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Case No: CO/7349/2008 and
C/7302/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2010

**Before**:

**THE HON MR. JUSTICE BURNETT**

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**Between:**

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| **Mohamad Aziz Ibrahim and Aran Omer** | **Claimants** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Defendant** |

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**Mark Symes** (instructed by **Pierce Glynn**) for **Mohamad Aziz Ibrahim**
**Amanda Weston (**instructed by **Pierce Glynn)** for **Aran Omer**
**Sarabjit Singh** (instructed by T**reasury Solicitor**) for the **Secretary of State for the Home Department**

Hearing date: 9th February 2010

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# Judgment

**The Hon Mr. Justice Burnett:**

## Introduction

1. The claimants in both these claims are Iraqi nationals who were detained under Paragraph 2 of Schedule 3 of the Immigration Act 1971 ("the 1971 Act"). They had previously been sentenced to terms of imprisonment and so were foreign national prisoners ("FNPs"). Each contends that his detention following the date on which he would have been released on licence from his prison sentence was unlawful. Both applications come before the court as rolled-up permission hearings after a convoluted procedural history. They raise a common issue relating to the policy of the Secretary of State, withdrawn on 14 January 2008, that he would not take enforcement action against nationals who originate from countries which were 'active war zones'. Both applicants contend that at the time enforcement action was taken against them, Iraq was an active war zone. In consequence, the applicants submit that their detention was unlawful from beginning to end. They also submit that the policy of detaining FNPs was on a general basis unlawful because of the finding of Davis J in *R (Abdi and others) v Secretary of State* [2008] EWHC 3166 (Admin) that the Secretary of State applied an unlawful policy to the detention of FNPs. Mr Ibrahim submits that his detention was unlawful in whole, or in part, because it was never reasonable to detain him and because there was no prospect of removal within a reasonable time. Mr Omer submits that in his case, even if there was a power to detain, its exercise was irrational and founded upon a failure to consider all relevant matters. Additionally, even if the detention was initially lawful, he submits became unlawful because it was soon apparent that there was no reasonable prospect of removal.

2. At the outset of the hearing Miss Weston sought an anonymity order on behalf of Mr Omer. I rejected that application because there was no arguable factual or legal basis in support of it. It was advanced to avoid the possibility that Mr Omer's name might be reported in the context of an article mentioning his criminal convictions or critical of his efforts to remain in the United Kingdom. That provides no proper basis for according anonymity to a litigant in public law proceedings. No enforceable rights of Mr Omer are put at risk if he brings these proceedings in the normal way.

3. Mr Ibrahim arrived in the United Kingdom clandestinely on 11 February 2005. He unsuccessfully claimed asylum. His appeal against that decision was dismissed on 8 June 2005. On 16 October 2006 he was convicted of assault with intent to rob and sentenced to two years' imprisonment with a recommendation for deportation. The Secretary of State decided to make a deportation order on 23 July 2007. Mr Ibrahim was due to be released on licence on 3 August 2007 but his detention was maintained thereafter under Paragraph 2(1) of Schedule 3 of the 1971 Act. He appealed the decision to make a deportation order to the Asylum and Immigration Tribunal ("AIT"), but his appeal was dismissed on 18 September 2007. The argument that enforcement action was inconsistent with the 'active war zone' policy was not taken in the AIT. A deportation order was served on 11 October 2007. From that date Mr Ibrahim was detained under Paragraph 2(3) of Schedule 3 of the 1971 Act. He was released from custody on 23 September 2008, bail having been granted in these judicial review proceedings a few days earlier. The proceedings had

been issued on 5 August 2008. The total period of detention was 14 months and 11 days.

4. Mr Omer says that he arrived clandestinely in the United Kingdom on 2 October 2002 and claimed asylum a week later. His claim was refused but he was granted exceptional leave to remain for four years from 6 December 2002. On 23 December 2004 he was convicted of using threatening behaviour and sentenced to a 50 hour community punishment order. On 13 June 2006 he pleaded guilty at Leeds Magistrates in respect of offences of battery, burglary and carrying a bladed article, committed over a period of several months from the Autumn of 2005. He was sentenced to 12 months' imprisonment at the Crown Court, to where he had been committed, on 8 August 2006. There was no recommendation for deportation. On the day he was due for release from custody, 6 December 2006, Mr Omer was detained under Paragraph 2(2) of Schedule 3 having been served with a notice of intention to deport. He appealed that decision to the AIT but his appeal was dismissed on 30 March 2007. He too did not rely upon the 'active war zone' policy. He sought a review of that decision but his application was dismissed by the Senior Immigration Judge. His appeal rights thus because exhausted in May 2007. After a number of unsuccessful applications to the AIT, Mr Omer was eventually granted bail on 8 August 2008. These proceedings were issued on 4 August 2008. Mr Omer was detained in total for 20 months and 2 days.

## The Legal Framework

5. The statutory provisions governing immigration detention and deportation action are found in the 1971 Act. Liability to deportation arises under sections 3(5) and (6) together with section 5. They provide:

> "3(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –
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> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (6) Without prejudice to the operation of subsection (5) above, a person who is not a [British citizen] shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.
>
> …
>
> 5(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and

> prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

The powers of detention material for the purposes of these applications are found in Schedule 3 of the 1971 Act:

> "1. — (1) Where a deportation order is in force against any person, the Secretary of State may give directions for his removal to a country or territory specified in the directions being either—
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> (a) a country of which he is a national or citizen; or
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> (b) a country or territory to which there is reason to believe that he will be admitted.
>
> ….
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> 2. (1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs, or a direction is given under sub-paragraph (1A) below, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary or State directs him to be released pending further consideration of his case or he is released on bail.
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> (1A) Where –
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> (a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and
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> (b) he appeals against his conviction or against that recommendation,
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> the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.
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> (2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall

> continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

6. Thus an FNP who has been the subject of a recommendation for deportation by the sentencing court will be detained under the authority of Paragraph 2(1) of Schedule 3 until a deportation order is made unless the Secretary of State, or a Court considering a criminal appeal, directs his release. If a deportation order is made, the power to detain is found in Paragraph 2(3) of Schedule 3. An individual (whether a FNP or not) who is served with a notice of a decision to make a deportation order may be detained under Paragraph 2(2) of Schedule 3 until a deportation order is made. Thereafter detention may be maintained pursuant the power contained in Paragraph 2(3) of Schedule 3.

7. It follows that a distinction must be drawn between detention under paragraph 2(1), on the one hand, and paragraphs 2(2) and 2(3), on the other. Such a distinction was noted by the Court of Appeal in *R (WL Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111. That was one of the cases heard by Davis J with *Abdi,* and was principally concerned with the legal implications of an unpublished policy being applied in contradiction of the published policy..

8. Paragraph 2(1) of Schedule 3 is the legislative authority for detention in the case of an FNP who has been recommended for deportation by a criminal court. If it is suggested that the Secretary of State has unlawfully failed to direct the release of such a person, that decision may be challenged in judicial review proceedings. The Secretary of State may be required to take the decision again, but the legislative authority for the detention is unaffected and there will be no claim for false imprisonment in such circumstances for any period of detention pursuant to Paragraph 2(1) of Schedule 3. The detention remains lawful: see *WL Congo* at paragraph [88].

9. When a decision to detain is made under paragraphs 2(2) or 2(3), the position is different. This is how it was put in *WL Congo:*

> "89. The position is different when the decision to detain is made under sub-paragraph (2) or (3). In these cases, there is no lawful authority to detain unless a lawful decision is made by the Secretary of State. The mere existence of an internal, unpublished policy or practice at variance with, and more disadvantageous to the FNP than, the published policy will not render a decision to detain unlawful. It must be shown that the unpublished policy was applied to him. Even then, it must be shown that the application of the policy was material to the decision. If the decision to detain him was inevitable, the application of the policy is immaterial, and the decision is not liable to be set aside as unlawful. Once again, however, once a decision to detain has lawfully been made, a review of detention that is unlawful on *Wednesbury* principles will not necessarily lead to his continued detention being unlawful.
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> 90. For completeness, we would add that the test of materiality may not be precisely the same as in the context of an application for a

quashing order in judicial review. In that context, a court, faced with a judicial review claim made promptly following the original decision, would be likely to quash a decision, and require it to be retaken, even if the evidence showed only a risk that it might have been affected by the illegality. However, in the context of a common law claim in tort, which is concerned not with prospective risk, but actual consequences, we think it would be entitled, if necessary, to look at the question of causation more broadly, and ask whether the illegality was the effective cause of the detention (see e.g. *Galoo Ltd v Bright Grahame Murray* [1994] 1WLR1360, 1374; and the discussion of "Causation in Law" in *Clerk & Lindsell Torts* 19th Ed, paras 2-69-71)."

