Neutral Citation Number: [2009] EWHC 1989 (Admin)

Case No. CO/3803/2009

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday, 1 July 2009

**B e f o r e:**

**HHJ VOSPER QC**
(Sitting as a Deputy High Court Judge)

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**Between:**
**THE QUEEN ON THE APPLICATION OF CHAHBOUB**
**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**
**Defendant**

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**MR G DENHOLM** (instructed by WILSON & CO) appeared on behalf of the **Claimant**
**MR S SINGH** (instructed by TREASURY SOLICITORS) appeared on behalf of the **Defendant**

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J U D G M E N T

1. THE DEPUTY JUDGE: This is the rolled up hearing of an application for permission to apply for judicial review, to be followed by the hearing itself, directed by Hickinbottom J on 22 May 2009.

2. The claimant applied for judicial review on 22 April 2009. He challenges, in essence, the decision of the defendant, the Secretary of State for the Home Department, to detain him under immigration detention, and to do so in a prison rather than in an Immigration Removal Centre.

3. The claimant was born on 3 December 1974, and is now aged 34. He is an Algerian national. He arrived in the United Kingdom on 21 January 1990 but was refused leave to enter at Heathrow and returned to Algeria. An appeal against the refusal of leave to enter the United Kingdom was dismissed. In August 1993, the claimant entered the United Kingdom using, it is said, French identification documents to which he was not entitled. On 10 April 1994 he was arrested on suspicion of immigration offences. On 13 April he claimed asylum. On 6 December 1994, while his application for asylum was still under consideration or appeal, he was arrested for theft. He self-harmed at a police station while under arrest, to such an extent that he required hospital treatment.

4. By October 1994 his application for asylum, and any appeal arising from its refusal, had been dealt with and his removal from the United Kingdom was directed. Between November and December 1994, when in custody in Wandsworth Prison, he went on hunger strike. As a result, on 16 December 1994, his temporary release from prison to hospital was authorised. He arrived at hospital on 19 December, unescorted apparently, and absconded within about 15 minutes of arrival and before receiving treatment.

5. During the period of his absconsion he was arrested on 7 March 1995 for picking pockets, and he was detained in Wandsworth Prison. On 15 March 1995 he was granted bail. His appeal, which I assume must be his appeal against refusal of asylum, was listed for hearing on 2 June 1995 but the claimant did not attend and the appeal was heard in his absence in September 1995. Shortly after his appeal he was arrested for offences of dishonesty, on 21 September 1995, and bailed to appear at the Middlesex Guildhall Crown Court on 24 April 1996. In fact, he failed to attend on that date.

6. In the meantime his appeal against refusal of asylum had been dismissed in October 1995. He last reported to the police, which had been a condition of his bail, on 3 April 1996, and thereafter failed to report, and as I have said, failed to attend at Middlesex Guildhall Crown Court on 24 April 1996.

7. Between 1996 and 2004 he succeeded in avoiding the attention of the defendant, though there is some evidence that he appeared in Glasgow in June 1996 but had returned to London by July of that year. During those years however, the claimant accumulated a number of criminal convictions. In the papers provided for this case there is a chronology, compiled by someone in the Home Office, which records convictions in February and April 1998 for handling stolen goods and for a public order offence; in May 1998 for public order offences and possession of drugs; in August 1998 for handling stolen goods for which he was sentenced to a term of imprisonment; in September 1998 for a drugs offence; in July 1999 for attempting to obtain property

by deception and using a false instrument for which he was sentenced to a term of imprisonment, and for four offences of obtaining property by deception and possessing a false instrument; then in January 2001 he was dealt with for a drugs offence; in December 2001 sentenced to 18 months' imprisonment for theft, and for possession of a class A drug; in July 2003 he was dealt with for an offence of theft and a public order offence, the sentence included a term of imprisonment. Those offences, as I say, are recorded on a schedule prepared by an official of the Home Department, but they are not backed up by any criminal record. It should be noted however, that there is information that the claimant has used 15 aliases during the course of his offending and it may well be that obtaining a criminal record which is comprehensive and complete may be difficult in his case.

8. In any event, by January 2004 he was again in court. He was convicted of 11 offences involving dishonesty and public order at Horseferry Road Magistrates' Court, he must have been committed to the Crown Court for sentence because he was sentenced to a total of 33 months' imprisonment on 12 March 2004.

9. It appears that he was released from that sentence on 17 May 2005, I assume on licence, and that later in 2005 he was convicted of an offence and returned to prison. He was in prison in January, February, March, April and May 2006. On five occasions during that time he harmed himself by swallowing a razor blade or cutting himself, and on one occasion it is said attempted to hang himself.

