CO/14430/2009

Neutral Citation Number: [2010] EWHC 259 (Admin)

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 29th January 2010

B e f o r e:

LORD CARLILE OF BERRIEW QC
(Sitting as a Deputy High Court Judge)

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Between:
THE QUEEN ON THE APPLICATION OF
NABIL IDRIS ALI ABDULLAH

Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Graham Denholm (instructed by Wilson & Co Solicitors) appeared on behalf of the **Claimant** (**Sandra Akinbolu** appeared for judgment)
Nicholas Chapman (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. THE DEPUTY HIGH COURT JUDGE: The claimant in this case, Nabil Idris Ali Abdullah, is now 24 years old. It is not disputed by the defendant, the Secretary of State for the Home Department, that the claimant comes from Sudan.

2. He arrived in the United Kingdom on 26th February 2002 with a settlement visa to join Ms Akon, who was described as his mother and who is a refugee. She has been treated, throughout most of the time with which we are concerned, as if she were his mother. She may well be his mother, though some doubt has been raised, both by the United Kingdom and Sudanese authorities, as to whether she actually is.

3. The Sudanese authorities now appear to be saying that the claimant is not, or may not, be Sudanese. The UK authorities, on the other hand, in reality have regarded him as Sudanese at all times and have never suggested any other nationality for him.

4. Before he entered the United Kingdom, on the evidence, his identity was checked by UK officials in Egypt. Although the results are apparently not available, it is clear that DNA was obtained for the purposes of familial comparison.

5. On 26th April 2005 he was convicted of attempted robbery and sentenced to 2 years' detention in a young offenders' institution.

6. On 22nd December 2006 he was convicted of possession of an offensive weapon and sentenced to 4 months' detention in a young offenders' institution. He stated to his probation officer that he carried the blade because he was afraid of drug dealers, from whom he was buying drugs for personal use. Having been sentenced to 4 months, he was due to be released after 2 in late February 2007. However, he was held in immigration custody upon his release.

7. On 4th February 2007, before that release, the claimant was served with a notice of intention to deport him to Sudan, with a covering letter, an appeal form and a letter explaining the reasons for the deportation.

8. As a consequence, he has now been in deportation custody for almost exactly 3 years. Repeatedly, he has sought his release, but he has been refused. In deportation custody, therefore, unconvicted of any criminal offence, he has served the equivalent of 6-year criminal prison sentence (allowing for standard release provisions).

9. On 14th February 2007 he lodged an appeal against his deportation. The appeal was heard on 23rd August 2007 and refused on the 29th. A further appeal was heard on 15th January 2008 and refused on the 22nd. He became appeal rights exhausted on 30th January 2008.

10. On 3rd June 2008 the claimant was served with a deportation order. He refused to sign the confirmation of conveyance to acknowledge that he had received the order, stating that he will not go back to Sudan and will "fuck around with them now".

11. On 11th June 2008 the claimant stated that he was willing to meet with Sudanese officials so that he could be issued with the travel documentation necessary to enable his removal.

12. On 26th June 2008 the claimant applied to be accepted on the Facilitated Returns Scheme (FRS), which would have allowed for voluntary return; but he was refused entry on to the FRS because the deportation order had already been served. Following reconsideration, he was accepted on to the FRS on 18th July 2008, but that acceptance was withdrawn in August 2008, apparently on discovery of his mother's passport.

13. The question of the FRS has now become academic, as he is subject to a deportation order and the FRS, I am told, does not apply to a person subject to a deportation order.

14. With the permission of the single judge, the claimant applies for judicial review of the defendant's refusal to release him from custody. By an amendment to his claim, which I granted yesterday, he also claims damages for false imprisonment, including aggravated and exemplary damages. The making of the amendment, rightly, was not opposed; though the claim for damages is strongly opposed.

15. There have been, as is required, monthly detention reviews, as they are called, of the detention position of the claimant. These detention reviews are carried out by officials of the defendant Secretary of State's department. Some of the detention reviews have not been found, but others, and useful ones, are available. The view of the defendant at the time being can be found in those reviews.