10. The power to detain found in Paragraph 2 of Schedule 3, although expressed is unlimited terms, is subject to the restrictions articulated by Woolf J in *Hardial Singh* [1984] 1 WLR 704, 706:

"Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.

In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

11. In *R (I) v Secretary of State* [2003] INLR 196; [2002] EWCA Civ 888 at paragraph [46] Dyson LJ distilled what was said in *Hardial Singh* to four propositions, which he elaborated in paragraph [47]:

"(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

(ii) the deportee may only be detained for a period that is reasonable in all the circumstances;

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

12. As already noted, the decision of the Court of Appeal in *WL Congo* was given in an appeal from the collection of cases heard by Davis J in *Abdi and others.* The cases before Davis J concerned detention of FNPs pursuant to an unpublished policy which he concluded contained a presumption in favour of detention. That was in apparent conflict with the published policy of the Secretary of State which indicated a presumption in favour of release. The Judge had declared that a policy containing a presumption in favour of detention was unlawful. He nonetheless dismissed the various claims for damages before him on the grounds that the claimants would anyway have been detained, a causation point. The Court of Appeal allowed the Secretary of State's appeal against the declaration and rejected the claimants' appeals against the dismissal of their claims on causation grounds. It did so on the following bases:

(1) A policy involving a presumption of detention would not in itself necessarily be unlawful.

(2) A policy of detention which effectively operated on a blanket basis would be unlawful.

(3) The Court concluded that the unpublished policy was not one of 'presumption' but a secret blanket policy or practice, which was unlawful because it conflicted with, and was less favourable to the Appellants than, the published policy. But this did not make the detention unlawful unless the unlawful practice or policy was a material cause of the detention. It was necessary, therefore, in every case in which it was relevant to do so, to ascertain whether detention was authorised by reference to the blanket practice or policy or by consideration of a presumption or, indeed, without reference to any administrative practice or presumption.

(4) On the facts in the two cases before the Court of Appeal, the materiality was not established and so no question of damages arose.

13. The Judgment of the Court, given by Stanley Burnton LJ (after argument was concluded in the two applications before me), contains a succinct description of the legal impact of policies in various contexts:

> "53. In modern government, Ministerial policy statements are a familiar means of guiding, and explaining, the exercise of government powers and discretions (see e.g. the discussion in *Halsbury's Laws* Vol 8(2) *Constitutional Law and Human Rights* paragraph 7). We would make a number of comments relevant to the discussion of such statements in the present case.
>
> *Policy and Practice*
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> 54. First, for the purposes of legal analysis, it is desirable to distinguish between different categories of policy or practice. In the context of the present case we would distinguish (a) formal published policies, (b) formal *internal* policies, and (c) informal internal "practices". The most obvious example of (a) is a White Paper, which can be regarded as Government policy in the fullest sense, representing as it does a public statement of the settled view of government (normally following full consultation) on a particular subject. …. Other less formal published statements include the many circulars or guidance notes issued by Departments on a wide variety of topics, ranging from high level policy to practical guidance. An example in this case is the published Operations Enforcement Manual, which offers a more detailed statement of how the relevant policies are operated in practice.
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> 55. Under (b) we would include internal statements of policy or practice, which have been subject to some form of process leading to what may be regarded as formal Departmental approval, but are not intended for general publication… We suggest that the term "policy" would normally be reserved for such formalised statements, as distinct from category (c), that is, matters of internal practice, which, however prevalent, have never been subject to any formal process, internal or external…
>
> 56. It is also important, when considering the effect of departure from policy to distinguish between illegality and administrative muddle. As Carnwath LJ said in a recent case:
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> "… The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck, or sheer muddle. It is the unlawfulness, not the cause of it,

> which justifies the court's intervention, and provides the basis for the remedy. Conversely, if the 2004 decisions were otherwise unimpeachable in law, I find it hard to see why even "flagrant" incompetence at an earlier stage should provide grounds for the court's (as opposed to the ombudsman's) intervention." (*R (S) v SSHD* [2007] EWCA Civ 546 paragraph 41).
>
> *Policy and law*
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> 57. Secondly, to state the obvious, policy is not the same as law. The Home Secretary is not a legislator, except to the extent (not relevant here) that he has been given specific powers to make delegated legislation. This is as true under the Convention as it is in domestic law. Indeed, it is clear that, where the Convention requires something to be done in a manner "prescribed by law", that means what it says; mere administrative policies are not good enough: see *R (Gillian) v Commissioner of Police of Metropolis* [2006] UKHL 12; [2006] 2 AC 307 at paragraphs 31 to 34 per Lord Bingham.
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> 58. However, although policy is not to be equated with law, it may give rise to obligations or restrictions in public law. Depending on the context, that may be explained in different ways. For example, a failure by the Secretary of State to apply his own published policy without good reason may be reviewable as a breach of legitimate expectation (see e.g. *R (Abbasi) v Foreign Secretary* [2003] UKHRR 76; [2002] EWCA Civ 1598, paragraph 82). A different analysis is needed where the decision is by a different body. Thus, a failure by a local planning authority to have regard to planning policy guidance issued by the Secretary of State is not a breach of any expectation created by the authority, but may be categorised as a failure "to have regard to material considerations", under familiar *Wednesbury* principles. More broadly, such cases may sometimes be analysed as examples of inconsistency or unfairness amounting to abuse of power. Indeed, we may have arrived at the point where it is possible to extract from the cases a substantive legal rule that a public body must adhere to its published policy unless there is some good reason not to do so. The treatment of such concepts may vary in the cases and textbooks, but the differences are usually immaterial. The principles are well summarised in the discussion in *Wade & Forsyth Administrative Law* 10th Ed p 315: "Inconsistency and unfairness, legitimate expectation"; see also *De Smith's Judicial Review* 6th Ed p 618 "To whom directed - personal or general?")

14. This last observation emphasises the need for any claim for illegality arising from an alleged failure to apply a policy to be developed by reference to a recognised public law ground of challenge. A failure to apply a policy does not, without more, lead to the conclusion that the decision in question was unlawful. Neither does it lead to the conclusion, if the decision was to detain, that the resultant detention was necessarily unlawful. Stanley Burnton LJ considered the judgment in the Court of Appeal in *R (Nadarajah) v Home Secretary* [2003] EWCA Civ 1768. It

had been widely understood as deciding that the Home Secretary's published policy in this environment amounted to 'law' for the purposes of Article 5 ECHR, with the consequence that a failure to comply with it would render the detention that followed unlawful. However, he explained that *Nadarajah* could not support the proposition that the Secretary of State's published policy was to be equated with law, for the purposes of Article 5 ECHR or otherwise. *Nadarajah*, which concerned a conflict between published and unpublished policy, was explicable as a decision based in legitimate expectation: see paragraphs [76] – [79] in *WL Congo*.

15. The Court of Appeal in *WL Congo* was bound by the decision in *SK (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 1204. That was a claim for false imprisonment based upon *Hardial Singh* principles and additionally on the failure of the Secretary of State to carry out regular reviews as required by the Detention Centre Rules 2001 and the Operations Enforcement Manual. The Judge rejected the challenge by reference to *Hardial Singh* but concluded that the Secretary of State's failure to review detention as required by the Rules and the Manual rendered the detention unlawful. The Court of Appeal demurred. That Court's conclusions are found in paragraph [35] of the judgment of Laws LJ:

> "In seeking to formulate the issue before us I posed the question, what is the reach of the power conferred by paragraph 2(2) of Schedule 3 to the Immigration Act 1971, and characterised it is a question of statutory construction. In light of all the matters I have canvassed I would summarise my conclusions on this issue as follows:
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> i) Compliance with the Rules and Manual as such is not a condition precedent to a lawful detention pursuant to paragraph 2(2). Statute does not make it so (contrast s.34(1) of PACE, and the case of *Roberts* [1999] 1 WLR 662). Nor does the common law or the law of the ECHR.
>
> ii) Avoidance of the vice of arbitrary detention by use of the power conferred by paragraph 2(2) requires that in every case the *Hardial Singh* principles should be complied with.
>
> iii) It is elementary that the power's exercise, being an act of the executive, is subject to the control of the courts, principally by way of judicial review. So much is also required by ECHR Article 5(4). The focus of judicial supervision in the particular context is upon the vindication of the *Hardial Singh* principles.
>
> iv) In the event of a legal challenge in any particular case the Secretary of State must be in a position to demonstrate by evidence that those principles have been and are being fulfilled. However the law does not prescribe the form of such evidence. Compliance with the Rules and the Manual would be an effective and practical means of doing so. It is anyway the Secretary of State's duty so to comply. It is firmly to be expected that hereafter that will be conscientiously done."