10. In July 2006 that term of imprisonment came to an end and a decision was taken to deport him. The decision to deport him may have been taken on 27 July and his term of imprisonment may have come to an end on 28 July, the precise dates are not clear but it makes little difference. He was at this time being detained in Brixton Prison, and he continued to be detained there for a period of time, except when he was released to a hospital because of injuries which he had caused to himself between about 28 July and 3 August 2006. In August 2006 the claimant sought to appeal the decision to deport him, and on 16 August had to be restrained physically to prevent himself self-harming.

11. At some point between mid September and early October 2006 the claimant was moved from Brixton Prison to Harmondsworth Immigration Removal Centre. His appeal against deportation was heard on 1 February 2007 and dismissed on 5 February. He then made applications for reconsideration which were refused, and his appeal rights were exhausted by 5 March 2007. On 4 April 2007 he was served with a signed Deportation Order.

12. He applied for bail and was granted bail on 23 May 2007 by the Asylum and Immigration Tribunal. There were conditions to his bail, the extent of those conditions is not known, though one of them may have been a surety provided by his brother. In any event, having been granted bail on 23 May, within two weeks, on 4 June, he was reported as having absconded. In fairness, it may be that he had not strictly absconded, but been arrested for an offence which he had committed whilst on bail, because on 19 June 2007 he was convicted of theft and assaulting a police officer, and on 21 July 2007 sentenced to a term of 112 days' imprisonment which he served at Wandsworth Prison.

13. On 21 September 2007 that term of imprisonment ended. He remained at Wandsworth Prison under Immigration Detention. On 15 November 2007 he was transferred to Colnbrook Immigration Removal Centre where he remained until 9 December 2008. He was then sent back to Wandsworth Prison where he remains.

14. By these proceedings the claimant seeks to challenge the lawfulness of the decision of the Secretary of State to keep him in immigration detention throughout the whole of the two periods when he has been in detention. The first issue which arises is this: the defendant objects to that application for judicial review in so far as it relates to the first period of detention. There is no issue about the power of the Secretary of State to detain the claimant, his powers are contained within paragraph 2 of schedule 3 to the Immigration Act 1971: by paragraph 2, sub paragraph 2, he is authorised to detain a person in respect of whom a decision to make a Deportation Order has been made, and under sub paragraph 3, to detain a person in respect of whom a Deportation Order is in force. In this case therefore, detention during the first period, between 28 July 2006 when the prison sentence ended and 23 May 2007 when bail was granted, was in part under sub paragraph 2 and in part under sub paragraph 3. The second period of detention which began on 21 September 2007, is under sub paragraph 3.

15. The claimant contends that the authority to detain him in immigration detention arises as a consequence of the Deportation Order and that therefore the whole of the period of his detention from July 2006 should be regarded as a single administrative act. It follows that the lawfulness of his detention, both during the first and the second period of detention, falls to be considered in this application. Further, it is submitted on behalf of the claimant by Mr Denholm, that the limitation period for a civil action in respect of unlawful detention is 6 years, and that it would be convenient and in accordance with the overriding objective of the Civil Procedure Rules that a single court should deal with all issues.

16. As to the first of those submissions, I cannot agree that it is relevant. It is true that the Secretary of State's authority to detain the claimant arises from paragraph 2 of schedule 3 to the Immigration Act 1971, and the fact that a Detention Order has been made. But the decision to detain him rather than to release him on bail was a separate executive decision made in July 2006 and in September 2007. The factors taken into account in the September 2007 decision are not identical with those taken into account on the earlier occasion. Plainly, by the time of the second decision, the claimant had been released on bail, and had been on bail for some months, and whilst on bail had failed to comply with conditions, whether as a result of his own volition or as a result of the criminal offence he had committed, and had committed that criminal offence. Accordingly, it seems to me that, although his continued detention in respect of the second period of detention might properly be challenged under judicial review, it would be inappropriate to permit a challenge now in respect of the first and completed period of detention. I accept the submission of Mr Singh on behalf of the defendant, that the decisions relating to that earlier period of detention are long ago and well outside the 3 month limit which is imposed in applications for judicial review.

17. I have more sympathy with Mr Denholm's second point that all issues should, if possible, be resolved by the same court on the same occasion. However, the Civil

Procedure Rules not only contain the overriding objective, but also contain, in Part 54, the provisions relating to judicial review. Judicial review serves a different purpose from a civil claim for damages, and I take the view therefore that the reference to the 6 year limitation period and the overriding objective is not of sufficient force to displace the more appropriate time limit for judicial review contained in Part 54. I therefore accede to Mr Singh's submissions on this part of the case, and I refuse permission to apply for judicial review in respect of the earlier period of detention.