16. For example, on 15th October 2007, at Month 7 Detention Review, it was noted that the claimant co-operated by providing bio-data. It was stated:

> "Subject to the outcome of his appeal the subject can be removed at most 2 months after a decision has been made."

Continuing detention was authorised to "effect re-documentation". That, of course, means that at the time of Month 7 Detention Review it was envisaged that he would be deported by the end of 2007.

17. In the Month 17 Detention Review of 18th July 2008, the case worker said:

> "The current barrier to removal is the lack of travel documentation. It is hoped that this situation may be resolved shortly given the recent communications with RGDU, and the FRS team."

and:

> "SEO states:
>
> 'The barrier to removal has long been the position with regards [to] obtaining Sudanese travel documents although it is hoped that RGDU and the FRS team may be able to secure one in this case given the subject's apparent desire to return to Sudan.
>
> Recent developments may see the subject removed within a reasonable period.'"

Authorising continuing detention, a Deputy Director of the relevant department stated:

> "Removal is progressing to final stages... We must push for co-operation under FRS."

18. At the Month 18 Detention Review of 19th August 2008 there was a reference to:

> "the lady who is believed to be the subject's mother".

Then it was commented:

> "It was also decided that we should withdraw the FRS approval, as the team were unable to establish from the process team what would happen to the original leave obtained if we now revoked the deportation order.
>
> Current barrier to removal is the lack of travel documentation. It is hoped that this situation may be resolved shortly given the discovery of a passport which we believe relates to this subject's mother".

19. Detention Review of Month 19, dated 19th September 2008, stated that for FRS to proceed it would be necessary to revoke the deportation order and if that happened, the claimant's original leave to remain would be reinstated:

> "Current barrier to removal is the lack of travel documentation. It is hoped that this situation may be resolved shortly given the recent discovery of a passport which we believe relates to this subject's mother, and given the ongoing negotiations with Sudanese officials".

The reasons for maintaining detention were cited as "risk of harm and re-offending".

20. An inspector commented:

> "Locating mother's passport and file has not proven helpful."

He suggested there was some deception by the family "not helped by the incompetence of some of our officials as it would appear that his mother is not his mother after all".

21. Further discussion of the family was followed by:

> "... even though he has been detained 19 months, which is a somewhat disproportionate length of time, and we currently have no avenue to obtain documentation from the Sudanese, I am recommending that detention be maintained, at least until we have managed to interview him and the meeting between our official(s) and the Sudanese has taken place."

The director authorising continuing detention on this occasion went on to refer to "two instances of unacceptable UKBA delays". The director also stated that the proposal section of the detention review did not contain a plan of action. Further reference to

this review is made in paragraph 65 below.

22. Month 23 Detention Review brings us to January 2009. In that review Graham Chapman, an inspector in the relevant department, said:

> "... it would appear that our colleagues in RGDU are not according this case the priority it deserves, given that he has now been in UKBA detention almost 2 years. [He] has on occasion expressed a willingness to return.
>
> ... there is currently no prospect of removal, seemingly no urgency in RGDU in trying to resolve the issue; and he does have numerous alleged family members in the UK, including his mother."

23. Month 24 Detention Review of 24th February 2009 included:

> "The current barrier to removal is the lack of travel documentation. It is at present unclear how this situation may be resolved but the matter will continue to be reviewed with the documentation unit and returns liaison unit, as it is hoped that the passports provided for the subject's alleged mother and grandmother, along with the subject's application for entry clearance, may assist.
>
> ... We are hopeful that the passports of the alleged family members will support the claim to be Sudanese and cause the embassy to revisit their decision... It is unfortunate that these documents were not available to the embassy staff in time for the interview with the subject, although given the concerns that have been expressed by the returns liaison visit it might have been counterproductive."

