Neutral Citation Number: [2009] EWHC 1067 (Admin)

Case No: CO/8119/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(Administrative Court)
(Sitting at Swansea Crown Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2009

Before:

THE HONOURABLE MR JUSTICE OWEN

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Between :

SHYLOLIBAVAN	**Claimant**
- and -	
SSHD	**Defendant**

- -
- -

Phillip Nathan (instructed by **Theva & Co. Solicitors**) for the **Claimant**
Ian Hutton (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing date: 4 November 2008

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JUDGMENT

The Honourable Mr Justice Owen :

1. The claimant is a national of Sri Lanka, an ethnic Tamil who was born in Jaffna, in North-East Sri Lanka. He arrived in the United Kingdom on 6 May 1999 and claimed asylum on arrival. On 7 September 2005 his claim for asylum was determined on the basis that he did not have a well founded fear of persecution and did not therefore qualify for asylum. The claimant appealed against the decision, but his appeal was rejected by the AIT on 7 November 2005. On 19 December 2006 the claimant's solicitors wrote to the defendant making a fresh claim to asylum based on a deterioration in the situation in Sri Lanka. The letter was supplemented by further submissions made on 9 July 2007. On 7 August 2007, the defendant notified the claimant of a decision to uphold the original refusal, finding that the submissions did not amount to a fresh claim. On 3 September 2007 the claimant was detained and removal directions set for 18 September. On 7 September 2007 further submissions were made on his behalf; and the defendant responded with supplemental reasons for refusal on 14 September. On the same day, the claimant applied for judicial review seeking to challenge the refusal to treat the further submissions made on his behalf as a fresh claim for asylum. On 18 September the removal directions were deferred and on 28 September the claimant was released from custody.

2. **The preliminary issue**

In the course of the hearing on 4 November 2008 the defendant relied upon a Country of Origin Information Report on Sri Lanka issued by the Home Office UK Border Agency, and dated 30 October 2008, two working days before the hearing. It contained a quotation from a letter from the British High Commission dated 28 August 2008 referring to fingerprint records maintained in Sri Lanka. The claimant was finger-printed when in the custody of the Sri Lankan army in 1999, and the significance of such finger-printing was in issue in the application. Mr Philip Nathan, who appeared for the claimant, therefore sought leave to seek further expert evidence in response to the contents of the letter from the British High Commission. I granted his application and directed that the claimant have leave to file further evidence as to fingerprint records in Sri Lanka and to make further written submissions in relation to such evidence if so advised, and that the defendant have leave to respond in writing.

3. The claimant duly obtained and served expert evidence from Dr Chris Smith in the form of a report dated 9 December 2008. But the report went far beyond the fingerprint issue. It contained a comprehensive analysis of the situation in Sri Lanka. The only reference to the letter from the British High Commission was in paragraph 80 in which he said that "*The BHC statement regarding fingerprints is reasonably accurate*".

4. On 4 February 2009 the defendant filed further written submissions relating to the fingerprint issue, and secondly drew my attention to the decision of the Court of Appeal in *SK (Zimbabwe) v SSHD [2008] EWCA Civ 1204*, handed down on 6 November 2008, two days after the hearing on 4 November, which it was submitted was of relevance to the second issue to which the application gave rise, the issue of unlawful detention.

5. On 25 March 2009 the claimant filed further written submissions. But in the meantime the claimant had proposed to the defendant that in the light of the contents

of Dr Smith's report, she should agree to the claimant's withdrawal of the claim with no order as to costs. That proposal was rejected by the defendant on the basis that there was no reason why I should not give judgment, and that the claimant could make further representations on the basis of the information contained in Dr Smith's report as to the current situation in Sri Lanka if so advised.

6. The claimant's written submissions were prefaced by an application to me for permission to withdraw the claim on the basis that there be no order as to costs. That application is refused. Having heard full argument on the application there is no reason why I should not proceed to judgment. As the defendant has observed, if the report from Dr Smith warrants a fresh application for asylum, that is the course that should be followed.

7. **The substantive claim**

There are two limbs to the claim. First it is submitted that the refusal of the defendant to treat the further submissions made on behalf of the claimant as amounting to a fresh claim to asylum was irrational (the asylum issue). Secondly it is submitted that the defendant acted unlawfully in detaining the claimant from 3 – 28 September 2007 (the unlawful detention issue).

8. **The Asylum Issue**

The relevant law is not in issue. The defendant's submission was governed by Rule 353 of the Immigration Rules. It is in the following terms:

> *"353. When a Human Rights or Asylum claim has been refused and appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:*
>
> *i) "had not already been considered; and*
>
> *ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."*

9. In *WM (DRC) v SSHD* [2006] EWCA Civ 1495 Lord Justice Buxton, giving the judgment of the Court of Appeal, addressed the task of the Secretary of State under Rule 353.