18. It follows that, so far as the second period of detention is concerned, I am concerned with the period from 21 September 2007 to today. There was a short initial period of detention, for under 2 months, in a prison, after which there was a transfer to an Immigration Removal Centre. The claimant remained in the Immigration Removal Centre for just over a year until transferred back to Wandsworth Prison where he has remained since 9 December 2008. The first basis upon which the claimant challenges the decision of the Secretary of State to detain him at all, is that it fails to comply with the Secretary of State's policy with respect to mentally ill persons recommended for deportation. That policy is set out in the Enforcement Instructions and Guidance issued by the Secretary of State at paragraph 55.10 headed "Persons considered unsuitable for detention". It reads:

> "Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or elsewhere. Others are unsuitable for immigration detention accommodation because their detention requires particular security care and control. In CCD cases [those are cases in which the deportation order has been made subsequent to a criminal conviction] the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention."

That last sentence was added to the policy, I am told, in September of 2008 and therefore was not a part of the policy at the time of the initial detention. The policy then continues:

> "The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or elsewhere..."

And of the list that follows the relevant one is this:

> "Those suffering from serious medical conditions or the mentally ill."

Then is added:

> "In CCD cases please contact the specialist mentally disordered defender team."

19. The claimant submits, firstly, that the records of his self-harming behaviour raise the issue that he is suffering from a mental illness. The records in fact, as I shall mention in a moment, exclude mental illness but do mention personality disorder. Mr Denholm

submits, on behalf of the claimant, that there is no evidence that the defendant ever considered this policy in deciding to detain the claimant, and that his failure to do so makes his detention unlawful.

20. He relies, in particular, on a decision of Beatson J, *R(MMH) v Secretary of State for the Home Department* [2007] EWHC 2134 Admin. In that case, the relevant claimant had arrived in the United Kingdom in December of 2002 and was given 4 years' leave to remain. He was convicted of robbery and sentenced to 32 months' imprisonment. The robbery involved the use of a knife and was committed after the consumption of drugs and alcohol. He was recorded as having attempted to garrotte himself on the night before he was interviewed by a probation officer. He was entitled to be released in October 2006, but in June was told that he would not be released but detained under the Immigration Act, and told of the defendant's intention to make a Deportation Order.

21. On 11 April, or shortly thereafter, the Secretary of State was provided with a report by a consultant psychiatrist which stated that the claimant had fulfilled the criteria for a diagnosis of post traumatic stress disorder, and that his mental disorder was a risk factor predicting a risk of completed suicide. His mental state in prison increased the risk of self-harm and suicide.

22. Beatson J noted that the review of detention carried out in May 2007 did not consider the applicability of the policy relating to detention of those who are mentally ill. He considered however that the position of the Secretary of State was sustainable until receipt of the copy of the consultants psychiatrist's report on 10 May.

23. It was only in the light of that evidence that the defendant's decision could be said to be flawed on public law grounds. He went on to say this:

> "It is necessary for a Secretary of State who takes that position to have engaged with the policy. I hesitate to use the word used in a number of contexts, that the decision maker must grapple with the matter, but the letter of 4 June does not indicate that any consideration was given to the implications of the diagnosis. It does not state that the level of illness is insufficient, it does not address the diagnoses at all, for example by questioning it or saying that this level of PTSD is not sufficiently serious. It simply says that there was, at that time, no risk of suicide. That is, in the light of the policy, insufficient. The letter states that the consultant psychiatrist's report does not refer to a post-history of self harm. The prison records to which the defendant would however have access would have informed him of that position."

As a result Beatson J concluded that the detention was unlawful.

24. The defendant does not accept that the principle that the detention was thereby unlawful is a sound one. But, in any event, Mr Singh submits on behalf of the defendant that the obligation on the Secretary of State to give consideration to the policy relating to mentally ill detainees never arose in this case. What triggered it in the case of MMH was the receipt by the Secretary of State of the psychiatric report indicating that the

claimant in that case was suffering from Post-traumatic Stress Disorder. On the contrary, here, the information supplied to the Secretary of State is that the defendant was not exhibiting signs of mental illness. He draws attention to medical examinations carried out in February and May 2006, at the time when the claimant's self-harm was at its height. Those medical examinations record the fact of self-harm and substance abuse. They also record the diagnosis, if that is the right word, of Personality Disorder, but they expressly exclude mental illness. Therefore, Mr Singh submits, there was nothing in this case to cause the Secretary of State to consider and, if necessary, apply the policy relating to the detention of mentally ill detainees.

