex p. Hardial Singh [1984] 1 WLR 704, Woolf J said this (at p.706):-

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported

> within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

46. In R(I) v Home Secretary [2002] EWCA Civ.888; [2003] INLR 196 Dyson LJ summarised the matter in four basic propositions:-

> "(a) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (b) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (c) 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;
>
> (d) The Secretary of State should act with reasonable diligence and expedition to effect removal."

An illustration of proposition (b) is that, as is borne out by other authorities, a person ordinarily cannot complain that a period of time is unreasonable if the delay is occasioned by his own conduct. Also, as to proposition (ii), it may be noted that at paragraph 29 Simon Brown LJ said:-

> "The likelihood or otherwise of the detainee absconding and/or reoffending seems to me to be an obviously relevant circumstance. If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit murder or mayhem, that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee's removal abroad."

See also at paragraph 48 per Dyson LJ. At paragraph 53 Dyson LJ warned against the notion that the risk of absconding could become a trump card "regardless of all other considerations, not least the length of the period of detention".

47. It may be thought that the "procedure prescribed by law" for the purposes of Article 5(1) of the Convention might be taken to be that set out in the 1971 Act (as interpreted by the courts) and subordinate Rules and policy statements: see Nadarajah v Secretary of State for the Home Department [2003] EWCA Civ.1768, [2004] INLR 139 at paragraph 54. Interestingly, however, in the very recent case of SK (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ.1204 Laws LJ, at paragraph 33 of his judgment, stated that the "rules" connoted by Article

5(1), to ensure that any interference with liberty was not arbitrary or random, lay in the Hardial Singh principles themselves.

48. There is also clear authority for the proposition that what can be a relevant factor, in a decision to detain, is a risk of reoffending: see R(A) v Secretary of State for the Home Department [2008] EWCA Civ.804 (in a case incidentally where, in the circumstances, detention of over 3 years was held justifiable). At paragraph 54 (per Toulson LJ) it is stressed that a risk of absconding and a refusal to accept voluntary repatriation are "bound to be very important factors and likely often to be decisive factors in determining the reasonableness of a person's detention". At paragraph 55 Toulson LJ said this:-

> "55. A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

49. It is also to be noted that Toulson LJ, in dealing with an argument that the courts were concerned solely to review the reasonableness of the Secretary of State's decision to exercise his power of detention during the period in question, stated at paragraph 62:-

> "Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions often being inextricably linked."

Keene LJ expressed the same view, in particular at paragraph 71 of his judgment.

Factual background relating to the claimants

50. Looking at the matter from a wider perspective, in one sense none of the claimants appeals very much to a sense of the merits: and some of them very decidedly do not. One might have thought that some kind of reciprocity, in the form at least of seeking to behave in a responsible and law abiding way, should be expected from someone in whose case a country has been prepared to grant leave to enter or remain. Not so, in the case of at least some of these claimants, who seem actively and consistently to have pursued serious criminality whilst in the United Kingdom. Attempts by Mr Husain to mitigate by reference to the difficult circumstances such persons can often find themselves in did not much impress me: not least because they are a disservice to

the great majority, in comparable circumstances, who do behave responsibly and lawfully.

51. But ultimately counsel for the claimants are, I suppose, entitled to adopt an almost clinical detachment from what might be styled the overall merits. Those unlawfully detained (if they are unlawfully detained) should have the appropriate remedy, even if "undeserving", no less than those unlawfully detained however "deserving". The law cannot discriminate in such a context: and a broad, and in some respects subjective, appeal to "the merits" should not be permitted to subvert legal certainty and the proper application of firmly established principles.

52. In summary, the background is this so far as the individual claimants are concerned.

The claimant Abdi

53. Mr Abdi was born in Somalia on 5 January 1980. He arrived with two siblings in the United Kingdom on 13 October 1991 (his mother having arrived in 1989) and claimed asylum. On 28 November 1996 he was granted indefinite leave to remain.

54. Mr Abdi was convicted of affray in 1994 and of taking a vehicle without consent in 1995. He received further convictions for theft and handling in 1996, the year he was granted indefinite leave to remain. In 1997 he was convicted of two counts of robbery and other matters. In 1998 he was convicted of two counts of indecent assault, a count of robbery and two counts of burglary and theft. He was sentenced to a total of 4½ years detention and recommended for deportation. In 2001, shortly after release, he was convicted of a drugs offence and affray and in November 2001 he was convicted of robbery (3 years' detention). When released on licence, he committed further offences for which he was sentenced to 2 years' imprisonment in 2004. In 2005, further serious offences were committed, involving also significant violence towards the police, for which he received a 3 year custodial sentence. It is said that Mr Abdi had long since become addicted to crack cocaine.

55. Notice of intention to deport was served on 29 November 2006, together with a notice authorising his detention under paragraph 2 of Schedule 3 to the 1971 Act. The accompanying letter gave reasons as including that it was likely that he would abscond if temporarily released and that his removal from the United Kingdom would take place within a reasonable time.

56. Mr Abdi went on a "dirty protest" on receipt of these papers. He is also recorded as refusing to co-operate with Biodata applications.

57. By determination of 13 March 2007 the AIT allowed an appeal of Mr Abdi against the deportation order. A further notice of intention to deport was served on 1 April 2007 and reasons for detention given: these included risk of absconding and reoffending and the need to protect the public.

58. Thereafter his detention was regularly, although not always on a monthly basis, reviewed. On 26 April 2007 Mr Abdi was given permission to appeal out of time against the further decision to deport him. The appeal, after some delays, was dismissed by determination of 30 October 2007. The AIT described his criminal

record as "appalling" and (unsurprisingly) that they were not satisfied he would avoid reoffending.

59. On 6 February 2008 Mr Abdi applied for bail but then withdrew such application. A further application for bail was rejected, after hearing evidence, by an Immigration Judge on 6 March 2008.

60. On 12 March 2008 Mr Abdi issued the current proceedings. The essential (although not only) grounds relied on were that there was no prospect, and never had been a prospect, of deportation with a reasonable timescale; that his detention was contrary to the policy stated in Chapter 38 of the Operations Enforcement Manual; and that a reasonable timescale for detention had in any event by then elapsed. Various applications for interim relief failed.

The claimant Ashori

61. Mr Ashori says that he is a national of Iran, born on 1 August 1974. He arrived in the United Kingdom on 18 September 2004 and claimed asylum. This was refused. An appeal was dismissed on 1 February 2005, the Adjudicator taking the view that the asylum claim had no truthful foundation, and permission to appeal from that dismissal was refused on 17 March 2005, with all appeal rights thereafter exhausted on 7 April 2005. He remained in the United Kingdom unlawfully.

62. On 26 July 2005 Mr Ashori claimed asylum under a different name. On 31 August 2005 he was arrested on suspicion of attempting to obtain leave by deception. He was charged and on 30 May 2006 convicted, being sentenced on 11 July 2006 to 8 months' imprisonment, with a recommendation for deportation. He had in the meantime been apprehended on 20 May 2006 attempting to stow away in a ship leaving the United Kingdom, having previously failed to attend a court hearing and a warrant for his arrest having been issued.

63. On 26 September 2006 Mr Ashori completed the custodial element of his sentence but was then transferred to immigration detention. On 10 November 2006 he was served with a notice of a decision to make a deportation order. On 7 December 2006 Mr Ashori withdrew an appeal and indicated that he would seek to leave the United Kingdom.

64. On 22 January 2007 Mr Ashori requested an interview with the Iranian Embassy. Further evidence was requested by the Embassy, in the form of a birth certificate or certified passport. On 19 April 2007 the Secretary of State made a deportation order which was served on 4 May 2007. Then and thereafter the Home Office advised or requested Mr Ashori to seek to obtain documentation. Bail applications were refused on 9 March and 9 May 2007. It is the case that, unhappily, matters were thereafter complicated by information relating to another case being, wholly erroneously , placed on Mr Ashori's file. A further bail application was refused on 19 August 2007, as were subsequent applications.

65. On 23 October 2007 Mr Ashori commenced these proceedings. The case came before the court on 26 November 2007 and the upshot was that Mr Ashori was encouraged again to obtain further documentation.

66. Mr Ashori's case had been regularly reviewed. It had been reviewed also in the light of the Cullen 1 criteria issued in November 2007. He was not released. A detention review of 10 January 2008 considered that he could be removed within a reasonable timescale. On the issuance of the Cullen 2 criteria, Mr Ashori's case was again reviewed. He was then released on 29 February 2008, removal being assessed as not being "imminent".

67. There are no other recorded criminal convictions against Mr Ashori. It may be noted that, set against a sentence imposed by the courts of 8 months imprisonment, of which he was liable to serve one half (less any time spent on remand in custody), Mr Ashori was thereafter held in immigration detention for a period of nearly 17 months before release, and for a period of some 13½ other months after his appeal rights were exhausted.

68. His case eventually came before Mitting J on 22 May 2008, with the result which I have set out above.

The claimant Madani

69. Mr Madani is a citizen of Algeria. He entered the United Kingdom unlawfully at some stage in 1992. Between 1998 and 2001 he was convicted on four occasions of seven offences, serving two custodial sentences.

70. On 19 September 2002 he applied for asylum. The application was refused on 4 November 2002, notification to him as a person liable to removal having first been served.

71. In March 2003, he was convicted of various matters. On 10 September 2003 he was charged with conspiracy to defraud and remanded in custody; on the same day his detention as a person liable to be removed was authorised. Biodata details were in due course given.

72. A fresh asylum application (or reconsideration of his earlier application) was refused on 26 April 2004. An appeal was dismissed on 2 July 2004. Mr Madani was convicted of the charged conspiracy to defraud on 26 April 2004 and was remanded in custody. On 24 November 2004 he was sentenced to two years imprisonment and recommended for deportation – in fact because of the time spent on remand in custody his release date was on that day. However, he was kept in immigration detention (or purported immigration detention). On 9 January 2005 he was served with a form 1S151F, notifying him that he was being detained as an immigration offender. On 9 February 2005 a notice of decision to deport was served on him.

73. An appeal against this decision was dismissed on 28 September 2005; a deportation order was served on 23 November 2005.

74. Attempts to obtain the necessary travel documents did not prosper. It is said that Mr Madani refused to co-operate. In the meantime, there were regular reviews of his detention.

75. On 11 October 2006 a bail application was refused. Eventually he was released on conditional bail on 8 March 2007. There had been frequent reviews of his case while in detention.

76. In his case, therefore, the initial detention antedated the new policy brought in from April 2006; but continued (until 8 March 2007) after it was brought in.

The claimant Mighty

77. Mr Mighty was born in Jamaica on 18 November 1980. He arrived in the United Kingdom on 4 December 1992, initially being given 6 months leave to enter as a visitor. Various applications thereafter for leave to remain failed; however on 10 February 2003 he was granted indefinite leave to remain as part of the seven year overstayer concession. A subsequent application for naturalisation was refused in 2005.