> *"6. There was broad agreement as to the Secretary of State's task under Rule 353. He has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i)*

according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to the other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly prohibitive, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator but not more than that. Secondly as Mr Nichol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at page 531F. "

10. Lord Justice Buxton also addressed the approach of the court when reviewing a decision by the Secretary of State:

"10. … Whilst, therefore, the decision remains of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

> *11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return …. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirements of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."*

11. The claimant's case is based essentially on the deterioration in the security situation in Sri Lanka since the determination of his claim for asylum in September 2005, a deterioration that has been accompanied by an increase in Human Rights violations on the part both of the LTTE and the Sri Lankan government. He relies in particular on the fact that on 8 December 2006 the defendant removed Sri Lanka from the 'White List' of safe countries, and on the recognition of the deterioration in two country guidance cases decided by the AIT, *LP (Sri Lanka CG)* [2007] UK AIT 00076 and *AS and SS (Sri Lanka CG)* [2008] UK AIT 00063. He also relies upon the judgment of the European Court of Human Rights in *NA v UK* ECHR [2008] Appeal No. 25904/07 and dated 17 July 2008.

12. The deterioration was summarised in the judgment in *NA* in the following terms:

> "*124. The court first observes that it is accepted by the parties to the case that there has been a deterioration in the security situation in Sri Lanka. The court finds no reason to disagree with the parties' assessment and notes that all the objective evidence before it supports this conclusion. This deterioration took place before the present application was lodged with the court and has continued while the case has been pending, particularly since the formal end of the cease fire in January 2008. It is also clear to the court that the evidence before it supports the conclusion that the deterioration in the security situation in Sri Lanka has been accompanied by an increase in Human Rights violations, on the part both of the LTTE and the Sri Lankan government.*

Paragraph 124 then set out the sources upon which that conclusion was based.

13. The court went on to say:

> *"128. It follows that both the assessment of the risk to Tamils of "certain profiles" and the assessment of whether individual acts of harassment cumulatively amount to a serious violation of Human Rights can only be done on an individual basis. Thus, while account must be taken of the general situation of the violence in Sri Lanka at the present time, the Court is satisfied that it would not render illusory the protection offered by Article 3 to require Tamils challenging their removal to Sri Lanka to demonstrate the existence of further special distinguishing features which would place them at real risk of ill-treatment contrary to that Article …".*

At paragraph 129 the Court said that it "… *considers that it is in principle legitimate, when assessing the individual risk to returnees, to carry out that assessment on the basis of the list of "risk factors", which the domestic authorities, with the benefit of direct access to objective information and expert evidence, have drawn up"*. The Court was therefore approving the approach that had been taken by the AIT in LP, in which the AIT held, per the head note, that:

> *"(1) Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: a previous record as a suspected or actual LTTE member, a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the Security Forces to become an informer; the presence of scarring; return from London or other centre of LTTE fund raising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and accumulatively, must be considered in the light of the facts of each case, but they are not intended to be a check list."*

The AIT also held that if a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport; but that otherwise the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.

14. In *AN* and *SS* the AIT held:

> "*Since the breakdown of the ceasefire, heightened security in the capital has restricted the operations there of the LTTE, who are focusing on 'high-profile' targets. The background evidence does not show the Tamils in Colombo who have*

stopped supporting the Tigers, or who support parties opposed to them, are at real risk of reprisals, absent some feature bringing them to prominence. The conclusion to that effect in PS (LTTE – internal flight – sufficiency of protection) Sri Lanka CG [2004] UK AIT 297, which this determination updates and supersedes, is thus affirmed.

There is no good evidence that the LTTE maintain a computerised data base of their opponents, such that new arrivals in Colombo can be checked against it. Checks are, on the other hand, run on a computerised data base by immigration officers when passengers arrived at Bandaranaiki International airport, or by members of the security forces when people are detained, but there is no good evidence to show that everyone who has in the past been detained and questioned about possible involvement with the LTTE is on that data base. On the contrary, it is likely to contain the names only of those who are of serious interest to the authorities.

The twelve 'risk factors' listed in LP … can usually be divided into risk factors per se, one of more which are likely to make a person of adverse interest to the authorities, and 'background factors' which neither singly nor in combination are likely to create a real risk, but which in conjunction with risk factors per se will intensify the risk."

15. The factual background

The factual background to this application is that between 1991 and 1995 the claimant was forced to wear LTTE uniform and provide assistance to the rebel fighters. He was then between 16 and 20 years of age. His assistance to the LTTE ceased in 1995 after he was wounded during an assault on Jaffna by government forces. After spending one month in hospital he went to stay with his uncle in Chavakacheri. In 1996 he moved with his uncle's family to Jaffna where he assisted his uncle in a grocery business. But on 15 March 1999, after the Sri Lankan army had taken control of Jaffna, he was identified as having assisted the LTTE, was arrested and detained for two weeks at Rasapathai camp where he was tortured. He was then transferred to Kopay Camp from which he was able to escape during an attack on the camp by the LTTE. He was then taken to Colombo clandestinely and introduced through a friend of his uncle's to an agent who arranged his departure from Sri Lanka. He travelled to the United Kingdom using a passport bearing his own photograph but in a different name.

