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Case No: CO/10025/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2008

Before :

MR JUSTICE MUNBY

- -

Between :

R (SK)	**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)

Mr Alex Goodman (instructed by Lawrence Lupin) for the Claimant
Mr Martin Chamberlain (instructed by the Treasury Solicitor) for the Defendant

Hearing date: 18 January 2008

- -

Judgment
As Approved by the Court

Mr Justice Munby :

1. Mr Alex Goodman moves for the discharge from custody of SK. He asserts on behalf of the prisoner that he has been unlawfully detained by the Secretary of State for the Home Department for the best part of twenty-two months. I agree that SK has indeed been unlawfully detained for substantial periods. But he is at present lawfully detained. SK is accordingly entitled to damages for false imprisonment in the past but he is not entitled to be released.

2. I must return to this in due course but I have to say that the melancholy facts that have been exposed as a result of these proceedings are both shocking and scandalous. They are shocking even to those who still live in the shadow of the damning admission by a former Secretary of State that a great Department of State is 'unfit for purpose'. They are scandalous for what they expose as the seeming inability of that Department to comply not merely with the law but with the very rule of law itself.

3. None of this can in any way be extenuated – and very properly Mr Martin Chamberlain, who had the unenviable task of representing the Secretary of State, did not for a moment suggest otherwise – by the fact that SK is a foreign national, a convicted sex offender (the reason why he is being deported) and a failed asylum seeker whose claim to the protection of the Geneva Convention was properly found by the Secretary of State, upheld by an Immigration Judge on appeal, to be false.

4. SK will evoke sympathy in few hearts but *everyone* is protected by the law, by the rule of law. It matters not what a person has done. Outlawry has long been abolished. As Lord Scarman said in *R v Secretary of State for the Home Department ex p Khawaja* [1984] AC 74 at page 111:

> "Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed "the black" in *Sommersett's Case* (1772) 20 StTr 1."

<u>The legal framework</u>

5. The Secretary of State admits that she is detaining SK; indeed, she asserts the right to do so. It follows that the burden of justifying his detention lies upon the Secretary of State. As Lord Atkin said in *Liversidge v Anderson* [1942] AC 206 at page 245, in a passage cited with approval by Lord Scarman in *Khawaja* at page 110,

> "in English law every imprisonment is prima facie unlawful and … it is for a person directing imprisonment to justify his act."

6. The Secretary of State is not merely subject to the common law: *Entick v Carrington* (1765) 19 StTr 1029. She is also, by virtue of section 6 of the Human Rights Act 1998,

bound to act in a manner compatible with SK's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

7. Article 5(1) of the Convention provides, so far as material for present purposes, as follows:

> "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."

Mr Goodman places particular emphasis upon the phrases I have highlighted.

8. The Secretary of State's power to detain someone in SK's position is conferred by paragraph 2 of Schedule 3 to the Immigration Act 1971. Paragraph 2(2) permits such a person to be "detained under the authority of the Secretary of State pending the making of the deportation order" and paragraph 2(3) provides that once the deportation order is in force against such a 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 … when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise."

There are corresponding provisions in Schedule 2 relating to failed asylum seekers.

9. The powers conferred on the Secretary of State by Schedule 3 are not unfettered. As Davis J said in *R (D) v Secretary of State for the Home Department, R (K) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin) at para [32]:

> "The power to detain asylum seekers is conferred, in wide terms, on the [Secretary of State] by the provisions of the Immigration Act 1971 and, in particular, the provisions of Schedule 2 of that Act. The width of the primary statutory provisions has, however, been limited by pronouncements of policy by the Government and by secondary legislation, in the form of the Detention Centre Rules 2001."

The same applies to the powers conferred on the Secretary of State by Schedule 3 in relation to those liable to deportation.

10. Rule 9 of the Detention Centre Rules 2001, SI 2001/238, is headed 'Detention reviews and update of claim.' Rule 9(1) provides that:

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

11. The Detention Centre Rules 2001 are supplemented, so far as is material for present purposes, by Chapter 38 of the Home Office's 'Operations Enforcement Manual', which is headed 'Detention and Temporary Release.' For present purposes the relevant provisions are as follows:

i) Paragraph 38.1 provides so far as material that:

> "To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law *but must also accord with this stated policy*" (emphasis added).

ii) Paragraph 38.3 provides so far as material that:

> "Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified."

iii) Paragraph 38.5 provides that:

> "Although the power in law to detain an illegal entrant rests with the IO, or the relevant non-warranted immigration caseworker under the authority of the Secretary of State, in practice, an officer of at least CIO rank, or a senior caseworker, must give authority. Detention must then be reviewed at regular intervals (see 38.8)."

iv) Paragraph 38.6 provides so far as material that:

> "The Government stated in the 1998 White Paper that **written reasons for detention** should be given in all cases at the time of detention and thereafter at monthly intervals" (emphasis in original).

v) Paragraph 38.6.3 provides so far as material that:

> "It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure that they are always **justified and correctly stated**. A copy of the form must be retained on the caseworking file" (emphasis in original).

vi) Paragraph 38.8 provides so far as material that:

> "Continued detention … must be subject to administrative review at regular intervals. At each review robust and formally documented consideration should be given to the removability of the detainee.
>
> … A formal and documented review of detention should be made after 24 hours by an Inspector and thereafter as directed at the 7, 14, 21 and 28 day points.
>
> **At the 14 day stage, or if circumstances change between weekly reviews an Inspector must conduct the review** (emphasis in original).
>
> … In CCD an HEO reviews detention up to 2 months. An SEO/HMI reviews detention up to 4 months, the Assistant Director/Grade 7 up to 8 months, the Deputy Director up to 11 months and the Director at 12 months and over."

The CCD, I should explain, is the Criminal Casework Directorate, which has had responsibility throughout for SK's case.

The legal framework – the case-law

12. I take as my starting point what Lord Bingham of Cornhill said in *A v Secretary of State for the Home Department, X v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at para [8]. Having referred to paragraphs 2(2) and 2(3) of Schedule 3 to the Immigration Act 1971, Lord Bingham continued:

> "In *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out. Thus there was no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wished to remove."

Having observed that this ruling was wholly consistent with the obligations undertaken by the United Kingdom in the Convention (not of course at that time part of our domestic law), and having referred to Article 5, Lord Bingham continued:

> "Thus there is, again, no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wishes to remove. Such a person may be detained only during the process of deportation. Otherwise, the Convention is breached and the Convention rights of the detainee are violated."

13. As Mr Goodman points out, one can see this principle in operation in *Ali v Switzerland* (1998) 28 EHRR 304 at page 310, where the Commission said (para [41]) that:

> "where authorities are aware, as here, that a deportation order cannot be enforced, detention under an order made at that specific time can no longer be considered to be detention of a person "against whom action is being taken with a view to deportation"."

14. I need not go to the summary of the case-law to be found in the speech of Lord Brown of Eaton-Under-Heywood in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207, at paras [21]-[24]. The *Hardial Singh* principles, as I shall refer to them for convenience, were set out by Woolf J, as he then was, in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 at page 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 … 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."

15. In *R (I) v Secretary of State for the Home Department)* [2002] EWCA Civ 888, [2003] INLR 196, at paras [46]-[47] Dyson LJ summarised the law as follows:

> "[46] There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704, 706D … This statement was approved by Lord Browne-Wilkinson in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, 111A-D … In my judgment, [counsel] correctly submitted that the following four principles emerge:
>
> (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) The deportee may only be detained for a period that is

> reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with the 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) applies. 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 has not yet expired."

16. There has been much elaboration of the *Hardial Singh* principles in the case-law. I shall return to this when considering the opposing submissions of Mr Goodman and Mr Chamberlain.

The factual background – the situation with regard to Zimbabwe

17. SK is a national of Zimbabwe, it was in relation to the situation in Zimbabwe that he claimed to be entitled to protection as a refugee seeking asylum in accordance with the Geneva Convention and it is to Zimbabwe that the Secretary of State proposes to deport him. I must therefore sketch out the relevant background. It is well-known. What matters for present purposes is not so much the detail of the by now extensive case-law on the topic of removing failed Zimbabwean asylum seekers but, as Mr Chamberlain rightly submitted, the chronology of relevant developments.

18. I can take this shortly:

i) 4 August 2005: Collins J ordered by consent that removal of 30 "test case" Zimbabweans be suspended pending resolution of the issue in a test case. Involuntary returns of failed Zimbabwean asylum seekers were thus suspended.

ii) 14 October 2005: The Asylum and Immigration Tribunal promulgated its decision in *AA (Involuntary Returns to Zimbabwe) Zimbabwe CG* [2005] UKAIT 00144 that failed asylum seekers returned to Zimbabwe were at risk.

iii) 12 April 2006: The Court of Appeal in *AA and LK v Secretary of State for the Home Department* [2006] EWCA Civ 401, [2007] 2 All ER 160, remitted the decision of the AIT back to the AIT for reconsideration, but without indicating that forced return was safe for failed asylum seekers.

iv) 2 August 2006: The Asylum and Immigration Tribunal promulgated its decision in *AA (Risk for Involuntary Returnees) Zimbabwe CG* [2006] UKAIT 00061, revising its previous decision and holding (see at paras [244] et seq) that failed asylum seekers returned involuntarily to Zimbabwe were not at risk.

v) 26 September 2006: In response to comments by Burton J in the Administrative Court, the Secretary of State undertook not to enforce the return of failed asylum seekers to Zimbabwe pending the outcome of the appeal to the Court of Appeal against the decision of the AIT in *AA (Risk for Involuntary Returnees) Zimbabwe CG* [2006] UKAIT 00061.

vi) 6 March 2007: The Court of Appeal in *AA v Secretary of State for the Home Department* [2007] EWCA Civ 149 again remitted the decision back to the AIT. Subsequently the AIT identified a different case – *HS* – as the appropriate vehicle to address the issues about the return to Zimbabwe of failed asylum seekers.

vii) 16 July 2007: The Border & Immigration Agency issued its most recent 'Operational Guidance Note' in relation to Zimbabwe. Having referred to the Zimbabwe case-law summarised above, it stated the Secretary of State's policy in paragraph 5.4:

> "The Home Office therefore continues to defer the enforced return of failed asylum seekers to Zimbabwe until the AIT has determined HS."

