Case No: CO/10730/2008

Neutral Citation Number: [2010] EWHC 65 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2010

Before :

MR CMG OCKELTON
(sitting as a Deputy Judge of the High Court)

- -

Between :

OM (Algeria)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr R Khubber (instructed by **Fisher Meredith**) for the Claimant
Ms K Olley (instructed by **Treasury Solicitor**) for the Defendant

Hearing dates: 24 and 25 November and 18 December 2009

- -

Judgment

Mr C M G Ockelton :

1. In these proceedings OM (the claimant) challenges his detention under the Immigration Acts.

The Claimant

2. The claimant is an Algerian national, born in 1974. It is not clear when he left Algeria. He spent some time in France and Spain. In France he met and married a woman with whom he travelled to the United Kingdom, entering, apparently illegally, in March 1996. He worked illegally, first at cleaning in a bus garage and then as a minicab driver with no driving licence and no insurance. By February 2002 he was describing himself as an "entrepreneur". The claimant has a considerable criminal record in this country. He has used a number of false names and birthdates. The first conviction recorded against him was in May 1999 for obtaining property by deception (using stolen cheques to buy goods). He was sentenced to six months imprisonment. There was a further conviction of obtaining property by deception in May 2000, one of theft in February 2001, one of making off without payments in May 2002, and one of robbery in July 2002, following which the claimant was made subject to a Hospital Order under Section 37 of the Mental Health Act 1983. He was detained at Homerton Hospital from the date of the Order in 2003 until some time in 2004; and his continuing mental illness is an important factor in this claim. So far as offences of dishonesty are concerned, there was a further conviction in June 2005 of handling stolen goods, in July 2005 of burglary and theft, leading to a custodial sentence of six months, and a further offence of theft in May 2006, with a custodial sentence of eight months.

3. Other offences include convictions of common assault and assault occasioning actual bodily harm in August 2003, resulting from an assault on security staff at Haringey Magistrates' Court, a number of road traffic offences in 2004 when he was again working as a minicab driver with no licence and no insurance, and an offence of failing to surrender to custody in February 2005. When at liberty he has been a regular user of Class A drugs, and he has attributed some of his convictions to his habit.

4. The conviction of theft in May 2006 is his last conviction. Were it not for his detention under the Immigration Acts, he would have been released on 13 September 2006.

5. The claimant had claimed asylum shortly after his first conviction, when he had been in the United Kingdom for over three years. He was required to attend an interview in July 1999, but did not attend. By the time he did return to pursue his asylum application, he had contracted a marriage with GE. That marriage is said to have taken place in 1999. There are children, born in 2001 and 2002. GE also has a record of serious crime, and she and the appellant have been separated since 2003.

6. The claimant's asylum claim was refused in September 2001. He does not appear to have challenged the refusal. In more recent proceedings the Asylum and Immigration Tribunal noted that it was clear from his own evidence that the whole of his 1999 claim was a fabrication.

7. On 13 September 2006, the date on which he would have been released from his last period of imprisonment, the Secretary of State made a decision under s 3(5) of the Immigration Act 1971that it would be conducive to the public good for the claimant to be deported from the United Kingdom. That decision was served on the claimant on 22 September. There was a right of appeal, which the claimant exercised. His appeal was heard on 26 June 2007. The determination, containing the observation to which I have just referred, was sent out on 12 July 2007. The appeal was dismissed. An application for reconsideration was unsuccessful.

8. Once the claimant's appeal rights were exhausted, the Secretary of State proceeded with the decision to deport him. A deportation order was made on 2 October 2007 and served the following day. The claimant has continued to resist removal. He has failed to co-operate with the Secretary of State in obtaining a travel document, and he has made further submissions. In particular, he has submitted (i) that he has a right to remain in the United Kingdom under Article 8 of the European Convention on Human Rights, because of his link with his daughters; (ii) that as his eldest daughter, born in the United Kingdom, has reached the age of seven years it would be contrary to the Secretary of State's published policy to deport him; and (iii) that because of his mental illness he is not suitable for detention.

9. The response to those submissions when first made was a letter to the claimant's solicitors dated 28 May 2008, and beginning, rather surprisingly, "Dear Salutation". It reads, in part, as follows:

> "Re: Mr [OM] Algeria 22 December 1974
>
> Thank you for your letter of 20 March 2008 and 19 May 2008 which has been taken as an application to revoke the deportation order against your client and for your representations to be considered as a fresh application in relation to Articles 3 & 8 of the European Convention on Human Rights (ECHR). I am sorry that you have not had an earlier reply.
>
> Your application has not been considered by the Secretary of State personally, but by an official acting on her behalf.
>
> Paragraph 353 of the Immigration Rules (HC 395, as amended by HC 1112) states that when a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content had not already been considered, and taken together with the previously considered material, likely to create a realistic prospect of success, notwithstanding its rejection.
>
> Some points raised in your submissions were considered when the earlier claim was determined. They were dealt with in the appeal determination promulgated on 12 July 2007.
>
> The remaining points raised in your submissions, taken together with the

material previously considered in the determination, would not have created a realistic prospect of success."

10. The letter goes on to consider the substantive submissions on human rights grounds and the 'seven year' policy and those relating to detention and to reject them. The closing paragraph of the letter is as follows:

> "Your representations have been reconsidered on all the evidence available, but we are not prepared to reverse our decision of the 22 September 2006, which was upheld at appeal on 12 July 2007 and as we have decided that your submissions do not amount to a fresh claim under Section 92(4)(a) of the Nationality Immigration and Asylum Act 2002 you are not entitled to a right of appeal against the decision to revoke the deportation order from within the United Kingdom. Your client may however, appeal against this decision from outside the United Kingdom by virtue of Section 82 (2) (K) of the NIA 2002."