16. The claimant gave evidence before the AIT in October 2005 in which he gave an account of his involvement with the LTTE and of the circumstances in which he left Sri Lanka. His factual evidence was not challenged on behalf of the Secretary of State, and the AIT treated him as a credible witness. The following findings by the AIT are relevant:

"*50. It is the appellant's evidence that he provided some limited information to the Sri Lankan authorities about his involvement*

with the LTTE such as the digging of bunkers, their location and assisting wounded LTTE soldiers. We find the appellant's activities for the LTTE to have been at a very low level and 10 years ago. He also gave evidence that his finger prints were taken by the army together with his name and address. There is no evidence that the authorities also had his photograph. We note that he was able to leave through Colombo airport using a passport which contained his own photograph, albeit with the assistance of an agent. There is no evidence that he faced any problems, or that the agent had to deal with any enquiries, at any checkpoint on his way to Colombo, at the airport or on leaving the country.

51. There is no evidence that he was made to sign any confession or that he was formally charged, taken before a court or tried.

52. On his own evidence, he was detained for just over two weeks and managed to escape along with others following an attack by the LTTE on the army camp to which he had been transferred.

53. There is no reasonable degree of likelihood that there would have been any record kept by the army of this particular appellant because of his political activities or profile. There is no evidence before us that he is someone who is wanted and who is being currently sought after. We do not find that there is a real risk that he would have been treated as an escapee. There is no evidence of this before us or to establish a serious possibility of him being on any wanted list as an escapee. We do not find there to be anything about this appellant or his circumstances which make this an exceptional or special case. We do not find that his scars would cause him a real risk. They were inflicted a long time ago in 1995 – 1996 and were shrapnel injuries to concealed parts of his body (shoulder and leg).

57. We do not find therefore to be a real risk to the appellant of persecutory harm or ill-treatment on his return at the airport, in his home area or elsewhere in Sri Lanka from the LTTE."

17. The claimant's challenge to the refusal of the Secretary of State to treat his further representations as a fresh claim to asylum is essentially based on the deterioration in the security situation in Sri Lanka since the decision by the AIT in late 2005. A major part of the representations made on his behalf were directed to the evidence of such a deterioration. That there has been a deterioration is not in issue. The critical question was identified by the Secretary of State in paragraph 16 of the decision letter of 7 August 2007.

> "*The fundamental question which arises when considering what effect the collateral impact of any deterioration in the Sri*

> *Lankan cease-fire will have on your client, who is to return to Colombo, is this. It is whether it has been or can be demonstrated that such a situation has an appreciable effect so as to bring an individual within the ambit of the Refugee Convention or the ECHR."*

That approach cannot be faulted. It was entirely consistent with the decision in *LP*.

18. But it is submitted on behalf of the claimant that the Secretary of State's decision was flawed by having considered the representations through the prism of the finding by the AIT in 2005, rather than by taking full and proper account of the deterioration and the degree to which it might affect the risk to the claimant if returned to Sri Lanka.

19. In this context Mr Nathan, who appeared for the claimant, placed considerable reliance upon the fact that the Secretary of State made no reference to the country guidance case of *LP* in her decision. He submitted that that was all the more surprising given that *LP* had been argued in late November 2006, and that cases in the AIT and in the Administrative Court were being adjourned pending its resolution. But the explanation of the failure to make any reference to *LP* appears to lie in the timing of the decision letter and of the promulgation of the judgment in *LP*. The decision letter was dated 7 August 2007, although it was not served on the claimant until 3 September 2007; and the judgment in *LP* was promulgated on the following day, 8 August 2007. Be that as it may the issue is whether the approach taken by the Secretary of State was consistent with the decisions in *LP, AM* and *SS* and the ECtHR in *NA*. As to that on 7 September 2007 the claimant's solicitors wrote a letter before action to the defendant pointing out that the decision had made no reference to *LP*, and seeking confirmation that the removal direction had been cancelled. The defendant replied by letter dated 14 September 2007 giving supplementary reasons for the refusal. Paragraph 6 of the letter said that consideration had been given as to whether the claimant's return to Colombo would place him at risk of persecution or ill treatment, *"with respect to the findings in the recent case of LP…"*, and the letter went on to address each of the risk factors in LP before concluding that the claimant's reliance on LP took his case no further.

20. The second general point taken on behalf of the claimant is that it was held in *LP* that given the deterioration in the security situation in Sri Lanka

> *"… The assessment exercise is a much larger and more detailed one than may have been the situation up to 2002 and certainly during the period of the ceasefire agreement (CFA). The current worsening situation in Sri Lanka requires serious consideration of all of the above factors, a review of the up to date country of origin information set against the very carefully assessed profile of the appellant."*

21. It is submitted that the Secretary of State failed to give the case the larger and more detailed consideration that is now necessary. But in my judgment it is clear from the content of the decision letter of 7 August 2007 that the consideration given by the Secretary of State, both to the deterioration of the situation in Sri Lanka and to the claimant's position, was entirely consistent with the level of scrutiny required following the decision in *LP*. Furthermore in the supplementary reasons for refusal

the Secretary of State gave detailed consideration to the claimant's position in relation to each of the *LP* risk factors. I do not therefore consider that there is any validity in the general point that the Secretary of State failed to give adequate consideration to the further representations.