That remains the policy today. The Operational Guidance Note continued in paragraph 5.6 by making the point that:

> "Zimbabwean nationals may return voluntarily to any region of Zimbabwe at any time by way of the Voluntary Assisted Return and Reintegration Programme run by the International Organization for Migration … The AIT determination in AA did not find voluntary returnees to be at risk when going back to Zimbabwe."

viii) 21 November 2007: The Asylum and Immigration Tribunal promulgated its decision in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094, confirming that failed asylum seekers are not at risk on return to Zimbabwe by reason only of being failed asylum seekers. An application for permission to appeal to the Court of Appeal is pending.

The factual background – SK's case

19. I can summarise this as follows:

i) 30 October 2002: SK, a national of Zimbabwe, arrived in the United Kingdom as a visitor with 6 months leave to enter.

ii) 9 May 2003: SK applied for leave to remain for two years as a student. Leave was granted for one year until 30 April 2004.

iii) February 2004: SK was accused of common assault. The police took his passport, so he was, he says, unable to apply for an extension of his leave when it expired on 30 April 2004.

iv) January 2005: SK was acquitted. The police returned his passport.

v) 18 July 2005: SK committed three offences for which he was charged and remanded on bail.

vi) 30 August 2005: SK was remanded in custody, having breached a curfew condition imposed as a term of his bail.

vii) 17 November 2005: SK was convicted of a Bail Act offence

viii) 9 December 2005: SK was convicted on two counts of common assault and one count of sexual assault on a female.

ix) 24 January 2006: SK was sentenced to a total of 12 months imprisonment and ordered to be registered as a sex offender for 5 years. No recommendation for deportation was made by the sentencing judge.

x) 7 March 2006: The Secretary of State decided to make a deportation order against SK.

xi) 8 March 2006: SK's sentence of imprisonment expired. He was detained by the Secretary of State in accordance with his powers under paragraph 2 of Schedule 3 to the Immigration Act 1971. He remained in HMP Woodhill, where he had been serving his sentence. The material part of the letter dated 8 March 2006 in which this decision was communicated to SK reads as follows:

> "It has been decided that you should remain in detention because:

> You have not provided a reliable address and are likely to abscond if given temporary admission or release.
>
> There is insufficient reliable information to decide whether to grant you temporary admission or release.
>
> The decision to detain you has been reached on the basis of the following factors:
>
> You have not submitted evidence that you have close ties (eg family or friends) to make it likely that you will stay in one place. You have not provided us with any address that you will be resided [sic] on your release.
>
> You have previously failed to comply with conditions of your stay. You failed to leave the United Kingdom on expiry of your leave to remain in the United Kingdom.
>
> You have not produced satisfactory evidence of your lawful basis to be in the United Kingdom.
>
> You have previously failed or refused to leave the United Kingdom when required to do so.
>
> Your detention will be reviewed on a regular basis."

It will be noticed that neither the fact of SK's criminal convictions let alone the alleged seriousness of the offences of which he had been convicted formed any part of the reasons for his detention. Detention was justified, in substance, on two grounds: that SK was an unlawful 'overstayer' and that it was likely he would abscond if released.

xii) 24 March 2006: SK claimed asylum. His letter read as follows: "I wish to claim asylum. I am unable to return to Zimbabwe." No further particulars were given.

xiii) 11 April 2006: SK asked the Secretary of State to move him from HMP Woodhill to a Detention Centre "where I will be treated as a human and not an animal."

xiv) 18 April 2006: Acting on behalf of SK, the Milton Keynes Citizen's Advice Bureau (the CAB) wrote two letters to the Secretary of State: one requesting SK's urgent transfer to a Detention Centre now that his sentence had been completed; the other appealing against the deportation order on the grounds that, in the light of the decision of the Court of Appeal in *AA and LK v Secretary of State for the Home Department* [2006] EWCA Civ 401, [2007] 2 All ER 160, deportation would contravene SK's rights under both the Geneva Convention and the European Convention.

xv) 20 April 2006: Again acting on behalf of SK, the CAB wrote to the Secretary of

State requesting SK's release on temporary admission "for the following reasons":

> "1 Our client wishes to claim asylum and given that he is a Zimbabwean, there is NO prospect of any imminent removal presently.
>
> 2 We would submit that it would be unlawful to detain our client indefinitely pending the outcome of the Court decisions in relation to the involuntary returns of asylum seekers or failed asylum seekers from the UK to Zimbabwe.
>
> 3 We submit that our client's prolonged detention in this respect is unjustified and unlawful. We would request that you consider granting our client temporary admission as a matter of urgency."

xvi) 3 May 2006: Having had no response to its earlier letter the CAB wrote again to the Secretary of State seeking SK's release on temporary admission:

> "It is quite clear that our client cannot be forcibly returned to Zimbabwe in the foreseeable future and we would therefore submit that he should be released on temporary admission/ release as a matter of urgency. Given that our client cannot be removed within a reasonable time or in the foreseeable future, would in our view make his further detention unlawful. We wish to remind you that our client's detention can only be lawful if it is for a reasonable period of time."

Although the CAB did not say so in terms, this letter, like the previous one, was quite plainly relying upon the *Hardial Singh* principles. It is shocking that these letters, which it will be noted asserted in terms that SK's detention was "unlawful", were simply ignored by the Secretary of State's minions. No reply to either letter was ever sent to the CAB and the Secretary of State's file contains nothing to show that officials ever gave any consideration of any sort to either of them.

xvii) 17 May 2006: SK applied for bail (by now he had been moved to HMP Lincoln).

xviii) 19 May 2006: SK's bail application was refused by Immigration Judge Wilson. The Secretary of State's stance at that hearing was that SK "could be removed swiftly" if his appeal against the deportation order failed (seemingly no thought was given by the Secretary of State to the fact that SK had an outstanding asylum application). The Secretary of State's Minute of the hearing notes that if SK were to lose his appeal "then SoS will have to demonstrate that further detention lawful if policy on enforced removals to Zimbabwe is still suspended." The Minute also records:

> "Mr Wilson stated that he wanted submissions from PO [at the substantive hearing] as to lawfulness of [SK's] detention in view of policy not to enforce removals to Zimbabwe."

xix) 15 September 2006: SK again applied for bail. The Secretary of State's stance was that if SK's appeal failed he could be removed "with[in] a reasonable time scale as he has a valid passport." The bail application and SK's appeal were adjourned for hearing on 21 September 2006 to enable the Secretary of State to make a decision on SK's application for asylum.

xx) 19 September 2006: The Secretary of State refused SK's application for asylum.

xxi) 21 September 2006: The hearing of SK's appeals against the deportation order and the refusal of asylum and of his human rights appeal took place before Immigration Judge Chambers and Ms V S Street (Lay Member). Bail was refused, Immigration Judge Chambers noting that SK had a previous Bail Act offence, that his prospects of obtaining sureties were poor, that his appeals appeared to be without merit and that "there is every likelihood that [SK] if granted bail, will abscond", having no family ties in the United Kingdom.

xxii) 4 October 2006: Promulgation of the decision of Immigration Judge Chambers and Ms Street dismissing all three of SK's appeals. In dismissing SK's claim to asylum they rejected his account of events in Zimbabwe, finding that he was misleading and eventually evading the authorities and that,

> "believing he had a poor case in resisting deportation he sought to bolster his prospects of success by inventing a false asylum claim."

As they pointed out, SK had claimed asylum only when he had been served with deportation papers. In relation to SK's appeal against the deportation order, they concluded that the Secretary of State was right to conclude that SK's deportation was necessary:

> "These were serious offences. [SK] is assessed as presenting "a medium risk of sexual or violent offending upon his release"."

xxiii) 4 January 2007: Decision of Senior Immigration Judge Allen ordering a reconsideration of SK's appeal.

xxiv) 4 May 2007: SK was moved from HMP Lincoln to Campsfield Immigration Removal Centre.

xxv) 21 June 2007: The reconsideration of SK's appeals against the deportation order and the refusal of asylum and of his human rights appeal took place before

Immigration Judge Blair-Gould.

xxvi) 6 July 2007: Promulgation of the decision of Immigration Judge Blair-Gould refusing SK's appeals following reconsideration: "The Tribunal made no material error of law in its determination and its decision upon [SK's] appeal shall stand." There has never been any challenge to this decision. So SK's appeal rights were exhausted on 16 July 2007.

xxvii) 28 July 2007: An internal fax shows that attempts to serve FRS (Facilitated Return Scheme) papers on SK, who was by now detained in Harmondsworth Immigration Removal Centre, had been unsuccessful. SK had "refused to accept them and said that he has no intention of returning to Zimbabwe as he will be tortured and killed."

xxviii) 24 August 2007: A Deportation Order was made and served on SK.

The letters before action

20. On 24 October 2007, SK's new representatives, Messrs Lawrence Lupin, solicitors, wrote to the Secretary of State contending that SK had been unlawfully detained "*at least* since September 2006" (emphasis in original) and threatening legal proceedings.

21. There was no response. They wrote again the following day (25 October 2007). Again there was no response. On 2 November 2007, still having had no response, they again wrote to the Secretary of State threatening to issue proceedings in the absence of a response within seven days.

22. Having had no response (though on 6 November 2007 the Secretary of State had written to SK saying that he was entitled to support in the form of accommodation under section 4 of the Immigration and Asylum Act 1999!) the solicitors wrote again on 9 November 2007, giving the Secretary of State a further 3 working days to respond and saying that unless SK was released on temporary admission as a matter of urgency they would have no alternative but to obtain his release through the court.

23. The Secretary of State finally responded on 9 November 2007, though the letter does not seem to have reached SK's solicitors by the time they lodged his application for judicial review on 12 November 2007. The letter asserted (in the light of what we now know – see below – with questionable candour) that "Your client's detention is regularly reviewed." The letter also stated that placing SK on temporary release "is not an option in this case."

The proceedings

24. The judicial review proceedings were issued on 12 November 2007. The relief sought

was an order for SK's immediate release from detention, a declaration that SK was unlawfully detained and damages. The Form N461 was accompanied by a Form N463 seeking an interim order for SK's immediate release. That application was supported by grounds which included (paragraph 10) this complaint:

> "The unlawfulness of the detention is aggravated by the continued failure of the Home Office to respond to the representations sent by [SK's] solicitor dated 24/10/07, 25/10/07, 02/11/07 and 9/11/07. Where an allegation of unlawful detention is made it is submitted that it is incumbent on the SSHD to act swiftly."