11. Further submissions (including a report by a forensic psychologist) were met by a letter dated 14 October 2008, declining to change the earlier decision but making a new one and giving the same information about rights of appeal.

The Present Proceedings

12. The claim form is dated 7 November 2008. The grounds are structured, if I may so put it, in terms of a challenge to a "fresh claim" decision. That is to say, they refer to submissions made to the Secretary of State on 20 March 2008, 8 September 2008, and 8 October 2008 and assert that the Secretary of State should, in response to those submissions, have revoked the deportation order or at least accepted that the submissions constituted a 'fresh claim' within the meaning of paragraph 353 of the Statement of Changes in Immigration Rules, HC 395 so that the refusal to revoke the deportation order carried a full right of appeal, exercisable from within the United Kingdom. Added to the claim that there should be a right of appeal was a claim that the claimant's detention under the Immigration Acts had been unlawful since its inception in September 2006.

13. Permission was refused on the papers on 10 March 2009 by His Honour Judge Birtles sitting as a Deputy High Court Judge. The claimant renewed his application to be heard orally. The application was listed for hearing on 20 May 2009. The day before the hearing the claimant's counsel put in amended grounds relying on the decision of the Court of Appeal in R (BA Nigeria and PE Cameroon) v Secretary of State for the Home Department [2009] EWCA Civ 119 ('BA'), in which judgment had been given on 26 February. In that case the Court of Appeal had held, reversing the decision of Blake J, that where the subject of a deportation order made further submissions designed to enable him to stay in the United Kingdom, a resultant negative decision, the decision not to revoke the deportation order, carried a right of appeal exercisable from within the United Kingdom.

14. There was some discussion between counsel, and by the time the matter came before the Court on 20 May 2009 the amended grounds had been lodged, but so had a new refusal decision. The new decision, dated 19 May 2009, is again a refusal to revoke the deportation order, but, no doubt because of BA, the decision letter is not structured around paragraph 353. Instead, it alleges that all the issues now raised could have been raised at the hearing before the tribunal in 2007. The letter indicates that for that reason the Secretary of State certifies the matters set out in s 96(1) of the Nationality, Immigration and Asylum Act 2002. The letter concludes with the following paragraphs:

> "The effect of this certificate is that an appeal under section 82(1) against this immigration decision ('the new decision') may not be brought.
>
> Appeal
>
> As your human rights claim has been certified under section 96(1) of the Nationality, Immigration and Asylum Act 2002 (as amended) you cannot appeal while you are in the United Kingdom."

15. The former paragraph is better than the latter, which, despite its reference to s 96(1), otherwise contains wording appropriate only to certification under s 94. The effect of certification under s 96 is indeed that there is no right of appeal at all against the immigration decision.

16. His Honour Judge Purle QC sitting as a Deputy High Court judge heard submissions on the legality, rationality and procedural fairness of the course of action adopted by the defendant. He appears to have expressed the view that the original claim was arguable in the light of BA. He ordered that the hearing be adjourned to 12 June 2009, with a time estimate of 45 minutes, that the claimant file and serve an amended claim form, and that the defendant serve amended grounds of defence.

17. On 11 June, the day before the adjourned hearing, the defendant withdrew the decisions of 14 October 2008 and 19 May 2009. The reason for withdrawing the certification was the obviously appropriate one, that the submission based on the age of the claimant's eldest child could not have been made to the Tribunal because she was not seven by the date of the Tribunal hearing. As a result, when the matter came before His Honour Judge Mole sitting as a Deputy High Court Judge on 12 June, there were no extant decisions except the continuing decision to detain the claimant. The Secretary of State gave the Court an undertaking that the claimant would be issued with a further decision, carrying an in-country right of appeal, following the decision of the Court of Appeal in BA and the recognition that s 96 was not applicable.

18. That has been done. The claimant has appealed to the Tribunal against the decision to refuse to revoke the deportation order. The Tribunal has not yet heard the appeal: it was adjourned, apparently at least twice, on the ground that the Tribunal would be unable properly to determine the Article 8 appeal without a ruling on whether the claimant's detention had been lawful. I have been told since the hearing that the Tribunal granted bail to the claimant on 11 January 2010. So he is no longer in detention.

19. His Honour Judge Mole ordered that the application for permission be listed on an expedited basis for a "rolled up" hearing on 3 July 2009 or as soon as possible thereafter. The matter eventually came before Walker J on 23 September. He found that the time estimate was inadequate and ordered re-listing by the end of November 2009 with a time estimate of two days.

20. The hearing before me was on 24 and 25 November 2009. During the course of it I heard submissions relating in particular to the question whether the defendant had properly applied his policy in relation to the detention of those suffering from mental illness. At the conclusion of the hearing I decided that the documents before me raised at least an arguable issue on that point. I granted permission and ordered that the defendant conduct a full review of the claimant's detention and file and serve it by 4 December 2009. I intended that I should take that review into account in preparing judgment, which was to be given on 18 December.

21. A review of the claimant's detention was filed and served on 4 December. It was not, however, a full review, as it was made without any current information about the claimant's mental state. The review records that the claimant gave consent some time apparently soon after 30 October 2009 for the disclosure of his medical reports but does not say why such consent was or is necessary for the defendant to assess his mental condition; it also states that "a request has been made to Brook House IRC [Immigration Removal Centre] for a typed report from a Consultant Psychiatrist on his current state of mental health and we are awaiting a response". In other words, the review failed to deal with the point that was known to be of particular interest and which had been the reason for the grant of permission. For reasons which I set out below I did not think it would be right to give judgment if the defendant's considered position could be obtained and I therefore ordered a further review making explicit the need for attention to be given to the issue of the claimant's mental state. The revised review, with supporting medical documentation, was filed and served on 7 January 2010 and I have taken it and the claimant's submissions on it into account in preparing this judgment.