22. It is then necessary to consider the specific respects in which it is submitted that the further representations amount to a fresh claim. There are four matters in relation to which it is submitted that the evidence as to the deterioration in the security situation in Sri Lanka has materially increased the risk to the claimant,

    i) his level of involvement with the LTTE

    ii) his escape from detention

    iii) his scarring

    iv) the fact that fingerprints were taken when he was held by the Sri Lankan army prior to his escape.

23. It is to be noted that in their written representations the claimant's advisors also sought to place reliance upon copies of arrest warrants allegedly relating to the claimant. But any reliance upon such documents was expressly withdrawn by Mr Nathan in the course of the hearing.

Level of involvement with LTTE

24. The decision letter reflected the findings of the AIT as to the low level of support that the claimant had given to the LTTE. The conclusion at paragraph 13 was that:

> *"Taking these events into account there continues to be no evidence that the authorities in Sri Lanka are concerned with those individuals with past low level support for the LTTE. There was therefore no evidential basis for supposing that your client is reasonably likely to attract the adverse interest of the Sri Lankan authorities and cannot relocate to Colombo."*

It is clear that in arriving at that conclusion the defendant was taking account of the deterioration in the general security situation, and in my judgment her conclusion was fully justified on the evidence before her.

Escape from detention

25. The issue was specifically addressed at paragraph 9 of the supplementary reasons for refusal in the following terms:

> *"Your client in his own evidence at his appeal hearing claims to have been detained on 15/3/1999 and that the period of detention was for just over 2 weeks (paragraph 10). He escaped after the base he was held in was attacked by the LTTE (paragraph 11). The Immigration Tribunal found that there was no evidence that your client was forced to sign a confession during his time in detention or that there was a*

> *reasonable likelihood that his records were kept by the army (paragraph 53). We consider that it is therefore unlikely that your client will be recorded as an escapee by the Sri Lankan authorities. As such it is unlikely that your client would be at risk on return to Sri Lanka."*

26. The facts found by the AIT, and relied upon by the defendant were not in issue, and the deterioration in the security situation does not in my judgment undermine the conclusion as to risk arrived at in reliance upon those facts.

Scarring

27. The issue of scarring was addressed at paragraph 217 of *LP*, the AIT concluding:

> *"However, on the evidence now before us we consider that the scarring issue should be one that only has significance where there are other factors that would bring an applicant to the attention of the authorities, either at the airport or subsequently in Colombo, such as being wanted on an outstanding arrest warrant or a lack of identity. We therefore agree with the COIR remarks that it may be a relevant, but not an overriding factor. Thus, while the presence of scarring may promote interest in a young Tamil under investigation by the Sri Lankan authorities, we do not consider that, merely because a young Tamil has scars, he will automatically be ill-treated in detention."*

28. In the decision letter the defendant made express reference to the May 07 COI report when concluding that:

> *"We are not persuaded that your client's scars, status of failed asylum seeker and heightened levels of security checks at Colombo would bring him to the adverse attention from the Sri Lankan authorities."*

29. In the supplementary reasons the defendant referred to the AIT's view of the significance of scarring in *LP* and continued:

> *"Your client's scarring is not an overriding factor as there is no reason to believe that your client is of interest to the authorities. This view is reinforced by the findings of the Immigration Tribunal who found that your client's scars were inflicted a long time ago in 1995 and are on unconcealed parts of his body (paragraph 53)."*

30. The further representations included photocopies of photographs of the scarring, and a medical report which simply describes the scarring. At paragraph 19 of the decision letter the defendant concluded:

> *"In light of the fact that the Immigration Judge found that your client's failed asylum claim and small concealed scars would not result in his ill treatment or persecution in Sri Lanka and*

that his opinion is upheld by the May 2007 COI and that there is no change in the material facts underpinning your client's claim in this regard. We concur with the findings reached by the special adjudicator SA that your client's fear of ill treatment and of persecution for the reasons summarised in paragraph 5(b) is not well founded."

31. In my judgment the defendant's approach to the claimant's scarring was both consistent with authority, and fully justified on the evidence.

