Neutral Citation Number: [2009] EWHC 2094 (QB)

Case No: CO/3825/09

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2009

Before :

Mr. Justice Foskett

- -

Between :

R (on the application of Feridon Rostami) **Claimant**

- and –

Secretary of State for the Home Department **Defendant**

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- -

Ms Stephanie Harrison and Mr Edward Grieves (instructed by **Luqmani Thompson & Partners**) for the **Claimant**
Mr Sarabjit Singh (instructed by **The Treasury Solicitor**) for the **Defendant**
Hearing date: 4 August 2009

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Judgment

MR JUSTICE FOSKETT:

Introduction

1. The Claimant was born on 29 January 1984 and is, therefore, now 25 years of age. He is an Iranian national born in Kurdistan who arrived illegally in a lorry in the UK on 27 October 2005 when aged 21, apparently having left Iran in mid-September some weeks after the elections leading to the installation of the then new government in Iran during August 2005.

2. He arrived in Harwich and claimed asylum at the police station on the day of his arrival in the UK. The Defendant refused his claim on 14 December 2005. The Claimant appealed against this decision and his appeal was dismissed on or about 3 March 2006, his appeal rights being exhausted on or about 20 March 2006.

3. It is his case that on 30 May 2006 he travelled to the Republic of Ireland to claim asylum. On 13 October 2006, he was returned to the UK by the Irish authorities under the Dublin Convention and detained. He repeated his claim for asylum which the Defendant treated as constituting further representations. These further representations were rejected by the Defendant on 17 October 2006 with no further right of appeal.

4. It is at this point that the story behind the present application begins. He was, as I have indicated, detained on his arrival back in the UK on 13 October 2006 and has remained in detention since then, a period of very nearly 34 months. There is some debate about whether the whole of that period can be characterised as "immigration detention", but on any view a substantial part of it can be so characterised. I will return to this in due course at paragraph 68.

5. It is that prolonged detention that lies at the heart of the present application for judicial review, the case advanced on his behalf being that his detention for much of that period has been and continues to be illegal. It is submitted on the Secretary of State's behalf that the court's focus should be on his immigration detention since certain appeal rights were exhausted on 16 December 2008, a period of around 7 months. I will return to this in due course.

6. On 18 May 2009 Mr John Randall QC, sitting as a Deputy High Court Judge, adjourned the Claimant's application for permission to apply for judicial review to a 'rolled up' permission and substantive hearing and it is that hearing that has taken place before me. Because of time constraints within the vacation it has been necessary to confine the argument largely to the question of the legality of the Claimant's continued detention. Various other issues have been raised on his behalf to which I will refer later.

7. As will become apparent, an issue arises as to the extent to which he is and has been prepared to co-operate in making arrangements for his return to Iran by facilitating the obtaining of emergency travel documentation ('ETD'). If it is the case that he is not prepared to return and not prepared to do anything to facilitate that return, the general scenario that arises in the case is not wholly unfamiliar (see paragraph 49 below). The cases of *R (on the application of Qaderi) v SSHD* [2008] EWHC 1033 (Admin) and *R (on the application of Mustafa Jamshidi) v SSHD* [2008] EWHC 1990 (Admin) are recent illustrations of difficulties faced by the UK authorities in returning an illegal immigrant to Iran. *Regina v Tabnak* [2007] 1 WLR 1317 is an illustration of the issue in a different context. It is not, of course, solely cases involving a possible return to Iran that raise these general issues: see, e.g., *The Queen on the Application of IO v Secretary of State for the Home Department* [2008] EWHC 2596 (Admin) and *The Queen on the Application of Franchou Badjoko v Secretary of State for the Home Department* [2003] EWHC 3034 (Admin).

The legal framework

8. There is plainly a tension between the individual right of anyone, including someone who has intrinsically no right to remain in the UK, to be at liberty and the right of the Government to retain in detention such a person whilst efforts are made to secure his removal from the UK. Article 5 of the European Convention on Human Rights is relevant in this context. The appropriate part provides as follows:

> "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
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> ....

> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

9. Schedule 3, paragraph 2 of the Immigration Act 1971 provides:

> (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 of State directs him to be released pending further consideration of his case or he is released on bail.
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> ....
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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.
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> (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).