## The Active War Zone Policy

16. Chapter 12 Paragraph 3 of the Operational Enforcement Manual concerned 'those exempt from deportation'. It set a out a number of categories and then concluded with:

> "Enforcement action should not be taken against nationals who originate from countries which are currently active war zones. Country Information Policy Unit (CIPU) or enforcement Policy Unit (EPU) will provide advice on this."

The policy was withdrawn on 14 January 2008. The circumstances in which that occurred reflected a surprising state of affairs, as Sedley LJ (giving the leading judgment) put it in *Secretary of State v HH (Iraq)* [2009] EWCA Civ 727. The policy had been in place for many years, certainly from long before the coming into force of the Human Rights Act and had fallen into disuse. It appears that after the coming in force of that Act the policy was simply never applied although it continued to be accessible on the UKBA website and was set out in the 2005 edition of Macdonald's Immigration Law and Practice. The policy was relied upon by the appellant *HH* in reconsideration proceedings before the AIT. As soon as the Secretary of State was reminded of the existence of the policy by that mechanism, immediate steps were taken to withdraw it. The Secretary of State's explanation was that the policy had become otiose. Although no evidential material contemporary with its introduction was available, the view of the Secretary of State contained in a letter written at the time of the policy's withdrawal was that it was designed to prevent removal of individuals to an environment where, as a result armed conflict, they would face unacceptable danger. Since 2 October 2000 the Human Rights Act has provided some equivalent protection which has been augmented by Article 15 of the Qualification Directive (Council Directive 2004/83/EC). So, reasoned the Secretary of State, when those protections were added to that provided by the Refugee Convention, the policy no longer served any practical purpose.

17. The claimants submit that at the time enforcement action was taken against them Iraq was an active war zone, giving those words their ordinary meaning. In the result, they suggest that the Secretary of State failed to have regard to a material factor in deciding to take enforcement action. His decisions were thus *Wednesbury* unreasonable and unlawful, rendering subsequent detention unlawful. There are many steps in that reasoning but the starting point in the assertion that Iraq was an active war zone both on 23 July 2007 and 10 October 2007 (respectively the dates on which the Secretary of State made a decision to make a deportation order against Mr Ibrahim and the deportation order) and 6 December 2006 (the date of the decision to make a deportation order in Mr Omer's case).

18. No direct judicial consideration of the meaning of the phrase 'countries which are currently active war zones' has been discovered in counsel's researches. It is common ground that this policy, like others, must be interpreted according to a reasonable person's understanding informed by an examination of the presumed intent of the policy maker: *Raissi v Secretary of State for the Home Department* [2009] QB 564. The AIT in *HH v Secretary of State* [2008] UKAIT 00051 concluded that Iraq was an active war zone. It did so by a short route of reasoning. The Secretary of State accepted for the purposes of Article 15(c) of the

Qualification Directive that there was 'internal armed conflict' in Iraq. Therefore, the AIT reasoned that Iraq was a currently active war zone: see paragraphs [11] to [15] of the determination. The AIT went on to conclude that the service of a notice of intention to deport constituted enforcement action. The Secretary of State appealed on a number of short grounds. First, that the policy was an unlawful fetter upon the Secretary of State's discretion and so should not be given effect. That was rejected with Sedley LJ noting that:

> "It has been known for many years that the Home Office, for entirely intelligible reasons, does not return foreign nationals to parts of countries where war is raging or uncontrolled violence is endemic. This court has recently noted as much in its decision on the interpretation of article 15 of the Qualification Directive in *QD (Iraq)* [2009] EWCA Civ 620: see §21. But to announce such a policy may well have been thought a potential magnet for nationals of such states who had no affirmative entitlement to enter or remain here, and it may well be for this reason that, as Mr Palmer puts it, the OEM policy "lay unnoticed over a number of years until this appeal, and is not known to have been applied, at least in recent years". What undoubtedly can be said is that since the coming into effect of the Qualification Directive, the practice of the UK and many other European states in this regard has in large part acquired the force of law." [6]

The second submission was that 'enforcement action' did not include the decision to make a deportation order. That too was rejected in particular because such a decision could be appealed to the AIT on the basis of the Secretary of State's failure to have regard to his policy in making the order: paragraph [11]. The Secretary of State's third submission was that the failure to have regard to the policy did not render the decision 'not in accordance with the law' for the purposes of section 86 of the Nationality, immigration and Asylum Act 2002 which governs the determination of appeals to the AIT. That too was rejected. None of these arguments involved a challenge to the conclusion that Iraq was indeed an active war zone. Sedley LJ noted:

> "For reasons which we have not been asked to review, though which the Home Secretary does not necessarily accept, [the AIT] concluded that Iraq was as that date [i.e. January 2007] an active war zone."

19. In placing a meaning on the policy, a good starting point is the presumed intent of the policy maker. Why would it be inappropriate to start enforcement action against someone whose country was an active war zone? There is little difficulty in understanding what is meant by an 'active war zone'. It is an area within which armed conflict is being actively waged by opposing forces or groups. It is an area in which fighting is taking place with the result that all within the area are exposed to serious physical risk, irrespective of their personal characteristics. Sedley LJ put his finger on the underlying reason for the policy in *HH Iraq* when he said:

> "It has been known for many years that the Home Office, for entirely intelligible reasons, does not return foreign nationals to parts of countries where war is raging or uncontrolled violence is endemic."

Those intelligible reasons arise from common humanity. To return an individual into an environment of active fighting with an attendant risk of death or serious injury would not accord with the principles of common humanity.

20. Mr Symes submits that the policy may have its foundations in a concern for Home Office staff (or their contractors), who might be called upon to escort an individual back to country where there is conflict, and not necessarily be concerned with the personal safety of the person being removed. Mr Sarabjit Singh submits that the policy is evidently rooted in a concern for the safety of those being returned. That submission is well-made. It seems to me highly unlikely that the policy was motivated by a concern for Home Office staff, or their delegates. The relevant paragraph is concerned with categories of people who are exempt from deportation and not with the welfare of escorts, or even the nuts and bolts of the removal process.

21. The language of the policy talks of 'countries which are currently active war zones.' The policy is concerned with countries that for practical purposes can be considered in their entirety to be active war zones. The underlying concern is that there is nowhere in the country to which a person may safely be returned. Unlike the provisions of the ECHR and the Qualification Directive, which may be relied upon to resist removal to places of danger, this policy is not concerned with the individual circumstances of a returning person. It operates as a blanket inhibition because of the conditions in the country of origin. There are many countries in which active war zones may be found but relatively rarely would an entire country be considered an active war zone. Modern examples illustrate the point. There have been localised conflicts within the Russian Federation in recent years. The regions in which they have occurred might properly have been considered war zones for the duration of those armed conflicts. Yet the Russian Federation as a whole could not sensibly have been considered an active war zone. This policy could have had no general application to Russia. Many other countries have been host to serious conflicts without the whole of their territories becoming war zones. Sri Lanka is an example. By contrast, there have been other conflicts where all or most of a country could properly be considered a war zone. An example might be Georgia in the summer of 2008. A reasonable understanding of the policy could not interpret it as prohibiting enforcement action against a national simply because part of his home country might properly be considered a war zone, when safe return to other parts of the country was possible. On the contrary, what the policy was concerned with was the return of an individual to an environment which would, without more, place the person concerned at risk to his life or person.

22. On behalf of Mr Ibrahim Mr Symes draws my attention to a dozen observations by politicians and commentators which uses the language of 'war' to describe what was happening in Iraq in 2006 and early 2007. Miss Weston, for Mr Omer, adopted Mr Symes' submissions on this issue. Many of the observations were directed towards whether the internal conflicts in Iraq should be described as a civil war (for example Kofi Annan on 4 December 2006) and others towards the

conflicts with insurgents in which coalition forces were engaged. A number of observations of Robert Gates, the United States Secretary of Defence, are relied upon. In February 2007 he identified four different conflicts in Iraq: "One is Shia on Shia, principally in the south, the second is sectarian conflict principally in Baghdad, the third is the insurgency and the fourth is Al Qaida". The context of his observations was in resisting as too simplistic the label 'civil war' to what was going on in Iraq.

23. Within the list of observations identified by the claimants there are two references to a 'war zone'. One, from the Member of Parliament for Aldershot in January 2007, suggested that 'Iraq is effectively a war zone' he went on to suggest that Afghanistan certainly was a war zone. Yet he was making the point that it was euphemistic to suggest that British forces were going 'on operations' in either country when in fact there were being deployed in 'war zones'. He was not suggesting that the whole of Iraq was a war zone, but that part where British troops were then deployed should be considered as a 'war zone'. The second observation was made by Lord King of Bridgwater, a former Secretary of State for Defence, in the course of a debate in the House of Lords on 15 March 2007. One of his concerns was the apparent lack of protection provided to Royal Air Force transport aircraft as compared with those of the American Forces. He asked, 'Why are all planes the Americans have flying in the war zone properly protected?' Understood in its context, Lord King was drawing a distinction between a war zone, on the one hand, and the whole of Iraq on the other. He was concerned about a suggested contrast in protection between aircraft flown by different air forces in zones where they were vulnerable to attack.