25. Mr Denholm counters that by reference to the provisions of the Mental Health Act 2007 in which a Personality Disorder is now to be included as a mental disorder, but not strictly as a mental illness. I have come to the conclusion that Mr Singh's submissions on this are correct. Had there been, at any stage, a report or other medical evidence coming from the examination to suggest that the claimant was suffering from a mental illness then it would have been appropriate for the Secretary of State to have considered the policy on detention of mentally ill detainees. However, the information available to the Secretary of State in this case was not simply neutral, but actually excluded mental illness. I am not persuaded that the inclusion of Personality Disorder within the definition of mental disorder in the Mental Health Act 2007 means that the Secretary of State should, when considering the detention of this claimant, either at the beginning of the detention or at any point during it, have sought to apply the policy relating to detainees suffering from mental illness to this particular claimant. Even if I had been against Mr Singh on that point, he submits that there is a further point of causation which needs to be dealt with. I agree with him that there may be such a point, but it does not arise as a consideration in this case. I therefore reject the claimant's contention that his detention was unlawful by reference to the policy with respect to mentally ill detainees.

26. The next basis upon which Mr Denholm challenges the detention of the claimant is by reference to what he calls the common law position. Detention under Schedule 3 to the Immigration Act 1971 must of course comply with the statutory requirements of that Schedule, but it must also comply with general principles. Those general principles are derived from the judgment of Woolf J in *Hardial Singh* [1984] 1WLR 704, but the principles are now most conveniently stated in the judgment of Dyson LJ in the Court of Appeal in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888. At paragraph 46 Dyson LJ said this:

> "There is no dispute as to the principles that fall to be applied in the present case, they were stated by Woolf J in *Hardial Singh*. The statement was approved by Lord Brown Wilkinson in *Tan Le Lam v Tai A Chau Detention Centre* [1997] AC 97. In my judgment, Mr Rob of counsel correctly submitted that the following four principles emerge:
>
> "(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.
>
> "(ii) The deportee may only be detained for a period that is reasonable in

all the circumstances.

> "(iii) If, before of the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to affect deportation within that reasonable period, he should not seek to exercise the power of detention.
>
> "(iv) The Secretary of State should act with reasonable diligence and expedition to affect removal."

27. Mr Denholm does not rely on principle (i) but does rely on the remaining three. Firstly, he says that the period of detention is now too long to be reasonable in all the circumstances. The period of detention now is, of course, approximately 21 months.

28. Mr Denholm relies upon a passage in the judgment of Mitting J in the case of *R (Mohammed Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 Admin, where Mitting J said this in a case where there had been 23 months' detention:

> "Whilst I do not assert that in no circumstances could detention lasting as long as 23 months be justified, I am satisfied on the facts of this case that this claimant's detention has by now become unlawful."

29. He then set out the reasons why he came to that conclusion, one of which was that 23 months, on any view, must be at or near the top of the period during which detention could lawfully occur. Although in that case the conviction had been of a very serious offence, a street robbery involving the use of significant violence to the person, the claimant himself had not personally committed the violence and the case was not in the category of truly grave offences such as in other cases. Although Mitting J suggested that 23 months must be at or near the top of the period during which detention can lawfully occur, Mr Singh submits that no limit in fact applies. He refers me to the decision of Sir George Newman in *R (MJ) v Secretary of State for the Home Department* [2008] EWHC 1990 Admin. Where Sir George Newman was considering the period of detention of 31 months he said this:

> "What then should I conclude about the other aspects of the case which are relied upon as to the unlawfulness of the very period of time to date? Well 31 months is plainly something which puts the court very much on the alert, but there is no set sign off time, there is no particular period of time which will in itself, simply because of the period time, be determinative of the issue of legality of the detention. One must have regard to all the circumstances of each case."

That, if I may say so, with respect, is plainly right, and indeed is in accordance with what Mitting J was saying.

30. The factors which are particularly relevant in this case are these: firstly the likelihood of absconding; secondly, the likelihood of the claimant committing further offences; and thirdly, the extent to which the claimant's own conduct has contributed to the

period of detention. As to the first two of those factors, helpful guidance is given firstly, in the case of *R (I) v Secretary of State for the Home Department* [2002] EWHC Civ 288, where Simon Brown LJ said:

> "The likelihood or otherwise of the detainee absconding and/or re-offending seems to me to be an obviously relevant circumstance."

and also in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 where Keene LJ described the risk of offending as a factor which in most cases will be of great importance.

31. In the case of A, Toulson LJ said this at paragraph 55:

> "A risk of offending, if the person is not detained, is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring, and the potential gravity of the consequences."

Then, a little later in the same paragraph, he says:

> "The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom, and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of the propensity to commit serious offences, protection of the public from that risk is the purpose of the Deportation Order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

32. On the facts of this case, I conclude that the risk of this claimant absconding is high. The history which I have already referred to indicates that he avoided the defendant's knowledge for a period of a number of years in the late 1990s and the early part of this century. He must have done so knowing that he was not entitled to be in the country, and that the defendant intended to remove him. He has used, according to the information I have, a large number of aliases during the time he has been in the country. I take the view that if he is released from detention it is very likely that he will abscond.