24. In the Month 30 Detention Review, dated 30th July 2009, it was said that the claimant presented a significant risk to the public, and:

> "it is hoped that the documentation matter will be concluded one way or the other within the next few weeks... the final outcome could be the issue of a travel document...
>
> The barrier to removal remains the lack of an [emergency travel document]... of course [mother] is under no obligation to assist us."

25. Another aspect of the barriers to progress was a request by the Sudanese Embassy for fees. According to an agreed note I was handed yesterday, in July 2007 the Sudanese Embassy in London advised the Foreign and Commonwealth Office that in circumstances where UKBA (the UK Borders Agency) had asked for a re-documentation interview, but where the interviewee was then found not to be Sudanese, the Sudanese Embassy would charge UKBA a specific fee for each such interview.

26. As a result, on 9th August 2007 UKBA issued an operational instruction that emergency travel document (ETD) applications were not to be submitted to the Sudanese Embassy at all, because of the imposition by the embassy of the proposed interview charge. The interview charge was challenged and there was diplomatic lobbying, even at ambassadorial level, to try to resolve the matter.

27. The matter was resolved 15 months after it started, in October 2008 and, 2 months later, on 3rd December 2008, UKBA issued interim operational instructions stating that, following positive negotiations between UKBA and the Sudanese government, that issue was resolved. Thus, the RGDU were able to recommence the submission of applications for ETDs and the scheduling of ETD interviews with the Sudanese officials.

28. All those items to which I have referred earlier show how exceeding slow can grind the wheels of officialdom. The fees impasse meant that for 1½ years no serious possibility of progress existed.

29. An important aspect of the defendant's defence in this case is that the claimant has been obstructive towards any question of being deported. In particular, it is said, he tried to avoid any engagement, either himself or via Miss Akon, with the Sudanese Embassy. I have considered that issue carefully. However, in my judgment the evidence indicates the contrary. The worst that can be said of him in this context is that he was grumpy and reluctant about engagement with the Sudanese Embassy, but there is simply no evidence to persuade this court that he was heavily obstructive, let alone contumelious of legitimate attempts to secure his removal to Sudan; or that his attitude made any difference at all.

30. According to a bail summary prepared on behalf of the defendant, on 24th November 2008 he was interviewed by immigration officials for the purposes of ascertaining his family history, as Sudanese passports had been obtained for his mother and grandmother (as it was put). The claimant provided information to suggest that these individuals were indeed his mother and grandmother.

31. On 30th January 2009, with his consent, an interview was arranged at the Sudanese Embassy for 5th February. On 5th February 2009, with his consent, he was interviewed at the Sudanese Embassy, who informed the Home Office that they did not consider him to be Sudanese.

32. On 6th March 2009 it was confirmed that the Sudanese authorities had agreed to re-interview the claimant in view of supporting evidence in the form of his mother's and grandmother's passport.

33. On 11th March arrangements were made for him to attend a further interview at the embassy on 20th March. On 17th March the interview scheduled for 20th March was cancelled, not because the claimant did not want to go, but because the immigration official due to attend was unavailable and no alternative was provided.

34. On 31st March an interview at the Sudanese Embassy was arranged for 2nd April. On 2nd April the interview at the Sudanese Embassy did not occur, as the claimant refused to leave the removal centre for the interview. That is hardly surprising, given the history of the matter.

35. On 27th April 2009 an interview with a Sudanese Embassy official was scheduled to take place on 30th April 2009 at Colnbrook Remand Centre and, on the evidence, took place with the claimant's consent and co-operation.

36. On 1st May 2009 the embassy refused to issue a travel document. They said they believed he was Sudanese but needed to double-check the mother's heritage and wanted to see her first.

37. On 11th May an inspector at the defendant's documentation unit spoke to the embassy, who made it clear that they wanted to speak to Ms Akon. Attempts to obtain an interview with Ms Akon at the embassy were unsuccessful. However, Sudanese officials in London had, or were able to access, a copy of her passport.