24. None of the references to which my attention has been drawn suggests that Iraq as a whole was an active war zone in 2006 or 2007. There were undoubtedly areas of conflict and a pattern of localised violence. The Home Office Operational Guidance Note for Iraq issued on 12 February 2007 confirms this view. It noted that the security situation in the region of Kurdistan (recognised by the Iraqi Constitution as a federal region) had been 'largely unaffected by the fall of Saddam Hussain'. The picture elsewhere in Iraq was variable. 2006 had seen deterioration in the security situation, particularly in Baghdad coupled with the development of a complex armed opposition. It noted that Baghdad, Mosul and the western province of Al Anbar were experiencing the most difficult security situation. The position in the Northern Governorates of Dohuk, Erbil and Sulaymaniyah, as well as the Lower South was more stable. The discussion in that document of the state of play on the ground in Iraq was a prelude to consideration of whether return to Iraq without more would found a claim for humanitarian protection or asylum. The overall conclusion, found in paragraph 3.7.12 of the Guidance Note included this observation:

> "Generally the reports of tension and security breaches in Iraq do not demonstrate that there would be a consistent pattern of gross and systematic violation of rights under Article 3 ECHR. The current evidence also does not suggest that the level of violence and insecurity amounts to a serious risk of unlawful killing and so a grant of Humanitarian Protection in such cases is unlikely to be appropriate."

That conclusion is inconsistent with the suggestion that Iraq as a whole was a war zone for the purposes of the policy. The Guidance Note paints a picture of insecurity and violence in many parts of Iraq. But it does not suggest that Iraq was a country which in 2006 and 2007 was an active war zone. I do not consider that Iraq could properly be considered a war zone in 2006 and 2007.

25. It follows that the first challenge advanced by both claimants based upon the active war zone policy has no substance. If the Secretary of State had considered the policy, it would not have availed either of these claimants.

26. The Secretary of State advances two further arguments in support of his contention that permission to apply for judicial review should be refused on this ground. The first is time. The decisions under challenge are in effect those to make deportation orders (respectively 23 July 2007 and 6 December 2006). These proceedings were issued on Mr Ibrahim's case on 5 August 2008 and in Mr Omer's case the day before. The second is that the argument about the active war zone should have been taken before the AIT and it is too late to do so now. Mr Singh relies upon *R(G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445.

27. Mr Ibrahim appealed against the decision to make a deportation order by notice dated 3 September 2007. It was open to him to take the point relating to the active war zone policy, but he did not do so. There is no suggestion that Mr Ibrahim sought to challenge the decision of the AIT when he lost his appeal. Neither did his then solicitors try to do so out of time when they came on the scene in December 2007. Indeed the point was not taken even then. Instead arguments were advanced that it was unsafe to return Mr Ibrahim to either Mosul or Baghdad. Mr Omer appealed against the decision to make a deportation order on 21 December 2006. His appeal was dismissed 30 March 2007. He too had not taken the active war zone point. He applied for a reconsideration. That was refused on 23 April 2007. His new solicitors did not take the point when they became involved in December 2007.

28. To the extent that these claims seek to argue that detention was unlawful because the Secretary of State failed to apply his active war zone policy, they attack the legality of the enforcement action which started with the decisions to make deportation orders and continued with the making of deportation orders after the AIT dismissed their respective appeals. In Mr Ibrahim's case his detention was authorised by the recommendation for deportation of the sentencing court (rather than the decision to make a deportation order) until the deportation order was served on 11 October 2007 following his unsuccessful appeal. The deportation order could be signed and served only after his appeal had been dismissed. Mr Omer was detained under powers which arose when the decision to make a deportation order was made and thereafter under the authority of the deportation order from 29 June 2007. Thus in both cases, for the purposes of the argument founded on the active war zone policy the claimants attack the original decisions to makes deportation orders. Those decisions were appealed to the AIT and the appeals dismissed.

29. The question, therefore, is whether the claimants can attack those decisions through judicial review proceedings when they could have been attacked in the immigration appellate system.

30. *R(G) v Immigration Appeal Tribunal* was a case decided by reference to the immigration appellate structure in place in 2004. At first instance Collins J decided that it was an abuse of process to pursue an application for judicial review when a statutory review was available as an alternative remedy. He said:

> "It is an abuse of process for a claim for judicial review to be pursued (after a statutory review has failed) on grounds which were or could have been relied on in the statutory review claim. The decision of a High Court Judge cannot be judicially reviewed and this is an attempt to get round that prohibition. The claimants maintain that the court's discretion should not be exercised so that and ouster is established in fact if not in law. However, it would clearly be contrary to Parliament's purpose in enacting section 101 to permit judicial review unless there are exceptional circumstances and by no stretch of the imagination can a claim based on grounds which were or could have been raised in the statutory review be regarded as one to which exceptional circumstances apply. I recognise that it is dangerous to say 'never', … but it is difficult to envisage any situation which would make judicial review appropriate short, perhaps, of evidence of fraud or bias or similar matters."

Collins J's conclusions were reached after a careful analysis of the structure and practical effect of the appellate system. In giving the judgment of the Court of Appeal Lord Phillips of Worth Matravers MR engaged in a similar analysis before concluding:

> 26. For these reasons… we have concluded, in agreement with Collins J, that the statutory regime, including statutory review of a refusal of permission to appeal, provides adequate and proportionate protection of the asylum seeker's rights. It is accordingly a proper exercise of the Court's discretion to decline to entertain an application for judicial review of issues which have been, or could have been, the subject of statutory review.
>
> 27. We would add two observations. First, the applicability of the well-established principle that judicial review is a remedy of last resort is tested objectively by the court. Thus our conclusion has had regard to the legislative purpose and effect of s.101 but not to any wider policy – if there is one – of excluding recourse to the courts. Secondly, our decision concerns only cases, such as the two before us, in which the application for judicial review is coextensive with the available statutory review. Judicial review remains open in principle in cases of justiciable errors not susceptible of statutory review.

31. The immigration appellate system was changed with effect from 4 April 2005 when section 103A of the Immigration, Nationality and Asylum Act 2002 was inserted creating the system of statutory review which was in place when both these claimants' appeals were before the AIT. That involves the possibility of an application for reconsideration first to a senior Immigration Judge and thereafter, if

unsuccessful, to a High Court Judge. Both applications are of right and do not require leave. The old two tier system of an adjudicator followed by the Immigration Appeal Tribunal was also replaced by the single AIT. In *R(F) Mongolia v AIT* [2007] 1 WLR the Court of Appeal decided that the principles established in *R(G)* applied with equal force to the new appellate system.

32. The proper avenue for seeking to overturn an appealable immigration decision is (i) an appeal to the AIT; (ii) if unsuccessful on appeal, an application for reconsideration to a Senior Immigration Judge; (iii) if unsuccessful in that application, an application for reconsideration to the High Court. If that route is followed and the High Court refuses to order reconsideration or to refer the matter to the Court of Appeal, that is the end of the matter. The decision of the High Court is not itself subject to appeal; nor can it be judicially reviewed. So if that process were exhausted a direct judicial review challenge to the decision of the High Court Judge would not be entertained. On the authority of *R(G)* it is a proper exercise of the court's discretion to refuse to entertain an application for judicial review where the matter in issue was or could have been challenged in the immigration appellate and review process. It is expressed as a matter of discretion because there is no ousting of the court's jurisdiction but as Collins J recognised there are very few circumstances in which it would be appropriate to allow such a claim to proceed.

33. The decisions to make deportation orders were challenged in the AIT. Mr Omer sought reconsideration. He could have gone one step further to the High Court and Mr Ibrahim could have sought reviews. Neither took the active war zone point, because each was unaware of it. In that they appear to have been in the good company of the solicitors who thereafter acted for them and in all probability the Immigration Judge and Home Office presenting officer. I do not consider that the assumed collective ignorance of the policy, despite its being available on the UKBA website and in Macdonald, affects the principle in play even though it can be said that the Home Office presenting officer should have drawn attention to any policy that might be in play: see *AA (Afghanistan) v Secretary of State* [2007] EWCA Civ 12 per Keene LJ at [28]. Even had I come to a different conclusion about the underlying application of the active war zone policy I would, applying *R(G)* have refused permission on that ground.