78. He has been convicted of 14 offences on 11 occasions. In particular, on 23 May 2003 he was convicted on counts of robbery and possession of a Class A drug with intent to supply and was sentenced to 3½ years imprisonment on 27 June 2003. On release on licence, he committed a driving offence and was recalled to prison. He had received a further custodial sentence for this on 30 May 2005. He was released on 31 March 2006.

79. On 9 May 2006 he was notified of a decision by the Secretary of State to deport him. On 19 May 2006 he was detained. An appeal against the decision was unsuccessful and all appeal rights were exhausted by 20 November 2006. An application for bail had been refused on 27 September 2006.

80. A further application for bail was unsuccessful. On 2 November 2006 he attempted with others to escape from detention (apparently while in a prison van). In respect of this he was subsequently convicted of counts of attempting to escape and assault occasioning actual bodily harm on 6 August 2007 and sentenced to 6 months imprisonment.

81. A deportation order was signed on 15 December 2006. An application for a travel document was submitted to the Jamaican High Commission and there was an interview on 27 November 2007. He remained in detention, with regular reviews: the decisions to continue detention included, as reasons, risk of absconding and risk of reoffending, against an assessment that his removal to Jamaica was imminent. An application for bail was refused on 19 February 2008. He commenced the present proceedings on 29 May 2008. He was finally released on bail by an Immigration Judge on 28 July 2008.

The claimant Lumba

82. Mr Lumba, a citizen of the Democratic Republic of Congo, entered the United Kingdom unlawfully on 10 April 1994. He claimed asylum. This was eventually refused, but he was given leave to remain until 13 April 2004.

83. On 26 February 1998 he was convicted of a count of assault occasioning actual bodily harm and received a custodial sentence. He was convicted subsequently, on separate

occasions, of counts of disorderly behaviour and threatening behaviour. Then on 24 April 2001 he was convicted of a count of assault occasioning actual bodily harm and was sentenced to 6 months imprisonment. On 29 August 200l (in the interim having been convicted for minor offences of theft) he was sentenced to 4 months imprisonment for assaulting a police officer. On 24 October 2003 he was convicted of a count of inflicting grievous bodily harm with intent, which involved striking a man on the head with a brick. A probation report noted no sign of regret or remorse and "an alarming pattern of reoffending in relation to violent offending". He was sentenced on 12 January 2004 to 4 years imprisonment. He received several adjudications for bad behaviour while in prison (including for fighting).

84. On 20 January 2004 Mr Lumba lodged an application for indefinite leave to remain. However, by letter dated 3 April 2006 the Secretary of State informed Mr Lumba of the intention to deport him, and formal notice was thereafter given to him and, in due course, his wife. He was due to be released from prison on 23 June 2006 but by letter dated 22 June 2006 he was notified that he was to be detained under immigration powers.

85. He pursued an appeal against deportation. The appeal was dismissed on 15 December 2006, the Immigration Judge noting the "appalling criminal record" and being unpersuaded as to the assertions of illness. In the meantime, it does not appear that regular, or any, detention reviews were introduced before February 2007.

86. Lack of co-operation on the part of Mr Lumba in helping obtain travel documentation was noted. On 14 March 2007 a deportation order was signed. The Democratic Republic of Congo Embassy was pressed by the Home Office for progress. Eventually, directions for removal were set for 20 August 2007. Five days before that, fresh representations were made by Mr Lumba that he would be at risk if returned. Those were rejected. He commenced judicial review proceedings, which were then ordered by consent to be stayed pending the decision in the pending BK case (relating to removal of failed asylum seekers to the Democratic Republic of Congo). In the meantime, detention reviews maintained a decision to detain on the principal ground of very high risk of absconding and also risk of reoffending.

87. The present proceedings were commenced on 18 October 2007. Thereafter various bail applications were refused by Immigration Judges: one, not unreasonably, noting that Mr Lumba had shown a "blatant disregard" for some aspects of English law. In the meantime, the renewal application for permission to apply for judicial review was adjourned, pending the final outcome of the BK case. On 14 May 2008, Collins J refused to grant bail.

88. On 24 June 2008, his application came before Collins J as I have already said. In a fully reasoned judgment Collins J reviewed relevant authorities such as Hardial Singh and I and A Collins J expressed himself as "entirely satisfied in the circumstance of this case that there is a real risk of absconding". Collins J concluded that continued detention then remained lawful (the decision of the Court of Appeal in the BK case by then being awaited). Collins J then went on to note the "disturbing development" raised during the hearing before him, concerning the changed approach to the detention of FNPs; considered that aspect; but indicated that he remained satisfied that it was proper to maintain detention. But he ruled that the issue of the lawfulness of

the past detentions of Mr Lumba would have to be considered at a further hearing (which, as I have already indicated, is how the matter came before me).

The submissions

89. All the claimants, in one form or another, challenged the lawfulness of their detention, primarily on the grounds that removal was not imminent or could not be achieved within a reasonable time; and that prolonged detention in each case could not be justified : in effect, drawing on Hardial Singh principles. But in the light of the evidence as it has emerged, or been extracted, from the Home Office concerning the new policy operating from April 2006 they have all added grounds to their claims to challenge their detention as having been made or continued under such a policy: which they say was an unlawful policy. These grounds were styled "the generic grounds" before me.

90. I should make one thing clear. Some of the written grounds indicate, on one reading, that bad faith is alleged. At the hearing, I asked each counsel appearing for each claimant whether such an allegation was being maintained. Each confirmed that it was not. Mr Husain did say that what happened here was "on the cusp" of bad faith, and he also fiercely criticised what he said was inadequate disclosure by the defendant and the like. But either there is bad faith or there is not; and here bad faith is not asserted. I might add my own view that the evidence put before me does not indicate bad faith on the part of anyone on behalf of the defendant, whatever other criticisms can be made.

91. At the hearing before me, the generic grounds were argued first. The submissions on behalf of the claimants were primarily advanced by Mr Husain, whose submissions were adopted, albeit in some respects amplified, by Mr Macdonald and Miss Jegarajah. Mr Tam responded on behalf of the defendant. I then heard argument on the specific grounds by reference to the facts of each case as to whether there had been unlawful detention for a particular period or periods giving rise to an entitlement to damages in respect of each individual claimant: Mr Johnson responding on behalf of the defendant. However, in the case of Mr Abdi it had been decided before the trial before me, for reasons I need not go into, that the specific causation and other matters going to reasonableness relating to his detention would need to be dealt with (subject to my decision on the generic issues) at a later hearing.

92. It is convenient to take the various generic grounds argued broadly in the order to which they were responded by Mr Tam on behalf of the defendant.

The grounds

93. (1) The first point to address is the one disputed aspect of the application for leave to amend. The claimants (most notably by Mr Husain on behalf of Mr Abdi and Mr Lumba) seek declaratory relief relating to the overall conduct of the defendant with regard to the application of the new policy between April 2006 and September 2008 (or at least to 26 June 2008, the date of Mr Wood's statement). In the formulation of Mr Husain the declaration sought was this:-

> "A declaration that the Secretary of State acted unlawfully in failing to disclose to the courts from April 2006 to June 2008

> the policy that was in fact being applied to the detention of foreign national prisoners and to the claimant WL over that period and to the claimant HJA over the period November 2006 to July 2008"

94. I refuse permission to amend in this regard.

95. So far as the individual claimants Abdi and Lumba are concerned, this declaratory relief, so far as it relates specifically to them, adds nothing to the remedies already claimed. But so far as the declaration goes further than that it seems to me objectionable in principle. Precisely what has happened (or not happened) in other courts in other cases is not known to me. As Mr Wood explains, the position is under investigation. A declaration, if made, speaks to all the world. It would not be right for me to make such a declaration which might then be used in other cases, even though the facts of those cases were not before me.

96. The same can be said of the corresponding formulations, by reference to an asserted lack of candour on the part of the defendant in other cases, made by the other claimants. Such a declaration is not necessary for a fair disposal of their own cases and is not appropriate.

97. Mr Husain submitted that the failure to disclose the new detention policy to the courts "amounted to abuse of executive power of the most extreme kind and an egregious failure to comply with the basic tenets of the rule of law". He no doubt scores top marks for rhetoric in that submission. But it does not advance the argument for the new declaration sought to be included by amendment.

98. (2) The second point advanced by the claimants can also, I think, be given short shrift. It is submitted that the departure from the pre-existing and published policy, after April 2006, had not been duly authorised; that no evidence of an instruction from the Secretary of State or relevant Minister to officials confirming that a new policy (whether it be a blanket policy or presumptive policy in favour of detention) had been adduced; and that officials, in applying their own interpretation to what the then Secretary of State had stated to the House of Commons and Home Affairs Committee in 2006, had no mandate to do that; and overall officials had acted in excess of their delegated authority.

99. I reject that. The broad thrust of what the Secretary of State was seeking was set out in his statements, even if precision and detail was not present and even if the reference to "consideration" was, on one view, obscure. Further, I have no justification, even allowing for Mr Husain's complaint at the lack of disclosed minutes or records, for rejecting Mr Wood's statement in paragraph 8 of his witness statement of 31 October 2008 that senior officials had frequent discussions with the then Home Secretary, Dr Reid, and that "on such occasions the intention to maintain detention until deportation was made very clear". Officials had authority to formulate and implement that general policy set by the Home Secretary: indeed he was expecting them to. Applying the general approach indicated in cases such as Carltona Ltd v Commissioner of Works [1943] 2 All ER 560 at pp.562 – 3, I can see no basis for an argument that the implementation of the new policy was in some way ultra vires or in breach of authority.

100. (3) The next question is to determine what the actual policy was which was to be applied after April 2006. One might have thought this ought to be capable of a ready answer: but that did not prove to be so.

101. Mr Tam rightly accepted in this context that there were legal limits to a power of detention: as exemplified by the principles set out in Hardial Singh and restated in I and A. But he also emphasised the distinction between the existence of a power to detain and the exercise of such power: citing for that R (Khadir) v Secretary of State for the Home Department [2006] 1 AC 207; [2005] UKHL 39. That there is such a distinction is, of course, clear. But I had the greatest difficulty in seeing how that really bears on the issues in the present cases. No one disputes that the defendant had and has the (legal) power to detain FNPs: it is conferred by the 1971 Act. The question in these particular cases is whether or not that power was exercised unlawfully. In shorthand terms, in fact, it can be said that the defendant has no power to detain unlawfully: but that is not a vires argument, as such, rather it is simply one broad way of formulating the existence of limits on the exercise of the general power to detain.

102. Another important concession on behalf of the defendant should also be recorded. That was that the defendant could not properly exercise the power of detention of FNPs pending removal in a way that was mandatory and admitting of no exceptions (reflecting what was called the "blanket" policy of detention in argument). In my view that concession was clearly right. It was right because, quite apart from questions of compatibility with Article 5 of the Convention were it not so, paragraph 2 of Schedule 3 of the 1971 Act plainly connotes and requires an individual consideration of the circumstances of each case.