25. The next day, 13 November 2007 the matter came before Bennett J as a table application. He made an order which, having recited the Secretary of State's failure to respond to any of the letters from SK's solicitor, provided in its operative part that:

> "unless by midday on Friday 16 November 2007 the Defendant lodges with the Court Office an Acknowledgement of Service together with Summary Grounds of Defence explaining why [SK] is, and/or should continue to be, detained, [SK] is to be released from Detention immediately thereafter" (emphasis in original).

26. On 16 November 2007 the Secretary of State filed an Acknowledgement of Service, together with Summary Grounds of Defence, disputing the claim and saying that permission to apply for judicial review ought to be refused.

27. On 20 November 2007, following a hearing in court, Mitting J gave SK permission to apply for judicial review and adjourned his application for bail to be re-listed on 4 December 2007.

28. On 4 December 2007 Sullivan J refused the application for bail and gave directions with a view to an expedited hearing in January 2008.

29. On 14 December 2007 the Secretary of State filed detailed grounds of defence settled by counsel but not, I should emphasise, by Mr Chamberlain. On 9 January 2008 SK made a witness statement.

30. It is a significant, and in my judgment a very disturbing, feature of this case that the Secretary of State has not seen fit to file any evidence at all in answer to the serious allegations being made by and on behalf of SK. Following the hearing before Sullivan J, whose order had provided that the Secretary of State was "to serve detailed grounds of defence *evidence* and disclosure" by 20 December 2007 (emphasis added), the Secretary of State contented herself with serving, in addition to her detailed grounds of defence, a bundle, running to 522 pages, being, as I understand it, a copy of the relevant Home Office file on SK. That bundle, as we shall shortly see, raised as many questions – very serious questions indeed, I might add – as it answered. It reveals the shameful

extent of the failure of duty and defiance of the law by the Secretary of State's officials. But the Secretary of State has not condescended to give any evidence explaining what has happened.

31. The substantive hearing took place before me on 18 January 2008 (a Friday). The hearing finished somewhat after 5pm. I reserved judgment.

SK's case

32. SK's case is put by Mr Goodman on two distinct grounds:

i) First, Mr Goodman submits that there has been a failure to carry out regular reviews of the kind required by the Detention Centre Rules 2001 and the Operations Enforcement Manual. This complaint itself falls into two parts:

a) In the first place it is said that SK's detention has not been reviewed with the frequency required and by persons with the necessary seniority as required by paragraph 38.8 of the Operations Enforcement Manual.

b) In any event, it is said, such few reviews of SK's detention as have been carried have been inadequate.

ii) Secondly, Mr Goodman submits that bearing in mind the *Hardial Singh* principles there is not, and has long ceased to be, if there ever was, any jurisdiction to detain SK. This complaint also falls into a number of parts for it is said that SK's detention offends each of the four *Hardial Singh* principles.

33. In these circumstances, says Mr Goodman, SK's detention is not merely unlawful at common law, entitling him to common law damages for the tort of false imprisonment. It is also an actionable breach of his rights under Article 5. The failure to carry out regular reviews of the kind required by the Detention Centre Rules 2001 and the Operations Enforcement Manual means that SK's detention has not been "in accordance with a procedure prescribed by law" nor was it a "lawful detention" as those phrases are used in Article 5(1). Moreover, the "action" being undertaken against SK – his detention – is not "being taken with a view to deportation" within the meaning of Article 5(1)(f). SK's detention, he says, has been arbitrary and disproportionate to any legitimate purpose being pursued by the Secretary of State.

34. Mr Chamberlain summarises the Secretary of State's response as follows:

i) At all times there have been rational and lawful grounds for SK's detention.

ii) At all times there has been a reasonable prospect of SK'a removal.

iii) SK's detention has not exceeded a reasonable period for effecting his removal.

iv) The Secretary of State has taken steps to effect SK's removal.

v) What Mr Chamberlain calls "procedural breaches" of the Secretary of State's policy in relation to the regularity of reviews do not render his detention unlawful unless SK can show that but for them he would have been released.

35. Mr Chamberlain accepts that it is for the court to reach its own view, having regard to all the facts at the relevant time, as to whether SK's detention is, or was at any particular time, compliant with the *Hardial Singh* principles (and thus, subject to Mr Goodman's procedural complaints, lawful) or non-compliant with the *Hardial Singh* principles (and thus unlawful).

36. I shall deal with each of Mr Goodman's complaints in turn.

Failure to carry out reviews at the required frequency and by appropriate persons

37. The Secretary of State's decision to detain SK was communicated to him and implemented with effect from 9 March 2006. He has been detained ever since, a period (as of 18 January 2008) of over 22 months.

38. The letter dated 8 March 2006 informing him that he was to be detained also told him that "Your detention will be reviewed on a regular basis." He was entitled, in accordance with paragraph 38.8 of the Operations Enforcement Manual, to expect that his detention would in fact be reviewed on 10 March 2006 (after 24 hours), 16 March 2006 (7 days), 23 March 2006 (14 days), 30 March 2006 (21 days) and 6 April 2006 (28 days) and thereafter at monthly intervals.

39. So, following the 28 day review on 6 April 2006, there should have been monthly reviews in each of the remaining 9 months in 2006, in each of the 12 months in 2007 and, finally, on 6 January 2008. Leaving on one side the reviews which should have taken place between 10 and 30 March 2006, there should therefore, in all, have been 22 monthly reviews, the first on 6 April 2006 and the most recent on 6 January 2008. In accordance with paragraph 38.8 of the Operations Enforcement Manual, the first two of these (April and May 2006) could be carried out by an HEO. The next two (June and July 2006) should have been carried out by an SEO/HMI, the next four (August – November 2006) by the Assistant Director/Grade 7, the next three (December 2006 – February 2007) by the Deputy Director and the most recent eleven (March 2007 – January 2008) by the Director.

40. The disgraceful fact is that in the whole period from 9 March 2006 to the hearing on 18 January 2008 there were only ten reviews, only six of which (those in January, May, July, August and October 2007 and in January 2008) were conducted by an official at the correct level of seniority. Even worse, the *first* review did not take place until late

January 2007. So there was no review at all during the first ten months of SK's detention!

41. This is not merely supposition on my part based on inference from the absence of appropriate documents in the file. For the file contains an internal e-mail sent on 16 January 2007 which reads:

> "The subject has been in detention since 09 March 2006 and no monthly review has been done since. SK has a current asylum claim still pending."

Another e-mail dated 20 January 2007 shows that this e-mail came to the attention of an Assistant Director. There is also a 'Minute of Decision' dated 16 January 2007 which records that:

> "SK is currently being detained at HMP Lincoln. He has been detained since 9 March 2006 and no monthly review has been done since."

That Minute was seen on 20 January 2007 by both an Assistant Director and the Deputy Director. So this disgraceful state of affairs was known at a high level within the CCD. It does not seem to have been unique, for on 22 January 2007 another official added to the Minute the comment "this is *another* pretty appalling case" (emphasis added).

42. If it might be thought that the belated recognition by officials of this appalling state of affairs might thereafter have brought about some concerted attempt at fidelity to the requirements of the Operations Enforcement Manual, not a bit of it.

43. So far as can be ascertained from the Secretary of State's file – and that is the only material I have, the Secretary of State having chosen not to file any evidence – the following were the only reviews that ever took place:

i) January 2007: SK was sent a 'Monthly Progress Report to Detainees' dated 16 January 2007. Signed by a casework officer, this document asserted that "It has been decided that you will remain in detention". That was untrue, for the file shows that all that had happened by 16 January 2007 was that a Minute had been written by an official who said "I suggest that detention is maintained?" Further Minutes show that continuing detention was not authorised by the Deputy Director, as it should have been, until 20 January 2007. The reasons for detention specified in the 'Monthly Progress Report' were that:

> "There is reason to believe that you will fail to comply with any conditions attached to the grant of temporary admission or release.
>
> To effect your removal from the UK."

The document continued:

> "This decision has been reached on the basis of the following factors
>
> - You have not produced satisfactory evidence of your identity, nationality or lawful basis to remain in the UK.
>
> - You have previously failed or refused to leave the UK when required to do so.
>
> - You have used or attempted to use verbal/ documentary deception to gain leave to enter/remain or evade removal and it is considered likely that you will do so again.
>
> - You do not have enough close ties (eg family or friends) to make it likely that you will stay in one place."

ii) March 2007: This review should have been conducted by the Director. There is no evidence that it was, if indeed there was any review at all. SK was sent a 'Monthly Progress Report to Detainees' dated 5 March 2007 signed by a casework officer, this document again asserting that "It has been decided that you will remain in detention" and setting out the same reasons and relying upon the same factors as in the corresponding document dated 16 January 2007. The file contains no other documentation relating to this review.

iii) 22 May 2007: This review was conducted, as it should have been, by the Director and SK was sent a 'Monthly Progress Report to Detainees' dated 24 May 2007, again setting out the same reasons as in the previous two documents and relying upon essentially the same factors as previously. It is of interest to note that the Minute dated 15 May 2007 which was sent up to the Director, with the recommendation that detention be maintained, stated that SK had been detained since 9 March 2006 and noted that the first detention review since SK had been detained was completed on 16 January 2007 and the second on 5 March 2007. So the Director was reminded of the failings prior to January 2007 and now had drawn to his attention the fact that during the almost four months since then there had been only one review. Yet this deplorable state of affairs seems to have passed the Director by. His only comment on the Minute was "I agree detention should be maintained pending the High Court review" – this apparently being a reference to the reconsideration proceedings by SK in the AIT.

iv) June 2007: This review should have been conducted by the Director. There is no evidence that it was. SK was sent a 'Monthly Progress Report to Detainees' dated 30 June 2007 signed by a casework officer, this document again asserting that "It has been decided that you will remain in detention" and setting out the same reasons and relying upon the same factors as in the corresponding

document dated 24 May 2007. The file contains no other documentation relating to this review except for a Minute dated 30 June 2007 prepared by a casework officer, containing his "proposal" that "subject should remain in detention", which does not contain any comments by and is not signed by anyone else. So again it would seem that the document sent to SK was untrue, for all that the file shows to have happened by 30 June 2007 was that the caseworker had made a "proposal" that SK should remain in detention. Neither then nor at any time later does the Minute seem to have been passed to the Director or to anyone else who actually took a decision.