22. Because of the long procedural history and the defendant's changes of stance the claimant's claim has also changed on a number of occasions. It is now a claim that the claimant's detention was unlawful from the date of the first submissions made after the deportation order had been signed until the date when the claimant was released on bail; that is to say from 20 March 2008 until 11 January 2010.

Law and policy

23. The general powers of detention under the Immigration Acts are in Schedules 2 and 3 to the Immigration Act 1971. Paragraph 2 of Schedule 3 allows the detention of a person who has been recommended for deportation by a Court, who is the subject of a decision to make a deportation order decision against him, or who is the subject of a deportation order against him. The powers are subject to two important restrictions.

24. First, R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704, and the authorities following and applying it, establish that detention under the Immigration Acts is limited to the period reasonably necessary for the machinery of deportation or removal to be carried out. For the purposes of this case I may cite the

judgement of Dyson LJ in R(I) v Secretary of State for the Home Department [2002] EWCA Civ 888 at [46] – [47]:

> "46…
>
> (i)[T]he Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention,
>
> (iv) the Secretary of State should act with … reasonable diligence and expedition to effect removal.
>
> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applied. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period had not yet expired.

25. Article 5 of the European Convention on Human Rights, which prohibits the deprival of liberty in general, but subject to a number of exceptions including, in Article 5.1(f): "the lawful arrest or detention of the person to prevent his effecting an unauthorised entry into the country or of a person against whom action is been taken with a view to deportation or extradition.", has nothing for present purposes to add to the restrictions already developed in the Hardial Singh line of cases: see R (SK) (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ 1204, per Laws LJ at [26]-[30].

26. Secondly, detention is subject to restrictions imposed by the Secretary of State himself in published operational guidance. For the purposes of these proceedings again I do not need to set out the authorities in full. They are discussed by Cranston J in R (Anam) v SSHD [2009] EWHC 2496 (Admin). Immigration detention can be unlawful if it is in conflict with the Secretary of State's policy. At [42], Cranston J distilled the following principles, which he said apply when judicial review is sought of a decision to detain on the basis the non-application or a breach of the Secretary of State's policy:

> "(i) At the outset there must be a non-application or a breach of the policy. To determine whether there has been a breach of policy, the policy is to be construed in the ordinary way;
>
> (ii) Any non-application or breach of the policy must have caused the detention. Of itself the non-application or breach of policy cannot lead to a conclusion that detention is unlawful without an additional enquiry into whether this in fact led to the detention. That turns partly on the nature of the policy in issue: for example, there is a difference between a policy requiring the medical examination of detainees and the one at issue in this case which limits the detention of those with mental issues to very exceptional circumstances.
>
> (iii) The non-application or a breach of policy causing the detention may give rise to ordinary public law remedies such as a declaration. Ordinarily, damages are not available in judicial review, but may be awarded if the court is satisfied that they would be awarded on private law principles (in this case the tort of false imprisonment) or as a result of the Human Rights Act 1998 (in this case just satisfaction for breach of Article 5)."

27. As will be apparent from that extract, Cranston J was dealing with an application by a person who, like the present claimant in the present case, had a mental illness. I shall have to refer in more detail to Anam later in this judgement.

28. The policy on immigration detention is in chapter 55 of the defendant's Enforcement Instructions and Guidance . The chapter begins with a reference to a 1998 White Paper "Fairer, Faster and Firmer" – A Modern Approach to Immigration and Asylum". That document "confirmed that there was a presumption in favour of temporary admission and release and that, where possible, we would use alternatives to detention." Further relevant parts of the policy are as follows.

> 55.1.2. Criminal Casework Directorate Cases
>
> Cases concerning foreign national prisoners – dealt with by the Criminal Casework Directorate (CCD) - are subject to the general policy set out above in 55.1.1, including the presumption in favour of temporary admission or release. Thus, the starting point in these cases remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attention must be paid to their individual circumstances. In any case in which the criteria for considering deportation action (the "deportation criteria") are met, the risk of re-offending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of

the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of temporary admission or release is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding.

The deportation criteria are:

For non-EEA nationals, those who have been convicted in the UK of a criminal offence and received:

a single sentence of 12 months [regardless of when it was passed]*; or

an aggregate of 2 or 3 sentences amounting to 12 months in total over the past five years; or

a custodial sentence of any length for a serious drugs offence (as defined in our policy) [since 1 August 2008]

*Save where the conviction is spent under the Rehabilitation of Offenders Act before a deportation order is signed.

...

NB: From 1st August 2008, non-EEA cases convicted and sentenced to 12 months imprisonment or more are liable to automatic deportation, and are also subject to CCD's detention policy as set out in this guidance.

Further details of the policy which applies to CCD cases is set out below.

55.1.3. Use of detention

General

Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.