103. Accordingly, if there was here in operation a blanket policy of detention, admitting of no exception, of FNPs after April 2006 then such policy would be unlawful. And that would be so irrespective of whether or not such policy had been sufficiently published and made sufficiently accessible.

104. It was the submission of the claimants that the policy was a blanket policy, applied irrespective of the circumstances of each individual case, and accordingly for that reason alone was an unlawful policy. It was the submission of the defendant, on the other hand, that there was here no blanket policy. In Mr Tam's formulation, the policy was that there was a presumption that individual FNPs would remain in detention pending their deportation. When asked in argument, he added the word "rebuttable" before the word "presumption".

105. That that is so would accord with the effect of Mr Wood's statement of 26 June 2008 and witness statement of 31 October 2008. But, as it seems to me, those most carefully crafted statements can indeed be said (as the claimants said) to involve a degree of after the event rationalisation. Thus this is said in paragraph 13 of the statement of 26 June 2008:-

> 13. 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. This is because in such cases, there is a clear imperative

> to protect the public from the risk of harm, which arises through a risk of re-offending if the individual is released, as well as an increased risk of absconding evidenced by a past history of lack of respect for the law. The public protection imperative has the effect that the starting point is 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. In assessing what is a reasonable period in any individual case, the caseworker must look at all relevant factors to that case, including the particular risks of re-offending and of absconding which the individual poses. In balancing the factors to make that assessment of what is reasonably necessary, UKBA distinguishes between more and less serious offences. Caseworkers are given guidance in Cullen 2 as to whether an offence is more or less serious."

In paragraph 11 of his witness statement of 31 October 2008 he said this, for example:-

> "11. Some members of CCD have expressed their understanding of the policy to be implemented as a 'blanket' or 'near blanket', and documents that are exhibited contain references to these, and comparable, terms. Such language is also used in documents by more senior officials describing in general terms the new approach. This reflects the significant change in policy from a presumption in favour of release to a presumption in favour of detention. The result of this change was that the vast majority of FNPs who were to be deported were detained pending deportation. The presumption in favour of detention was, however, rebuttable and it was not a "blanket" policy in the sense of permitting no exception: quite apart from the releases that took place as a result of Operation Cullen, I have identified 16 cases where FNPs were released, even though a decision to deport had been made, and there may well be others. Moreover, some of the contemporaneous documents do demonstrate that it was recognised at the time that this was not a blanket policy."

106. The difficulty with some of these assertions is that they do not entirely reflect what many of the contemporaneous e-mails, recording views within the Criminal Casework Directorate, Detention Services Policy Unit, IND and Border and Immigration Agency and others, were actually saying. Many of them (as set out above) seem to record an acceptance of there being in fact a blanket policy of detention – notwithstanding frequent and repeated assertions of unease about the legality of such a situation.

107. Moreover, of the 16 FNP cases identified by Mr Wood as having been released, not one of them (on the information put before me) connoted release on Hardial Singh

principles – all were on medical, or related, grounds. Mr Husain indeed said that, in context, they should be regarded as de minimis.

108. I can see the force in that. But overall I do not think I would be justified in concluding that what was operated here was a blanket policy of detention, admitting of no exceptions and allowing for no individual consideration of individual cases. The Home Office's investigations are, even now, not complete. Further, some – though not many - of the disclosed contemporaneous e-mails would indicate that the policy was a presumptive policy, not a blanket policy. Moreover, as these five cases themselves show, individual consideration *was* being given to cases. Further again, Mr Wood's informal survey of caseworkers (as recorded in paragraph 70 of his witness statement of 31 October 2008) indicated that, of those responding, the "vast majority either correctly understood the policy that was intended to apply or were applying a policy that was more likely to result in release". I do not think I would be justified, in the absence of cross examination, in rejecting this.

109. My conclusion here is that the policy applied after April 2006, albeit inconsistently understood by caseworkers, was not designed to be a mandatory policy of detention of FNPs, permitting of no individual consideration of individual cases and of no exceptions to detention. It was a presumptive policy, admitting of exceptions whereby release from detention was capable of being authorised. Even so, the presumption – described by Mr Wood, with no element of overstatement, as a "strong" presumption – was intended to be very rigorously applied and flexibility, by reference to consideration of exceptional individual circumstances, clearly was to be limited, both by design and in practice. That is shown by the very few actual examples of release thus far identified by Mr Wood; by the contents of a significant number of the contemporaneous e-mails; and by Mr Wood's concession (in paragraph 11 of his witness statement of 31 October 2008) that the result of the change in the policy was that "the vast majority of FNPs who were to be deported were detained pending deportation". In other words, the proposition that such FNPs were never released pending removal shaded, in a Gilbert and Sullivan way, into the proposition that they were hardly ever released. Quite how that compares with the figures for detention of FNPs pending removal (whether or not after court recommendation) *prior* to April 2006 is not known: since no such figures were put before me.

110. (4) But even on that footing, and turning to the next ground of argument, I do not think that, ultimately, avails the defendant: for two, separate, reasons. First, such a presumptive policy was not in my view lawfully open to the defendant in the light of legal authority on the true meaning and effect of paragraph 2 of Schedule 3 of the 1971 Act. Second, and in any event, such a policy was not sufficiently published or accessible, in the public law sense.

111. As to the first reason, the authority in question is the decision of Moses J in R (Sedrati) v Secretary of State for the Home Department [2001] EWHC Admin 410. That was a case which, on its facts, raised an issue under paragraph 2(1) of Schedule 3 to the 1971 Act. In the event, the interpretation to be applied, in the context of Article 5 of the Convention being invoked, was agreed between the very experienced counsel appearing for the claimants and for the Home Secretary, as also was the outcome of the case itself agreed: viz, that a decision not to release the claimants from detention should be quashed. What was left in issue was whether a declaration should be made. This was in the context of Home Office officials having taken the view that there was

a presumption in favour of detention: as to which Moses J commented that he was "not wholly surprised" that they had taken such a view, having regard to the wording of paragraph 2 (1). Moses J decided that a declaration should be made, stressing that it was important that there be correct compliance with procedures and important that there be clarity. The declaration was (in the relevant respects) in these terms:

> "It is declared that the terms of paragraph 2 of Schedule 3 to the Immigration Act 1971 do not create a presumption in favour of detention upon completion of the sentence."

That has since been applied subsequently, for example by Calvert Smith J in R (Vovk) v Secretary of State for the Home Department [2000] EWHC 3386 Admin. It has also been stated as representing the law in subsequent editions of the most widely used practitioners' text book in this field, Mr Macdonald's work on Immigration Law and Practice – see paragraph 17.17 in the most recent edition (7th ed.).

112. Mr Tam made clear that he was not seeking to depart from the concession made in the Sedrati case. He accepted that I should regard Sedrati as correctly decided. But he said that Sedrati was distinguishable in that it was a case under paragraph 2(1). In my judgment that does not avail him. First, Moses J's declaration specifically relates to paragraph 2 generally; second, if the declaration extends to paragraph 2(1) then, a fortiori, having regard to the wording, there can be no presumption in favour of detention arising under paragraph 2(2) or 2(3) either.

113. I would add that, like Moses J, I am not at all surprised that Home Office officials had read paragraph 2(1) as giving rise to a presumption in favour of detention: as it seems to me, on an ordinary interpretation under English law principles of the language used ("shall … be detained … unless the Secretary of State directs him to be released …"), a presumption in favour of detention is indeed connoted. It seems to me that the conclusion reached by consent by Moses J must have been by a process of reading down. It in fact occurs to me that the approach applied here is analogous to that applied in some categories of cases relating to bail (although these cases were not raised in argument before me): cf. R(O) v Crown Court at Harrow [2007] 1 AC 249; [2006] UKHL 42: paragraph 12 of the judgment of Lord Carswell and paragraph 35 of the judgment of Lord Brown. Reference may also be made to R(Sim) v Parole Board [2004] QB 1288; [2003] EWCA Civ.1845 in particular at pages 1310-1312 (Elias J) and pp. 1336-1337 (Keene LJ).

114. Given then, on the authority of Sedrati, that as a matter of law paragraph 2 of Schedule 3 does not create a presumption in favour of detention, the obvious question that follows is: how can such a presumption be created as a matter of executive decision?

115. If there is a valid answer to this in favour of the defendant, then all I can say is, with respect, that Mr Tam did not provide it. I do not think there is an answer. The defendant of course has no free standing power of detention in this context: the defendant's powers derive from the statutory provisions. Those statutory provisions have been interpreted by the court in Sedrati. I do not think that it can for this purpose be circumvented by seeking to distinguish a legal (persuasive) presumption from a factual (evidential) presumption. No statutory amendment has been made in this regard in the aftermath of Sedrati. The defendant must apply the law: the

defendant cannot displace it by executive decision. Mr Tam submitted that the policy adopted since April 2006 does call for individual consideration of each individual case. But even if it be accepted that is so, as I am prepared to do, that advances this particular argument on the issue of the presumption not at all: for the provisions of paragraph 2 of Schedule 3 likewise in any event require an individual consideration of each case.

116. I accordingly conclude that the provisions of paragraph 2 of Schedule 3 (as interpreted in Sedrati, accepted as authority which I should follow) operate to prevent the defendant from operating a policy of a presumption in favour of detention of FNPs pending deportation.

117. It also follows from this, as I see it, that the policy promulgated in the amended Enforcement Instructions and Guidance issued on 9 September 2008 also does not comply in all respects with the law in so far as it relates to cases concerning FNPs dealt with by the CCD – just because that too sets out a presumption in favour of detention. I should add, however, that I can see that, in terms of consequences, the outcome which the defendant presumably desires to achieve is still capable of being achieved, by appropriate redrafting of the latest policy, in most cases: even where, necessarily in my view, the starting presumption is, and is stated to be, in favour of release. This can in practice be achieved by appropriately worded exceptions (and guidance) to the presumptions. If general exceptions to the operation of a presumption in favour of release have an objective and reasonable justification and the means thereby adopted are proportionate to that justification then a valid conclusion, after individual consideration of an individual case, in favour of detention is capable of being reached. It is, I would think, likely to be a relatively rare case where the outcome ("the default position") is decided solely by the application of a presumption or by the burden of proof: a point alluded to (in the context of bail and section 25 of the Criminal Justice and Public Order Act 1994 as amended) in the Harrow Crown Court case (op.cit).