v) July 2007: SK was sent a 'Monthly Progress Report to Detainees'. It is dated 13 *June* 2007 but internal evidence shows that the true date must have been July. Signed by a casework officer, this document (which set out the same reasons as in the previous documents though now reverting to and relying upon the factors which had been set out in the corresponding documents dated 16 January 2007 and 5 March 2007) again asserted that "It has been decided that you will remain in detention". That again was untrue, for the file shows that all that had happened by 13 July 2007 (the document is dated 13 *June* 2007 but internal evidence again shows that the true date must have been July) was that a Minute had been written by an official who said "It is therefore proposed that he should remain in detention". Further Minutes show that continuing detention was not authorised by the Director, as it should have been, until 2 August 2007.

vi) August 2007: SK was sent a 'Monthly Progress Report to Detainees' dated 15 August 2007. Signed by a casework officer, this document again asserted that "It has been decided that you will remain in detention". That again was untrue, for the file shows that all that had happened by 15 August 2007 was that a Minute had been written by an official who said "It is therefore proposed that detention be maintained". Further Minutes show that continuing detention was not authorised by the Director, as it should have been, until 30 August 2007. The 'Monthly Progress Report' dated 15 August 2007 set out the same reasons for detention as before but now identified the decision as having been based on:

> "the following factors:
>
> - You have exhausted all of your rights of appeal and your removal from the UK is pending.
>
> - You have obstructed the removal process by failing to co-operate with the application process to obtain an Emergency Travel Document.
>
> - You do not have close ties to make it likely that you will stay in one place."

vii) September 2007: This review should have been conducted by the Director. There is no evidence that it was. SK was sent a 'Monthly Progress Report to Detainees' dated 19 September 2007 signed by a casework officer, this document again asserting that "It has been decided that you will remain in detention" (and setting out the same reasons and relying on the same factors as

the corresponding document dated 15 August 2007). The file contains no other documentation relating to this review except for a Minute also dated 19 September 2007 prepared by a casework officer, proposing that detention be maintained, which does not contain any comments by and is not signed by anyone else. So again it would seem that the document sent to SK was untrue, for all that the file shows to have happened by 19 September 2007 was that the caseworker had made a "proposal" that SK should remain in detention. Neither then nor at any time later does the Minute seem to have been passed to the Director or to anyone else who actually took a decision.

viii) October 2007: This review appears to have been conducted by the Director, though the Minute is silent as to the date when he approved the recommendation for detention. Much the same thing seems to have happened as in September 2007. The 'Monthly Progress Report to Detainees' signed by a casework officer and sent to SK (and setting out the same reasons and relying on the same factors as the corresponding document dated 19 September 2007) was dated 12 October 2007 although by then all that had happened was that the caseworker had prepared a Minute and "proposed that detention be maintained". Assuming that the Minute did reach the Director, there is nothing to show that it had by the time the 'Monthly Progress Report' was signed. Since this judgment was prepared it has emerged that the decision was not in fact authorised by the Director until 5 December 2007. Mr Chamberlain accepts that in these circumstances a review in which the substantive recommendation precedes the Director's authorisation by over a month is not (on the basis of the findings in this judgment and subject to appeal) a valid review

ix) December 2007: This review should have been conducted by the Director. There is no evidence that it was. It appears to have been dealt with by a HEO. Much the same thing happened as previously. The 'Monthly Progress Report to Detainees' signed by a casework officer and sent to SK (and setting out the same reasons and relying on the same factors as the corresponding document dated 12 September 2007 with the omission of the third factor) was dated 3 December 2007 although by then all that had happened was that the caseworker had prepared a Minute, his "proposal" being to "maintain detention." Authority was not given until 6 December 2007, and then purportedly by a HEO. The insouciant manner in which this review was conducted is quite breathtaking, given that by 6 December 2007 not merely had the Secretary of State received the letter before action and the formal claim for judicial review but also that permission to apply for judicial review had actually been granted by Mitting J.

44. During the hearing – this was on 18 January 2007 – I pointed out to Mr Chamberlain that there appeared to have been no review of SK's detention during the previous month. I required the Secretary of State to produce any further documents relied on by her as showing that there had been any other reviews of SK's detention. In due course the Treasury Solicitor's representative returned to court with documents showing that on 24 December 2007 a HEO had sent up a Minute that "Continued detention is recommended." Authority for SK's continuing detention was given by the Director on 3 January 2008.

45. Two things about this decision are striking. In the first place it appears never to have been communicated to SK, for the Secretary of State did not produce any 'Monthly Progress Report to Detainees' which had been sent to him. If indeed it was not communicated then there would not merely be a non-compliance with rule 9(1) of the Detention Centre Rules 2001. The failure would engage the fundamental constitutional principle identified by Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, at para [26]:

> "The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a 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."

He continued at paragraph [28]:

> "This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the comer decisions or knocks on doors in the early hours. That is not our system."

46. Much more surprising, however, is what the Director minuted on the file:

> "I agree detention should be maintained. Subject is lengthening his stay in detention by refusing to sign disclaimer. *Removals to Zimbabwe are now in progress* and every effort should be made to remove asap" (emphasis added).

Mr Chamberlain had to agree that the words I have emphasised are simply wrong. Removals of failed asylum seekers to Zimbabwe are *not* in progress. The Secretary of State's policy, Mr Chamberlain confirmed, is that set out in the 'Operational Guidance Note' dated 16 July 2007, namely that "The Home Office … continues to defer the enforced return of failed asylum seekers to Zimbabwe until the AIT has determined HS."

47. Mr Chamberlain very frankly accepted that the decision embodied in the Director's Minute was unsustainable, being vitiated by a fundamental mistake of fact going to the root of the decision. I understood Mr Chamberlain to concede in terms that on an application for judicial review SK would be entitled to an order quashing the Director's decision. It is astonishing that an official as senior as the Director should seemingly be ignorant of current Home Office policy on a matter as significant as this. It is also disturbing that decision-making exhibiting this degree of ineptitude should be taking

place in relation to an individual at the very time that the legality of his detention was under scrutiny by the court.

48. So a man who, according to the Secretary of State's own publicly proclaimed policy – a policy which moreover, as we have seen, proclaims that a detention to be lawful "must" accord with this policy –, was entitled to no fewer than 22 monthly reviews of the lawfulness of his detention has had the benefit of only ten reviews, of which only six were conducted by officials of the requisite seniority. And of these six, Mr Chamberlain has had to disavow two as fatally flawed.

49. So SK has had only four of the 22 reviews to which he was entitled. And on top of this, with the sole exception of the 'Monthly Progress Report to Detainees' dated 24 May 2007, every 'Monthly Progress Report to Detainees' sent to SK seems to have pre-dated the actual decision. The casual mendacity of a system under which the written reasons for detention required by rule 9(1) of the Detention Centre Rules 2001 to be sent to detainees are dated and signed by junior officials before the decisions have in fact been taken is concerning. To be specific, and by way of example (there are too many others): the 'Monthly Progress Report' which SK received dated 15 August 2007 would plainly have conveyed to him that his continuing detention had been reviewed and approved by the Director on or shortly before 15 August 2007. In fact, as we know, the actual decision was not taken until 30 August 2007. So the document SK received was wholly misleading.

50. Thus the allegation made on behalf of the Secretary of State, not just in the letter of 9 November 2007 but persisted in as recently as in the detailed grounds of defence dated 14 December 2007, that SK's detention has been "regularly reviewed" is at best tendentious. How such an assertion could be made in the light of what Mr Goodman correctly characterises as the Secretary of State's blatant failure to follow her own policy in relation to review I do not begin to understand. I make these observations noting in fairness to counsel who settled these grounds – not Mr Chamberlain – that I have not had the benefit of any submissions from him.

51. The picture which emerges from this melancholy analysis of the Secretary of State's file is deeply disturbing, indeed profoundly shocking.

52. So much for the facts. How does Mr Goodman put his case?

53. Mr Goodman submits that the Secretary of State's complete failure to review SK's detention for the first ten months, and thereafter only sporadically and inadequately for a further year, defy the Secretary of State's own policy, SK's human rights and the rule of law. I agree.

54. Mr Goodman further submits that detention in circumstances where SK was deprived of the safeguards prescribed by law and by the Secretary of State's policy was plainly arbitrary and unlawful, striking at the very heart of the principle enshrined in Article 5, which is to protect against arbitrary detention. Again, I agree.

55. Mr Goodman's fundamental proposition is that for SK's detention to have been lawful the Secretary of State must demonstrate, first, that the detention was reviewed with the regularity required by rule 9(1) of the Detention Centre Rules 2001 and paragraph 38.8 of the Operations Enforcement Manual and, second, that each review was carried out by someone of the appropriate seniority as required by paragraph 38.8. Not merely does he point to the Secretary of State's own recognition in paragraph 38.1 of the Operations Enforcement Manual that to be lawful detention "must" accord with the Secretary of State's policy – a proposition seemingly no longer accepted by the Secretary of State given Mr Chamberlain's submissions. Mr Goodman points to authority.

56. First, Mr Goodman draws attention to what Lord Phillips of Worth Matravers MR said in *Nadarajah v Secretary of State for the Home Department, Amirhanathan v Secretary of State for the Home Department* [2003] EWCA Civ 1768. That was a case involving a part, albeit a different part, of the policy in Chapter 38 of the Operations Enforcement Manual, so the Court of Appeal was concerned with a part of the very same policy which is in issue here. At para [68] Lord Phillips said this in relation to N's appeal:

> "Those acting for N could reasonably expect, having regard to those aspects of the Secretary of State's policy that had been made public, that N would not be detained on the ground that his removal was imminent. The only basis upon which the Immigration Service could treat his removal as imminent was by applying that aspect of the Secretary of State's policy which had not been made public, namely that no regard would be paid to an intimation that judicial review proceedings would be instituted. 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."

At para [72] Lord Phillips made the same point in relation to A's appeal:

> "the detention was unlawful for the same reason that N's detention was unlawful. It was at odds with the Secretary of State's policy, as made public."

57. Next Mr Goodman draws attention to *R (Konan) v Secretary of State for the Home Department* [2004] EWHC 22 (Admin), another Chapter 38 case, where Collins J said this at para [32]:

> "Since the detention at least since 24 June 2002 was contrary to the defendant's own policy as published in Chapter 38, it was unlawful. In so deciding, I am applying the decision of the Court of Appeal in *Nadarajah*. I do not therefore have to consider the question of proportionality."