CCD cases

As has been set out above, due to the clear imperative to protect the public from harm, the risk of re-offending or absconding should be weighed against the presumption in favour of temporary admission or temporary release in cases where the deportation criteria are met. In CCD cases concerning foreign national prisoners, if detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale. If detention is appropriate, a foreign national prisoner will be detained until either deportation occurs, the foreign national prisoner (FNP) wins their appeal against deportation (see 55.12.2. for decisions which we are challenging), bail is granted by the Asylum & Immigration Tribunal, or it is considered that release on restrictions is appropriate because there are relevant factors which mean further detention would be unlawful (see 55.3.2 and 55.20.5 below). In looking at the types of factors which might make further detention unlawful, caseowners should have regard to 55.1.4, 55.3.1, 55.9 and 55.10. Substantial weight should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does re-offend, must be considered. Where the offence which has triggered deportation is included in the list at 55.3.2.1, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of release. In cases involving these serious offences, therefore, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences. Where a serious offender has dependent children in the UK, careful consideration must be given not only to the needs such children may have for contact with the deportee but also to the risk that release might represent to the family and the public.

The routine use of prison accommodation to hold detainees ended in January 2002 in line with the Government's strategy of detaining in dedicated removal centres. Nevertheless, the Government also made clear that it will always be necessary to hold small numbers of individual detainees in prison for reasons of security and control.

55.3.A. Decision to detain-CCD cases

As has been set out above, 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 may well be outweighed by the risk to the public of harm from re-offending or the risk of absconding, evidenced by a past history of lack of respect for the law. However, detention will not be lawful where it would exceed the period reasonably necessary for the purpose of removal or where the interference with family life could be shown to be disproportionate. In assessing what is reasonably necessary and proportionate in any individual case, the caseworker must look at all relevant factors to that case and weigh them against 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. A list of those offences which UKBA considers to be more serious is set out below at 55.3.2.1.

More serious offences

A conviction for one of the more serious offences is strongly indicative of the greatest risk of harm to the public and a high risk of absconding. As a result, the high risk of public harm carries particularly substantial weight when assessing if continuing detention is reasonably necessary and proportionate. So, in practice, it is likely that a conclusion that such a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean detention is not appropriate. Caseworkers must balance against the increased risk, including the particular risk to the public from re-offending and the risk of absconding in the individual case, the types of factors normally considered in non-FNP detention cases, for example, if the detainee is mentally ill or if there is a possibly disproportionate impact on any dependent child under the age of 18 from continued detention. Caseworkers are reminded that what constitutes a “reasonable period” for these purposes may last longer than in non-criminal cases, or in less serious criminal cases, particularly given the need to protect the public from serious criminals due for deportation.

Less serious offences

To help caseworkers to determine the point where it is no longer lawful to detain, a set of criteria are applied which seek to identify, in broad terms, the types of cases where continued detention is likely to become unlawful sooner rather than later

> by identifying those who pose the lowest risk to the public and the lowest risk of absconding. These provide guidance, but all the specific facts of each individual case still need to be assessed carefully by the caseworker. As explained above, where the person has been convicted of a serious offence, the risk of harm to the public through re-offending and risk of absconding are given substantial emphasis and weight. While these factors remain important in assessing whether detention is reasonably necessary where a person has been convicted of a less serious offence, they are given less emphasis than where the offence is more serious, when balanced against other relevant factors. Again, the types of other relevant factors include those normally considered in non-FNP detention cases, for example, whether the detainee is mentally ill or whether their release is vital to the welfare of child dependants.

29. Paragraph 55.8 has the provisions for review. In CCD cases review is to be undertaken every 28 days, and the Guidance contains a table listing the level of authority at which the review is to be carried out. At 12 months and on each occasion after 17 months, the level is 'Director'.

30. Further guidance on detention in CCD cases where the person has completed a term of imprisonment are set out in paragraph 53.3.2. They emphasise the need to assess the risk to the public, and the risk of absconding, amongst other factors.

31. Paragraph 55.8A is headed "Rule 35 – Special Illnesses and Conditions", and requires a further review of detention where a report is made under rule 35 of the Detention Centre Rules, relating to persons whose continued detention may damage their health, who are suspected of suicidal intentions, or who have been the victims of torture. The claimant, whose mental illness I have already mentioned, does not rely on that paragraph, but he does rely on paragraph 55.10, which is as follows:

> 55:10. Persons considered unsuitable for detention
>
> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration accommodation or elsewhere. Others are unsuitable for Immigration detention accommodation because their detention requires particular security, care and control. In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration detention accommodation or elsewhere:
>
> [among the categories listed is:]

> those suffering from serious medical conditions or the mentally ill – in CCD cases, please consult the specialist Mentally Disordered Offender Team.

The Claimant as a Mentally Ill Detainee

32. After his conviction of the robbery in 2003, the claimant was diagnosed with paranoid schizophrenia. His condition was treated with drugs at that time. In June 2008, when he was seen by the Chartered Forensic Psychologist Lisa Davis, he was taking valium and medication for insomnia, as well as anticonvulsant, antipsychotic and antidepressant drugs. A similar regime continues, as evidenced by the medical report of Dr Spoto, dated 21 December 2009 and attached to the most recent detention review. The summary in that report is as follows:-

> "A 35 year old man with a history of psychiatric illness dating back for several years. He also suffers from epilepsy, first diagnosed as a child in Algeria. He has a recent history of anxiety depression, with some biological symptoms, said to date back for the past three and a half years, however, the onset is unknown. The biological syndrome is also not wholly convincing.
>
> Mr [OM] does seem to have a diagnosis of schizophrenia, said to have been reached in the UK hospital where he claims he was detained under the Mental Health Act 1983, the history is not presently substantiated."

33. In that report the diagnosis is given as "uncertain, possibly schizophrenia".

34. Dr Spoto's report appears to be the fullest investigation of the claimant's mental condition that has been undertaken by those having custody of him, since his detention at Homerton Hospital. Despite the author's evident scepticism about some of the symptoms reported by the claimant, it seems to me that given the claimant's history and the previous diagnosis of paranoid schizophrenia, which has not been definitively superseded, and on the basis of which he is receiving regular medication, the claimant must be regarded as a person who is mentally ill.