118. Mr Tam also referred to the general law and submitted that posed no obstacle to a (rebuttable) presumption in favour of detention. He referred to R(Saadi) v Secretary of State for the Home Department [2002] 1 WLR 3131; [2002] UKHL and observed that the House of Lords nowhere suggested, in referring to Schedule 2 of the 1971 Act, that detention was not permissible. But whatever the position may be in other cases, for the purpose of the cases before me these arguments lead nowhere. Saadi was not concerned with the validity of a presumption in favour of detention under paragraph 2 of Schedule 3: it was concerned with whether the statutory power of detention conferred under paragraphs 2 and 16 of Schedule 2 was lawful and compatible with Article 5(1)(f) of the Convention. Moreover, an appeal to the general law is hardly likely to avail the in these particular cases before me: given that the history of the English common law is to presume in favour of liberty, as such famous example as Lord Atkin's (dissenting) speech in Liversidge v Anderson [1942] 1 AC 206, since approved at the highest level, amongst many other cases, demonstrate: which history is acknowledged by Parliament's careful approach to arrest, as exemplified in sections 28 and 34 of the Police and Criminal Evidence Act 1978 and related police codes. Accordingly to the extent that Mr Tam submitted that there was no authority which suggests that the executive cannot operate a policy containing a presumption in favour of detention in the way it has done here, I would turn that

around and say that there is no authority – or at all events none cited to me – which says that it can.

119. (5) Given these conclusions, I will deal with the next issue, that of accessibility, relatively shortly.

120. In my view, the policy operated between April 2006 and September 2008 was also unlawful in that it was not sufficiently published or accessible – indeed, in circumstances where such policy actually ran counter to, and departed from, the policy which *was* published and accessible and which was only (in terms of publication and accessibility) put right by the publication of the Enforcement Instructions and Guidance in September 2008.

121. Mr Tam accepted that publication could not properly be said to have taken place by, for example, the Home Secretary's statements contained in newspaper articles. He also accepted that such new policy had nowhere been published with precision. But he said that the public (and practitioners in the immigration field) knew from the general publicity in 2006 and thereafter, in the media and elsewhere, that the attitude of the Government towards detaining FNPs had changed markedly.

122. In my view, where detention is involved both publication of the applicable policy and a degree of precision in stating that policy are necessary: the more so where there is a departure from a previously published policy.

123. There were cited to me many cases on the requirement of publication and accessibility. I can limit reference to these. In The Sunday Times v UK [1979] EHRR 245, for example, this was said:-

> "49. In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

As put by Sedley LJ in R(Begbie) v Secretary of State for Education and Employment [2000] 1 WLR 1115 at p.1132:-

> "… there are today cogent objections to the operation of undisclosed policies affecting individuals' entitlements and expectations."

In R(Salih) v Secretary of State of the Home Department [2003] EWHC 2273 Admin Stanley Burnton J said at paragraph 52, in the context of "hard cases" support of unsuccessful asylum seekers but speaking generally:-

> "Leaving aside contexts such as national security, it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by Statute."

An illustration of the particular requirement for the need for sufficient accessibility (and precision) for a policy in the context of detention can be found in the case of R(Nadarajah) v Secretary of State for the Home Department [2003] EWCA Civ.1768, especially at paragraphs 64-67.

124. It is clear to me that the new policy was, prior to 9 September 2008, neither sufficiently accessible nor sufficiently precise; and so is unlawful on that ground. This is amply illustrated by what was going on within the Home Office itself. Some officials construed it as a blanket policy; others not. Attempts over many months were made, unsuccessfully, to come up with a clear statement of the policy. Caseworkers were reported as seeking advice. Mr Wood's informal survey showed some caseworkers (said to be a significant majority of those responding) as applying "the" policy: others, therefore, were not. Some again clearly were unaware of it, as illustrated by the questionnaire and also by the initial failure to draw it to the attention of the courts in these five cases (if not others also). Judges such as Collins J and Mitting J knew nothing of it. It was not mentioned in a leading text book such as Macdonalds' Immigration Law and Practice. It is also, to my mind, striking that when the Enforcement Instructions and Guidance were first released in June 2008 the presumption in favour of release was still stated. Mr Wood, in fact, by his statement of 31 October 2008 effectively conceded that the new policy required publication and that that was only achieved on 9 September 2008.

125. Mr Tam accepted that the statements of Dr Reid to the House of Commons and the Home Affairs Committee in 2006 could not of themselves suffice (in any event, as I have said, they only refer to detention until "consideration" of deportation). Attempts to rely on individual statements reported in the media cannot suffice, as Mr Tam also agreed – indeed some of such statements, as reported, and made no doubt in part for reasons of publicity (public statements in any case are not always to be equated with public action), indicate a blanket policy rather than a presumptive policy.

126. I do not propose to say more on this. In my view the new policy, such as it was, as operated between April 2006 and September 2008 was unlawful, running counter as it did to the published policy and being insufficiently accessible in the public law sense.

127. (6) An argument on behalf of the claimants was also advanced before me, in further development of the overall submission that this new policy was vitiated by arbitrariness, to the effect that the new policy was in effect discriminatory and

inconsistent with Article 14. Again I can deal with this shortly, given my previous findings. I can accept that it can be argued that it could be unlawful discrimination were foreign nationals to be detained *solely* on the ground of risk of reoffending in circumstances where there would be no lawful power to detain a British national on such a basis (cf. A and X v Secretary of State for the Home Department [2005] 2 AC 68; [2004] UKHL 56). But it seems to me that matters stand on a very different footing when one sees that the context is proposed deportation of FNPs (which cannot arise in the case of British nationals): and where a risk of absconding naturally may feature (and, in my view, did feature in each of these five cases). As Mr Tam put it, the object of the exercise here is deportation: detention is not the end in itself. Moreover, I repeat that it is authoritatively established that a risk of reoffending, pending removal, may properly feature in a decision to detain pending removal: see paragraph 57 of A (op.cit).

128. I therefore, dealing with it very shortly, would have rejected the discrimination points raised before me on behalf of the claimants.

Causation

129. Having decided that the policy operated between April 2006 and September 2008 was unlawful, I turn next to decide whether the claimants were unlawfully detained so that they can claim damages by reason of unlawful detention.

130. The essential submission on the part of the claimants was simple. Each of these claimants was, they say, detained (or as the case may be kept in detention) under an unlawful policy. Therefore they were unlawfully detained. Unlawful detention is to be equated with false imprisonment: and accordingly, and without more, they are entitled to damages for the period of their unlawful detention. Further, they submit, it is salutary that that should be so; just because of the primacy the law accords to the liberty of the subject. Yet further, the law cannot and will not discriminate against them in awarding damages for unlawful detention simply because they have conducted themselves reprehensibly in the past. Thus it is that the claimants say that questions of causation do not arise: and that it is irrelevant to enquire whether or not they could and would lawfully have been detained applying the (valid) pre-April 2006 policy of an initial presumption in favour of release. Mr Husain and Miss Jegarajah added the observation that it is not the administrative court's usual practice to refrain from granting the remedy of a quashing order in (for example) breach of natural justice cases or insufficiency of consultation cases in response to an assertion that the result would have been the same anyway. Still less, they submitted, should the court be diverted from awarding the remedy of damages in the context of these detention cases against an assertion that detention in any event could properly have been and would properly have been directed quite apart from the new policy.

131. Mr Tam did not seek to advance before me an argument that there may be some categories of unlawful detention case, properly so styled, which do not sound in damages. Rather his submission was that where the unlawful policy was of no causative effect (because detention would still have been lawfully directed irrespective of the new policy) then the detention is not to be styled as unlawful detention at all.

132. So there are two stages to the argument. The first is whether, as a matter of principle, it is open to the defendant to rely on an argument based on causation. The second is (if it is so open to the defendant) whether on the individual facts of each of these five cases the claimant concerned would in any event have been lawfully detained quite apart from the new policy.

133. As to the first stage of the argument, I can see the purist force in the contentions of the claimants. But it seems to me potentially to give rise to some very odd, indeed unjust, results.

134. In this context, I would refer to the case of R(D&K) v Secretary of State for the Home Department [2006] EWHC Admin 980 (which in fact is a case where I was the judge). In that case there was a complete failure at Oakington Detention Centre, and contrary to the Detention Centre Rules, to give effect to requirements for medical checks on arrival to assess suitability for detention. I said this at paragraph 108:

> "108. It is common ground that the fact that D and K were wrongfully denied a medical examination within 24 hours of admission contrary to Rule 34 does not of itself mean that they were wrongfully detained. It is common ground that it is for each of D and K to show that had they received (as they should) such examination within 24 hours then they would have been released at an earlier time than in fact they were. It is common ground that this issue of causation is to be assessed on the balance of probabilities: these are not 'loss of chance' cases."

The authoritative force of this is much weakened by the fact that this was a matter of concession (albeit by most experienced counsel): although I clearly acted on the basis that the agreed approach was correct. But for what it is worth I have to say, revisiting the matter, that it still seems to me that this approach was correct. I am reluctant to appeal to considerations of common sense. After all common sense can sometimes be a slippery customer (many judges, for example, have experience of two advocates arguing for diametrically opposed conclusions with each simultaneously praying in aid "common sense" in support of the conclusion each advances). But all the same any other conclusion would seem to me totally unjust. Why should a detainee who has not received the medical examination within 24 hours, as required by the Rules, receive damages for unlawful detention, even if it can be shown – I say nothing about the burden of proof here – that he would have been detained anyway had the medical examination occurred within 24 hours?

135. That kind of consideration – albeit arising, I appreciate, in a context rather different from the present – causes me to be wary about the claimants' general approach as an asserted principle. Moreover all the claimants submitted that if the new policy was unlawful (as I have held that it was) then that renders every detention under the policy unlawful. The word "under" as it seems to me, is in this formulation somewhat loose: but I think that at least it must, and rightly so, connote materiality – that is to say, in effect, "by reason of" the policy. That makes sense. Suppose a caseworker is ignorant of or in a complete fog as to the new policy (as some obviously were) and thus proceeds to decide on detention after April 2006 by application of the old policy and related principles: it surely cannot be said that such decision is vitiated simply

because of the existence of the new policy at the time of the decision. Suppose, again, a caseworker knows of the new policy but, again, reaches a decision to detain not dependent on the new policy or on any presumption in favour of detention: here too I have great difficulty in seeing how unlawful detention (and damages) can be claimed. It is, I would suggest, no very great step from that to say that there should be the same result – and it would be a very natural step to take in a civil proceedings case in tort – if it can be shown that, even if the new policy had been taken into account, the detention decision (and lawfully and properly so) would still have been the same had the old policy been applied. Moreover, I can see no injustice, as a matter of merits, in such a conclusion – quite the contrary.

136. But in any case as I see it this matter is concluded by authority binding on me.

137. In Saadi one of the issues was the failure to give proper reasons for detention. At first instance, Collins J [2002] 1 WLR at p.367 said that the failure to give reasons did not render the detention unlawful – because the claimants would lawfully have been detained anyway. In Saadi in the House of Lords [2002] 1 WLR 3131; [2002] UKHL 41 Lord Slynn at p.3146 agreed with this conclusion of Collins J saying:-

> "I agree with him that even on his approach the failure to give the right reason for detention and the giving of no or wrong reasons did not in the end affect the legality of the detention."