38. There is no evidence in any of the voluminous papers in this case of any irregularity with her passport, nor that it was forged, nor that it was not her passport. There is no evidence before this court of a conspiracy or agreement of any kind between the claimant and Ms Akon to obstruct the process. Even if she is his mother, the claimant is not his mother's keeper and cannot be held responsible for her actions in the absence of evidence to show that he is responsible for particular actions.

39. It was suggested on behalf of the defendant at one stage that it might be reasonable to hold the claimant in custody until and unless he persuaded Ms Akon to take steps provided for her by officials. On several grounds I hold that a deeply unattractive argument. If I can just give a very headline reason: not least, perhaps, because of the provisions of Article 5 of the European Convention on Human Rights.

40. In summary, the defendant submits, first, that the risk the claimant would abscond, and/or commit offences, were he to be released is significant. Second, that the claimant has adopted a policy designed to frustrate his removal, whether directly or by refusing to procure his mother to assist in the process, and consequently his continued detention is a product of his own making. Third, that if Ms Akon is not truly his mother, analysis of the period reasonably necessary to effect the claimant's removal should properly take into account the difficulties caused by his alleged deception. Fourth, that in the light of the Secretary of State's ongoing and concerted efforts to effect removal, and in particular the referral of the issue as high as ambassadorial level, there remains a realistic prospect that the claimant will forcibly be removed; and, therefore, fifth, that the claimant's continuing detention remains lawful.

41. In summary, the claimant says, first, officials have in effect accepted that the claimant's deportation is not possible, and therefore his detention is not being maintained for the permitted statutory purposes but rather for the impermissible purpose of public protection. Therefore, his detention does not fall within the exception to the right of liberty permitted by Article 5.1(f), and so is in breach of the article.

42. Second, the claimant's detention has endured for a period which is unreasonable in all the circumstances and, therefore, unlawful. In that context, the claimant denies any history of non-compliance with attempts to remove him, as to which I have already given my finding in his favour; and he says it is clear that in any event any non-co-operation on his part could not be material to the defendant's inability to document him for removal.

43. Thirdly, the claimant says it has been apparent to the Secretary of State for a long time now that he could not be removed in a reasonable period and that his detention has been unlawful from the point at which that became apparent.

44. In addition, it is said that a senior official in the Home Office accepted long ago that the Secretary of State has not pursued the claimant's removal with reasonable diligence and expedition.

45. It is to be noted that pursuant to section 35 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, section 35(1), the Secretary of State may require a person to take specified action. The specified action relates to deportation or removal and the individual's co-operation therewith.

46. By section 35(3) it is provided:

> "A person commits an offence if he fails without reasonable excuse to comply with a requirement of the Secretary of State under subsection (1)."

47. There has been no prosecution under section 35 in this case. It has never been suggested that there might be a prosecution under section 35(1). I have seen no evidence to justify the proposition that such a prosecution would, or even might, have succeeded. Indeed, no such proposition has been inferred even, by the defendant. It is clear that such a prosecution would not have passed the CPS two-stage code test before a prosecution can be brought.

48. I now turn to the principles. What are the legal principles applicable to this type of situation? The power to detain arises under paragraph 2 of schedule 3 to the Immigration Act 1971.

49. In the much-cited case of R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 QB, Woolf J (as he then was) said this:

> "7... Since 20th July 1983, the applicant has been detained under the power contained in paragraph 2(3) of third schedule to the Immigration Act 1971. Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be

> carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> 8. 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."

50. That set of principles has been accepted, adopted and repeated on numerous occasions. For example, by the Court of Appeal in R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888, in which Dyson LJ said:

> "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."

51. There are several examples of cases where these principles have been tested against factual situations. Counsel for the defendant submitted and recognised that each case is a matter of fact and degree, subject to the overarching principles I have referred to earlier.

52. I will cite some examples. One is the case of R (A) v Secretary of State for the Home Department [2007] EWCA Civ 804, summarised helpfully by Mr Chapman in the defendant's skeleton argument.