10. The word "pending" which appears throughout these provisions is crucial to the power to detain. The meaning of this word in the context of paragraph 16 of Schedule 2 of the 1971 Act has been described thus by Lord Brown of Eaton-under-Heywood:

> "[32] The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be 'impending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (ie throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to

> detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under para 21."

11. This approach follows the approach originally advanced in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704, where Woolf J, as he then was, said (at page 706) in a passage subsequently approved by the Judicial Committee of Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 and the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68 –

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

12. In *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* (see paragraph 11 above), Lord Browne-Wilkinson said this:

> "The principles enunciated by Woolf J in the *Hardial Singh* case … are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain 'pending removal' their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

13. The approach to the kind of issues that arise in this context has been considered by the Court of Appeal in recent years. In *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, Dyson LJ articulated the principles to be deduced from the authorities in this way:

> "46. There is no dispute as to the principles that fall to be applied in the present case ..:
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> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
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> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
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> 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;
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> iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.
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> 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.
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> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

14. It is clear from paragraph 48 of Dyson LJ's judgment that what constitutes a reasonable period of detention depends on the circumstances which include the factors identified. As Simon Brown LJ, as he then was, said in relation to the issue of whether removal is "going to be possible within a reasonable time", it is "plain that the reference there to "a reasonable time" is to a reasonable further period of time having regard to the period already spent in detention" (paragraph 20). In that case Simon Brown LJ characterised the "critical issue" as being "whether it was going to be possible to remove the appellant within a reasonable time". Addressing the evidence as it was when the case was before the Court of Appeal on 29 May 2002, Simon Brown LJ said this:

> "Given, as stated, that the appellant had by then been in administrative detention for nearly 16 months and that the Secretary of State could establish no more than a hope of being able to remove him forcibly by the summer, substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period. True, the appellant could, by the date of the appeal hearing, have agreed to return voluntarily to Afghanistan. But, as already observed, that possibility only arose on the day before the hearing and it would surely not be right, given his unwillingness to go (and, indeed, his asylum claim) to subject him to an indeterminate period of further detention merely on that account." (My emphasis).

15. Accordingly, Simon Brown LJ held that the appellant in that case should be released. Dyson LJ was also of the view that he should be released because "by 29 May 2002 the appellant had been in detention for an unreasonable period".

16. In relation to the issue of non-cooperation, there was a division of view about its significance in that case. As will be apparent from what Simon Brown LJ said (see paragraph 14 above), he did not regard it as determinative in that case. In paragraphs 31 and 32 of his judgment he said that it was not something "that the court should ignore entirely", but it was a consideration "of relatively limited relevance in the circumstances of the present case." Mummery LJ, who dissented, however, regarded the matter as of considerable significance. He expressed himself in this way at paragraphs 41 and 43:

> "41. As the appellant does not want to go back to Afghanistan, refuses to co-operate with the authorities to return voluntarily and has so far had no success in his asylum claims, there are, in my judgment, reasonable grounds for believing that, given the chance, he will probably seek to frustrate attempts to remove him under the deportation order before it is possible to carry it into effect. So, there is a real risk that, if he is now released from his present detention under paragraph 2(3) of schedule 3 to the Immigration Act 1971, he will probably abscond and never return to Afghanistan.
>
> ....

> 43. In my judgment, the Secretary of State has supplied a valid justification of the detention to date and of the need for it to continue for a longer period. In addition to the risk that the appellant will probably abscond if he is now released, the Secretary of State reasonably relies on continuing efforts on his behalf to operate the machinery for the appellant's removal."

17. Dyson LJ said this on this issue at paragraph 50:

> "As regards the significance of the appellant's refusal of voluntary repatriation, there appears to be agreement between Simon Brown LJ and Mummery LJ that this is a relevant circumstance, but Mummery LJ considers that it is decisively adverse to the appellant, whereas Simon Brown LJ considers that it is of relatively limited relevance on the facts of the present case. I too consider that it is a relevant circumstance, but in my judgment it is of little weight."