58. Finally, Mr Goodman relies upon an authority which Mr Chamberlain very properly drew to my attention although it hardly helped his own case: *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662. That was a case involving detention of a suspect under section 37 of the Police and Criminal Evidence Act 1984. Section

34(1) of the Act provides that:

> "A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act."

Section 40 of the Act provides so far as material that:

> "(1) Reviews of the detention of each person in police detention in connection with the investigation of an offence shall be carried out periodically in accordance with the following provisions of this section –
>
> (a) in the case of a person who has been arrested and charged, by the custody officer; and
>
> (b) in the case of a person who has been arrested but not charged, by an officer of at least the rank of inspector who has not been directly involved in the investigation.
>
> …
>
> (3) Subject to subsection (4) below –
>
> (a) the first review shall be not later than six hours after the detention was first authorised;
>
> (b) the second review shall be not later than nine hours after the first;
>
> (c) subsequent reviews shall be at intervals of not more than nine hours …"

59. The plaintiff was detained at 11.25pm. His detention was not reviewed by an inspector until 7.45am the next morning, although it had been considered in the interim at 1.45am by an officer of junior rank. The plaintiff sued for unlawful imprisonment for the period of 2 hours and 20 minutes from 5.25am (when the first review should have taken place in accordance with sections 40(1)(b) and 40(3)(a)) until 7.45am. The plaintiff succeeded at trial. An appeal by the Chief Constable was dismissed.

60. Clarke LJ, as he then was, said this at pages 665-666:

> "In these circumstances the judge held that the plaintiff was being unlawfully detained as from 5.25am. I agree. Section 34(1) of the Act is mandatory. As already stated, it provides that a person shall not be kept in police detention except in accordance with the relevant provisions of the Act. The plaintiff was detained at 11.25pm on 30 July, so that by section 40(3)(a) a review of his detention should have taken place before 5.25am on 31 July. No such review took place. It follows, as I see it, that from that time the plaintiff was not being detained in accordance

> with the relevant provisions of the Act. It further follows from section 34(1) that his detention was thereafter unlawful until some event occurred to make it lawful."

61. Clarke LJ then turned to address the submission on behalf of the Chief Constable (see at page 666) that the plaintiff could only prove false imprisonment if he could show that if the review had been carried out at the appropriate time he would have been released, it being common ground, and in any event the case, that the plaintiff could not show that he would have been released. Rejecting the submission Clarke LJ said this at page 667:

> "[Counsel] submits that, so long as circumstances existed which were or would be sufficient to justify continued detention, the plaintiff could not be fairly be said to be detained without lawful excuse. I am, however, unable to accept that submission. From 5.25am the plaintiff was not being detained in accordance with Part IV of the Act of 1984 because no review was carried out as required by section 40(1) and (3)(a). As I see it, it is nothing to the point to say that the detention would have been lawful if a review had been carried out or that there were grounds which would have justified continued detention. Part IV of the Act exists in order to ensure that members of the public are not detained save in certain defined circumstances. In all other circumstances every member of the public is entitled to his or her liberty …
>
> In this case the plaintiff was entitled to the benefit of a review before 5.25am. In the absence of a review he was in principle entitled to his liberty. His further detention was therefore unlawful. In short he was being deprived of his liberty without lawful excuse. It follows that this was a case of false imprisonment".

62. Mr Goodman says that it is clear as a matter of principle, and if authority be needed it is clear in the light of these authorities, that SK's detention was therefore lawful only during such periods as it had been authorised by a person of appropriate seniority in accordance with paragraph 38.8 of the Operations Enforcement Manual. In the circumstances as I have set them out above, this means, says Mr Goodman, that, quite apart from any other arguments upon which he relies, SK's detention has been unlawful at all times since 10 March 2006 with the sole exception of (i) the period of one month from 20 January 2007, (ii) the period of one month from 22 May 2007; (iii) the period from 2-30 August 2007; and (iv) the period of one month from 30 August 2007. I agree.

63. The Secretary of State's response to all this is that these are matters (so it is repeatedly said in the detailed grounds of defence) of form and not substance. I do not agree.

64. Mr Chamberlain seeks to avoid the impact of the authorities to which Mr Goodman referred. He points to the reference by Lord Phillips in *Nadarajah* at para [72] to the detention in that case as being "at odds with" the policy, asserting that, in contrast, SK's detention here was not "at odds with", merely non-compliant with, the (procedural)

obligations in rule 9(1) of the Detention Centre Rules 2001 and paragraph 38.8 of the Operations Enforcement Manual. He says that *Konan* adds nothing to *Nadarajah*. He says that there is lacking from the provisions here in play anything as clear cut as the peremptory language in section 34(1) of the Police and Criminal Evidence Act 1984 which, he says, is the key to the decision in *Roberts*. There, he says, the power to detain was created by the statute, which itself in section 34(1) circumscribed the exercise of the power, so there was, he says, simply no power to detain except in a manner complying with section 34(1); compliance with section 34(1) was a precondition to the exercise of the power. Here in contrast, he says, the statutory power to detain is conferred by the Immigration Act 1971 and neither rule 9(1) of the Detention Centre Rules 2001 nor paragraph 38.8 of the Operations Enforcement Manual operates as a precondition to the exercise of the power.

65. Mr Chamberlain points to what Davis J said in *R (D) v Secretary of State for the Home Department, R (K) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin) at para [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."

That is a reference to rule 34 of the Detention Centre Rules 2001, which provides that every detained person shall, unless he does not consent, be given a physical and mental examination within 24 hours of his admission to a detention centre. The relevance of rule 34 for present purposes (and this was the point in *R (D*) is that a detainee who on such examination is found to have been the victim of torture will not continue to be detained except in very exceptional circumstances: see paragraph 38.10 of the Operations Enforcement Manual. Consequently, as Davis J put it in *R (D)* at para [50]:

> "In my view the combined effect of the Detention Centre Rules, the statement of Lord Filkin, the provisions of Chapter 38 of the Operation Enforcement Manual and the relevant provisions of the Detention Services Operating Standards Manual all point in one direction: which is that the medical examination required under Rule 34 of the Detention Centre Rules is a part – an important part – of the safeguards provided to assess whether a person, once removed to Oakington, should continue to be detained there under the fast-track procedure."

66. Finally, Mr Chamberlain takes me to *R v Secretary of State for the Home Department ex p Jeyeanthan* [2000] 1 WLR 354 and, in particular, to Lord Woolf MR's reference at page 359 to:

> "what can be the very undesirable consequences of a procedural

> requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity".

That case, it may be noted, had nothing to do with the liberty of the subject; it was a case where a litigant had made an application to the Immigration Appeal Tribunal by letter rather than using the prescribed form. It is merely one – albeit, as Mr Chamberlain pointed out, in the asylum context – of the long beadroll of cases grappling with what was once seen as the distinction between 'mandatory' and merely 'directory' provisions.

67. I cannot with all respect to Mr Chamberlain's valiant efforts accept any of this. His attempt to distinguish *Nadarajah* and *Konan* is little more than semantic quibbling. Nor does his analysis of the contrasting language of the two different regimes justify discarding *Roberts* as an authority which it might be thought is, if not directly in point, at the very least uncomfortably close to home. The rule with which Davis J was concerned in *R (D)* is very different from the rule and the policy with which I am concerned. Compliance with rule 34 could at most set in train a process by which a detainee might be released from a detention which had already been properly authorised and would otherwise continue to be appropriate. I am concerned, in contrast, with the process by which detention is authorised. And *Jeyeanthan*, for the reasons I have already mentioned, seems to me not to assist at all.

68. Integral to the scheme endorsed by Parliament in its approval of rule 9(1) of the Detention Centre Rules 2001, and integral to the policy laid down by the Secretary of State in paragraph 38.8 of the Operations Enforcement Manual, is the principle that someone is not to be detained beyond a certain period without there being a review undertaken at regular intervals and moreover, as required by the Secretary of State's policy, a review undertaken at increasingly high levels of seniority within the Home Office as the period of detention grows longer. Those reviews are fundamental to the propriety of the continuing detention, they are required in order to ensure that the continuing detention can still be justified in the light of current, and perhaps changed, circumstances, and they are, in my judgment, a necessary prerequisite to the continuing legality of the detention.

69. Mr Chamberlain, very properly, did not seek to suggest that breaches of this policy were in any way acceptable or justifiable. They are not. He confined himself to the entirely proper submission – albeit one I have rejected – that the many breaches I have identified did not have the legal consequences contended for by Mr Goodman. But the fact remains. SK's case has been handled by officials, month after month, indeed for the best part of two years, blithely ignoring the vitally important protections for the detainee mandated by rule 9(1) and paragraph 38.8 and, moreover in a manner which sits most uncomfortably with the peremptory language of the passages in paragraphs 38.1, 38.3 and 38.8 of the Operations Enforcement Manual which I have already quoted. What has happened is little short of outrageous; the very kind of arbitrary behaviour against which not merely the common law but also Article 5 stand as bulwark and protection. After all, and quite apart from everything else, how can the Secretary of State conscientiously apply the *Hardial Singh* principles unless detention is being regularly and properly reviewed?

70. As Mr Goodman correctly says, in matters relating to liberty procedural safeguards are themselves of paramount importance. This principle is underscored by Article 5 and, in my judgment, cannot be cast aside in the manner the Secretary of State seeks to do.

71. Davis J's observations in *R (D) v Secretary of State for the Home Department, R (K) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin) at para [108] are also the basis for Mr Chamberlain's contention that no breach of the requirements of rule 9(1) of the Detention Centre Rules 2001 or of paragraph 38.3 of the Operations Enforcement Manual can avail SK unless he can show that had he received the appropriate reviews he would have been released. It is, says Mr Chamberlain, "quite plain" that he would not. It is, he says, artificial to suppose that the evaluation of his detention in formal monthly intervals would have led to any different result. He says that Mr Goodman's approach, if correct, would have the effect that SK became entitled to damages for unlawful detention because of a "purely procedural breach of policy", even in circumstances where the breach of policy could have had no material effect on the decision to detain and therefore no impact on the period of his detention. That, says Mr Chamberlain, is wrong as a matter of principle and is in any event inconsistent with the approach adopted by Davis J in *R (D)*.