(It may be noted that, in the European Court of Human Rights: Application 13229/03 a finding of violation of Article 5.2 was made but no compensation by way of just satisfaction ordered; para.89).

138. In the case of Nadarajah (op.cit) the Court of Appeal held that one aspect of the policy by reference to which the applicant had been kept detained (which policy was not to have regard to an intimation of proceedings, as opposed to actual issue of proceedings, to cause a person to be released) was not lawful, since it was not , in that respect, accessible. It was crisply stated, at paragraph 68:-

> "The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy as made public."

The thrust of the claimants' argument in the case before me would indicate that, in Nadarajah, the applicant should without more have been declared to have been unlawfully detained and entitled to damages. But the Court of Appeal in that case went on to find that, had the policy been made accessible, the solicitors would have filed the necessary proceedings, rather than simply have stated that they were ready to institute them. Again (and while the point was not necessarily debated before the Court of Appeal and perhaps is not part of the ratio) causation and materiality do seem to have been considered or assumed to be relevant.

139. In my view what disposes of the matter, at all events so far as I am concerned at first instance, are two further decisions of the Court of Appeal. The first is the case of D v Home Office [2006] 1 WLR 1003; [2005] EWCA Civ.38. The facts were complex. The claim, brought in the county court, involved a claim for damages for false imprisonment and breach of Convention rights, the context being detention under the

provisions of Schedule 2 to the 1971 Act. Certain preliminary procedural points arose. It was held that the claimants were entitled to pursue in the County Court a claim for damages for alleged false imprisonment, it being stated by Brooke LJ at para.109:-

> "If an immigrant has been deprived of his liberty by unlawful executive action he should not be denied access to the courts … for the mandatory compensation to which he is entitled."

140. But for present purposes the important passage is what follows at paragraph 110. Brooke LJ said this:-

> "Mr Catchpole also submitted that we should bear in mind the consideration that, when the Administrative Court quashes a decision of an immigration officer on the grounds of public law error, there will be nothing to stop him making the same decision, this time by a lawful route. It appears to me that the answer to this objection lies in the field of causation. In Nadarajah's case this court held that if the immigration officers' decisions had not been tainted by their failure to disclose the policy on which they relied, the applicants' lawyers would have ensured that legal proceedings would have been in fact initiated, and not merely threatened, if this was what was needed to prevent their clients' detention. In Saadi's case [2002] 1 WLR 3131, para 48, on the other hand, Lord Slynn observed that the failure to give the right reason for the detention, and the giving of no reasons, or the wrong reasons, on the form delivered to the claimants, although procedurally inept, did not affect the legality of their detention."

141. There is then the recent decision of the Court of Appeal in the case of R(SK) v Secretary of State for the Home Department [2008] EWCA Civ.1204. One of the issues that arose in that case was the failure on the part of the Home Office to cause to be carried out regular reviews by persons of sufficient seniority as required by the Detention Centre Rules 2001 and the Operations Enforcement Manual, or to give reasons, contrary to Rule 9 of such Rules. Damages for false imprisonment on this basis, as well as other bases, were claimed.

142. At first instance ([2008] EWHC 98 Admin) Munby J had decided that damages were so claimable. He felt able to distinguish my decision in D, saying that Rule 34 could at most set in train a process by which a detainee might be released, whereas he (Munby J) was concerned with a process by which detention is authorised – that position, I might add, corresponding to the position in the five cases now before me. Accordingly, after a closely reasoned discussion and following what he took to be the approach set out in, for example, Roberts v Chief Constable of Cheshire Constabulary [1999] 1 WLR 662, (a decision on section 34 of the Police and Criminal Evidence Act 1978), Munby J found that SK's continued detention had been unlawful in so far as that detention had been continued without regular reviews and by persons of sufficient authority as required by the Detention Centre Rules. Amongst other things, an inquiry as to damages for the periods of unlawful detention was directed.

143. That approach seems to me very much in line with the arguments advanced by Mr Husain before me. But the difficulty for the claimants is that that decision was, very recently, reversed by the Court of Appeal.

144. In the course of his judgment, Laws LJ stated that a system of regular monitoring was a highly desirable means of seeing that the Hardial Singh principles were fulfilled: but it was not itself one of those principles. He went on to say at paragraphs 33 and following this:-

> "33 … The words 'in accordance with the law' appear, of course, in Article 8(2). Plainly the language of Article 5(1) – 'in accordance with a procedure prescribed by law' – is not the same, but the two provisions impose, I think, kindred requirements: 'to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules'. Here the 'rules' are the Hardial Singh principles. Their fulfilment in any given case saves a detention from the vice of arbitrariness. A system of regular monitoring is, no doubt, a highly desirable means of seeing that the principles are indeed fulfilled. But it is not itself one of those principles. The words in Article 5(1) 'in accordance with a procedure prescribed by law' no doubt require appropriate formalities, so that any order for detention ' should issue from and be executed by an appropriate authority' (as it was put in Winterwerp); and they certainly prohibit arbitrary action. But they do not necessarily require the imposition of any specific system of internal mechanics as the means of avoiding it."
>
> "34. It is important to notice that if this approach is wrong, it means that a detention will be unlawful in the absence of (or failure to fulfil) a system of internal monitoring *even though* it can be shown on the particular facts that the detention, far from being arbitrary, is wholly justified. Such a position, however, is at odds with authority in this jurisdiction which tends to show that a failure of a published procedure which a detainee is entitled to have applied to him will not of itself invalidate his detention. …"

He then proceeded to cite D & K and Saadi, and went on:-

> "35. In seeking to formulate the issue before us I posed the question, what is the reach of the power conferred by paragraph 2(2) of Schedule 3 to the Immigration Act 1971, and characterised it is a question of statutory construction. In light of all the matters I have canvassed I would summarise my conclusions on this issue as follows:
>
> (i) Compliance with the Rules and Manual as such is not a condition precedent to a lawful detention pursuant to paragraph 2(2). Statute does not make it so (contrast s.34(1) of

PACE, and the case of Roberts [1999] 1 WLR 662). Nor does the common law, or the law of the ECHR.

(ii) Avoidance of the vice of arbitrary detention by use of the power conferred by paragraph 2(2) requires that in every case the Hardial Singh principles should be complied with.

(iii) It is elementary that the power's exercise, being an act of the executive, is subject to the control of the courts, principally by way of judicial review. So much is also required by ECHR Article 5(4). The focus of judicial supervision in the particular context is upon the vindication of the Hardial Singh principles ..."

Laws LJ went onto hold (para.40) that it was "plain" that the claimant (SK) was lawfully held in compliance with the Hardial Singh principles throughout; and the appeal was allowed. Keene LJ ("with some hesitation") agreed, saying at paragraph 47:-

"… these breaches do not render unlawful the detention of [SK]. In particular I see the force of Laws LJ's point that compliance with the 2001 Rules is not a precondition for the exercise by the Secretary of State of his powers contained in Schedule 3 of the Immigration Act 1971".

He concluded that a failure to comply with the requirements of Rule 9 of the 2001 Rules would not of itself render the detention unlawful. Longmore LJ also agreed that the appeal should be allowed.

145. Mr Husain made no bones about his unhappiness with this decision, and in particular the reasoning of Laws LJ. Indeed at one stage he asserted to me that the case was wrongly decided: although of course he accepted that it was binding on me for what it decided. (For that reason, at least, he and the other claimants accepted that they could pursue no complaints about alleged failures to provide regular monthly detention reviews for various of the claimants.) Likewise, Mr Husain made no bones about his approval of the approach of Munby J at first instance: although of course, so far as I am concerned, that is overtaken by the Court of Appeal decision.

146. SK was a case involving breaches of Rule 9 of the Detention Centre Rules and of the Operations Enforcement Manual. In point of fact, therefore, it is not on all fours with the cases before me. But in point of approach, as it seems to me, the judgment of Laws LJ, and this being a necessary part of the Court of Appeal's reasoning for the decision, does set out an approach which I should, and do, regard as binding on me. That approach is consistent with the approach of Collins J and the House of Lords in Saadi and, for what it is worth, my approach in D&K; as well as the approach adopted in Nadarajah. It is also consistent with what Brooke LJ said in D v Home Office. I appreciate that was not necessarily the approach of Bean J in R (Faulkner) v Secretary of State for the Home Department [2005] EWHC 2567 (Admin) who adopted an approach different from that of Collins J in Saadi (which was cited to him). In that case, detention was held to be unlawful for want of reasons, and accordingly an assessment of damages for false imprisonment was without more

directed. But in my view Faulkner has to be read in the light of the subsequent decisions of D v Home Office and SK; moreover, it is to be noted that (at paragraph 23) Bean J at least contemplated cases where the failure to give reasons, in a detention case, might be immaterial; and indeed found in Faulkner that the failure to give reasons in that case could not be said to have been immaterial to the continued detention. So Bean J was by no means necessarily precluding for all purposes a causation approach.

147. I therefore accept Mr Tam's submissions on this aspect of the case; and direct myself on the footing that inquiry has to be made as to whether the introduction of the unlawful and unpublished policy in fact caused each claimant unjustifiably and unlawfully to be detained.

148. I turn, therefore, to the second stage of this causation argument.

Burden and Standard of Proof

149. At this stage, yet another legal issue arises. On whom does the burden of proof lie? Is it for the Secretary of State to show that these claimants would have been and were lawfully detained in any event, irrespective of the unlawful policy? Or is it for the claimants to show that they would have been released but for the unlawful policy?

150. In D&K I proceeded on the (conceded) footing that – consistent with the general rule for civil claims for damages –it was for the claimants to prove that they had been unlawfully detained and would have been released earlier had only the Rule 34 examinations taken place when they should have done in accordance with that rule. That may have been right in the circumstances of those cases: although, on reflection, I am not so sure about that. Generally speaking, where the relevant statutory power exists the burden in any such case initially rests on the claimant to show that a decision made purportedly pursuant to such statutory power is unreasonable or unlawful as the case may be. But once that is established, then there seems to me to be a lot to be said for the burden then reverting to the defendant to show that the decision has not in fact been causative of unlawful detention where damages for unlawful damages are claimed.

151. At all events, I do take the view that in these five cases before me the burden does now revert to the defendant. I say that for one particular reason. The new policy introduced in April 2006 was designed to shift the presumption from being one in favour of release to one in favour of detention (so far as FNPs awaiting removal are concerned). That change was, it can safely be inferred, intended to have causative impact and was intended to cause at least some FNPs who otherwise under the former (published) policy would not or might not have been detained to be detained. In fact, as the evidence of Mr Wood shows, it did in general terms have such result. That being so, I consider that it is for the defendant Secretary of State to show that lawful detention would in any event still have, and has, taken place.