53. A was a Somalian who, following his conviction for raping a girl, was detained for a period of 35 months after the end of his sentence, pending deportation. It was found that he had determined to frustrate his deportation "by hook or by crook", refusing to assist in the comparatively simple steps necessary to enable the issue of travel documents necessary for his repatriation, and he refused to agree to voluntary repatriation. Over a period of around 18 months enforced repatriation to Somalia was not possible due to the security risk in that country at the time. A was assessed as presenting a high risk of sexual re-offending and a medium risk of violent offending.

54. The Court of Appeal held that the period of 35 months' detention was, and remained, lawful. The balancing exercise was described particularly by Toulson LJ in his judgment. He considered it relevant that there was some prospect of the Home Secretary being able to carry out the enforced removal, although there was no way of predicting with confidence when that might be.

55. Another example is the case of R (Wang) v Secretary of State for the Home Department [2009] EWHC 1578 (Admin), a decision of Mitting J.

56. Mr Wang asserted that he was Chinese and had arrived unlawfully in the UK 1 week before his arrest. Whilst at liberty, he committed a number of offences and was sentenced to 12 weeks' detention. Whilst in detention he made an application to the Chinese Embassy for emergency travel documents, but his application was refused because the embassy could not verify his address. After his release, he committed further petty crimes and repeatedly failed to surrender to custody when he was required to do so. Subsequently, he was detained in an immigration centre and was served with a deportation order. He made several applications to return to China voluntarily, but they were refused. He also repeatedly made applications for emergency travel documents, but was not successful.

57. A difference between the case of Wang and this case is that Mr Wang suffered from a mental illness as a result of his detention. The only barrier to his removal was the issue of emergency travel documents. He submitted that he had done everything possible to provide the Chinese Embassy with details to satisfy them that he was a Chinese national, thus assisting them to permit his deportation to China.

58. The court, Mitting J, held that on any view detention for over 2 years was a very long time and at the outer limit of the period which could be justified on the principles annunciated by Woolf J in Hardial Singh, except in cases where very serious offences have been committed or the person detained posed a threat to national security. It was clear that imminent deportation was not possible. The claimant had already been detained for such a period that it was no longer possible to justify continued detention, notwithstanding that he posed a significant risk of absconding and committing further low-level crimes if at liberty. He had not demonstrated a persistent and deliberate refusal to provide the necessary information to the Chinese Embassy to permit them to verify his Chinese nationality. Even if he had, held Mitting J, so long had elapsed since he was first detained that it was no longer reasonable to detain him and therefore his detention was unlawful.

59. Another example worth citing in this context is R (Rostami) v Secretary of State for the Home Department [2009] EWHC 2094 QB. Foskett J considered the position of an Iranian male who had steadfastly refused to co-operate with steps taken to document him for removal.

60. At paragraph 71 of his judgment the learned judge said:

> "If I apply conscientiously, as I must, the test established by previous cases of whether the Secretary of State has proved on the balance of

> probabilities that there is a reasonable prospect of securing the Claimant's removal within a reasonable time, then the answer on the evidence before me is clear: the Secretary of State has not established this."

He made it clear that it was the claimant's own failure to co-operate that had made a significant contribution to the situation. Nevertheless, the Secretary of State failed the Hardial Singh test.

61. Indeed, that position is emphasised in European human rights jurisprudence. For example, in the case of Mikolenko v Estonia 10664/05 [2009] ECHR 1471 (8th October 2009), which involved a Russian army officer who refused to co-operate with efforts to remove him from Estonia to Russia, the European Court of Human Rights held that the applicant's expulsion had become virtually impossibly as, for all practical purposes, it required his co-operation, which he was not willing to give.

62. At paragraph 65 of its judgment the court said:

> "While it is true that States enjoy an 'undeniable sovereign right to control aliens' entry into and residence in their territory'... the aliens' detention in this context is nevertheless only permissible under Article 5.1(f) if action is being taken with a view to their deportation. The Court considers that in the present case the applicant's further detention cannot be said to have been effected with a view to his deportation as this was no longer feasible."

63. The cases I have cited recently in this judgment are only some examples; there are others. I turn to apply the principles to the facts of this case.