Fingerprints

32. In the course of his submissions Mr Nathan suggested that the case revolved around the significance of the fact that the claimant was fingerprinted when in the custody of the Sri Lankan army in 1999. He accepted that the fingerprints were probably not of significance in 2005, but sought to argue that the fact that they were taken has resulted in an elevated risk as at the present day. I find nothing in the evidence to suggest that that is the case. In particular there is nothing to suggest that a further fingerprint run would be done at the airport on admission so as to connect him with having been held for two weeks in 1999. Furthermore paragraph 32.10 of the COIR on Sri Lanka dated 30 October 2008, to which the preliminary issue related, contains the following quotation taken from the letter from the British High Commission dated 28 August 2008:

> *"With regard to fingerprint records, CID officers informed me that the only fingerprint records that exist are held in the criminal records office in Colombo. There is no electronic fingerprint database or IT facility to read fingerprints. The data is used solely as part of a person's criminal record and the fingerprints held are only those of convicted criminals. This was confirmed by the international organisation for migration who are currently working with Sri Lankan government on identity management issues. They added that there are 500,000 records in paper form, dating back to the 1980's"*

33. As I have already observed in the context of the preliminary issue, the further expert report obtained by the claimant does not take issue with the content of the letter from the British High Commission.

34. Accordingly in my judgment the Secretary of State was fully justified in concluding at paragraph 58 of the decision letter and paragraph 16 of the supplementary reasons that:

> *"The points raised in your submissions have not previously been considered, but taken together with the material which was considered in our decision of 7 September 2005 and also the appeal determination promulgated on 7 November 2005, they would not have created a realistic prospect of success. This is because they cannot disturb the conclusions concerning the risk of ill-treatment and sufficiency of protection. Viewing all the evidence in the round, there is nothing here that would*

reasonably lead an immigration judge, applying the rule of anxious scrutiny, to conclude that your client would be exposed to real risk of persecution on return to Sri Lanka."

35. It follows that the application fails with regard to the asylum issue.

36. **Unlawful detention**

The claimant contends that he was unlawfully detained between 3 and 28 September 2007.

37. It is the defendant's case that the claimant was lawfully detained under the power contained in section 4(2)(d) and paragraph 16(2) of schedule 2 of the Immigration Act 1971 (the Act). They are in the following terms:

Section 4(2)(d)

"4(2) The provisions of schedule 2 to this Act shall have effect with respect to –

(d) the detention of persons pending examination or pending removal from the United Kingdom.

Schedule 2

*"16.2 If there are reasonable grounds for suspecting that a person is someone in respect of whom directions (*for removal*) may be given…, that person may be detained under the authority of an immigration officer pending –*

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions.

38. **The facts**

The claimant was temporarily admitted following his claim to asylum upon his arrival in the United Kingdom on 6 May 1999. On 19 January 2005 his temporary admission was further authorised subject to a condition that he report on 2nd of every month. He did so without fail until September 2007. The 2nd September 2007 was a Sunday, a day upon which Eaton House is closed. On his previous attendance, he was therefore told to report on Saturday 1 September. In the event, and as he explained in his written statement dated 20 October 2008, the reporting date of the 2nd of the month was registered in his memory, and he simply forgot that he had to report a day earlier. He therefore reported on Monday 3 September, and was then detained.

39. There is a conflict of evidence as to precisely what happened when he reported on 3 September. He says that he explained his error to the reception staff, but was then taken into the building by a woman who introduced herself as an Immigration Officer, and who told him that his fresh claim was refused, served the decision letter on him and detained him. The defendant has served a witness statement from Samantha Hicks dated 27 May 2008. She is an Immigration Officer based at Eaton House. She

says that when the claimant reported on 3 September, she was called to the reception area and was told that he had reported and that his file had been flagged for detention. She says that she then reviewed his file and the Case Information Database where she saw (paragraph 5) that:

> *a) the claimant was a failed asylum seeker with no lawful basis to remain in the United Kingdom*
>
> *b) the claimant was to be served with a refusal letter ... and following service of that letter, he would have no outstanding matters (obstacles to removal)*
>
> *c) emergency travel documents had been obtained to facilitate the claimant's removal to Sri Lanka*
>
> *d) removal directions could be made for the claimant within a short period of time*
>
> *e) the claimant had been required to report on the previous Saturday (1 September 2007) and the claimant had not then reported as required."*

40. Ms Hicks then asserts that she interviewed the claimant to ascertain whether there were any further matters which would affect his removal to Sri Lanka. She says that in the course of the interview she asked him to explain why he had not reported as required on the previous Saturday, and that in response he told her that he had gotten his dates mixed up. Her statement continues:

> *"I did not believe the claimant was telling me the truth as people who are required to report are given a letter with the next reporting date stamped on it."*

41. She says that she therefore formed the view that it was appropriate for the claimant to be detained *"in order to effect his removal from the United Kingdom."* She discussed the case with a Higher Executive Officer, Pam Dheol, who authorised the claimant's detention and removal. Thus it appears that the decision to detain was taken by the HEO, but there is no evidence from her as to the basis upon which she made the decision.