152. To what standard must the Secretary of State so prove it (if she can)? I conclude that, in accordance with ordinary principles, it is to the balance of probabilities. Mr Husain argued that the Secretary of State would need to show that it was "inevitable" that the Secretary of State would still (lawfully) have decided to detain. That perhaps reflects the approach on occasion adopted in the Administrative Court in declining, as a

matter of discretion, to grant relief on the footing that the same outcome would, notwithstanding some flaw in the process, have resulted in any event (or, putting it another way, that no reasonable decision maker could have reached any other decision than the one in fact reached, notwithstanding some flaw in the process). But as I see it, such approach would not be consistent with the general approach to causation in this particular context as indicated by Brooke LJ in D v Home Office and Laws LJ in SK.

Fallback Argument

153. Mr Tam then presented an argument, which he described as a fallback argument, in reliance on the case of Ullah [1995] Imm A R 166, a decision of the Court of Appeal comprising Kennedy and Millett LJJ. That was a case involving detention, or purported detention, under paragraph 2(2) of Schedule 3. Notice of the decision to detain was duly given and the claimant was detained. The notice was subsequently withdrawn, on the basis of not being in accordance with law in that not all the relevant facts had been taken into account. The claimant was released. He then commenced an action claiming damages for false imprisonment. The action was struck out. It was held that all that was required to make the detention lawful under paragraph 2(2) was the giving, in good faith, of a notice of intention to deport. That having been given, the subsequent withdrawal of the notice did not render the intervening detention unlawful: see in particular at pp.170-171 (per Kennedy LJ) and 171-172 per Millett LJ. That should likewise be the position here, so Mr Tam submitted.

154. If that be right, then one might wonder why this argument was advanced, at this stage, as a fallback argument, rather than at the very front of the vanguard of Mr Tam's arguments. In my view the argument is not right. It is not right, if only because that decision has in my view been overtaken by, and superceded by, subsequent authority and most particularly, for present purposes, D v Home Office (op.cit).

155. In D v Home Office it was expressly noted by Brooke LJ (at para.90 of his judgment – a judgment with which Thomas and Jacob LJJ agreed) that it was necessary to consider with regard to the decision in Ullah, whether there had been any material differences to the law occasioned by the subsequent coming into force of the Human Rights Act 1998 and subsequent pronouncements of the House of Lords. At paragraph 120, he concluded that the court was not bound by Ullah, for a number of reasons. It is true that one such reason was that D v Home Office was a Schedule 2 case (not Schedule 3, as in Ullah): but in my view D v Home Office is to be read as connoting that Ullah has been overtaken by the passage of the 1998 Act and consequential developments in English law.

The individual cases

156. I therefore turn to consider the facts of each of the five cases before me to assess whether or not the defendant has proved that the claimant in each case would in any event have been and was lawfully detained, having regard, amongst other things, to Hardial Singh principles.

(1) Abdi

157. A significant volume of materials with regard to this issue was placed before me with regard to Mr Abdi which, on one view, would seem sufficient to enable this issue to be decided. However, as I have said, it was agreed, prior to the hearing before me, that – if matters came to this stage, as in the light of my earlier indicated views they have – this particular issue should be left to a further hearing. Therefore, I so direct. I will reserve the matter to myself and hear counsel as to any further directions that may be needed.

158. I should, however, here put on record one particular matter. In an internal CCD file note dated 14 March 2007, which contained an assessment of Mr Abdi's then situation, there is included these remarks:-

> "I have spoken to Doug Martin in CTU with regard to removals back to Somaliland. The MoU is still being renegotiated however Doug advised that as the existing MoU is still in place an application can be made to the Somaliland authorities for Mr Abdi to be taken back but it is likely to be refused as the authorities have said they do not want any new applications to be made until the new MoU is in place (NB: for the purposes of a JR or bail application the courts are to be advised that applications for removal to Somaliland can be made."

159. At first sight this last Nota Bene comment is disconcerting to say the least. However, since reliance was placed on this on behalf of Mr Abdi very late in the day, I gave leave to the defendant to serve, out of time, additional evidence in the form of two witness statements dated 20 November 2008, one of Mr Wools of the Returns Liaison Unit and the other of Mr Hearn, Deputy Director of the CCD. They say that returns to Somaliland were indeed a real possibility at that time and that the fact that a new Returns Memorandum of Understanding was then being negotiated with the Somali authorities did not have the effect of suspending returns under the previous Memorandum of Understanding negotiated in 2003; and the file note was to be read accordingly (as its maker has confirmed) and was in not way intended to be inviting a misleading of the courts.

160. I say nothing further with regard to the case concerning Mr Abdi.

Ashori

161. Mitting J, ex hypothesi assuming that the former policy was the applicable policy, considered the case to be "finely balanced". He decided in the result that detention was lawful and complied with Hardial Singh principles. Of course, the order of Mitting J was withdrawn and his judgment is in no respect binding on me – I have to make up my own mind on the material now before me – but I see no reason why I should not at least have regard to the detailed judgment of Mitting J.

162. Mr Ashori was detained, on expiry of his custodial sentence, between 26 September 2006 and 29 February 2008, his appeal rights being exhausted on 19 January 2007. I have already summarised the history thereafter relating to him. It will be recalled that a number of bail applications were made and did not succeed. I can accept the

submission that unsuccessful bail applications do not of themselves determine the lawfulness of the original or continued detention; nevertheless I see no reason why I should not at least take them into account.

163. Miss Jegarajah submitted that the application of the new policy made a "huge" difference to this case. She submitted that had there been no such policy Mr Ashori would have been released and at all events the defendant cannot show that he would not have been.

164. On my reading of the various reviews and internal notes and other evidence relating to Mr Ashori – and it is clear that careful individual consideration was given to Mr Ashori's case - it does not appear that the new policy was consciously operated within the Home Office in making the initial decision or in undertaking the reviews thereafter with regard to Mr Ashori.

165. Miss Jegarajah accepted that the history of events with regard to Mr Ashori indicated a high risk of absconding. But she was entitled also to make the point that there was a relatively low risk of reoffending, and in particular a very low risk of harm to the public. (He was in fact released in the light of the Cullen 2 criteria.)

166. On 8 March 2007 a Home Office document records his previous breaches of bail conditions and also notes a failure to provide documents as to identity. However, on 25 February 2007 a caseworker had said:-

> "I cannot see how we can remove him to Iran if the authorities in the Iranian Embassy cannot accept him as one of their nationals without evidence. I propose release from detention with restrictions … ."

167. On 16 April 2007 a recommendation for release was made but not accepted. A review note says among other things:-

> "With uncertified evidence or no evidence it is not possible to obtain an ETD. In this case, where the only evidence is insufficient for the Iranians' purpose we may well have to consider release, or tagging given the high risk of absconding."

However, the note goes on to record a view as to the lack of effort by Mr Ashori to assist and:-

> "Realistically this subject to going to be difficult to document. However, I am not satisfied that he has tried to obtain evidence and we have not exhausted our avenues of enquiry."

168. Subsequent reviews were in essentials to the same effect and with the same results. One comment, on 29 June 2007, by the Deputy Director was to this effect:-

> "He is going home one way or another and the chances are he will remain detained until this occurs – to prevent this he needs to assist us and be prepared to return."

169. On 27 July 2007, however, a review noted: "there seems little point in his continued detention when there is no reasonable timescale for his deportation … ." This proposal was rejected on 30 July 2007 on the basis that Mr Ashori had shown some cooperation in obtaining documents and "he has a history of deception and I do not believe he will comply with any release conditions". Likewise a proposal for release was made on 30 July 2007 "as at present there is no realistic chance of imminent removal", albeit expressing concern at the risk of absconding. The answer, declining the proposal, was: "I am not prepared to release given lack of cooperation. Please arrange for an urgent ETD interview to try and progress this further." I should add that much, although not all, of this documentation was before Mitting J and much was exhibited to a witness statement of Mr Hicks dated 5 March 2008. One such document not before Mitting J was the final referral, after introduction of the Cullen criteria, preceding Mr Ashori's release on bail. That was endorsed by or on behalf of the Chief Executive: "Bail – low risk to public". As Miss Jegarajah observed, a low risk to the public had *always* been the assessment in his case.

170. Miss Jegarajah also, understandably, emphasised that the reviews and notes relating significantly to Mr Ashori had to be put in the context of all the other general policy communications passing within the Home Office at this time concerning the new, unpublished, policy: extracts from a number of which I have set out above in this judgment. By way of example, she highlighted the CCD Taskforce e-mail of 22 January 2007 which states: "we are under strict orders to detain all of these without exception". On 16 May 2007, a comment was made in an e-mail by reference to an assessment of case law on the seriousness of the offence: "For that reason it seems more or less impossible to justify detaining a Somali or Iranian who is being deported for a fairly minor immigration offence". Miss Jegarajah also noted that in the draft of the submission to the Home Secretary of May 2007 there was included a remark that a significant minority of FNPs was "blocking beds" in the detention estate on a long term basis "because they are from countries to which enforced removal is not possible, such as Somalia, or from countries, such as Iran, which are reluctant to redocument their nationals … ." Comments of a similar kind are made elsewhere in the disclosed documents. It is to be noted however that the perceived practical impossibility of returns to Iran related to enforced removal: it was not by any means accepted as impossible where the individual (as Mr Ashori ostensibly was) was agreeing to be returned and where the individual co-operates in providing information: see the statement of Mr Hicks dated 5 March 2008, with exhibited statement of Miss Honeyman of 3 October 2007.

171. Overall, Miss Jegarajah's submission was that it was the case that Mr Ashori would have been released but for the new policy. She suggests that those officials who on occasion recommended release would not have known of the new policy and so applied the old policy: but the recommendations were turned down by more senior officials, who would have known of the new policy and can be taken to have rejected the recommendations for that reason.

172. It is not uplifting that someone who has completed the four month custodial element of an eight month sentence of imprisonment (the only sentence of imprisonment ever imposed on him by the courts of England and Wales) should then find himself in immigration detention, pending proposed removal, for a period of nearly 17 months before release on bail, or a period of over 13 months from final exhaustion of appeal

rights. But, as the authorities on the application of the Hardial Singh principles show, that is not of itself necessarily enough to show unlawful detention. Further, there was in my view here a proper and justified assessment of a high risk of absconding; there was a proper and justified assessment that Mr Ashori had failed to cooperate, over periods of time, in helping obtain documentary evidence needed to ensure a voluntary return to Iran; and in my view a proper assessment was made that a return to Iran within a reasonable time (which is the correct test: "imminent return" can be a misleading shorthand phase for the application of the Hardial Singh principles, although I agree that it is one stated test for the Manual and the Cullen criteria) remained possible. Overall, I agree with Mitting J's conclusion, and reasoning, that the decision to detain was a proper and lawful one and that the period of detention was justified and not excessive. In my judgment there was no infringement of the Hardial Singh principles.