33. As to the risk of further offending, that, in my judgment, is very high. So high as to be almost inevitable. He has, as I have indicated, committed offences when released on bail, indeed the offences recorded in the schedule which I dealt with earlier indicate that a large number were committed on bail, and there are bail offences themselves. It is true that the scale of offending is not of the most serious, by that I mean it does not involve serious offences of violence to the person, nor does it involve, for example, sexual offences against women or children. Although the type of offending is not serious, there is a large amount of offending, and it is both the extent and the seriousness of offending which needs to be considered. I see no reason why, in general terms, members of the public should not be protected from offences against their

property as well as offences against their person. I recognise that in the ultimate balance a detainee who is likely to cause injury, particularly serious injury to the person of members of the public, is more likely to be held in detention than one who is likely to cause no such injury but damage to their property or loss of their property. But, at this stage of proceedings, it seems to me that the risk of absconding and the risk of offending, taking into account the high risk of absconding and the almost inevitability of offending, are factors which are sufficient to justify continued detention.

34. I now turn to the claimant's conduct during his detention. It is accepted that up until March of 2008 the claimant was being obstructive and refusing to cooperate with attempts to remove him. It is said in the written submissions on his behalf, that since March 2008 he has been cooperative. Initially, in written submissions filed, the defendant agreed, but the position has changed somewhat in the detailed grounds of defence filed yesterday on behalf of the defendant. It is said that on 7 March 2008, the claimant indicated that he would cooperate but has not been wholly cooperative since that date. On 14 July 2008 it is said that he refused to give the defendant details of his mother in France, saying that he had given her details before and she could not assist. It is right to say that there is a record, dated 2 July 2008, which refers to the claimant having given his mother's address in France already by that date. The record is an instruction that he be asked to write to her to see if she can give any details about his identity or previous addresses. In March 2008, a Bio Data form had been completed by the claimant, his fingerprints were taken in April 2008, and on 2 May 2008 the defendant interviewed him to obtain further details about his place of birth because those details were needed in the Bio Data form. The claimant, according to the updated detailed grounds of defence, stated that he was unable to provide those details. It is said that the defendant persisted in the attempt to obtain documents; the claimant was asked to provide more details of his mother, as I said his fingerprints were taken and a check against them made to establish whether he had any status in France. By 18 July 2008 it was established that there was no indication that he had status in France.

35. He was interviewed on 28 August 2008 and gave details of two brothers who he claimed lived in the United Kingdom. He stated that he knew the telephone numbers of his brothers and his wife's address but would not disclose those details without the consent of the brothers and his wife. On 31 October 2008 it is said that the defendant contacted the police to try to locate the French identity papers which the claimant claimed to have, it will be recalled that when he entered the country illegally it was upon that basis. Enquiries were made at Uxbridge Police Station where the claimant had claimed that he was arrested. They were unable to help and said that the claimant had never in fact been arrested at that station. The defendant then contacted Charing Cross Police Station where it seems the bulk of the claimant's arrests had taken place, but received no answer from that police station.

36. On 3 December 2008, an application for a travel document was submitted to the Algerian Embassy, which included the information which the defendant had by then, and it is said that a response from the Embassy is still awaited. In April 2009 the defendant contacted the Embassy for an update but was informed that a response from the Algerian authorities was still awaited. Finally, bringing the matter up-to-date, it is said that on 7 May 2009 the Algerian Consulate confirmed that the claimant's mother,

who lives in Paris, was to take his birth certificate to the Algerian Consulate in London, and travel documents would then be issued. The claimant said that he was prepared to contact his mother in an attempt to facilitate that process, and on 7 May he agreed to telephone her. He was given the opportunity to do so but declined to do so until a time between the dates of 15 June and 25 June 2009. The claimant now contends, apparently, that he has spoken to his mother, and she has told him that he was adopted at the age of 4, and that she does not have his birth certificate. He claims that she is now trying to obtain his adoption papers. It was unclear to the defendant whether the claimant was suggesting that he had been unaware that he had been adopted until this telephone call, though Mr Denholm, who has been able to take some instruction on this up-to-date information, informs me that the claimant's instructions are that he had known since he was a child that he had been adopted.