42. Ms Hicks then completed the necessary paperwork which included form IS91R – Notice to Detainee – Reasons for Detention and Bail Rights. The form contains a number of boxes that can be ticked to indicate first the reason for detention, and secondly the basis upon which the decision has been reached. In this case she ticked box 2a *"you are likely to abscond if given temporary admission or release"*. It is to be noted that she did not tick box 2c *"your removal from the United Kingdom is imminent"*. Then in the section which provides boxes identifying the factors upon which the decision was reached she ticked the following:

> *"1. You do not have enough close ties (e.g. family or friends) to make it likely you will stay in one place.*

2. *You have previously failed to comply with conditions of your stay, in temporary admission or release.*

5. *You have used or attempted to use deception in a way that leads us to consider you may continue to deceive.*

6. *You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries.*

7. *You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK.*

8. *You have previously failed or refused to leave the UK when required to do so."*

43. Ms Hicks says that she did not tick the box "*your removal from the UK is imminent"* because at that stage removal directions had not been set. She then printed off an IS minute sheet from the Home Office computer records which she signed and dated. After setting out the claimant's particulars, it says:

> *"The subject was due to be detained on Saturday. However he failed to show up. The subject has now attended Eton House today, and he claims to have gotten his reporting dates mixed up."*

44. Ms Hicks says that directions were then made for the claimant's removal, and steps taken for the necessary reviews of his detention. The detention review form is exhibited to her witness statement. Also exhibited to that statement is a further form IS91R dated 18 September 2007 giving reasons for the continued detention. Again the reason advanced for detention was that the claimant was likely to abscond if given temporary admission or release. But on this occasion box 2 of the factors upon which the decision had been reached, was not ticked. I was told in the course of submissions that that was just an error. As to that I would simply observe that it is unacceptable for such errors to be made when authorising the detention of an individual.

45. In the meantime on 14 September the claimant's solicitors lodged this application for Judicial Review. They repeated the request for the release of the claimant that had first been made on 7 September. On 18 September the defendant cancelled the removal directions following repeated requests from the claimant's solicitors. The solicitors then again wrote seeking the claimant's release and providing details of the address at which he had been living on temporary admission. In response the defendant issued the further form IS91R. On 21 September, and in response to the further form IS91R, the claimant's solicitors wrote explaining that he had been living with the same relative at the same address for the past eight years. The defendant replied on 22 September 2007 saying that the detention would be maintained, but now relied on the imminent removal of the claimant from the United Kingdom. No IS91R form giving that as a reason for detention was ever served. The claimant was eventually released on temporary admission on 28 September 2007 with a weekly reporting order.

46. <u>The claimant's case</u>

Mr Nathan submitted that the detention of the claimant was unlawful by virtue of the failure on the part of the defendant to observe the provisions of the defendant's Operational Enforcement Manual (the 'Manual'). He invited my attention to the general policy set out in chapter 38.1

> ***"Chapter 38 – Detention/Temporary release***
>
> *38.1 Policy*
>
> *General*
>
> *In the White Paper "Fairer, Faster & Firmer – A Modern Approach to Immigration and Asylum" published in July 1998 the government made it clear the power to detain must be retained in the interests of maintaining effective immigration control. However, the White Paper confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention (see 38.19 and chapter 39). The Whiter Paper went on to say that detention would most usually be appropriate:"*
>
> - *To effect removal*
> - *Initially to establish a person's identity or basis of claim; or*
> - *Where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release …"*

Paragraph 38.3 addresses the factors influencing a decision to detain. It provides inter alia that there is a presumption in favour of temporary admission or temporary release, that "*there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified*", and that "*all reasonable alternatives to detention must be considered before detention is authorised"*.

47. With regard to the form IS91R giving reasons for detention, paragraph 38.6.3 includes the following passages:

> "*The IO (Immigration Officer) must specify the power under which a person has been detained, the reason for the detention and the basis on which the decision to detain was made.*
>
> *It should be noted that the reasons for detention given could be the subject of judicial review. It is therefore important to ensure that they are always* ***justified and correctly stated.****"* (emphasis added in the original)

48. Mr Nathan also invited my attention to the speech of Lord Scarman in R v Secretary or State for the Home Department ex parte Khawaja [1984] AC 74 in which he cited Lord Atkin in *Liversidge* and *Anderson* [1942] AC 206, who said:

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

Lord Scarman continued:

> *"Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is the subject to English law is entitled to its protection."*

49. Mr Nathan sought further support for his submission in the judgment of Munby J in *R on the application of Karas & Miladinovic v SSHD* Neutral Citation [2006] EWHC 747 Admin. At paragraph 57 he said:

> *"Ms Weston submits that in assessing whether the detention was unlawful I should adopt the same approach as that of Field J in Youssef v The Home Office [2004] EWHC 1884 (QB). In that case the claimant had been detained by the Secretary of State in the exercise of his immigration powers. It was common ground (see at para. 53) that it was for the Secretary of State to justify the detention. Counsel argued on behalf of the Secretary of State (see at para. 56) that the standard by which the legality of the detention should be judged is the Wednesbury standard. Field J disagreed. At para. 62 he said:*
>
> > *"Whilst it is a necessary condition to the lawfulness for Mr Youssef's detention that the Home Secretary should have been reasonably of the view that there was a real prospect of being able to remove him to Egypt in compliance with Article 3 ECHR, I do not agree that the standard by which the reasonableness of that view is to be judged is the Wednesbury standard. I say this both because I can find nothing in the Judgment of Woolf J in R v Governor of Durham Prison ex Parte Hardial Singh [1984] 1WLR 704 that points to this being the standard and because where the liberty of a subject is concerned the Court ought to be the primary decision-maker as to the reasonableness of the executive's actions, unless there are compelling reasons to the contrary, which I do not think there are. Accordingly, I hold that the reasonableness of the Home Secretary's view that there was a real prospect of being able to remove Mr Youssef to Egypt in compliance with Article 3 ECHR is to be judged by the court as the primary decision-maker, just as it will be the court as primary-decision maker that will judge the reasonableness of the length of the detention bearing*

> *in mind the obligation to exercise all reasonable expedition to ensure that the steps necessary to effect a lawful return are taken in a reasonable time."*

50. Munby J said that he respectfully agreed. So do I. Later in his judgment, and having pointed out that the claimant's application to the Secretary of State had been outstanding for over three years, that there was no history of failure to comply with the terms of his temporary admission or of absconding in any way, and that he had faithfully been reporting every week, Munby J went on to say:

> *"64. In my judgment it is not enough for the Secretary of State to be able to show that the circumstances are such that one or more of the boxes on the pro-forma can be ticked. Detention, if it is to be lawful, must be reasonable and it must satisfy the test of proportionality. As the pro-forma itself recites, "Detention is only used where there is no reasonable alternative available."*

51. It was in this context that Mr Hutton drew my attention to the decision of the Court of Appeal in *SK (Zimbabwe) v SSHD [2008] EWCA Civ 1204*, which was handed down on 6 November 2008, two days after I heard argument in this case. It was a case in which the claimant, the respondent to the appeal, was served with a deportation order on completion of a sentence of imprisonment, and was then detained at the direction of the Secretary of State pursuant to paragraph 2(2) of schedule 3 to the Immigration Act 1971. It was accepted that his initial detention was lawful; but there was a subsequent failure to carry out the regular reviews of his detention as required by the Detention Centre Rules 2001 and the Home Office Operations Enforcement Manual, the document to which I have already made reference in the context of the instant case. Mumby J held at first instance that the compliance with the relevant requirement of the Manual was a condition of the legality of the claimant's continued detention, and that the failure to comply with those requirements rendered the detention unlawful.

52. The issue before the Court of Appeal Court of Appeal was whether Munby J was right to conclude that the claimant was unlawfully detained by reason of the Secretary of State's failures to carry out the requisite reviews pursuant to the Detention Centre Rules 2001 and the Operations Enforcement Manual. Laws LJ, who gave the main judgment, identified the essential question as being the reach of the power to detain conferred by paragraph 2(2) of schedule 3 of the Immigration Act 1971 (the Act), and said that that was a question of statutory construction. He set out conclusions in the following terms:

> *"38. In seeking to formulate the issue before us I pose the question, what is the reach of the power conferred by paragraph 2(2) of Schedule 3 to the Immigration Act 1971, and characterised it as a question of statutory construction. In the light of all the matters that I have canvassed I would summarise my conclusions on this issue as follows:*
>
> *(i) Compliance with the Rules and Manual as such is not a condition present to unlawful detention pursuant to paragraph 2(2). The statute does not make it so (contrast section 34(1) of PACE and the case of*

Roberts (1999) [1 WLR 62]. Nor does the common law, or the law of the ECHR.

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

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

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

53. Mr Hutton contends that the decision in *SK* is determinative of the issue of unlawful detention in the instant case. He submits that following service of the Notice of Further Removal Directions on 3 September 2007 the claimant was lawfully detained, under paragraph 16(2) of schedule 2 (see paragraph 37 above), that on the authority of *SK*, the failure on the part of the Secretary of State to comply with the Manual, if failure there was, cannot render the detention unlawful, and that in consequence the claim that the claimant's detention was unlawful must fail.

54. I do not agree. *SK* was decided on a narrow point, namely whether compliance with the Manual was a condition precedent to a lawful detention. The issue in this case is not whether failure to comply with the manual rendered the detention unlawful, but whether the initial decision to detain was reasonable and proportionate. The challenge is to the exercise of the power to detain under paragraph 16(2). As Laws LJ stressed at paragraph (iii) of his conclusions and at paragraph 30 of his judgment, the exercise of the power to detain is subject to the control of courts.

> *"30. Detention under paragraph 2(2) is an executive act of public authority. Nothing is more elementary than that such an exercise of State power is subject to the supervision of the High Court by way of judicial review. The ECHR imposes a like standard. Article 5(4) provides:*
> *'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'"*

That applies equally to detention under paragraph 16(2).