72. I cannot accept this. *R (D)* was, as I have said, a different case raising a quite different point. I do not differ from Davis J in his analysis of rule 34 but it does not bear on the point I am addressing. There are, in my judgment, two reasons why on this point Mr Goodman is right in his submission and Mr Chamberlain is wrong. In the first place, the approach for which Mr Chamberlain contends is wrong as a matter of fundamental principle. It is for the Secretary of State to prove that SK's detention is lawful, not for SK to prove that it is unlawful. Moreover, and this is the second point, I agree with Mr Goodman that the reasoning of Clarke LJ in rejecting a similar argument in *Roberts* is, if authority be required, the clear and definitive answer to Mr Chamberlain's argument.

73. Mr Chamberlain persists in the contention (and I quote his skeleton argument) that SK has had "regular reviews of his detention since January 2007." If Mr Chamberlain uses the word "regular" as meaning, in the dictionary sense, 'recurring or repeated at fixed times or uniform intervals' or 'acting at the proper intervals', then his submission is, with all respect to him, simply wrong as a matter of fact. If he uses the word in some looser sense then it does not meet Mr Goodman's point. Nor, in my judgment, does his observation that prior to January 2007 the Secretary of State's consideration of the propriety of SK's continued detention is evidenced by the bail summaries produced in response to SK's two bail applications.

74. Mr Goodman rejects any suggestion that matters are in any way improved by the fact that SK made unsuccessful applications for bail, each of which was opposed by the Secretary of State. In the first place, an application for bail presupposes that the detention is otherwise lawful and what is here in question is precisely whether the detention was in fact lawful. The Secretary of State cannot be exonerated of her duty regularly and "robustly" to review SK's detention merely because from time to time he chose to apply to an Immigration Judge for bail rather than seeking to establish by an application for judicial review or for a writ of habeas corpus the unlawfulness of his detention. Moreover, consideration by the Secretary of State of whether to oppose an application for bail, and if so on what grounds, is an exercise wholly different of its

nature from the exercise required by paragraph 38.8 of the Operations Enforcement Manual. The one is no more than a forensic decision as to what stance to adopt in a situation where someone else – the Immigration Judge – is the arbiter; the other is an exercise in substantive decision-making where the Secretary of State is herself the decision-maker. I agree with Mr Goodman.

75. For all these reasons Mr Goodman makes good his first ground of challenge – with the consequences I have spelt out in paragraph [62] above.

Inadequacy of the reviews actually carried out

76. Mr Goodman submits that reviews must not merely be regular. They must, in the words of paragraph 38.8 of the Operations Enforcement Manual, be "robust and formally documented". Moreover, they must address the *Hardial Singh* principles, critically in a case such as this the issues of 'removeability' and the 'reasonableness' of the time already spent and likely to be spent in detention. Critical to the facts here, he says, was the Secretary of State's policy in relation to the non-return of failed asylum seekers to Zimbabwe which has been in force at all times since August 2005, save for a short period in August-September 2006.

77. Mr Goodman points to the fact that the significance of this in the context of SK's detention had been brought to the attention of the Secretary of State both in the letters in April and May 2006 from the CAB (which were simply ignored) and again by Immigration Judge Wilson on 17 May 2006. Despite all this, he says, there was a continuing failure by the Secretary of State ever to grapple with the issue in a satisfactory manner, hardly surprisingly, he suggests, given that in her detailed grounds of defence the Secretary of State asserts that her policy of suspending the return of failed asylum seekers to Zimbabwe "has no bearing on the lawfulness of [SK's] detention." Furthermore, he says, scant if any consideration was ever given to the extraordinary length of time for which SK had been and was proposed to be detained – something which, as he fairly says, one would have expected to be a prominent matter of concern at every single review, at least from 2007 onwards. On top of all this, there is the fact that until his application was finally dismissed on 6 July 2007, SK had a pending application for asylum, which meant (see sections 77-79 of the Nationality Immigration and Asylum Act 2002, prohibiting removal where there are outstanding appeals) that he could not lawfully be removed.

78. I confess to being not very impressed with the quality of the analysis revealed by the file which has now been disclosed. But I do not think that such shortcomings as there may be are sufficiently grave as to give rise to any independent ground of complaint. The decision-making was adequate if unimpressive. The procedural matter on which I have already ruled aside, the real question in this case, in my judgment, is not whether the decision-making process was adequate but whether the substantive decisions arrived at can be justified; in other words whether or not SK's detention can be justified in accordance with the *Hardial Singh* principles to which I now turn.

Absence of jurisdiction to detain – *Hardial Singh* principle (i)

79. As summarised by Dyson LJ the first *Hardial Singh* principle is that "the Secretary of State must intend to deport the person and can only use the power to detain for that purpose." As Woolf J put it in *Hardial Singh* itself, the Act "only authorise[s] detention if the individual is being detained … pending his removal. It cannot be used for any other purpose."

80. Mr Goodman's point is a short one. He asserts that the Secretary of State has to demonstrate that she was at all times intent upon removing SK, that the purpose of his detention was at all times to effect SK's removal, and that there has at all times been a prospect of achieving his removal. This, he submits, the Secretary of State simply cannot demonstrate – indeed, he characterises her attempt to do so as irrational – given (a) the fact that until July 2007 SK had outstanding appeals which prevented his removal and (b) that since long before then the Secretary of State's own policy has been not to remove failed asylum seekers to Zimbabwe. Since the removal of failed asylum seekers to Zimbabwe has been suspended and will remain suspended, he suggests, for the foreseeable future, the Secretary of State has not been detaining SK in order to effect his removal nor can she rationally have held an intention to deport him.

81. I cannot agree with Mr Goodman. As Lord Brown of Eaton-Under-Heywood observed in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207, at para [32], the power is in principle exercisable, even if it may be unreasonable actually to exercise it where removal is long delayed (the second and third *Hardial Singh* principles),

> "so long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this".

That, in my judgment, exactly describes the situation here. The Secretary of State has throughout been, and I have no doubt remains, intent upon removing SK at the earliest possible moment. And although the Zimbabwean litigation has proceeded for much longer than anyone would have anticipated at the outset, and although the light at the end of the tunnel may not yet be as visible as the Secretary of State would like to imagine, there remains at least *some* prospect of her being able to achieve her ambition.

82. The situation here is very different from that in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, where, as Lord Brown of Eaton-Under-Heywood pointed out in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207, at para [33], the reason why the Privy Council held that the power itself had ceased to exist was because there was simply no possibility of the Vietnamese Government accepting the detainees' repatriation. It was effectively conceded that removal was no longer achievable, and once that possibility had gone, detention could no longer be said to be "pending removal."

83. Mr Chamberlain submits, and I agree, that the reasons for his detention given in the letter sent to SK on 8 March 2006 were rational and lawful. And those reasons, he says,

continued to underpin the reconsideration of SK's continued detention throughout the whole of his time in detention. (They also, as he points out, weighed heavily with the Immigration Judges who considered, and rejected, SK's applications for bail.) Moreover, he says, the fact that the Secretary of State remains intent upon SK's deportation is borne out by her attempts – rejected by him – to assist him and provide him with the means to return voluntarily to Zimbabwe.

84. Moreover, says Mr Chamberlain, there has at all times during his detention been a reasonable prospect of SK's removal from the United Kingdom.

85. In the first place, when SK first appealed against the notice of intention to deport he had made no asylum claim, so the only bar to his deportation was an appeal which Mr Chamberlain says, and I agree, the Secretary of State was entitled to regard as hopeless, given the offences of which SK had been convicted and given that he was a single male with no family ties in the United Kingdom. Thereafter, he made what the Secretary of State was entitled to consider as a transparently fabricated asylum claim – a view in effect upheld by two Immigration Judges. So, says Mr Chamberlain, and I agree, the Secretary of State was at all times entitled to take a sanguine view of her ability to resist his appeals against her decisions.

86. Secondly, as Mr Chamberlain points out, there has not at any time during SK's detention (or at least not since 12 April 2006) been any judicial authority to the effect that he or other failed asylum seekers can not be returned to Zimbabwe. The AIT's decision in *AA (Involuntary Returns to Zimbabwe) Zimbabwe CG* [2005] UKAIT 00144 which had held that failed asylum seekers returned to Zimbabwe were at risk was remitted back to the AIT on 12 April 2006, and although the litigation has continued ever since there has never subsequently been any judicial decision to the effect that such failed asylum seekers cannot safely be returned. Indeed, as we have seen, the AIT, both on 2 August 2006 in *AA (Risk for Involuntary Returnees) Zimbabwe CG* [2006] UKAIT 00061 and again on 21 November 2007 in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094, has held that they can be.

87. The only barrier, says Mr Chamberlain, is the Secretary of State's own policy, formulated in response to an appellate process which has taken longer than originally anticipated and which the Secretary of State still anticipates will – and by now in the fairly near future – lead to a decision enabling involuntary returns to Zimbabwe to be resumed. And given the fact that SK's claim to asylum has been rejected as manufactured and false, there is nothing in SK's particular circumstances to show that he personally would be at any greater risk on return to Zimbabwe than any other failed asylum seeker.

88. Mr Chamberlain suggests, and I think there is force in his point, that this limb of Mr Goodman's argument comes perilously close to asserting that the effect of the Secretary of State's policy of not enforcing the return of failed asylum seekers is to render the detention of all Zimbabwean deportees unlawful, because the Secretary of State is unable to predict with any accuracy when, in the light of future judicial decisions, she may be in a position to reverse or alter her policy. That may be a powerful argument in relation *Hardial Singh* principles (ii) and (iii) (see below) but in relation to the issue I

am currently addressing in relation to *Hardial Singh* principle (i) it cannot, says Mr Chamberlain, be right. I agree. And the reason why it is not right is that given by Lord Brown Brown of Eaton-Under-Heywood in the passage in his speech in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207, at para [32], which I have quoted above.

89. Furthermore, as Mr Chamberlain points out, if Mr Goodman's submissions on this point are correct, someone who is subject to deportation can avoid detention, even when he is an absconding risk and a danger to the public, simply by making a transparently false asylum claim and then praying in aid the uncertain duration of the appeal and reconsideration processes and (in the case of Zimbabwe) the fact that involuntarily returns have been temporarily suspended. That, I agree, cannot be right.