173. As I have held the standard is that of the balance of probabilities. Reviewing all the evidence I have therefore come to the conclusion that the defendant has discharged the burden to this standard. In summary, I so conclude for the following reasons in particular:

i) There is no document relating to Mr Ashori which shows that he was put or kept in detention because of the new policy.

ii) The individuated consideration of his case generally shows an appreciation of, and application of, the Hardial Singh principles: that was the approach adopted and, as I have held, correctly applied.

iii) When recommendations for release were rejected, this was on (justified) grounds that a return to Iran was assessed as possible within a reasonable time, at all events for someone claiming (as Mr Ashori was) to be willing to be returned, and in the context of an assessment of Mr Ashori giving rise to the delay by his failure to help obtain the required documentation.

iv) The various bail applications were refused by Immigration Judges who could not, ex hypothesi, have been swayed by consideration of the new policy and who, among other things, considered that there was a lack of cooperation.

v) There clearly was a very high risk of absconding or breach of bail conditions (a matter which, as the decision in A shows, is capable of being of the greatest importance in this situation).

174. It was also suggested that Mr Ashori should at least have been released in the aftermath of the Cullen 1 criteria. But at that time Mr Ashori's legal advisers had stated that they had written to the Iranian authorities, with copies of his fingerprints, to obtain a copy of his identity card: and that was properly assessed as indicating removal was then imminent. But that had changed by the end of February 2008 when nothing more had happened.

175. Mr Ashori's claim for damages for unlawful detention therefore fails.

Madani

176. In this case Mr Madani was detained, on expiry of the custodial element of his sentence, on 24 November 2004. He was released on bail conditions on 8 March 2007. Subsequent to his release, I should add, he was arrested and charged with a number of offences, including a number of counts of supplying a class A drug (cocaine) and class C drug (cannabis); possession of false identity documents (including passports) with intent; and harassment. He was in due course sentenced to a total of 6½ years imprisonment, with 278 days spent on remand in custody to count towards sentence.

177. It will be noted that Mr Madani's initial detention antedated the new policy introduced in April 2006: the challenge therefore is as to the continuation of his detention on that ground: it cannot, on any view, be said that his initial detention was tainted by the unlawful new policy. A quite separate challenge, however, is made as to the validity of his initial detention on 24 November 2004.

178. The separate challenge comes to this. There is no dispute that Mr Madani was detained on 24 November 2004. But it also is not disputed that no notice as to deportation or as to his detention pending deportation was given to him at that time. Such notice was given to him, as I find, on 9 January 2005 when a Form 1S151F was served on him. It seems on the face of it that he simply was detained on 24 November 2004.

179. What is the justification for this? The defendant's answer is that she does not seek to justify the initial detention by reference to paragraph 2 of Schedule 3 to the 1971 Act. Rather the justification is that set out in an authorisation dated 10 September 2003 (Form 1S91), authorising administrative detention of Mr Madani as an illegal entrant, pursuant to the powers set out in Schedule 2 to the 1971 Act, in particular paragraph 16. (That date was the date on which he was remanded in custody in respect of the conspiracy to defraud for which he was convicted on 26April 2004 and sentenced on 24 November 2004.) No challenge before me was made as to the validity of that authorisation.

180. Mr Macdonald complains, however, that that does not suffice. He referred me to R (Anufrijeva) v Secretary of State for the Home Department [2004] IAC 604; [2003] UKHL 36. At paragraph 26, Lord Steyn said:-

> "Notice of a decision is required before it can have the character of determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system …."

Lord Steyn went on to make observations to the effect that an uncommunicated administrative decision cannot bind an individual (paragraph 30). That was said in the context of a case where income support was terminated on the footing of an asylum claim having been determined, but no notice of the determination had been given to the applicant. That was similarly so here, Mr Macdonald submitted. (It

occurs to me that another way of putting it, adapting the language of Laws LJ in SK, is to say that such a notice here was a precondition to lawful detention.) On that basis, the argument went, the detention was unlawful, at all events until 9 January 2005: and it is irrelevant to enquire whether there might have been other grounds whereby detention on 24 November 2004 could have been justified.

181. I see the force in this. But I do not accept it. It was not disputed that the authorisation of 10 September 2003 was valid, and capable of being lawfully carried out. That was done on 24 November 2004. Moreover, in contrast to the applicant in Anufrijeva, here Mr Madani would have known perfectly well, by virtue of the very fact of his detention, that a decision had been made to detain him. As is pointed out in the witness statement of Mr Michael Taylor dated 9 February 2007 made in these proceedings Mr Madani had on 3 October 2002 been given notice that he was a person liable to removal as being an illegal entrant; and the notification of temporary admission also of that date made clear that the he remained liable to be detained. (Thereafter his claim for asylum was also dismissed, as he knew.) Thus as I see it, he knew that he was liable to be detained, and why, and that there was power to detain him. In such circumstances, given that there was authorisation for detention, I do not think Mr Madani can claim that he was unlawfully detained, and claim damages, as from that date. And if and to the extent that the argument then becomes a lack of reasons challenge then issues of causation and materiality (for the reasons I have sought to give earlier) do arise. It may also be noted that an argument comparable to that of Mr Macdonald, and relying on Anufrijeva, was advanced in SK, with success, before Munby J, whose decision was of course reversed in the Court of Appeal.

182. Two points with regard to Mr Madani can, I think, readily be made. Quite apart from what happened subsequent to his release, at all relevant times he was properly assessed as posing a high risk of reoffending, involving serious crime. Second, he posed a high risk of absconding.

183. This is borne out by the various regular reviews and progress reports. There can be no claim that Mr Madani was held up to April 2006 by reason of the operation of the new policy, since that of course had not been implemented. Thereafter detention was, in my view, continued (individuated consideration of release clearly being given to his case) on a similar basis to that maintained before: viz. that there was a risk of reoffending and absconding and in circumstances where removal to Algeria was being pursued.

184. Mr Macdonald nevertheless submitted that, by February 2005, it could and should have been seen that removal to Algeria was not imminent or, at all events, likely to take place within a reasonable time and therefore, on the application of the Hardial Singh principles, Mr Madani should have been released.

185. Throughout 2005 Mr Madani was pursuing his asylum appeal. On 15 April 2005 it was recorded that he refused to complete an ETD application required to facilitate return to Algeria. His appeal against the Notice of Decision to deport was dismissed on 28 September 2005. Continued refusal to cooperate with obtaining travel documents was noted, until 31 March 2006 when he completed a Bio Data form, which was sent to the Algerian Embassy. Thereafter he was kept in detention. Bail applications were made from time to time, and refused by Immigration Judges, on the grounds of risk of absconding and of failure to comply with bail conditions. The

evidence indicates that the defendant frequently raised the case with the Algerian Embassy: and on 6 February 2007 an interview was arranged for Mr Madani to allow the Algerian authorities to ask him for more information, although it is said he then gave conflicting information. All this is set out in the statement of Michael Taylor made on behalf of the defendant.

186. The time for which Mr Madani was held in detention was, on any view, long: some 2 years and 3 months. At numerous stages in their monthly reviews, however, officials were referring to the lack of cooperation by Mr Madani as explaining why obtaining the necessary travel documentation "is taking longer than we would like."

187. There is nothing to show that, overall, the new policy played any part in the decision to keep Mr Madani in detention. In my view, on the evidence, it did not. Ultimately, I think Mr Macdonald's arguments really come down to a straight challenge to continued detention on Hardial Singh principles, he saying that it was for an unreasonable period of time. I do not accept this. Given the high risk of absconding, the high risk of reoffending by means of serious criminality and the lack of cooperation in helping obtain travel documentation, I conclude that detention over this (long) period was justifiable and lawful. I also conclude, on the evidence, that there was at all relevant times a prospect of return (if there was cooperation) within a reasonable time and reasonable expedition was shown in the circumstances.

188. It follows that I conclude that Mr Madani would properly and lawfully have been detained in this period, and was so detained, irrespective of the new policy. His claim for damages for unlawful detention therefore fails.

Mighty

189. Mr Mighty's detention under paragraph 2 of Schedule 3 commenced on 19 May 2006. His appeal rights were exhausted on 20 November 2006. He was released on bail on 28 July 2008: a period of over 2 years and 2 months' from initial detention. Thereafter, I add, it seems that he has now been charged with an offence of possession of a class A drug with intent to supply, committed after his release, and is awaiting potential committal for trial.

190. The essence of his claim, he having commenced proceedings on 29 May 2008, was that his detention was for a longer than reasonable period; that there had been no prospect of deporting him within a reasonable period of time; that he was unlikely to abscond if released; and generally, on Hardial Singh principles, that he should have been released. The amended grounds also of course attack the new policy.

191. That Mr Mighty could properly have been detained and was properly detained in the first instance, if applying the old policy, seems to me to be plain. He had a very bad record of serious criminality, with a very high risk of reoffending, and there was a high risk of absconding (illustrated further by his attempt to escape while in detention). It is to be noted that bail was refused on these grounds by Immigration Judges on numerous occasions which supports what in my view is also plain, namely that such risks continued.

192. The question remains as to whether he was detained for a longer than reasonable period or (a linked issue) whether there had been no prospect of deporting him within

a reasonable period of time. Mr Macdonald suggested that he should have been released after one year's detention.

193. The evidence in this case was relatively limited. But it is sufficient to show that Mr Mighty's case was reviewed on an individuated basis. It also shows that contact was maintained by the defendant with the Jamaican authorities with a view to securing removal. Ultimately, after an application on 18 September 2007, an interview was arranged with the Jamaican Embassy on 27 November 2007 to secure the necessary travel documentation. A monthly progress report of the CCD of 18 January 2008 indicated that Mr Mighty would be kept in detention because of a risk of absconding, because "it will enable us to affect your removal from the United Kingdom" and because "your release is not considered conducive to the public good". This position was thereafter maintained until eventually he was released on bail on 28 July 2008.

194. There is no very detailed evidence to show that Mr Mighty, his appeal rights having been exhausted, failed to cooperate. However, by a letter from the defendant dated 12 May 2008, it was recorded that in March and July 2007 Mr Mighty failed to comply with requests for information which might lead to the issue of a travel document and he only completed the necessary forms on 21 August 2007. It is also the case, as I see it, that, inevitably, he would have been remanded or detained, in the aftermath of the attempt to escape and assault occasioning actual bodily harm, in respect of which he was convicted on 6 August 2007 and sentenced to 6 months' imprisonment. Indeed the defendant's letter of 12 May 2008 makes that practical point. I would, all the same, have appreciated rather more evidence than was put before me to show the defendant's attempts to gain the necessary travel documents before the autumn of 2007 and thereafter. It may also be noted that throughout Mr Mighty had been pursuing an application to the European Court of Human Rights. Indeed that was relied on by his solicitors as showing no reasonable prospect of removal within a reasonable period; which, on Hardial Singh principles, does not follow.