64. I have already given my conclusion that this is not a case of material obstruction by the claimant. The real cause of his continued detention and non-deportation has been the inability to obtain replacement ETDs. Administrative action in this case has been less than of a consistently high standard. Of course the court must recognise the pressure under which officials work. On the other hand, one must also recognise that they are dealing with individuals whose rights must be recognised and given effect to.

65. On 19th September 2008 Graham Chapman, an inspector in the defendant's department, to whom I referred earlier, said in the Detention Review for that month, September 2008:

> "Although we had believed that the locating of Mr Abdullah's mother's passport and Home Office files would help us in our efforts to obtain a travel document for him this has proven not to be the case. In fact, it would appear that a certain amount of deception has been practised by the family, not helped by the incompetence of some of our officials, as it would appear that his mother is not his mother after all and that he should not have been issued with the entry clearance. To compound matters, no passport or other document was ever submitted by him to our embassy in Cairo, yet we inexplicably issued him with a Declaration of Identity for

> Visa Purposes. The whole family history is extremely complicated and various attempts have been made to try to get to the bottom of matters; DNA tests have even been done on a number of claimed family members. However, as far as this case is concerned, we are no further forward in documenting Mr Abdullah, probably further away. There is no mention of him anywhere in his 'mother's' file or documents so it would seem unlikely that we would be able to persuade the Sudanese authorities that he is her son, which renders her Sudanese passport worthless in terms of this case. Further, if we did try, and the Sudanese officials established that he isn't her son, and that we knew this to be the case, it could damage our relations with them and jeopardise any future ETD applications.
>
> On the other hand, he has always claimed to be Sudanese, and to be a son, so it is possible that, if interviews with the Sudanese recommence, they would be satisfied as to his identity and issue. It would be a gamble. The mother has already been interviewed but was (perhaps deliberately) very vague. I have asked [the] case owner to arrange for Abdullah to be interviewed in depth by a member of the operational team.
>
> There are doubts as to this man's true identity (not solely his fault, unfortunately), and he has several convictions. Although he claims to have a large extended family here, we cannot be satisfied for the time being that he is related as claimed. So, even though he has been detained 19 months, which is a somewhat disproportionate length of time, and we currently have no avenue to obtain documentation from the Sudanese, I am recommending that detention be maintained, at least until we have managed to interview him and the meeting between our official(s) and the Sudanese has taken place.
>
> So agree?"

66. The review of those comments by a director, Mr Jonathan Nancekivell-Smith, includes:

> "I have reviewed your submission for continued detention and agreed your recommendation for it to be continued.
>
> Instructions: Graham there are two instances of unacceptable UKBA delays in this — the first is with RGDU taking 3 weeks to make a decision on FRS (=£3,000) secondly the unwell official on 8th September and the subsequent non-rearrangement of the meeting (=£2,000 to date). The proposal section and subsequent comments for me — don't really contain a plan of action. Please can you convene a case conference and look to create a plan to move this case forward."

67. Then on 26th January 2009 (4 months later), the same Mr Chapman said:

> "As noted above, the RLPT has given the go-ahead for us to enforce Abdullah's return to Sudan. However, it would now appear that our

> colleagues in RGDU [Removals Group Documentation Unit] are not according this case the priority it deserves, given that he has now been in UKBA detention almost 2 years. Abdullah has on occasion expressed a willingness to return and FRS [Facilitated Returns Scheme] have been asked to reconsider his application. However, given that they cannot see a way forward, either, in terms of obtaining a document, they have not accepted his application. Abdullah has committed several serious offences..."

The following words should be noted particularly:

> "... there is currently no prospect of removal; seemingly no urgency in RGDU in trying to resolve the issue; and he does have numerous alleged family members in the UK, including his mother. In the circumstances, I think we should consider release on tagging."

68. Considering all the evidence alongside the principles, and particularly the two documents I have just cited, I have reached a similar conclusion to that reached by Davis J in another useful example, R (Abdi) v Secretary of State for the Home Department [2009] EWHC 1324 (Admin).