90. These arguments seem to me to be of compelling weight.

91. In any event the fact is that although the Secretary of State has not been able to say and is still not able to say with confidence exactly when she will be able to deport SK, it has throughout been her intention to deport him and there has throughout been, and remains, at least some prospect that she will be able to do so within a reasonable time. Putting the point the other way round, I agree with Mr Chamberlain when he submits that there has never been a time at which it would have been apparent to the Secretary of State that SK's deportation within a reasonable time would be impossible.

92. There was debate before me as to the precise weight to be attached as a matter of law to the perceived risk that SK would abscond if released and as to the significance of the fact that he is refusing to return voluntarily. Mr Goodman referred me to what Dyson LJ said in *R (I) v Secretary of State for the Home Department)* [2002] EWCA Civ 888, [2003] INLR 196, at para [53]:

> "the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake."

He also referred me to what Keene LJ said in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 at para [79]:

> "I am not persuaded by Mr Giffin that the refusal by this detainee to return to Somalia voluntarily when it was possible to do so is some sort of trump card. On this I see the force of what was said by Dyson LJ in *R (I)* at paragraph 52, namely that the main significance of such a refusal may often lie in the evidence it provides of a likelihood of the individual absconding if released. After all, if there is in a particular case no real risk of his absconding, how could detention be justified in order to

> achieve deportation, just because he has refused voluntary return?"

93. Mr Chamberlain for his part referred me to what Toulson LJ said in the same case at para [54] in the course of a judgment with which Longmore LJ agreed:

> "I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making."

94. Mr Goodman submits that Toulson LJ's judgment is at variance with what Dyson LJ had earlier said. I do not agree. And in any event, Toulson LJ's judgment, agreed with by Longmore LJ, is the latest word from the Court of Appeal. In common with Mitting J in *R (Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin) at para [19], I take what Toulson LJ said as an accurate statement of the law.

95. However, as Mr Goodman correctly submits, *R (A)* is not authority for the proposition that the risk of absconding is always a trump card – a proposition which would conflict with what Dyson LJ had said in *R (I)* and which would go further than anything said by Toulson LJ. Nor is *R (A)* authority for the proposition that the Secretary of State has power to detain indefinitely any person who refuses voluntary repatriation. (Not that this is a power which Mr Chamberlain seeks to assert on her behalf.) As Mitting J said in *R (Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin) at para [20]:

> "What Toulson LJ did not address, because it was not necessary to address it on the facts, was whether or not a period of detention initially lawful could become unlawful by reason of it being unreasonably protracted."

Mitting J's answer, consistently it might be thought with *Hardial Singh* principles (ii) and (iii), was that it could. Moreover, as Mitting J had earlier recorded at para [16]:

> "the Secretary of State … properly concedes that it would not be a lawful exercise of that power to detain someone indefinitely simply to compel him to decide voluntarily to depart."

This is a topic to which I must return when I come to consider *Hardial Singh* principles (ii) and (iii).

96. In my judgment it was entirely rational and lawful for the Secretary of State to attach very considerable weight indeed to the combined effect of these two facts – facts as the Secretary of State was entitled to find and facts as I find them to be: that there was and is a substantial risk of SK absconding coupled with his continuing and adamant refusal to accept voluntary repatriation.

97. On all these grounds I agree with Mr Chamberlain that there is no substance in Mr Goodman's attack insofar as it is based on *Hardial Singh* principle (i).

98. Mr Chamberlain, in support of his contention that there have always been rational and lawful grounds for SK's detention further asserts that, in addition to the risk of absconding and the refusal to return voluntarily, the seriousness of the criminal offence of which he was convicted is also material to any assessment of the reasonableness of the detention. So it might be if, in fact, it had ever been put forward as a reason or a factor justifying SK's detention. But the simple fact is that it never has been.

99. I do not see how the Secretary of State in a situation such as this can seek retrospectively to justify detention by reference to grounds, well within the knowledge of the Secretary of State, it may be noted, which were not in fact relied upon at the time. To do so would both make a mockery of rule 9(1) of the Detention Centre Rules 2001, which requires the detainee to be provided monthly with "written reasons for his detention", and offend the principle expounded by Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604. How in a matter affecting the liberty of the subject can the Secretary of State be allowed to say, as it were, although I have been telling you for many months that the reasons for your detention are A, B and C, I have also had regard to reason D, without ever telling you that there is a reason D, let alone what it is?

100. The submission is not improved by Mr Chamberlain's reference in this context to the fact, as made clear in the letter of 7 March 2006 explaining the Secretary of State's decision to make a deportation order, that the Secretary of State clearly had in mind the fact that SK was a convicted sex offender. That is so, but the point remains, surprising as it may be, that this was *not* one of the reasons ever put forward in any of the monthly reviews as justifying SK's detention.

101. Mr Goodman's challenge on this ground having failed I turn to consider his argument based on *Hardial Singh* principle (ii).

Absence of jurisdiction to detain – *Hardial Singh* principle (ii)

102. The second *Hardial Singh* principle is that "the deportee may only be detained for a period that is reasonable in all the circumstances." This is really at the heart of Mr Goodman's case. He says that SK has now been detained for the almost unprecedented

period of 22 months, and, moreover, with no end in sight. That, he says, exceeds any period which is "reasonable" to effect deportation. The reasons given for continued detention are in all the circumstances irrational and unlawful.

103. Mr Goodman says that the question I must ask myself is whether in all the circumstances it has been reasonably necessary to detain SK for 22 months in order to effect his deportation. He points to what Dyson LJ said in *R (I) v Secretary of State for the Home Department)* [2002] EWCA Civ 888, [2003] INLR 196, at para [48]:

> "It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

Here, he says, the length of detention (22 months) is exceptional and almost unprecedented, the obstacles in the path of the Secretary of State are unusual and unique, being created by her own policy of not returning failed asylum seekers to Zimbabwe, and there are no effective steps she can take to surmount those obstacles, since none can be taken to lessen the risk in Zimbabwe to returned asylum seekers.

104. Mr Goodman compares the period of 22 months which, he says, is the relevant period here with the shorter periods of detention which have been found to be unlawful in other cases. In *Hardial Singh* itself the claimant, who had committed a more serious offence than SK and received a longer prison sentence, succeeded before Woolf J although he had been detained for little more than four months. In *In re Mahmod (Wasfi Suleman)* [1995] Imm AR 311 the claimant, who had been sentenced to four years imprisonment was then detained for some ten months. Laws J as he then was said this at page 314:

> "While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards. In this case I regard it as entirely unacceptable that this man should have been detained for the length of time he has while nothing but fruitless negotiations have been carried on."

Laws J expressed himself "entirely satisfied" that whatever would have been "a reasonable period for this man's continued detention … has certainly now been

exceeded" and ordered his immediate release. In *R (I) v Secretary of State for the Home Department)* [2002] EWCA Civ 888, [2003] INLR 196, the claimant had been imprisoned for three years and then detained for some sixteen months. He was ordered to be released. Simon Brown LJ, as he then was, said this at paras [37]-[38], giving his reasons (as part of the majority of the Court of Appeal) for having released the applicant from detention at the hearing of the appeal the previous month:

> "[37] … Given … that the appellant had by then been in administrative detention for nearly 16 months and that the Secretary of State could establish no more than a hope of being able to remove him forcibly by the summer, substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period …
>
> [38] In short, I came to the clear conclusion that … it was simply not justifiable to detain the appellant a day longer; the legal limits of the power had by then been exhausted."

105. So, says Mr Goodman, these were all more serious criminals, who had served longer sentences for more serious offences than SK, yet who were ordered to be released from detention after significantly shorter periods of detention than that served by SK. *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 was by contrast, says Mr Goodman, an extreme case where both the risk to the public and the risk of absconding were very high.

106. Mr Chamberlain, for his part, asserts that the total period of detention, though long, is not disproportionate, given SK's history and the circumstances of the case. He points to what Beatson J said in *R (MMH) v Secretary of State, R (SRH) v Secretary of State* [2007] EWHC 2134 (Admin) at para [40] in a passage with which I respectfully agree and whose significance in the present context is apparent:

> "In the present case there is a significant risk of absconding, but a risk of re-offending which the defendant accepts is not very high. Leaving aside the second claimant's mental condition, I would hold that the period of their detention (thirteen months to date for the first claimant, and nine months for the second claimant) is, despite its length, in the circumstances reasonably necessary for the purposes of the deportation order and so lawful. This degree of risk of absconding in my judgment, together with the claimants' refusal to go voluntarily, so that their detention was a product of their own making, justified the defendant a substantially longer period of time within which to arrange removal."

107. There is also here an important point to which Mitting J adverted in in *R (Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin) at para [13]:

> "The blunt facts are, therefore, that the claimant has been

> detained in administrative detention for two years and eight months. He cannot complain about the first nine months of his detention because it was occupied by his appeal against the deportation order and elongated by his own failure to engage with the original order promptly, thereby delaying the hearing of his appeal. So much is conceded".

Accordingly, Mitting J treated the relevant period in that case as being only 23 months.

108. In the present case the entire period from 24 March 2006 to 16 July 2007 was taken up with SK's application for asylum and his various appeals against the Secretary of State's decisions and orders. I do not say that the period before 16 July 2007 simply falls out of account – of course not: the period since 16 July 2007 has to be assessed in the light of and having regard to the fact that by 16 July 2007 SK had already been detained for some 16 months – but in the light of Mitting J's approach there is force in Mr Chamberlain's submission that the primary focus ought to be on the period since 16 July 2007 when, having reached the end of the road, SK became a failed asylum seeker.

109. Putting the same point rather differently, I think a weighty factor that has to be built into any evaluation of the reasonableness of the overall time that SK has spent in detention is the fact that during the greater part of that time he was vigorously pursuing through the appellate system both what in common with two Immigration Judges I agree was a transparently fabricated asylum claim and also an appeal against the deportation order which was probably always little short of hopeless.

110. In all the circumstances I do not think that there has yet come to an end what is in all the circumstances a reasonable period during which SK can continue properly to be detained.

111. That said, I cannot help thinking that it will not be too long before SK will be able to say that it is no longer reasonable to keep him in detention. The Secretary of State will have to keep the matter under review.