35. That conclusion is important, because of the terms of paragraph 55.10 of the Secretary of State's Guidance, which is set out above. I read the Guidance as carrying a presumption against immigration detention in all cases, but recognising that that presumption is readily overcome in the case of a convicted criminal, because of the risk of re-offending, which carries a danger to the public, and the risk of absconding, which carries a danger to the removal or deportation process. Where a person falls within one of the categories set out in paragraph 55.10, however, the presumption against detention is very much stronger, because such a person is "considered unsuitable for detention". Persons within these categories are "normally considered suitable for detention only in very exceptional circumstances", a phrase which occurs twice within a few lines within paragraph 55.10. It will therefore be necessary to assess the existence of such "very exceptional circumstances" as outweigh the particular presumption against detention in such cases. That reading of paragraph 55.10 is consistent with that adopted by Cranston J in Anam.

36. The detention of the claimant has been subject to regular review, apparently in accordance with the guidance. Certainly the claimant takes no point on either the regularity of the reviews or the level of seniority at which they have been conducted. Each of the reviews is accompanied by a monthly progress report to the claimant himself. Each of them assesses the factors normally to be taken into account in CCD cases: the claimant's offending history, his use of aliases, the risk of re-offending, the risk of absconding. They each, expressly or by implication, conclude that removal can be effected within a reasonable time, sometimes with an indication that removal is being delayed only by the claimant's own actions, for example, by failing to co-operate with the authorities in obtaining travel documentation.

37. It is, however, striking that hardly any of them make any reference at all to the claimant's mental condition as a factor in deciding whether detention is to be maintained. At my request Mr Khubber prepared a note on the detention reviews, from which I see that the first occasion after May 2008 in which any reference is made to the claimant's medical health is in the review exactly a year later, on 23 March 2009. The reference there is to a crisis which had occurred during the previous month, when there had been a serious adverse reaction to the claimant's prescribed medication. It was soon possible to lower the risk from "high" to "raised", and those conducting the reviews considered that there was no current risk of self harm. But none of the monthly reviews purports to balance the factors pointing to detention against the claimant's mental condition, in the way required by paragraph 55.10 of the Guidance. In May and June 2009, the Consultant Psychiatrist at Colnbrook IRC indicated that the claimant's mental health might be improved by a change in the place where he was detained. The reviews at that time, and the summary of them in the most recent review dated 11 January 2010, indicate that the view taken was that the claimant's mental health needs were capable of appropriate management in the detention estate. As I have already noted, the review conducted immediately following the hearing took no account of the claimant's mental health.

38. In the subsequent fuller review, the assessment is stated as having taken place on 5 January 2010. Dr Spoto's report is summarised, and the matter is then dealt with as follows:-

> "7. ... [Dr Spoto] recommended that Mr [OM]s Honiton (sc Homerton) Hospital records are requested and if they become available he would be glad to advise further. Chapter 55 of UKBA's Enforcement Guidance states that: "… The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration detention accommodation or elsewhere:… those suffering from serious medical conditions or the mentally ill…" While this policy applies, the UK Border Agency judges that the high risk of re-offending, high risk of harm to the public and significant risk of absconding is justified for Mr [OM] to remain in detention. Dr Spoto's report assessment supports the view that he is currently being successfully treated in detention. While Dr Spoto has not been able to review the entire period of detention the information available to the UK Border Agency has shown that the has been successfully treated for schizophrenia during

his detention and his condition would appear to have been stable or at least to have stabilised such as to make his detention appropriate to date despite his apparent mental illness.

…

8. Mr [OM]'s detention has been reviewed in accordance with the guidelines produced by the UK Border Agency, currently his detention is reviewed every 28 days in line with Criminal Casework Directorate policy. In SK Zimbabwe v SSHD [2008] EWCA Civ 1204 promulgated on 6 November 2008 in paragraph 35 (iv) stated that "In the event of a legal challenge in any particular case the Secretary of State must be in a position to demonstrate by evidence that those principles have been and are being fulfilled… Compliance with the Rules and the Manual would be an effective and practical means of doing so". This has been done in this case. While there is a presumption in favour of temporary release there are strong grounds for believing that Mr [OM] would not comply with the conditions of release. Mr [OM] has not produced satisfactory evidence of his identity or lawful basis to remain in the UK and he has obstructed the removal process by failing to co-operate with the application process to obtain an Emergency Travel Document.

9. Mr [OM]'s detention has been reviewed on a 28 day basis by Higher Executive Officer, Senior Executive Officer, Assistant Director, Deputy Director and Director levels of authorisation. It was judged by these levels of authority that Mr [OM] had no legal basis to remain in the United Kingdom and while he claims to have family ties in the United Kingdom, these ties have not been able to exert any influence over his offending behaviour or subsequent behaviour while in immigration detention. It was judged that he had taken every opportunity to exhaust the appeals system and was on a previous occasion on the cusp of removal until a Judicial Review was submitted. It was judged that based on his past history and reports of his behaviour while in detention demonstrated a high risk of re-offending and significant risk of harm to the public. It was judged that Mr [OM] had used a number of false or alias names in the past and this propensity towards deception and disregard for UK laws indicated a likely risk of absconding. He previously claimed he had entered the United Kingdom in 1999 by presenting a falsified French Identity card, but later claimed he had arrived some three to four years earlier. It was concluded that detention was prolonged by Mr [OM]'s refusal to comply with the Emergency Travel Documentation process, his refusal to comply on 1 February 2008 with a bio-data interview was in contradiction of