37. The difficulty with this information is that it is provided only in the detailed grounds of defence, and I am informed by Mr Singh that if a statement were to be taken from an official of the defendant department then what is contained in the detailed grounds of defence would be confirmed. Mr Denholm was concerned about the information for understandable reasons. Firstly, information of that sort can be misconstrued as it is passed from person to person; secondly, if a statement is taken, the mind of the maker of the statement is concentrated upon the accuracy of what is being written down; and thirdly, if supporting documents can be provided then they too enable the parties and the Court to evaluate that information. Accordingly, I indicated to Mr Denholm that I was prepared, since this is a rolled up application and I am dealing with leave, to adjourn matters and give a direction that the information contained in the detailed grounds be provided in an evidential form. Mr Denholm took instructions on that but declined my offer of making an order on those terms. That means that I can not ignore the information contained in the detailed grounds of defence, I must take it into account in some way. I am conscious that it has not been verified in any way by a witness statement, but nevertheless I accept what Mr Singh says, namely that those are the instructions he has been given, and he puts them forward on the basis that they are accurate and correct and can be supported by a statement if required.

38. It follows, it seems to me from that information, that although progress is being made and some cooperation is being given by the claimant, total cooperation is still to some extent lacking. If the birth certificate had been provided, on the information contained in the detailed grounds, the necessary travel document would have been issued by the Algerian Consulate or Embassy in London. It may now be the case, though this remains unclear, that if the necessary adoption papers can be provided then such a document will be issued. If that is the case then of course removal can take place in the reasonably near future. Doing the best I can on that information, I take the view that it is a relevant factor in determining whether, under principle (ii) identified by Dyson LJ, detention up-to-date has been unreasonably long, and my conclusion is that it has not, and is not therefore unlawful. It is also of course relevant to principle (iii), namely, in summary, whether within a reasonably prompt time removal may be achieved. Again, on the information, it seems to me that removal may be achieved within a reasonable time. There is every prospect of that happening once appropriate documents have been provided to the Algerian authorities, who have been slow hitherto, but since May appear to have been prepared to issue the necessary travel document.

39. The same evidence is relevant to (iv), which of course requires the defendant to act with reasonable expedition. I have set out the history; in every month since March of 2008, up to which time it is accepted that the defendant was not cooperating, save for I think June and November, some steps appear to have been taken up to December last year when the Algerian Embassy was asked to provide the travel document. Delays thereafter have been occasioned by the requirements of the Algerian authorities. Accordingly, I do not find that detention of the claimant is unlawful under any of the three common law principles, as Mr Denholm refers to them, identified as principles (ii), (iii) and (iv) by Dyson LJ.

40. I turn now to the next basis upon which the decision to detain the defendant is challenged, that is that his transfer from the Immigration Removal Centre to Wandsworth Prison in December of 2008 was contrary to policy. Mr Denholm refers to paragraph 55.10.1 of the EIG to which I have already referred. That provides that:

> "Immigration detainees should only be held in prison establishments when they present specific risk factors that indicate they pose a serious risk to the stability of the Immigration Removal Centres. Risks which would indicate that detainees should be held in prison accommodation include, but are not restricted to, the following circumstances..."

A number of risks are then set out, criminality is one, but the footnote to that is this:

> "Those detainees who have been involved in serious offences involving the importation and/or supply of class A drugs, committed serious offences involving violence, or committed a serious sexual offence requiring registration."

The claimant has a bad criminal record but not of that type. Also included is this:

> "Behaviour during custody where an immigration detainee's behaviour whilst in either an IRC or prison custody makes them unsuitable for the IRC estate, for example numerous proven adjudications for violence or incitement to commit serious disorder which could undermine the stability of the IRC estates."

It is said that those are risks which would indicate detention in prison accommodation, but such risks are not restricted to those circumstances.

41. In this case the reason why the claimant was transferred from the IRC to prison is set out in a letter dated 27 February 2009 from the Border Agency to the claimant's solicitors. At paragraph 3 this is said:

> "The claimant has proved himself wholly unsuitable to be detained within an Immigration Removal Centre, as mentioned in previous correspondence he was relocated to HMP Wandsworth because he was deemed a 'prominent nominal' which is a level reserved for only the most troublesome of detainees. The claimant in his time at Colnbrook was described as very non-compliant, intimidating and aggressive to staff

> members, destructive, and would encourage non-compliance in other detainees. The claimant will be able to be managed more effectively in a prison environment. As such, the claimant will not be accepted in any Immigration Removal Centre."

42. In support of that evaluation of the claimant's conduct, Mr Singh referred to incidents which had occurred during his previous detention, that is the first period of detention which I have ruled not to be susceptible to review on this application. He also relies on evidence contained in a witness statement filed on behalf of the defendant by Mr Andre Cockell who is a Senior Executive Manager in the Criminal Casework Team. Annexed to that witness statement is a Home Office document which records an incident which occurred on 15 November 2007. This is an incident of course which occurred after the second period of detention began. It records that the claimant was placed into level 2 for trying to incite other detainees to disrupt the good order and running of the Centre. There, he self-harmed using an unknown item, he refused to be treated by health care staff, and carried on refusing to comply with all lawful requests made to him, saying that he had a razor and that he would use it on any member of staff left with him on a continuous watch. The claimant was then given an instruction to walk with the staff to the Care and Separation Unit. Because of his total lack of compliant behaviour and threats to the staff, he refused to comply. A response team was called and told to kit up because of the risk of blood and threat of a possible weapon. The claimant was then given another chance to walk with the Response Team present, he complied with that, he walked to the Care and Separation Unit. A full search was carried out, nothing was found, and he was thereafter on continuous watch.