112. Accordingly, I reject Mr Goodman's challenge on this ground.

Absence of jurisdiction to detain – *Hardial Singh* principle (iii)

113. The third *Hardial Singh* principle is that "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."

114. Mr Goodman says that it should have been apparent to the Secretary of State from the outset that she would not be able to deport SK within a reasonable time; it should have been apparent when the CAB wrote in April and May 2006; it should have been apparent when SK applied for asylum; it should have been apparent when, following

the decision of the AIT in July 2006, the removal of all failed asylum seekers to Zimbabwe was suspended; it should be apparent now. Yet even now the Secretary of State disagrees. So, says Mr Goodman, the court must intervene, for there is no prospect of deportation within a reasonable period.

115. Mr Chamberlain for his part insists that deportation has throughout been, and is now, in prospect within a reasonable period.

116. For reasons which will be apparent from what I have said in relation to *Hardial Singh* principles (i) and (ii), I agree with Mr Chamberlain. The reasonable period has not yet elapsed, nor is it yet clear that the Secretary of State will not be able to deport SK within a reasonable period. There remains, in my judgment, at least some prospect that she will be able to do so within a reasonable time.

117. Accordingly, this ground of challenge also fails.

Absence of jurisdiction to detain – *Hardial Singh* principle (iv)

118. The fourth *Hardial Singh* principle is that "the Secretary of State should act with the reasonable diligence and expedition to effect removal." Consideration of this principle, according to Mr Goodman, exposes the irrationality of having held SK in detention for the last 22 months allegedly "pending removal." As Mr Goodman says, whatever steps the Secretary of State may have taken to try and persuade SK to remove himself voluntarily, she has never taken any steps to ensure that he is removed, because it has all the while been her policy not to remove him or any other failed asylum seeker to Zimbabwe.

119. The short answer to this, in my judgment, is that the Secretary of State has taken all steps that are open to her. She has acted with reasonable diligence and expedition. The fact that she has thus far been unable to effect either SK's voluntary or his involuntary return is undeniable, but it does not undermine the validity of his continuing detention so long as there is no basis for his release under *Hardial Singh* principles (ii) and (iii).

120. Accordingly, this ground of challenge also fails.

Article 5

121. Mr Goodman's submission is short and simple. All the arguments which go to show the unlawfulness of SK's detention as a matter of domestic law go to demonstrate the breach of his rights under Article 5. I need not repeat the summary of the way in which Mr Goodman puts his case in paragraph [33] above. I agree.

122. To the extent that SK's detention has been unlawful as a matter of domestic law it has also, by parity of reasoning, been unlawful by virtue of section 6 of the Human Rights

Act 1998. Conversely, however, there is nothing in the circumstances of SK's case to give him a remedy under section 6 where there would not be a remedy under domestic law. So in practical terms the claim under Article 5 adds nothing.

Conclusion

123. In these circumstances, the position on Friday 18 January 2008, whilst the hearing was in progress, was that SK was unlawfully detained, for the most recent lawful review of his detention had taken place at the latest in October 2007. But the Secretary of State having succeeded in relation to the *Hardial Singh* point, it would have been open to her, on a lawfully conducted review of his case, to decide that SK should remain in detention.

Subsequent events

124. The hearing concluded, as I have said, somewhat after 5pm on Friday 18 January 2008. On the morning of Monday 21 January 2008, by which time much of this judgment had been prepared, I notified the parties that I hoped to be able to send them the draft judgment the following day (Tuesday) with a view to handing down judgment in court on Wednesday 23 January 2008.

125. I was not altogether surprised to receive from the Treasury Solicitor late in the afternoon the same day documents indicating that SK's detention had again been reviewed. There was a 'Monthly Progress Report' in familiar form, signed and dated 21 January 2008, and there was a Minute dated 15 January 2008 containing a junior official's recommendation that detention be continued and also containing, dated 21 January 2008, a more senior official's recommendation to the same effect. There were some indications that the Minute had reached the Director on 21 January 2008: the Director's name was shown on the Minute above the date 21 January 2008. But the Minute did not appear to have been signed by the Director, for the space opposite the rubric 'Signed' was blank.

126. In these circumstances it was necessary to make further inquiries of the Treasury Solicitor. The following day (Tuesday 22 January 2008) my Clerk sent the Treasury Solicitor an e-mail pointing out that the Minute (Detention Review) appeared not to have been signed by the Director and asking the following questions: (1) Has the decision been approved by the Director? (2) If so, when? (3) What is the evidence for this? (4) In particular, has the Detention Review been signed by the Director? (5) If so, when? (6) If not, why not? (7) Why does the Director's signature not appear on the document sent to the Judge?

127. I received a response from the Treasury Solicitor later that day. The answers to my questions were that the decision had been approved by the Director at approximately 4.04pm on Monday 21 January 2008. Various e-mails establishing this were sent to me. The explanation for the absence of the Director's signature on the Minute (the Detention Review) was as follows:

> "The detention review has not been signed by the Director in the signature box. The detention review was seen and approved by the Director electronically …
>
> I am instructed that due to the fact that officers within the Criminal Casework Directorate are located in different offices, it is normal practice for Detention Reviews to be sent electronically for consideration and, where appropriate approval. Therefore it is not always practical for the Detention Review to be signed by hand, however where this is the case, Detention Reviews are authorised electronically. In this case, detention was reviewed and agreement was given. In this case, although agreement was given the name of the Director was not added to the 'Signed' section."

There is, of course, no objection to this process being undertaken electronically in the way described by the Treasury Solicitor. Nor is there any need for a handwritten signature. An electronic signature will suffice. But the Minute (the Detention review) should make apparent on its face, if it be the case, that the Director has in fact approved the recommendation for continued detention. And this means that if the document is to continue to have a space for the Director's signature, that signature should appear, even if only in some electronic format. The validity of the detention should be apparent on the face of the document – a document which would, after all, be a key element in the return the Secretary of State would have to make in answer to the writ if a writ of habeas corpus were to be issued. The court should not be driven to have to make the kind of inquiries which I had to direct to the Treasury Solicitor.

128. That said, the documents and explanations provided to me during the course of Monday and Tuesday 21-22 January 2008 do appear to demonstrate that SK's detention was lawfully reviewed by the Secretary of State on Monday 21 January 2008 and that a decision was lawfully taken on Monday 21 January 2008 that SK should continue to be detained.

129. Mr Goodman, as was his right, has made further submissions in writing as to why, as he would have it, this decision was not in fact lawful. He makes two complaints, one going to the adequacy of the review and the other to what he says is a formal, if important, procedural defect. He rightly draws attention to what Sir Thomas Bingham MR said in *R v Ministry of Defence ex p Smith* [1996] QB 517 at page 554, accepting the submission of Mr David Pannick QC. He also says that in the context of the scandalous circumstances surrounding SK's detention so far, the court can give no latitude to the Secretary of State as to the standard of review required. I agree.

130. So far as concerns the adequacy of the review, Mr Goodman points in particular to the references in the Minute which went up to the Director to SK's application for judicial review as being "another deliberate attempt to frustrate removal" and to the remaining barriers to SK's removal as being "an agreed ETD and an outstanding JR claim". Each of these, he says, was wrong. This was not an abusive claim for judicial review of the type which the court is all too familiar with in this type of case. Mitting J had given permission. And the barrier to SK's removal was the Secretary of State's own policy.

That is so, but the Minute specifically drew attention to the fact that "enforced removals to Zimbabwe are not currently possible." Mr Goodman also complains that the Minute failed to engage adequately with the history of the case and, in particular, that that part of the Minute which was dated 21 January 2008 failed to engage at all with the fact that the Secretary of State had had to concede at court on 18 January 2008 that the previous review was defective. (Mr Goodman refers to the "recognition on 18 January 2008 that the Claimant was detained unlawfully", but this goes further than any concession made by Mr Chamberlain during the hearing or anything I had said during the hearing. Mr Chamberlain's stance, as we have seen, was that the admitted procedural defects did *not* invalidate the detention.) Finally, says Mr Goodman, it cannot be said that the Director has given the case the anxious consideration it required when all she has done is to the affix the word "Agreed" to the Minute five minutes after she received it. She has, he says, merely rubber-stamped the recommendation without bringing her own independent judgement to bear.

131. As in the case of the earlier reviews, I am not very impressed with the quality of the analysis revealed by these documents. But they have to be read as a whole and, read as a whole, and taking the offending passages in context, I cannot agree with the conclusion for which Mr Goodman contends. The reasoning is adequate, it engages adequately with the key factors and it is not vitiated by the inclusion of the passages to which Mr Goodman takes exception.

132. So far as concerns the complaint about the Director being a mere rubber stamp, it has to be borne in mind that the Minute she had to consider occupied only 3 sides of A4 paper. I am not prepared to accept that in these circumstances the Director was unable to read and assimilate the material in the document and come to a proper conclusion. Mr Goodman makes the point that no evidence has been filed by the Director. That is so, and the burden of proof of course remains on the Secretary of State, but there is no warrant for any assumption that the Director did not do what she should have done, namely read the Minute and conscientiously consider its contents.

133. Mr Goodman also queries whether the Director had in fact approved the decision when the 'Monthly Progress Report' was sent to SK's solicitors. It appears that the Director's decision was taken at 4.04pm. Amongst the e-mails sent to me is an e-mail from the Director to one of her subordinates timed at 4.04pm and saying "Agreed." I have no reason to question that. And Mr Goodman accepts that the 'Monthly Progress Report' was faxed to SK's solicitors at 4.29pm. So the material before me indicates that the Director had indeed decided that SK should be detained *before* the fact of the decision was communicated to his solicitors. So there was, in my judgment, no breach of the *Anufrijeva* principle.

134. Despite Mr Goodman's arguments to the contrary, the decision taken by the Director on 21 January 2008 was a valid decision, properly taken and properly communicated to SK. SK is therefore at present lawfully detained.

Order

135. I shall accordingly dismiss SK's application for an order that he be discharged from detention. There will have to be an inquiry as to the damages he is entitled to for his previous unlawful detentions and for that purpose I will need to give directions.

136. I invite counsel to draft an appropriate order to include the appropriate directions in relation to the inquiry as to damages.

Final observations

137. In paragraphs [2], [19], [23], [30], [40] [41], [42], [43], [47], [49], [50], [68], [78] and [131] of this judgment I have had to express a whole catalogue of concerns about the way in which the Secretary of State's officials have dealt with SK's case. As I have said in paragraph [51], the picture which emerges is deeply disturbing, indeed profoundly shocking. These are matters going to the liberty of the subject. They are matters of the first importance. This makes the serial shortcomings of the Home Office all the more concerning. I trust that no judge will ever again be faced with such a state of affairs.