18. That case raised the issue of the unwillingness of the appellant to return voluntarily to Afghanistan. This kind of recalcitrance is always a matter of concern. It was articulated clearly by Goldring J, as he then was, in *Chen v Secretary of State for the Home Department* [2002] EWHC 2797 Admin. Having referred to the *Hardial Singh* case and to what was said in the case of *I* about non-cooperation to which I have referred, he continued as follows:

> 21. The case of Mohamed Dahmani, reference CO/2947/97, was not, I am told, drawn to the attention of the Court of Appeal in the decision of *I*. The applicant had been detained for a period of some 19 months (a similar period to the detention in this case) under section 2(3) of schedule 3. I simply cite part of Keene J's judgment on page 4:
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> > "Miss Giovannetti has also drawn my attention to the case of Lehchibi, a judgment handed down on 21st January by Mr Justice Latham, which refers to the factor of how far an applicant has contributed to his own misfortune in the sense of delaying his removal through his own lack of co-operation. It seems to me that that becomes relevant because it may mean that whatever steps the Home Secretary has taken, they become all the more reasonable because of the problems created by the applicant himself.
> >
> > The position in the present case is that in my judgment the applicant has been responsible for a substantial part of the delay which has occurred in this case."
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> A little later on, page 5:
>
> > "In addition, as I have indicated, it seems to me that the responsibility for a large part of that 19 months of detention rests, at least partly if not largely, with the applicant himself

> because of the lack of co-operation to which I have referred earlier."
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> 22. It seems to me I am entitled to approach the present case on this basis. Non-co-operation may not be decisive. It is, however, a relevant, possibly highly relevant, factor. If that were not so, the purpose of these provisions could deliberately be defeated by a determined applicant. It would be open to such a person simply to sit there and do nothing until return was no longer a realistic prospect. Such a person might well then disappear, having been released into the community. That person may, moreover, be somebody convicted of most serious criminal offences (as has the applicant in this case). It cannot have been Parliament's intention that the Act could be frustrated in that way.

19. The comments made by Goldring J will have a resonance in all cases of this nature. However, the applicant with whom he was dealing in that case had been convicted of three charges of kidnapping, false imprisonment and blackmail and had been sentenced to a total of 6 years imprisonment in 1997. In *I* the appellant had equally been convicted of two offences of indecent assault sufficiently serious to warrant a total sentence of 3 years imprisonment.

20. Concerns about absconding and re-offending will always arise for consideration, particularly where, as in those two cases, there is evidence of serious criminal conduct on the part of those seeking their release from immigration detention. Simon Brown LJ, in the context of the case of *I*, said this:

> "The likelihood or otherwise of the detainee absconding and/or re-offending seems to me to be an obviously relevant circumstance. If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit murder or mayhem, that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee's removal abroad."

21. Whilst one might observe, with respect, that a court would not necessarily need to be satisfied of the risk of "murder or mayhem" in order to conclude that a longer period to arrange removal is necessary (and doubtless Simon Brown LJ did not so intend), an evaluation of the risks of the commission of offences is part of the process that has to be undergone.

22. Every case in this context is fact-sensitive, but it is to be observed that even the risk of serious re-offending has, on occasions, not been sufficient to dissuade the court from ordering the release from immigration detention of those assessed as posing a high risk of offending. In *The Queen on the application of Abdi v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin), Davis J, who was confronted with an applicant who had spent 30 months in detention pending removal but who was described in the following terms:

> "… [he] has a long history of criminal offending. His convictions variously include two counts of indecent assault, robbery, burglary, assault on a police officer and a drugs offence. A number of his offences were committed whilst he was on bail or on licence. It seems that for at least part of the time he had become addicted to crack cocaine. In the circumstances he was, as it seems to me, properly assessed both as posing a high risk of offending and also as posing a high risk of absconding. Further, bail applications in the interim had been refused by immigration judges."