43. It is arguable, as Mr Denholm submits, that more than that single incident was necessary. But it seems to me that that single incident is relied upon as illustrative of a general attitude manifested by the claimant towards the staff and other detainees at the Immigration Removal Centre where he was being detained. In the end it must largely be a matter of judgment for those running the Immigration Removal Centre whether they can maintain order and control other detainees while this claimant remains there. If they can not, then it seems to me that it is perfectly justifiable, and in accordance with the policy, to direct that the detention of the claimant should be, not at the Removal Centre, but at a prison. I am not persuaded therefore that the decision to move the claimant to Wandsworth Prison in December 2008 was unlawful.

44. At Wandsworth Prison the claimant was held for a period of time between about 20 December 2008 and about 15 April 2009 in a cell which he shared with a convicted prisoner. Mr Denholm complains about the way in which the claimant was detained at Wandsworth, and relies, again, upon policy. The policy on which he relies is contained in the Prison Service Order 4630, paragraph 3.9 of which provides that persons detained only under the Immigration Act must be treated as unconvicted prisoners with the same status and privileges. Paragraph 3.13 states:

> "Where a prisoner is held beyond the release date of a custodial sentence in a prison which does not normally hold unconvicted prisoners, the prisoner needs to be aware that he will be held with convicted prisoners, and his agreement must be recorded."

45. Other statements of policy found in the Prison Services Order include these:

> "Unconvicted prisoners have not been tried and are presumed to the innocent. The prison service's sole function is to hold them in readiness for their next appearance at court.
>
> "Their imprisonment should not deprive them of any of their normal rights and freedoms as citizens, except where this is an inevitable consequence of imprisonment of the court's reason for ordering their detention, and to ensure the good order of the prison.
>
> "Instructions or practices that limit their activities must provide only for the minimum restriction necessary in the interests of security, efficient administration, good order and discipline, and for the welfare and safety of all prisoners."

And then:

> "A mandatory requirement: subject to these conditions they must be treated accordingly, and in particular will be allowed all reasonable facilities to preserve their accommodation and employment, prepare for trial, maintain contact with relatives and friends, pursue legitimate business and social interests, and obtain help with personal problems."

46. By Prison Order 4630, reflecting paragraph 1.4, it is provided:

> "An unconvicted prisoner must not, in any circumstances, be required against their will to share a cell with a convicted prisoner."

And by paragraph 1.5:

> "Where it seems necessary that an unconvicted prisoner should share a cell with a convicted prisoner, their explicit consent must be obtained."

47. On 6 February 2009, solicitors acting for the claimant wrote to the defendant drawing attention to the following matters: firstly, that the claimant was sharing a cell with a convicted prisoner serving a sentence for an offence contrary to section 20 of the Offences Against the Person Act 1861; secondly, that he had particular dietary requirements that were not being complied with; thirdly that he was locked up for 23 hours a day; and fourthly, that he had limited access to a telephone and limited visiting rights. They point out that it was a much more restrictive regime than at the Removal Centre and it restricted his ability to contact the solicitors and others outside the prison. If that is correct, and there is no reason to suspect that it is not, then it seems to me that the way in which the claimant was being held at Wandsworth Prison, certainly between the dates I have mentioned, in December of 2008 and April 2009, was not in accordance with the Prison Services Policy for the way in which an immigration detainee should be held.

48. Article 5 of the European Convention on Human Rights prohibits the deprivation of the person's liberty except in accordance with law and on prescribed grounds. Ground F is as follows:

> "The lawful arrest or detention of a person to prevent his effecting unauthorised entry into the country, or as a person against whom action is being taken with a view to deportation or extradition."