55. I turn then to consider the evidence as to the basis upon which the decision to detain the claimant was made. There are a number of features of the evidence that give rise to concern. First the IS minute sheet clearly indicates that the decision to detain the

claimant had been taken before his failure to report on 1 September. There can be no other explanation of the sentences *"Subject was due to be detained on Saturday. However he failed to show up."* Secondly Ms Hicks says that she did not believe the claimant's explanation for failing to report on the Saturday, namely *"that he had gotten his dates mixed up"*. The claimant, who in 2005 was found to be a credible witness, does not recall giving that explanation to her. But on the assumption that he did, I do not consider its rejection to be reasonable. He had reported without fail when required to do so on the second of every month until the weekend in question, and he presented himself on Monday 3 September. The error that he made was wholly understandable.

56. Thirdly she ticked the box *"you do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place"*. The fact is that he had been living with a relation in one place for no less than eight years. If she knew that that was the case, her conclusion was plainly unreasonable. If she did not then her enquiries in interview were deficient.

57. She also ticked the box *"you have used or attempted to use deception in a way that leads us to consider you may continue to deceive"*. I was told in the course of submissions that that referred to his use of a false passport eight years earlier when he claimed admission to the United Kingdom seeking asylum. In that context it must be borne in mind that although the AIT was not satisfied that there would be a real risk to him of persecutory harm or ill treatment on his return to Sri Lanka, it accepted that he had established a genuine fear of the Sri Lankan authorities and the LTTE. She also ticked box 6 *"you have failed to give satisfactory or reliable answers to an Immigration Officer's enquires"*. I do not find any reasonable justification in the evidence for that conclusion, nor to the tick to box 7 *"you have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK"*. There is nothing before me to suggest that his identity or nationality had ever been in issue, and his status was that of a failed asylum seeker. Finally she ticked box 8 *"you have previously failed or refused to leave the UK when required to do so."* I was told that the basis for that tick, was that the claimant had remained in the UK following the exhaustion of the appeal process. But it was accepted that no steps had been taken in relation to his removal until his detention on 3 September 2007.

58. Furthermore by its letters to the claimant's solicitors dated 14 and 22 September 2007, the defendant purported to advance an alternative reason for detention, namely the claimant's imminent removal. But as I have already observed, no further IS91R form to that effect was served on the claimant. Accordingly that cannot in my judgment be advanced as an argument justifying his original detention.

59. As is clear from the evidence from Ms Hicks, although as I have already observed she does not appear to have been the final decision maker (see paragraph 41 above), it was the decision rejecting the further submissions as a fresh claim to asylum that gave rise to the question of whether the claimant should be detained. But the fact that following that decision the claimant, as a failed asylum seeker, no longer had any legal basis upon which to remain in the UK, did not of itself justify his detention, and moreover was not advanced as a basis for his detention in the form IS91R dated 3 September. Having learnt from scrutiny of his file that the claimant's further submissions had been rejected, it was for the Immigration Officer to address the question of whether to exercise the power administratively to detain, and in so doing

she was obliged to take account of the policy set out in the Manual. If her decision was to detain, then she was obliged both to specify the power that she was purporting to exercise, the reasons for her decision and the basis upon which the decision had been made (see paragraph 38.6.3 of the Manual – paragraph 47 above). It is also to be noted that it was important for her to ensure that the reasons for detention were both "*justified and correctly stated"* (see paragraph 47 above).

60. The question is therefore whether the decision to detain the claimant for the reasons identified in the form IS91R was a lawful exercise of the power contained in paragraph 16 of schedule 2. The issue can be addressed in classic *Wednesbury* terms – was the decision to detain a decision to which the decision maker could reasonably have come, taking full account of the Home Office policy as to the approach to the exercise of the power set out in the Manual?

61. In my judgment it cannot for two reasons. First the reasons given for detaining the claimant was that he was likely to abscond if given temporary admission or release. The basis for that decision does not stand up to scrutiny for the reasons set out above. In my judgment it cannot be said that that was a conclusion at which the decision maker could reasonably have arrived.

62. Secondly in the event of a challenge to a decision administratively to detain, compliance with the Manual will be an "*effective and practical means"* of testing the lawfulness of the decision, see Laws LJ in *SK* at paragraph 32 (iv) at paragraph 52 above. In my judgment the evidence does not demonstrate compliance with the Manual. First it appear that the decision to detain was taken both before the claimant failed to report on 1 September and before he reported of his own volition on 3 September, and accordingly before the decision maker had the opportunity properly to assess his current situation, and in particular as to the likelihood of his absconding, notwithstanding that paragraph 38.3.5 of the Manual specifically provides that each case must be considered on its individual merits. Secondly the reasons advanced for the decision to detain cannot reasonably be said to amount to strong grounds for believing that the claimant would not comply with conditions of temporary release, see paragraph 38.3 of the Manual at paragraph 46 above. Nor is there any evidence to suggest that the IO gave any or any adequate consideration to reasonable alternatives to detention.

63. I am therefore bound to conclude that his detention from 3 September to 28 September was unlawful.