> advice from his legal representatives. The barriers to Mr [OM]'s removal, which had led to continued detention have been delays in the appeals process and obtaining travel documentation, which took far longer than anticipated due to delays in the Removals Group Documentation Unit submitting the application to the Algerian Embassy and the five month delay in having an Emergency Travel Document agreed by the Algerian Embassy.
>
> 10. Since 1 September 2008 it has been Mr [OM]'s efforts to use every opportunity to exhaust the appeals system that has prolonged his time in immigration detention and prevented his removal. From the evidence presented to the UK Border Agency and the associated risk factors Mr [OM] presents a high risk of reconviction, a high risk of harm and a risk of absconding all of which combine at the current time to outweigh the presumption to liberty. It has been concluded by the UK Border Agency that detention should be maintained.
>
> 11. If the judicial review finds favour with the SSHD, Mr [OM]'s ETD can be revalidated and he can be removed to Algeria within a reasonable timescale.

39. Despite the very belated reference to paragraph 55.10 in paragraph 8 of this review, it does not appear to me that there is any real assessment in the manner required by the Guidance. It is difficult to see that anything has been taken into account in a way different from the previous reviews, where the appropriate test was clearly not being applied; and there is no balancing of the level of the claimant's mental condition against the level of risk. Further, there is no specific judgement that the claimant's circumstances are "very exceptional".

40. I would add that I am not prepared to give the writer of the report the benefit of the doubt in reading it. I say that not only because the report was produced only after a second Order of the court and then deals with the principal issue very summarily. I say it because it is clear from the last paragraph that I have quoted that the author of the report is not fully informed of the claimant's circumstances: the judicial review, which had been a feature of the earlier reports, now has no application to his removal, whereas the appellant is now pursuing a statutory appeal on human rights grounds.

41. For the foregoing reasons I find that the Secretary of State has not applied the policy contained in the guidance in maintaining the claimant's detention.

42. The next step in the determination of the issues before me is expressed by Cranston J in Anam, in the passage I have set out above, in terms of causation. The claimant is not entitled to a finding that his detention was unlawful, unless the failure to apply the policy caused the detention. In putting it in that way, Cranston J drew on the judgements of Davis J in R (D); R (K) v Secretary of State for the Home Department [2006] EWHC 980 (Admin) and Abdi v Secretary of State for the Home Department [2008] EWHC 3166 (Admin). In the latter case, Davis J found that a policy operating a presumption that foreign national offenders should be detained was not lawfully open to the Secretary of State, but went on to remark at [147] 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".

43. In Anam, Cranston J found that the Guidance on the detention of mentally ill individuals had not been followed and at [69] it appears that he was prepared to strike the balance himself; that is to say to decide whether there were "very exceptional circumstances" that would have meant that the claimant before him would have been detained if the Guidance had been followed. I take it that he thought that the case before him was one in which the result was obvious, and it is to be noted that amongst the documents before him was an assessment that the claimant was a 'very exceptional case" whose circumstances warranted detention. In the cases before Davis J, the non-compliance with the rules was of an entirely different nature, and he was readily able to find in a number of them that the non-compliance had not itself caused the detention.

44. Where, as in the present case, a balancing exercise is required by the guidance but has not been undertaken, it is by no means clear that the court ought to be the first to make the assessment. In such a case it seems to me that it is preferable to adopt the approach of Laws LJ in SK (Zimbabwe) v Secretary of State [2008] EWCA Civ 1204, which has the advantage for present purposes that, as the most recent review of detention shows, the Secretary of State accepts the burden it imposes upon him. In SK (Zimbabwe) Laws LJ (with whom the other members of the court agreed) reversing the decision of Munby J, rejected the argument that a failure to follow the guidance makes detention unlawful without more, but emphasised the requirement that the Secretary of State show that immigration detention complies with the Hardial Singh guidelines and is not arbitrary. His conclusions in paragraph [35], to which reference is made in the most recent review, are in full as follows:

> "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.

> (iv) In the event of a legal challenge in any particular case the Secretary of State must be in a position to demonstrate by evidence that those principles have been and are being fulfilled. However the law does not prescribe the form of such evidence. Compliance with the Rules and the Manual would be an effective and practical means of doing so. It is anyway the Secretary of State's duty so to comply. It is firmly to be expected that hereafter that will be conscientiously done."

45. In contrast to Anam, this is by no means an obvious case. The claimant is mentally ill, but the seriousness of his illness is unknown. He has a record of persistent crime, but in the light of the sentences he has served, his criminality cannot be regarded as being at the highest level of seriousness. There are other factors, including his use of aliases, his challenges to the process of removal and failure to co-operate with it, and his drug use. It is because the question of the appropriateness of his detention yields no obvious answer that I was anxious to ensure that I had full information about the Secretary of State's position. I now have it, and it has the characteristics I have identified. It may be that there could have been justification for the claimant's detention, but the Secretary of State has not been able to justify the detention according to the tests he has said are appropriate for cases of this sort. In my judgement the Secretary of State has, by failing to carry out the test prescribed for the detention of the mentally ill, and by failing to appreciate the nature of the claimant's challenges to removal, failed to establish that the claimant's detention was other than arbitrary. It follows that, for the period in question, it was unlawful.