195. In my view, on the evidence, the Secretary of State was justified in detaining, and in continuing the detention of Mr Mighty until he was released on 28 July 2008. Given the high risk of (serious) reoffending, the high risk of absconding, set also in the context of the escape incident for which he was convicted on 6 August 2007 and sentenced to 6 months' imprisonment, and the initial lack of cooperation I think the period of detention was reasonable and justified on Hardial Singh principles.

196. There is also nothing in the papers before me to indicate that the overall decision to detain, and keep in detention, was influenced, or "infected" as Mr Macdonald put it, by the new policy: on the contrary, the papers indicate that, generally speaking, the approach applied to Mr Mighty was in fact conducted by an assessment consistent with the old policy. Accordingly, I am satisfied that Mr Mighty would have been and was kept in detention irrespective of the new policy, and that such detention was lawful and justifiable.

197. I conclude that his claim for damages for unlawful detention fails.

Lumba

198. Mr Lumba was held in immigration detention on 23 June 2006 and has been in detention up to the time of the hearing before me – a period of nearly 2½ years. His

appeal rights were exhausted on 27 December 2006. The background of his (very serious) criminality while in the United Kingdom appears from what I have summarised earlier in this judgment.

199. There can be no doubt that Mr Lumba would, if released, pose a serious risk of (serious) reoffending, to the potential serious harm of members of the public, and would pose a high risk of absconding.

200. I think I can take his case quite shortly, notwithstanding the elaborate arguments advanced on his behalf. I can do so primarily because of the judgment of Collins J in this case given on 4 July 2008. Collins J necessarily considered the matter by reference to the old policy, which indeed (together with the Cullen criteria) was the one in effect identified in the initial evidence of the Secretary of State put before him. Collins J applied the principles of Hardial Singh and I and A. Collins J noted the various failed bail applications on the part of Mr Lumba, including a previous bail application refused by Collins J himself. He noted that there was pending for consideration by the Court of Appeal the case of returns to the Democratic Republic of Congo in the BK case. Collins J found that the continued detention in the case of Mr Lumba nevertheless as at that time was lawful, concluding that there was a real risk of absconding.

201. In the course of his judgment Collins J, said that the dangers to the public of release and the risk of absconding are always highly relevant considerations. He said this at paragraph 64:

> "64 I have already indicated that I am entirely satisfied in the circumstances of this case that there is a real risk of absconding. That means that to release would be likely to undermine the whole purpose of deportation, which is clearly in the public interest and for the public good, as the Secretary of State has decided; and that decision has been upheld on appeal."

He also said this at paragraph 78:-

> "In all cases it is surely necessary to consider whether the individual is sufficiently high risk, notwithstanding the circumstances which led to his imprisonment."

He went on to say this at paragraph 86 and 87:-

> "86. It seems to me that I have to consider for myself whether detention, applying the correct principles, based on Hardial Singh, is lawful. Mr Goodman submits that it is not for the court to remedy any defects in the process or any unlawfulness perpetrated by the Secretary of State. That is not what the court is doing. The court has to take account not only of the presumption in favour of liberty but also has to take into account the circumstances, the danger to the public if the man is released, the risk of absconding so that deportation is frustrated and the reasonableness, on the relevant principles, of

> continuing detention. That does not depend upon any matters raised by, or possible mistakes made by, the Secretary of State.
>
> 87. In SK Munby J suggested that it was not appropriate for the court to rely on matters not raised by the individual officer in objecting to bail. In that case the matter that was not relied on was the risk of absconding. I am bound to say that I do not agree with that. It seems to me that the court is not only entitled to, but is bound to take into account all relevant material in deciding for itself whether detention is or is not lawful, both that which is favourable to and that which is unfavourable to a particular individual."

As will be gathered, I agree with that approach of Collins J: which also seems to me to be entirely consistent not only with A but also with the subsequent approach of the Court of Appeal in SK.

202. In my view, if continued detention after July 2008 can be justified applying (among other things) Hardial Singh principles, as Collins J has decided, then it seems to me virtually to follow that continued detention before that date is likewise justified by reference to those principles. In any event, having reviewed the evidence for myself, I conclude that it was and that such detention was reasonable and lawful.

203. I further conclude that there is nothing in the evidence to show that Mr Lumba was initially, or thereafter, detained by application of the new policy. It is clear that his case was regularly reviewed after February 2007, with individuated consideration being given to release: these reviews are fully documented in witness statements of Ms Honeyman made in the proceedings. A high risk of absconding and a high risk of reoffending was, entirely justifiably, assessed. I also consider, in line with the reasons of Collins J, that there was at all stages indeed a prospect of removal within a reasonable period. There was no lack of due expedition. I have no hesitation in concluding that not only could the defendant properly and lawfully detain Mr Lumba, but the defendant properly and lawfully did do.

204. I conclude on the evidence that Mr Lumba's claim for damages for unlawful detention fails.

Other observations

205. I add, briefly, that, even if I had concluded there was unlawful detention in any of these cases justifying an award of damages, I would not in any event have awarded exemplary damages on the footing of unconstitutional, oppressive or arbitrary conduct, in so far as sought. While the Home Office has, to put it mildly, not covered itself in glory in this whole matter of the new policy, I think the failings were in essence one of failing, promptly and directly, to confront and address a perceived legal difficulty: whether through concerns at being bearers of unwelcome news to the Ministers or through an instinct for ducking an apparently intractable problem or through institutional inertia or some other reason, I cannot really say. I am not prepared, however, to conclude on the material before me that there was a conscious decision within the Home Office to operate tacitly an unpublished policy, known to be highly suspect, in the hope it would not be uncovered or, if it was uncovered, against

a plan, if the courts intervened, to present that reversal as being due solely to the courts or the Human Rights Act. In my view what happened here, in any of these five cases, cannot fairly, I think, be described as sufficiently outrageous to justify an award of exemplary damages. In any event, I emphasise that individual consideration was given to the cases of each of the claimants.

206. That conclusion accordingly means that I would reject Mr Husain's interesting suggestion that I could award exemplary damages even if I did not award general damages.

207. I have throughout borne in mind that the purported and unlawful change in policy in April 2006, and the purported reversal of the presumption, was intended to have causative effect and (according to a number of contemporaneous e-mails and other evidence) did have causative effect. I also have of course borne in mind the primacy the law attaches to the liberty of the subject. Nevertheless I have concluded that, of the four cases I have had specifically to consider on the facts, such new policy has not, in the event, caused there to be unlawful detention sounding in damages. To a significant extent that is just because individual consideration was in fact given to the circumstances of each such case and because three of those cases, at least, involved a high risk of serious criminal reoffending, a high risk of absconding and lack of cooperation in some respects: all matters well within the reach of the old policy. It is not too difficult, subject always (and vitally) of course to application of the Hardial Singh principles and to there being a realistic prospect of removal within a reasonable time, to conclude on the evidence that the defendant has proved that there has not been unlawful detention.

208. Mr Ashori's case, however, is more meritorious (or perhaps I should say less unmeritorious) in this regard. I have found the decision rather harder in his case. I think I ought to state my view that if there were here some "heightened" civil standard of proof (a concept generally deprecated by the House of Lords in Re B [2008] 3WLR 1, [2008] UKHL 35 but with the reservation that such approach could still apply in cases of the Khawaja kind: see per Lord Hoffmann at paragraphs 6 and 13) then I do not think the defendant would have proved its case, with regard to Mr Ashori, by reference to such "heightened" standard: although for the avoidance of doubt, I add, that I conclude that the defendant would still have done so with regard to Mr Madani, Mr Mighty and Mr Lumba. But as I see it, both on principle and on authority, as stated above, there is no such "heightened" standard in this particular context. Thus in Mr Ashori's case too I have concluded that - in circumstances of a very high risk indeed of absconding, lack of co-operation and with prospects of return - detention would lawfully and properly have been authorised quite apart from the unpublished policy. I repeat also that I have in all four cases assessed for myself the lawfulness of the detention having regard to, among other things, the Hardial Singh principles and have concluded that each detention was and remained lawful and justified.

Conclusion

209. I therefore conclude that:-

i) The policy introduced from April 2006 with regard to FNPs was unlawful as being contrary to law and the provisions of paragraph 2 of Schedule 3 to the 1971 Act (as interpreted by Sedrati).

ii) Such policy was also unlawful as being insufficiently published or accessible prior to its publication in the Enforcement Instructions and Guidance issued on 9 September 2008.

iii) The policy as published on 9 September 2008 remained unlawful, as being contrary to the provisions of paragraph 2 of Schedule 3 to the 1971 Act (as interpreted by Sedrati).

iv) Each claim for damages for wrongful detention on the part of the claimants Ashori, Madani, Mighty and Lumba fails. The remaining parts of the claim of the claimant Abdi are adjourned for further decision.

210. Whether this third conclusion will have much effect in practice I wonder. It seems to me that, in the vast majority of cases – just because an application of where the burden of proof lies is rarely decisive – the distinction between "you are liable to be released [unless particular circumstances apply]" and "you are not liable to be released [unless particular circumstances apply]" can be highly nuanced. It is at all events somewhat ironic that, as Mr Husain himself observed, the public concerns as expressed in the media in 2006, and which it seems there was a political will to reflect, were capable of being accommodated within the general framework of the old policy and there was no necessary reason to mark the difference by adopting a differing presumptive starting-point. What is absolutely essential in all cases, however, and what cannot in any circumstances be abrogated, is that individual consideration be given to the individual circumstances of each case. Be that as it may, I consider that, as the law currently stands, a written formulation of the applicable policy with regard to FNPs should proceed on the footing that paragraph 2 to Schedule 3 of the 1971 Act does not, and cannot, create a presumption in favour of detention. If Parliament wishes and is able to seek to alter that, that is a matter for Parliament – but it is not a matter for the executive.

211. I can see no reason why declaratory relief should not be granted as a remedy to the claimants to reflect my views on the unlawfulness of the policy relating to FNPs since April 2006: and I think it only right that there should be declaratory relief. I would hope counsel can agree appropriately clear and concise forms of declaratory relief. I will also hear counsel on costs.

212. I add that it is a frequent complaint of many court users that nowadays court judgments are too long. I have a lot of sympathy with that. I am not happy that this judgment is in excess of two hundred paragraphs even though I have tried to abbreviate it as much as possible: although I would say, as a partial defence, that I was faced with extremely extensive written grounds and written arguments (entitled "skeleton arguments" nonetheless) as well as oral argument lasting over 4 days. I am all the same aware that I have not specifically dealt in this judgment with every point of argument or every cited legal authority (5 volumes of authorities in fact being placed before me, supplemented during the hearing), raised with me. But I have tried to keep them all in mind and have tried to explain in this judgment the essential bases for my decision.