69. That case involved a detainee of Somali nationality, who was a prolific offender. At the date of the hearing before Davis J he had been detained for 30 months. His convictions variously included indecent assault, robbery, burglary, assault on police and a drugs offence, including a number of offences whilst he was on bail. He was a crack cocaine addict and was properly assessed as posing a high risk of offending and a high risk of absconding. There was, in his case, a lack of co-operation by Mr Abdi and what was assessed as obstructiveness. However, Davis J concluded that further legal proceedings would have to take their course before he could be removed, and were likely to go on for a long time, potentially even running into years.

70. The judge said at paragraph 76:

> "... I do not think that it can now be said that Mr Abdi will be or is likely to be removed within a reasonable time; and I think that by now a reasonable period of time for detaining him has elapsed."

71. So in that case the detention was held to be unlawful by Hardial Singh principles, and that was a detention of 30 months of someone with Mr Abdi's background of prolific and serious criminality and non-co-operation with the authorities.

72. I have reached the conclusion that, just as in the case of Abdi, so in this case the detention has been unreasonably long and is not justified for the same reasons: there is no clear prospect of him being released. His detention at the moment is without end. He is in what must to him look like a big black hole.

73. I do not consider Article 5 principles separately. In relation to those, I merely add that the same conclusion would be reached by me whether we went by the domestic law

route, without Article 5, or via European Court of Human Rights jurisprudence, or by a combination. I therefore hold that the claimant's detention today is unlawful.

74. The question then arises as to when the detention became unlawful. In my judgment, the Secretary of State was entitled to make a full investigation of the potential for carrying out the deportation. It is not an easy task dealing with certain countries, of which Sudan appears to be one. Though there were mistakes, in my judgment the Secretary of State acted in good faith and not in circumstances such as in my judgment give rise to aggravated or exemplary damages. However, by 20th January 2009, from which I read out part of the detention review earlier, it was in my judgment absolutely clear to the defendant that the point had been reached when there was no realistic prospect of this claimant being returned to Sudan in a foreseeable time frame.

75. I hold that his detention was unlawful from that date, 20th January 2009. I make a declaration accordingly.

76. MR CHAPMAN: My Lord, that leaves ancillary directions. I am aware that my learned friend — obviously Mr Denholm is not here today — would invite your Lordship to hold off the order until Mr Denholm has had the opportunity to read it.

77. THE DEPUTY HIGH COURT JUDGE: You would like Mr Denholm to have a look at the result, would you, Miss Akinbolu?

78. MISS AKINBOLU: My Lord, I think that is preferable, given his lengthy involvement in this case.

79. THE DEPUTY HIGH COURT JUDGE: I can understand that. This will be adjourned for further orders. Given the time, could an attempt be made to agree the further orders in writing and submit them to the Administrative Court office so they can pass them on to me. I would not have thought that there is going to be much difficulty in agreeing directions, which will presumably involve sending the case to a Queen's Bench Master?

80. MR CHAPMAN: The first issue is going to be the directions relating to the terms of release. I do not think there is going to be any disagreement about those terms.

81. THE DEPUTY HIGH COURT JUDGE: That is going to have to be done quickly.

82. MR CHAPMAN: Yes, very quickly.

83. THE DEPUTY HIGH COURT JUDGE: Like now, Mr Chapman.

84. MR CHAPMAN: Yes. Subsequently, yes, the case will have to be remitted to the Queen's Bench Division, assuming that no agreement can be reached.

85. THE DEPUTY HIGH COURT JUDGE: There may well be conventional figures or "per month" figures.

86. MR CHAPMAN: Yes. The only other issue will be that of costs, but I suspect that the usual direction --

87. THE DEPUTY HIGH COURT JUDGE: Your client is legally aided?

88. MISS AKINBOLU: He is, my Lord, so I suspect that it will be a request for detailed assessment, but I suspect they will follow as usual.

89. THE DEPUTY HIGH COURT JUDGE: The usual order.

90. Thank you both very much.