34. I shall say little about the time point. If, contrary to my conclusion, the active war zone policy precluded enforcement action in respect of the claimants, not only could an appeal have established that fact but judicial review (if permissible at all) could also have done so. Although it is unnecessary to decide the issue, it seems to me that there is some force in Mr Singh's argument that this aspect of the claim is long out of time and should not be allowed to proceed on that basis also.

**Abdi and unlawful policy**

35. Mr Symes relied upon the decision of Davis J in *Adbi v Secretary of State* [2008] EWHC 3166 (Admin) the appeal from which is discussed above sub nom *WL Congo.* This aspect of the claim was dealt with in a single paragraph in the skeleton argument and not further developed in argument. It is fair to observe that it was not at the forefront of the arguments. It has been overtaken by the decision of the Court of Appeal. It nonetheless merits attention because if there is merit in the point it could have a profound impact on the legality of the much of Mr Ibrahim's

detention and all of Mr Omer's. The reasoning on the Court of Appeal has been set out at paragraph [7] et seq above. In short, the Secretary of State's publicly articulated policy at the time of the detention of both these claimants provided that FNPs should be detained only when continued detention was justified. The presumption, though rebuttable, was that they should be released. At the same time there was an unpublished policy which the Judge had concluded amounted to a presumption, though rebuttable, of continued detention. Contrary to the finding of the Judge, the Court of Appeal concluded that a blanket policy of detention was in operation at least from November 2007 to September 2008 and that before then there was no consistency of approach amongst case workers: see paragraph [45]. That policy was unlawful. However, in any case the question is whether the policy was applied to the person in question and, if so, whether the policy was material to the decision to detain. Was it the effective cause of the detention?

36. In neither the case of Mr Ibrahim nor Mr Omer's does the evidence support the proposition that their detention was authorised by reference to this policy. Neither does the evidence suggest that the unlawful policy was ever the effective cause of their continuing detention. Their detention was consistently authorised because of fears they each would abscond, fears that were accepted as justified by Immigration Judges when rejecting bail applications.

37. In a letter dated 30 July 2007 Mr Ibrahim's detention was justified by reference to the publicly stated policy. He was told that detention is only used where there is no reasonable alternative available and that it was believed that he would not comply with restrictions attached to his release. In particular it was considered that he would abscond and had inadequate ties in this country. There was also a reference to his not having produced evidence of his lawful entry in the United Kingdom. In fact he had arrived illegally in the back of a lorry. His detention was initially maintained under Paragraph 2(1) of Schedule 3. Within 24 hours of his going into immigration detention the circumstances were reviewed. The decision to maintain detention was taken:

> "On the basis of his adverse immigration actions and his criminal conviction, it is considered likely that Mr Ibrahim would be unlikely to maintain contact with the Home Office or comply with conditions of his release if he were granted T/A. It is proposed therefore to detain Mr Ibrahim until his deportation can be arranged."

The same essential reasoning continued to apply, albeit various forms of words were used, throughout his detention. An application for bail was successfully resisted on these grounds in October 2007. Mr Ibrahim withdrew it.

38. The detention review on 27 October 2007 noted once again his mode of entry in the United Kingdom and also that following the refusal of his asylum claim (and before his conviction and imprisonment) he had a history of failing to report. The detention review for January maintained the position. On 27 February 2008 the Secretary of State responded to representations from solicitors then acting for Mr Ibrahim which had included a request for temporary admission. That request was refused because of concerns that he would disappear. The March detention review was to the same effect. An application was made for bail that month which was

resisted on the basis that the history suggested Mr Ibrahim would fail to surrender to custody if he were released on bail. He again withdrew his application for bail. The monthly progress report of 31 March 2008 noted, in addition, the claimant's refusal to return voluntarily to Iraq and a risk of reoffending. The April review relied on the fact that he would be unlikely to remain in contact if released on bail, and so it continued in May and June when another bail application was made. A hearing took place on 4 June but it appears that the Immigration Judge was not satisfied about the surety offered. The monthly progress report for July indicated that detention was being maintained because of the risk of absconding. Bail was granted by the High Court on 19 September 2008 and he was released four days later.

39. In December 2006 Mr Omer's detention was justified on the basis that he was liable to abscond. Before the deportation order was made in June 2007 the question of detention was reviewed and the lack of incentive to keep in touch should he be released was identified as the reason for maintaining detention. Another detention review in June 2007 relied upon the same reason. Similar reasons were given in support of the need for detention for the balance of 2007. An application for bail was thereafter made to the AIT which was dismissed on 3 January 2008. A further application was dismissed on 25 January 2008. In March 2008 the monthly review noted that detention should be maintained because there was reason to believe that Mr Omer would not comply with conditions of temporary admission. There was also a reference to his failure to co-operate with the process to obtain an emergency travel document, which inevitably heightened the concern that he would seek to frustrate any attempt at removal. Mr Omer did provide relevant data for that purpose in April but the detention review maintained that there was too high a risk of non-compliance for release to be considered. The May and June reviews were to the same effect. Bail was again refused by the AIT in June 2008. In July and August the Secretary of State continued to regard the risk of absconding as being too high to justify release. On 8 August 2008 Mr Omer was granted bail.

40. These reviews of the reasons given for maintaining detention in both cases, when judged by reference to the test of materiality set out in paragraphs 89 and 90 of *WL(Congo)*, suggest that the unlawful policy identified by the Court of Appeal was not material in the cases of these two claimants.

**Mr Ibrahim: Hardial Singh arguments**

41. Mr Symes did not suggest that the Secretary of State lacked the intention to deport Mr Ibrahim. There is no breach of the first *Hardial Singh* limitation. He submitted that having regard to the second limitation, the detention was unlawful from the outset or became unlawful before Mr Ibrahim's release in September 2008.

42. In outlining the legal framework between paragraphs [5] and [14] above, I referred to the conclusion of the Court of Appeal in *WL Congo* that the period of detention pursuant to Paragraph 2(1) of Schedule 3, authorised as it was by the recommendation for deportation made by the criminal court, remains lawful even if subsequently it can be shown that the Secretary of State's decision not to release a detainee was vitiated by a public law error. It follows in Mr Ibrahim's case that his period of detention between 3 August 2007 (the start of immigration detention) and 11 October 2007 was on any view lawful. Nonetheless, I do not consider that the period during which the lawfulness of Mr Ibrahim's detention is vouched safe by

the recommendation of the criminal court falls out of account altogether when considering the second *Hardial Singh* limitation. However, the focus should be on the period that follows. That approach is consistent with that established by the authorities with respect to the period of detention during which the detainee is pursuing his appeal rights. The focus should be on the period after appeal rights have been exhausted: see *R (SK) v Secretary of State* [2008] EWHC 98 (Admin) per Munby J at [108] and *Abdi* per Davis J at [36] – [39]. The underlying reason for this approach is that whilst the appellate machinery is engaged the Secretary of State cannot lawfully remove the person concerned. Assuming that detention is otherwise justified on the facts, it is reasonable to maintain detention whilst the appeals machinery is in action. Yet that period is not ignored when looking at an overall period that is reasonable because it is part and parcel of the overall immigration detention. In Mr Ibrahim's case his detention pursuant to Paragraph 2(1) Of Schedule 3 and the appeals process exactly coincided.

43. The second limitation from *Hardial Singh* identified by Woolf J has the two aspects identified by Dyson LJ in *R(I)* – see paragraph [10] above.

44. In respect of the first (the overall period of detention must be reasonable in all the circumstances), Mr Symes submits that it was never reasonable to detain Mr Ibrahim given the facts of his case. The Secretary of State should have placed him at liberty as soon as he was released from prison. His detention should not have been continued once the deportation order was served on 11 October 2007, whatever the legal position may have been before then. If that submission does not find favour, Mr Symes submits that at some point before Mr Ibrahim's release, a reasonable period was exceeded. These submissions proceed on arguments relating to the facts of Mr Ibrahim's case. Mr Symes submits that there were no cogent reasons for considering Mr Ibrahim to pose a risk of re-offending. That risk was mentioned in some of the Monthly Progress Reports but is absent from the majority of documents. It does not appear in the Detention Reviews, or in the bail review documents of March and June 2008. I accept that the documentation does not rely upon the risk of re-offending as the main reason for detaining Mr Ibrahim, although the risk cannot be discounted altogether. A number of the Monthly Progress reports refer to it and the nature of the underlying offence would have given rise to some concern about future risk. As it happens, following his release from detention, Mr Ibrahim did go on to re-offend during a dispute with his partner.

45. These cases involve FNPs. The reason each is being deported is because of his past offending. Risk of reoffending is a factor that looms large in cases such as this albeit it is a minor factor for Mr Ibrahim. It should not, however, be overlooked that immediately following the automatic date of release from prison an immigration detainee would otherwise be on licence and subject to recall in the event of reoffending or breach of licence conditions. In Mr Ibrahim's case, his licence period would have been a year, in Mr Omer's only six months. That provides some public protection.