The impact of BA

46. Following the making of a deportation order, the original basis of the present claim was, as I have said, that new facts put to the Secretary of State on 20 March and amplified on 8 September and 8 October 2008 should have been treated as a 'fresh claim'. That two-word phrase has a complex meaning, given by para 353 of the Statement of Changes in Immigration Rules, HC 395, read with the appeals provisions (principally s 82-83A) of the Nationality, Immigration and Asylum Act 2002. A 'fresh claim' is a claim on asylum or human rights grounds that the Secretary of State thinks is, when taken with what has been said before, such as to give a realistic prospect of success, notwithstanding its rejection. Given that the claim has been rejected, the realistic prospect refers to success before the Asylum and Immigration Tribunal, and if the claim is a fresh claim it is therefore to be refused in a way carrying a right of appeal to the AIT. That means that the Secretary of State, rather than merely rejecting it (as he is entitled to do if the submission does not amount to a fresh claim in this sense), is obliged to make a formal 'immigration decision' carrying a right of appeal.

47. If the Secretary of State decides that the material before him does not amount to a 'fresh claim' he is under no obligation to make an immigration decision, and so the claimant has no access to the AIT. Such a decision, obviously not appealable, is amenable to judicial review; and the many actions for judicial review of such decisions have as their aim the reversal of the decision, in order to oblige the Secretary of State to make an immigration decision and so afford access to the Tribunal. It follows that success in such a claim is normally equivalent to showing that the material before the Secretary of State was such as not to lead properly to a

decision that there was no prospect of success. In other words, winning the judicial review claim says something about the substantive merits of the submissions made.

48. In BA the Court of Appeal, and subsequently the Supreme Court [2009] UKSC 7 held that this process had no application where a deportation order had been made. In those circumstances the rejection of the claim is a refusal to revoke a deportation order, which is an immigration decision carrying a right of appeal. The question then is whether the right of appeal can be exercised from within the United Kingdom. Section 92 of the 2002 Act reads in part as follows:

> "92(1) A person may not appeal under s 82(1) against an immigration decision while he is within the United Kingdom unless his appeal is of a kind to which this section applies.
>
> ...
>
> (4) This section also applies to an appeal against an immigration decision if the appellant-
>
> (a) has made an asylum claim, or a human rights claim, while in the United Kingdom ... ."

49. The Secretary of State had argued that where he decided that the material before him was not a 'fresh claim' , it was not a claim at all for the purposes of s 92(4). In the usual case that would mean that there was no right of appeal from within the United Kingdom, with the further consequence that removal could proceed regardless of the right of appeal. That argument was rejected. A claim is a claim for the purposes of s 92(4) whether or not the Secretary of State treats it as a 'fresh claim' for the purposes of para 353.

50. It was because the facts of BA closely mirrored the facts of the present case that on 11 May 2009 the Secretary of State, having considered the decision of the Court of Appeal in BA, withdrew his opposition to part of the claimant's claim. He accepted that the claimant had an in-country right of appeal against the refusal to revoke the deportation order, because the submissions of 20 March 2008 were a claim within the meaning of s 92(4). He then certified the appeal under s 96, thus removing (or purporting to remove) the right of appeal altogether; but the certification has now also been withdrawn. The result is that that part of the present claim that was directed to securing an in-country right of appeal for the claimant no longer needs to be pursued. He has an in-country right of appeal.

51. Mr Khubber submitted that the Secretary of State's conceding the right of appeal had the effect of conceding the 'fresh claim' argument: that is to say that, by recognising in these proceedings that the claimant has an in-country right of appeal, the Secretary of State has accepted that the claim is not one that can properly be characterised as having no realistic prospect of success before the Tribunal. He builds on that submission with a submission that if the claim has a realistic prospect of success the prospect of the claimant's removal is correspondingly more distant and his detention to that extent less justifiable.

52. I am unable to accept that submission. The effect of BA in the Court of Appeal (on the basis of whose decision the Secretary of state's action was taken) and in the Supreme Court is that the process of classifying submissions as a 'fresh claim' or not, simply does not occur when there has been a deportation order. The in-country right of appeal that is recognised to exist, exists not because of the strength of the submissions but simply because they have been made. The Secretary of State's concession of this part of the original claim therefore carries no implication at all as to the strength of the claimant's case. The concession cannot therefore be prayed in aid in the way Mr Khubber suggests.

53. It seems to me, however, the relevance of the decision in BA to the present case is clearer and deeper than that: clearer, because it impacts on what actually happened, rather than on what might be thought to be going to happen; and deeper, because it concerns the conduct of the Secretary of State himself, rather than the views of a hypothetical Immigration Judge.

54. BA shows that on 28 May 2008, when the Secretary of State decided not to revoke the deportation order, there was an in-country right of appeal. He was bound on that date to serve on the claimant a document giving him notice of that under the Immigration (Notices) Regulations 2003 (SI 2003/658). Regulation 4 of those Regulations requires written notice of appealable decisions, and regulation 5(3) provides (subject to paragraph (6), which has no application to this case) that the notice

> "shall also include, or be accompanied by, a statement which advises the person of - "
>
> (a) his right of appeal and the statutory provision on which his right of appeal is based;
>
> (b) whether or not such appeal may be brought while in the United Kingdom;
>
> (c) the grounds on which such an appeal may be brought ... ."

55. Where an in-country right of appeal exists, the time for bringing it is short: five days if the appellant is in detention, ten days otherwise.