49. Mr Denholm submits that in interpreting that Article the European Court has made it clear that there must be some relationship between the ground of permitted deprivation of liberty relied on, and the place and conditions of detention. Here, he submits, the claimant was detained as an Immigration Act detainee, and the conditions of detention should have been in accordance with the Prison Service Order, but plainly were not. He does not submit that that makes the detention unlawful, plainly it does not make it unlawful, it is lawful for an immigration detainee to be held in the same cell as a convicted prisoner, it simply requires his express agreement as a prerequisite to that step. What it does amount to, Mr Denholm submits, is a breach of the claimant's rights under Article 5, which by virtue of sections 6, 7 and 8 of the Human Rights Act 1998, entitles him to claim damages against the defendant. Mr Singh does not directly address the argument about breach of the policy under which the claimant should be detained, save that he submits that in the absence of complaint it might be inferred that the claimant was content with the way in which he was held. The difficulty with that is that there is a letter from the solicitors during the period of detention which indicates that he was not happy. More significantly, he submits that if there is a breach of the policy contained under the Prison Service Order, that is not a breach for which this defendant is responsible. The appropriate defendant is the Secretary of State for Justice who has responsibility for prisons. Mr Denholm submits that that may be so, and the Secretary of State for Justice may also be liable, but overall the claimant is detained under the authority of the Secretary of State for the Home Department conferred upon him by Schedule 3 to the Immigration Act 1971, and that therefore a declaration and damages against the Secretary of State for the Home Department is a remedy which can be maintained in these proceedings. Neither counsel has been able to refer me to any authority either way upon this point, and in the end it seems to me it is open.

50. On balance I prefer the argument of Mr Denholm on this point. I accept that the Secretary of State for Justice may also have breached the human rights of the claimant in the respects that I have indicated, but I am satisfied that the Secretary of State for the Home Department is not thereby absolved of responsibility. Accordingly, on this point I am prepared to make a declaration that the claimant's rights under Article 5 have been infringed by the manner of his detention at Wandsworth between 20 December 2008 and 15 April 2009, and direct that there be an inquiry as to appropriate damages in respect of that breach. Save in that respect however, I refuse permission for this application for judicial review.

51. Gentlemen, that took rather longer than I expected it would, I am sorry. Do you want to consider what directions are necessary with respect to determination of damages, and perhaps file agreed directions at court rather than my keeping you any later, and keeping the court staff here any later?

52. MR DENHOLM: Gladly, my Lord, yes. My Lord, there is just briefly the question of permission to appeal. My Lord, had you granted permission and then dismissed our claim I think I would be bound to seek permission from your Lordship, but as your Lordship has refused permission I do not actually think your Lordship, if I understand the decision correctly, I do not think your Lordship has the power to give permission to appeal, so I do not think I need to ask for it.

53. THE DEPUTY JUDGE: I think that is right.

54. MR DENHOLM: I am grateful. If I could request -- I see that a transcript is being taken -- if I could request a direction that production of the transcript be expedited so we can consider position.

55. THE DEPUTY JUDGE: Yes, certainly.

56. MR DENHOLM: My Lord, if I could also request a direction for a detailed assessment of my client's publicly funded costs, whatever may happen on the costs front.

57. THE DEPUTY JUDGE: Yes.

58. MR SINGH: My Lord, as far as costs are concerned, given that this was a rolled up hearing, could I ask for an order that, given that the Secretary of State was largely successful, that the claimant do pay the defendant's costs, but such order not to be enforced without leave of the court because the claimant is legally aided.

59. THE DEPUTY JUDGE: Well, you did not win on everything. I suppose I could make a percentage order.

60. MR SINGH: Yes, that is a possibility.

61. THE DEPUTY JUDGE: You won on the bulk of points.

62. MR SINGH: Was it three out of four or something? I think it was three out of four. I suppose a percentage apportionment is possible.

63. THE DEPUTY JUDGE: Seventy-five percent.

64. MR DENHOLM: My Lord, as ever in these cases the reality is that the prospect of the Secretary of State ever enforcing it is remote, but I am not in a position to oppose the application, save, as your Lordship says, that it can not cover the whole of the proceedings.

65. THE DEPUTY JUDGE: What I will do as to costs, I will direct detailed assessment of the public funding costs of the claimant. I will order that the claimant pay 75 per cent of the defendant's costs, to be determined by a detailed assessment, not to be enforced without the permission of the court, under whatever the relevant section is, I have forgotten it now. I will simply say not to be enforced without the permission of the court, we all know what I am talking about, at least I hope we do.

66. Those are all the matters I think. Thank you very much.

67. MR DENHOLM: My Lord, sorry, in terms of the -- shall my learned friend and I agree an order reflecting those points and the--

68. THE DEPUTY JUDGE: If you would, and send it into the court. Do you want seven days to do that?

69. MR DENHOLM: I think we can probably do it by tomorrow.

70. THE DEPUTY JUDGE: Could you? Right, well if you could do it by tomorrow that would be excellent.

71. MR DENHOLM: My Lord, I think seven days might suit my learned friend better.

72. THE DEPUTY JUDGE: All right, seven days for counsel to draft the appropriate order and submit it to the court within seven days for approval.

73. MR DENHOLM: I am grateful.

74. THE DEPUTY JUDGE: Thank you very much.