46. Nonetheless, for reasons already identified it was the risk of absconding that animated the decision to maintain detention. Although Mr Symes submits that such a risk was never, in truth, present it is clear that there were cogent grounds for thinking that, if released, he would abscond.

47. Mr Ibrahim entered the United Kingdom clandestinely in February 2005. His original asylum claim was refused on 7 April 2005. He appealed that decision, but the appeal was dismissed on 8 June 2005. He failed to attend the hearing of his appeal and failed to report in June and July 2005 thus breaching conditions of temporary admission. Having unsuccessfully appealed against the decision to make a deportation order Mr Ibrahim was well aware that the Secretary of State was in earnest in wishing to remove him. He initially refused to provide his bio data. He made fresh representations in December 2007 through solicitors then acting for him. He made three applications for bail but was unable to offer a substantial surety. He resisted the possibility of voluntary return.

48. All of these factors are relevant to the second *Hardial Singh* limitation, although it is true that different judges have given each different weight in the many cases that were drawn to my attention particularly with regard to the potency of a refusal to accept voluntary return. That aspect was reviewed in the Court of Appeal in *R (A) v Secretary of State* [2007] EWCA Civ 804 where Toulson LJ said:

> "46. There are two ways in which a person against whom a deportation order is made may leave the country. He may accept that he is required to leave and do so, or he may refuse to go and be forcibly removed. The departure of a person in the former category is voluntary in a limited sense, and it was in that sense that the phrase "voluntary repatriation" or "voluntary removal" was used in argument in the present case. Schedule 3, paragraph 2(3) contemplates either involuntary or voluntary repatriation because it includes the words "pending his removal or departure from the United Kingdom".
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> 47. In *Tan Te Lam*, at 1145-115, Lord Browne-Wilkinson said that:
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> "In their Lordships' view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable."
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> 48. Mr Giffin naturally relied on that passage. Mr Drabble on the other hand pointed out, correctly , that the Privy Council was concerned in that case with a Hong Kong ordinance which required the court to consider whether an individual had refused to take part in a voluntary scheme of repatriation in considering the reasonableness of his detention. He referred us to the legislative history and its social and political setting, all of which he submitted were material to a proper understanding of why the refusal of voluntary repatriation should in that case have been considered a factor of fundamental importance.

49. The significance of a refusal to accept voluntary repatriation was considered by this court in *I*, without a clear unanimity of view.

50. Counsel for *I* submitted that his refusal to accept voluntary repatriation was an irrelevant consideration, because the question under consideration was the legality of his continuing detention pending an enforced removal, and the premise to that question was his unwillingness to go. Simon Brown LJ rejected that argument. He noted that in *Hardial Singh* it had been regarded as a factor in the applicant's favour that he was willing to return voluntarily, and he could see no reason why the converse should not be relevant. He said at [31]:

> "Clearly, of course, the position here is not as it was in Hong Kong where, because of the express provisions of the Immigration Ordinance 1981, it was regarded as "of fundamental importance" that the applicants' detention was "self-induced by reason of the failure to apply for voluntary repatriation". But that is not to say that the court should ignore entirely the applicant's ability to end his detention by returning home voluntarily."

However, he considered that the factor was of relatively limited relevance in the particular circumstances of *I*, since the option of voluntary repatriation only arose on the day before the hearing of the appeal.

51. Mummery LJ was in a minority in holding that *I*'s continued detention was lawful. He considered that *I's* refusal of voluntary repatriation was a factor leading to the conclusion that he would probably abscond if released, and that this was a good ground for his detention while the Home Secretary continued his negotiating efforts for an agreement by which *I* could be forcibly removed.

52. From A's viewpoint, the most helpful observations came from Dyson LJ (at [51] to [53] ). He said:

> "…In my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable."

He accepted that if it was right to infer from the refusal of voluntary repatriation that a detained person was likely to abscond on release from detention, then the refusal was relevant to the reasonableness of the duration of detention. But he said that:

> "…The relevance of the likelihood of absconding, if proved, should not be over stated. Carried to its logical conclusion, it

> could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake."
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> 53. During the course of argument, there was some narrowing of the ground between Mr Giffin and Mr Drabble. Mr Giffin accepted that if there was no risk of an individual absconding and no risk of him offending, in the ordinary way there would be no obvious reason for the Home Secretary to exercise his power of detention. Mr Drabble accepted that a refusal to agree to voluntary repatriation could suggest a risk of absconding. He also accepted that a refusal to accept voluntary repatriation could have additional relevance in that in a case where a person was likely to abscond the Home Secretary might reasonably take into account, in deciding whether and for how long it was reasonable to exercise his power of detention, that the person concerned had the option of voluntary repatriation, so ending the need for his detention. Mr Drabble preferred not to use the word "self-induced", but that seems to me to be essentially a matter of semantics. The real differences between the parties were about the degree of significance which could or should be attached to A's refusal to accept voluntary repatriation, and about whether the judge was right to take into account A's concern regarding conditions in Somalia as an offsetting factor. I will come back to the question of the relevance of A's reasons for not wishing to return to Somalia.
>
> 54. I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.”

Longmore LJ agreed. Keene LJ delivered a concurring judgment in which he emphasised the importance of the risk of absconding in determining whether detention was reasonable. He also recognised the relevance of a refusal to leave voluntarily and referred to it as one of the factors which made a long period of detention reasonable in that case.

49. *R(A)* decided that a refusal to leave voluntarily when that is possible will provide an added and powerful justification for detention which is not available in circumstances where that possibility does not exist. It will be reasonable to detain someone for longer than would otherwise be the case. It does not, however, provide a trump card which can justify detention of any length.

50. Mr Ibrahim withdrew two bail applications and was unsuccessful in his third, which was heard in June 2008. In *SK (Zimbabwe)* at paragraph [38] Laws LJ considered the relationship between bail applications and this aspect of the *Hardial Singh* limitations. Two unsuccessful bail applications had been made in that case. In the second, the Immigration Judge had concluded that there was every likelihood that SK would abscond. Laws LJ said:

> "It is in the circumstances quite unreal to suppose that at any point between [the commencement of immigration detention] and [the Immigration Judge's second refusal of bail] the claimant's detention was not strictly justified." [38]

Although Mr Ibrahim has not put the reasons of the Immigration Judge in June 2008 before the Court, his own statement in these proceedings indicates that the Judge was minded to grant bail subject to the question of a satisfactory surety. A surety of £200 had been offered but the Judge apparently indicated the need for a surety of £2,000 or £3,000. Thus the clear implication was that it was otherwise appropriate to maintain detention because of the risk of Mr Ibrahim's absconding. That was the basis on which bail was opposed by reference to his history. It is, however, important not to overstate the significance of a refusal of bail in circumstances such as this. In broad terms the AIT will be concerned with the need for and reasonableness of continued detention when it considers a bail application. It will be alert to consider whether such risk as there is, whether of absconding or further offending, can be appropriately managed by the imposition of conditions. It is not a surrogate for determining the underlying legality of the detention, a matter that would ordinarily be questioned in the High Court. So, for example, the AIT would not concern itself with the arguments advanced in these proceedings touching the legality of the detention, save to the extent that its overall view of bail would be informed by the length of detention and thus overlap with the second *Hardial Singh* limitation.

51. The conclusions of the Immigration Judge at the bail hearing on 4 June 2008 demonstrate that there was a risk of absconding. I am satisfied from the detail contained in the detention reviews, monthly progress reports and bail summaries (some of which have been referred to above) taken with the personal circumstances of Mr Ibrahim that, subject to whether it became apparent that removal would not be possible within a reasonable period, that the detention between October 2007 and September 2008, coming as it did after two and a half months of previous immigration detention was reasonable. There was a substantial risk that Mr Ibrahim would abscond if released and that coupled with his refusal to leave voluntarily justified the Secretary of State in detaining him for close to a year between the making of the deportation order and his release on bail. I consider that the period of detention was reaching the outer limits of reasonableness in his case given that once Mr Ibrahim provided his bio data and photographs (which he did on 16 October 2007) the issue of forced removal was in the hands of the Secretary of State. I would find it difficult to conceive that in Mr Ibrahim's case a reasonable period of

immigration detention, including that sanctioned by Paragraph 2(1) of Schedule 3 of the 1971 Act could exceed 16 months. That is especially so as the risk of reoffending in his case was of relatively limited significance. In the absence of the possibility of leaving voluntarily the reasonable period would have been less.