56. Clearly if the claimant had received the required notice on 28 May 2008 (instead of the notice he did receive, which told him that there was no in-country right of appeal) he would have known that he had to bring any appeal quickly, in fact within the next five days, rather than launch judicial review proceedings in the effort to get a right of appeal. And if it is right that his removal is imminent despite the right of appeal, the appeal would have been determined shortly thereafter. The delay after 28 May 2008 and certainly up to 19 May 2009 (when the potential right of appeal was recognised) is the result of the Secretary of State's legal error. The use of the certification procedure on the latter date was also an error, for the reasons set out above in the narrative of the procedural history of this case; and so the delay in the commencement of the statutory appeal process caused by the Secretary of State's error lasted until the giving of the new immigration decision after the hearing before His Honour Judge Mole on 12 June 2009.

57. In that context Mr Khubber submitted that BA removed the lawful basis for detention simply because that decision recognised that there was a right of appeal, so that removal could no longer ever have properly been regarded as imminent. Ms Olley's response is to say that the Secretary of State was entitled to rely on his own interpretation of the meaning of s 92(4) and the application of paragraph 353 of the Immigration Rules to decisions to revoke deportation orders, which had after all been endorsed by Blake J in this Court: [2008] EWHC 1140 (Admin). She submits that before the Court of Appeal's decision in BA a claimant could not have succeeded save on the basis of a Wednesbury challenge. She further submits that in the period after the Court of Appeal's decision in BA the fact that the claimant has a right of appeal does not prevent his detention, which was amply justified on the grounds of the risk of absconding and the risk of reoffending.

58. Neither of those submissions is in my judgment entirely correct.

59. It cannot be right in general to say that if there is a right of appeal, detention is necessarily unlawful because the claimant's removal is not imminent. The Secretary of State is entitled to consider, in appropriate cases, that the appeal will be concluded swiftly and that the result will be adverse to the claimant. That is particularly so where the existence of the right of appeal owes nothing to the strength of the grounds of appeal. The problem here is not the existence of the right of appeal but the fact that it took so long to be recognised.

60. The starting point must again be the Hardial Singh line of authorities. The fourth requirement identified by Dyson LJ in I , that "the Secretary of State should act with reasonable diligence and expedition to effect removal" is firmly based on words of Woolf J (as he then was) in Hardial Singh itself at 706:.

> "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".

61. In general it does not seem to me that treating representations and making a decision in the way that happened in the present case meets those requirements. If there is a right of appeal, to be exercised if at all within five days, the Secretary of State's exercise of expedition must include the recognition of that right and compliance with the Notices Regulations so that the individual can exercise the right. Failure to do that is bound to delay the conclusion of the process by which the individual can resist removal. Where the law is clear, a failure by the Secretary of State to apply it in this area would give a good ground for challenge on Hardial Singh grounds.

62. In a case like the present, where there have been further submissions after the signing of a deportation order, that are treated, as they have to be, as an application to revoke the deportation order, the law is now clear, following the judgment of the Supreme Court. What is also clear is that the Secretary of State's view that there was no in-country right of appeal was incorrect, albeit endorsed by Blake J. It is trite law that a judgment on interpretation is a judgment as to what the instrument in question always meant: there is no sense in which the view previously taken by the Secretary of State can be regarded as correct at the time. Nevertheless, as it appears to me, that view although incorrect can properly be regarded as reasonable, given that there had been

no effective challenge of it. It is a view that the Secretary of State was entitled to take.

63. At the beginning of the period of detention that is under challenge in these proceedings, therefore, the Secretary of State's view that there was no in-country right of appeal was a reasonable one. What is required is that the Secretary of State act with 'reasonable diligence and expedition'. If the Secretary of State applies the law as it is reasonably thought to be, it does not seem to me that his conduct ought to be amenable to challenge simply on the ground that that interpretation is subsequently shown to be wrong. So the Supreme Court's decision in BA does not render the detention unlawful on Hardial Singh grounds from the beginning of the period under challenge.

64. The question then is whether there came a time when that position changed. In my view there did. It was the date of the Court of Appeal's decision. Although the Secretary of State appealed (unsuccessfully) against that decision, it is clear both from his conduct in this case and Miss Olley's submissions that he did not and does not say that after that date the position was otherwise than that the claimant had an in-country right of appeal (unless certified). From the beginning of March 2009 (the Court of Appeal's judgment having been given on 26 February) it was not reasonable for the Secretary of State to maintain his earlier view.

65. The failure after that date to recognise and declare the right of appeal was, in my judgment, a failure to act with reasonable diligence and expedition to effect removal. There are three distinct periods involved. First, there was the period from 1 March to 19 May 2009, when nothing was done at all. Then there was the period from 19 May to 12 June, during which the right of appeal was purportedly removed by a certification that is accepted as having been inappropriate. Lastly, there is the period from 13 June 2009 to the present, when the right of appeal has been recognised and is being exercised. During the first two of those three periods the Secretary of State unreasonably delayed recognising and communicating the inevitable existence of an in-country right of appeal. He did not act with the diligence and expedition required.

66. For those reasons the claimant's detention from 1 March to 12 June 2009 was unlawful in any event, that is to say, independently of any question of compliance with the Guidance.

Final Comment and Conclusion

67. I have been able to reach my conclusions without any detailed reference to the claimant's family. It was part of his case that the Secretary of State has failed to take properly into account the closeness of his relationship to his children and a continuing relationship with his wife, who has expressed a willingness to accommodate him at her home if he is released from detention. It might have been somewhat difficult to accept those submissions on the evidence before the court, which may be taken as beginning with a statement of support from the claimant's former wife that is itself written from the prison where she was at the time detained. If the closeness of the relationship is disputed, as it appears to be, the proper place for assessment of the evidence is the Tribunal, which will hear the claimant's appeal on article 8 grounds shortly.

68. There will be a declaration that the claimant's detention from 20 March 2008 to 11 January 2010 was unlawful. I will hear counsel on any other matters.