52. Removals to most countries present few logistical difficulties. It is always necessary to secure the cooperation of an individual, at least if he has no valid passport. That is because biographical data are required to obtain a temporary travel document and to ensure that the receiving country will accept the deportee. No return, enforced or voluntary, can be achieved without a travel document of some sort. A person liable to removal will have little to complain about if he is detained for some months whilst he refuses to provide the data necessary as a first step to effect his removal. Thereafter, removal to most countries will follow very quickly. There are nonetheless destinations which present more difficulty. The Secretary of State must be allowed a reasonable period to make the necessary arrangements. In a case where the impediment arises from disorder in the receiving country, the task of predicting when conditions will improve and stabilise sufficiently to allow forced returns is an imprecise exercise. It may sometimes be possible to identify a trend which enables a timescale to be predicted. In other circumstances the disorder or conflict can end relatively suddenly, not least for political reasons. Yet there must be a limit to the period during which someone can be detained, albeit judged by reference to the facts of an individual case, when the grounds for believing that enforced removal will be possible rest on a hope, and little more, that the security situation in the receiving country will improve. Otherwise for practical purposes the detention becomes indefinite and assumes the almost exclusive purpose of applying pressure on the detainee to leave voluntarily. That is not the purpose for which the power to detain was conferred.

53. The other aspect of the second *Hardial Singh* limitation engages the inquiry whether, irrespective of whether the reasonable period of detention had been exceeded, the circumstances were such that it was clear that the Secretary of State would not be able to deport Mr Ibrahim within a reasonable period. Once it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, 'the detention becomes unlawful even if the reasonable period has not yet expired'. (*R(I)* paragraph [47]). Mr Symes submits that there was no prospect of removing Mr Ibrahim within a reasonable time, whatever that time was.

54. For the purposes of this claim, the question is whether before Mr Ibrahim was released from detention it was apparent that he could not be removed within a reasonable period.

55. No evidence was filed in these proceedings dealing with the expectations of the Secretary of State about when it was anticipated that enforced returns could be made to Iraq. Mr Singh submits that it never became apparent that removal would not be possible within a reasonable period. There was an unequivocal intention of removing him, but practical impediments. He has pointed to publicly available Home Office documents which detail the security concerns relating to Iraq in 2007 and 2008. They suggest that the security position was variable. Two earlier decisions of this court in late 2007 contain references to evidence of Hannah Honeyman in connection with returns to Iraq. Her evidence was prepared in *R (MMH and SRH) v Secretary of State* [2007] EWHC 2134 (Admin). Judgment was

delivered by Beatson J on 7 September 2007. It was also shown to Mitting J in *R (Bashir) v Secretary of State* [2007] EWHC 3017 (Admin) who delivered judgment on 30 November 2007. All parties have referred to these decisions. In the former case Beatson J summarised the effect of Ms Honeyman's evidence in this way:

> "Ms Honeyman states that the Home Office announced an intention to commence an enforced returns programme to Iraq in February 2004. She states that enforced returns have taken place by means of charter and scheduled flights. She gives details of three charter flights all to the northern part of Iraq and states that plans are in place to carry out enforced returns to northern Iraq using scheduled services via Jordan. She states that with respect to Baghdad and the south of Iraq, those who are willing to return can be returned on scheduled flights. Those who do not would ordinarily be escorted to their destination; but at present, as a result of advice by the Foreign and Commonwealth Office that its staff cannot fly to Baghdad on scheduled aircraft, the Home Office has taken the view that it cannot ask its escorts to do so. This is because the Foreign Office advice applies to British Nationals and the escorts are British Nationals. Ms Honeyman states that the sole obstacle to enforced returns to the south is the concern about safety of escorts. Arrangements have been made between the British and Iraqi governments for the reception of enforced returnees. The fact that voluntary returns on scheduled flights take place shows there is a route into southern Iraq. Nothing is said to suggest that there would be difficulties in using those scheduled services for compulsory returns if the concerns about the safety of the escorts are removed. The position therefore is that, since the announcement of an enforced returns programme in February 2004, there had been no enforced returns to southern Iraq. The only impediment is the safety of escorts and the advice of the Foreign Office." [18]

Mitting J provided some further detail in paragraph [8] of his judgment. Voluntary returns were taking place to Baghdad. Returns, both voluntary and enforced, were taking place to Kurdistan indirectly via Amman to Irbil. The authorities in Kurdistan would only accept people from the three provinces that make up that region of Iraq. The claimant before Mitting J was not from that region and neither is Mr Ibrahim nor Mr Omer. The Judge also noted that the policy based on an unwillingness to expose escort staff to risk had been in place since at least 3 September 2003. He added, 'there is no evidence of any kind as to when it might change'.

56. As is now well-known, the first enforced returns to Baghdad did not take place until 15 October 2009. They were not an unqualified success because the Iraqi authorities did not accept all those who had been removed from the United Kingdom. Many came straight back. Whilst it was necessary to be satisfied that it was appropriate for escorts to fly to Baghdad as a precursor to enforced removals, I would be very surprised if that were the only issue that needed to be dealt with. There were bound to have been discussions or negotiations with the Iraqi Government prior to the commencement of the process of forced returns to Baghdad. Be that as it may, such evidence as there is before me suggests that in late

2007 the reason why forced removals were not taking place to Iraq (other than to Kurdistan) resulted from the practical difficulty in providing escorts.

57. The Country Policy Bulletin 1/2007, dated 27 February 2007, pre-dates the evidence of Ms Honeyman just referred to, but confirms the position she described. An Operational Guidance Note of October 2008 noted that the security position in Iraq remained poor. There had been a marked improvement in the second half of 2007 and into the beginning of 2008 but the position had then reversed. As noted in paragraph 2.8 of that document there had been an outbreak of serious fighting between government forces and Shia militia in Baghdad in March, April and May 2008. In October 2008 a planned announcement by the Iraqi Prime Minister that the security situation in Southern Iraq had changed to the extent that British troops were no longer needed, was not made. This summary explanation of the security position no doubt explains why forced removals remained unachievable throughout 2008. The 2009 Operational Guidance Note from June 2009 is also before the court. With the advantage of a broad review of all material available from 2008, it noted an overall improvement with significant stabilisation in Southern and Central Iraq during 2007 and 2008 (paragraph 3.6.3).

58. Mr Symes relies upon a number of the documents produced by the Secretary of State to support the contention that there was no prospect of removing him with in a reasonable time. In particular, on 25 February 2008 a note records a senior caseworker's comments on the representations that had been made on Mr Ibrahim's behalf in December 2007. They include an observation that it was being suggested that it had been overlooked that he came from Mosul. That observation was not correct. In fact the point being made in the representations was that removal to Kurdistan was not an option, because Mr Ibrahim came from Mosul. It is clear from the evidence filed by Ms Honeyman in the two cases to which I have referred that the prospect of removal other than voluntarily was, at that time, remote because Mr Ibrahim did not hail from Kurdistan. There was a consistent recognition in the review documentation that enforced removal was not at option.

59. There is a section in the detention reviews which invites the reviewer to detail:

> "Likelihood of removal within a reasonable time scale (outline details of barriers to removal including availability of travel documents, and likely time needed to resolve these)."

In answer, there was consistently a reference to the bio data and photographs and a note that Mr Ibrahim was not eligible for enforced removal. No opportunity was taken in those forms to identify why enforced removal was not possible, nor how long was likely to be needed to resolve the difficulties. The last such entry in the papers before the court in Mr Ibrahim's case is dated 30 June 2008. The monthly progress reports consistently advised Mr Ibrahim that he could reduce the time he would spend in custody were he to agree voluntarily to return to Iraq, and offered him financial assistance through the Facilitated Return Scheme. Mr Ibrahim had set his face against voluntary return. He continued to make representations which he hoped would be recognised as amounting to a fresh claim for asylum or humanitarian protection. After his release from detention, the deportation order was revoked and a fresh decision to deport him was made. That was to ensure that there

was no possibility of its being infected by the active war zone policy. He unsuccessfully appealed that decision. It was dismissed on 12 March 2009 but he continues to insist that his return to Iraq would violate his rights.

60. By contrast, in a Detention Review in Mr Omer's case dated 7 July 2008 it is noted that he originates from Baghdad 'and there are no current plans to commence enforced removals to this area of Iraq.' That was a refrain that echoed throughout his detention reviews back to the middle of 2007.

61. I have noted that the Secretary of State has not filed evidence in this case directed towards this aspect of the *Hardial Singh* limitations. That creates an evidential difficulty. As Laws LJ emphasised in *SK (Zimbabwe)* it is for the Secretary of State to demonstrate by evidence that the *Hardial Singh* principles have been adhered to. I have little doubt that there was a hope that the security position in Southern and Central Iraq would improve sufficiently to allow enforced removals to commence. As the documents to which I have referred demonstrate there was what turned out to be a temporary improvement in late 2007 but the position soon reversed. Leaving aside any delays that might be generated by the need for bilateral discussions with the Iraqi authorities and other practical arrangements, it is clear that an improvement in the security position sufficient to allow escorts to travel with those being returned would need to be sustained before arrangements could be put in hand for enforced returns. It is a matter for concern that there is no information before the court which explains the Secretary of State's view during 2008 of when realistically enforced returns to Southern Iraq might be achieved. There is no evidence of the potential obstacles to commencing such removals or of the steps being taken to overcome them.

62. I am obliged to evaluate whether this aspect of the *Hardial Singh* limitations was respected, by reference to the material that is before the court, and decide whether the Secretary of State has shown that removal could be achieved within the reasonable time I have identified in Mr Ibrahim's case.

63. My conclusion is that it was apparent in Mr Ibrahim's case in the Summer of 2008 that it would not be possible for the Secretary of State to effect deportation within the reasonable period of 16 months overall detention that I have identified. No enforced removal was taking place because the security position in Iraq did not allow it. That security situation had not improved overall in the first half of 2008. None had taken place for five years, or thereabouts. By the summer of 2008 there appeared to have been a reversal of some of the improvements that had been noted in 2007. In the absence of a significant improvement no enforced returns would be achievable for many months, at the least. That improvement would have to be sustained before returns could be organised and even then it would inevitably take time to make the necessary arrangements. In the July Detention Review in Mr Omer's case it was noted as before that there were no current plans to commence enforced returns. There was a Detention Review undertaken in Mr Ibrahim's case on 30 June 2008. In my judgment it should have been apparent at that time that an enforced removal could not be effected within a reasonable time. There were no plans for enforced removal at all. At that point Mr Ibrahim should have been released, albeit with conditions attached. In consequence I hold that Mr Ibrahim's detention from 1 July 2008 was unlawful.

64. The third *Hardial Singh* limitation, namely that the Secretary of State should act with reasonable diligence and expedition does not arise in practice in this case. The reason why enforced removals were not taking place resulted from the adverse security position in Iraq. That was not something over which the Secretary of State had any control. It is not suggested that the Secretary of State could have removed Mr Ibrahim but was dilatory in doing so.

**Mr Omer: Hardial Singh arguments**

65. For the same reasons as given with respect to Mr Ibrahim, the first and third *Hardial Singh* limitations do not assist Mr Omer. The second limitation is the material one.

66. Mr Omer says that he entered the United Kingdom clandestinely in 2002. He claimed asylum on 9 October. His application was refused on 6 December 2002. He was granted exceptional leave to enter for 4 years in accordance with the policy then in force regarding Iraq. Mr Omer's offending comprised a series of a series of incidents, most of which concerned domestic violence. A summary is contained in paragraph [4] above. He was sentenced to 12 months imprisonment on 8 August 2006.

67. His time in custody under the authority of that sentence ended on 6 December 2006, when he was served with a notice of intention to deport. He appealed unsuccessfully. His appeal was dismissed and an application for reconsideration was rejected. A deportation order was served on 29 June 2007. Mr Omer made unsuccessful applications for bail to the AIT on 3 January 2008, 25 January 2008, 4 April 2008 and 26 June 2008. As has already been noted he was granted bail by the AIT on 8 August 2008. Those failed applications for bail demonstrate the Immigration Judge's acceptance of the risk of his absconding.

68. For many months Mr Omer refused to provide his bio data. Such data are required to enable travel documents to be obtained. In an interview on 19 June 2007 Mr Omer explained that his refusal was based upon his unwillingness to return voluntarily to Iraq. It is certainly the case that throughout his period of detention Mr Omer steadfastly refused to countenance the possibility of returning voluntarily. Shortly before solicitors made representations in support of a fresh claim on his behalf, Mr Omer supplied his bio data on 25 November 2007. Subject, therefore, to arranging documentation the only impediment to forced removal thereafter was the Secretary of State's inability to make the necessary arrangements.

69. The difficulty in arranging removal was noted in the Detention Review on 14 June 2007:

> "Mr Omer originates from Baghdad and there are no current plans to commence enforced removals to this area of Iraq. However, it is open for Mr Omer to depart voluntarily and he will be interviewed … to have this option put to him."

On 28 June this further note was made:

> "He was interviewed on 19/06/07 … and was asked whether he wanted to return to Iraq, he said he would rather die that go back to Iraq."

It was as a result of his lack of co-operation in the process of documentation and his vehemently expressed resistance to removal that led to the conclusion that he would be unlikely to comply with any release conditions.

70. A detention review in January 2008 again noted that there were 'no current plans to commence enforced returns to [Mr Omer's] area of Iraq.' In answer to the question about the likelihood of removal within a reasonable time scale this was said:

> "Mr Omer is refusing to seek voluntary departure and as such removal would not be expected within a short time scale. ReSCU have advised on 3 January 2007 [that should read 2008] that no enforced removals to Iraq are currently in place for this region and as such unless Mr Omer cooperates we would be unable to progress his removal. Mr Omer was reminded that he remains eligible to apply for the Facilitated Return Scheme (FRS) by way of inducement for him to voluntary [sic] depart."

The author went on to note that although removal would not be expected within a 'short time' detention should be maintained essentially because of the risk of his disappearing if released. The Detention Review signed off on 7 July 2008 once again noted there were no current plans to commence enforced removals and went on:

> "It is open to Mr Omer to depart voluntarily to Iraq if he so wishes. He has previously been asked and has refused to do so. We now intend to interview him to explain the benefits of FRS. The removal time scale will depend on his response."

The review that followed at the beginning on August made the same observations. A number of additional points were noted:

(i)There had been an internal discussion on 3 June 2008 when it was thought that 'the only way' of achieving removal would be to revoke the deportation order in conjunction with Mr Omer's agreeing to leave under the FRS scheme.

(ii) On 18 July Mr Omer declined to leave under that scheme.

71. The overall period of immigration in Mr Omer's case was from 7 December 2006 to 8 August 2008, a period of 21 months.

72. Miss Weston submits that there was never any substance in the suggestion that this claimant would abscond. Additionally, since there was never any explicit reliance on the risk of re-offending, it was never reasonable to detain Mr Omer. I am unable to accept that submission. There was every reason to suppose that Mr Omer might well abscond.

73. As in the case of Mr Ibrahim, two questions arise. First, given the circumstances of Mr Omer's case, for how long was it reasonable to maintain detention in the hope that it would be possible to remove him? Secondly, did the time come when it was apparent that it would not be possible to remove him within that reasonable time?

74. The factors in play in answering the first question are:

(a) The risk of absconding;

(b) Mr Omer's refusal to provide his bio data as a preliminary to obtaining a travel document until November 2007;

(c) Mr Omer's refusal to contemplate voluntary return.

75. Absent from this list, as in Mr Ibrahim's case, is any serious concern about reoffending either because of a demonstrated recidivist history or the nature of the underlying criminal conduct. Indeed, in Mr Omer's case there is no mention of it at all in the documents. That is not to minimise the offending which was serious. It would not have attracted a custodial sentence if that were not so. It was, however, of a different order of seriousness from the offending of *A* - rape etc - which provided a potent additional justification for the lengthy detention found lawful by the Court of Appeal in that case.

76. There is a broad symmetry between the cases of both the claimants, albeit that their circumstances are not identical. However, Mr Omer's refusal to provide his bio data until November 2007 leads me to conclude that it was reasonable to detain him for an overall period of 18 months leaving aside the question whether he could be removed within that period.

77. That finding would lead to the conclusion that his detention was unlawful from 6 June 2008. Was it unlawful before that date on the basis that it was apparent that removal could not be achieved within a reasonable time? I am satisfied that it was. The comment quoted in paragraph [70] above from January 2008 amounts to a recognition that Mr Omer's enforced removal could not be achieved within a reasonable period. He had already made clear that he would not leave voluntarily. The FRS scheme, which as already noted provides someone departing the United Kingdom with a valuable financial inducement, was all that was left to the Secretary of State to achieve Mr Omer's departure. Mr Omer knew of that scheme. He had been 'reminded' of it. He had expressed no interest. There was no realistic prospect of his being removed by early summer.

78. The January Detention review was signed off on 8 January 2008. On this aspect of the matter my conclusion is that from that date that it was apparent that he could not be forcibly removed within a reasonable time and he had made it abundantly clear that he would not go otherwise. Thus, to use the language of *Hardial Singh,* it was apparent from mid-January that the Secretary of State was not going to be able to operate the machinery of removal within a reasonable time.

## Conclusion

79. On the basis of the evidence available, I have concluded that Mr Ibrahim's detention was unlawful from 1 July 2008 and Mr Omer's from 8 January 2008. Declarations to that effect will be made but I will hear counsel further on the question of other relief and directions for the determination of damages. I refuse permission to apply for judicial review on the 'active war zone' ground, but otherwise grant permission and allow the claims to the extent indicated.