23. Davis J held as follows:

> "76 … I think that the time has come in this particular case to say that enough is enough here. The relevant legal proceedings are likely to go on for a long time, so far as concerns Mr Abdi, potentially even running into years. It is time now, in my view, that Mr Abdi be released from detention and I so order. Rejecting, as I do, [the] argument that the court should ignore any period of time, whether in the past or hereafter to be spent in detention, whilst Mr Abdi is pursuing his appeal and any other related litigation, I do not think that it can now be said that Mr Abdi will be or is likely to be removed within a reasonable time; and I think that by now a reasonable period of time for detaining him has elapsed.
>
> 77 I am entitled, in reaching that conclusion, to have at least some regard to the already very long period of time he has already spent in detention: that is, the 30 months. As I have said, I have also borne in mind, in deciding this matter, the fact of his ongoing appeals, the risk of absconding and the risk of re-offending. All the same, as to this last point it should at least be borne in mind that the gravity of his criminality is of a lesser order than that in the Court of Appeal case of *A* . [His Counsel] also told me that not only is Mr Abdi of course now older but also he has, in the light of his long detention, broken himself of his drug addiction."

24. I will return to these considerations in due course. In the first instance, it is necessary to trace the sequence of events upon which reliance is placed on the Claimant's behalf – and indeed on the Defendant's behalf in response to the application.

The sequence of events from October 2006

25. The Claimant was met by immigration officials on arrival at Heathrow on 13 October 2006 and, as indicated above, was detained. The decision to reject his further asylum claim was made on 17 October. From that point the attention of the UK authorities would have been directed to arranging his return to Iran.

26. In order for ETD to be obtained from the Iranian authorities, it was necessary to obtain confirmation of his identity. A passport, a birth certificate or ID card would

generally be needed to support the application for ETD: see *R (on the application of Qaderi) v SSHD* and *R (on the application of Mustafa Jamshidi) v SSHD* (paragraph 6 above). I will refer later to suggestions that this requirement has been diluted (see paragraph 70).

27. This particular period was a period of considerable disquiet for the Claimant. On 14 October he tried to tie a pair of boxer shorts around his neck, was put on constant watch and placed in isolation wearing a self-harm suit. Two days later he swallowed liquid soap from a dispenser which represented the fourth attempt at self-harm in approximately 36 hours. He had also tried to strangle himself when subject to a 15-minute watch. On 20 October he was seen to be banging his head violently against the wall saying he wanted to die. He was put on constant watch after he was found standing on a chair with a ligature. The decision to refuse him asylum had already been taken by then, but it was decided on 22 October to defer serving him with the relevant notice until after the Bio data interview had taken place "otherwise he may not co-operate".

28. On 24 October it is recorded that the Claimant refused to complete the form stating "I will stay in detention for the rest of my life but I will not return to Iran as I will be executed".

29. The contemporaneous records refer to the possibility of a prosecution under section 35 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. It had been mentioned on 22 October and then again on 26 October. It was noted in a file note dated 26 October that the Claimant had no passport or ID card to support the travel document application, refers to the fact that "although removal is unlikely we should try to proceed with a section 35" and suggests it will take "a week to set up the prosecution at their end". On that day he was taken off self-harm watch.

30. On 28 October an electronic file note records that the Claimant has already refused to co-operate three times, but since this was "prior to his refusal notice being served … [it could not] be counted against him". The Heathrow Immigration Prosecution Unit (HIPU) is recorded as advising that he is asked again to complete a travel document application and that if he refuses the matter is to be referred back to them with a view to prosecution.

31. On 31 October arrangements were made for the notice of refusal to be served at Harmondsworth to be followed by the travel document interview. The Claimant refused to fill in an application for a travel document, but stated he "would be prepared to go to any country other than Iran".

32. Over the next 14 days there are various entries concerning a possible psychiatric assessment which may have an impact on whether to prosecute under section 35. Apparently, it was carried out on 10 November. On 14 November the Management of Detained Cases Unit (MODCU) declined to provide a long term bed on the grounds that "travel documentation unlikely to be received within a reasonable timescale". This was confirmed in a fax the following day which said "there is no reasonable time scale to complete the [subject's] travel documentation".

33. There are a number of other file entries over the succeeding weeks recording attempts at self-harm and the preparations being made with a view to his prosecution. On 21

December the Claimant was arrested and appeared before Uxbridge Magistrates Court when he was granted bail until 3 January 2007 when he was to reappear. The File notes indicate that he is not in police detention. He had apparently tried to hang himself whilst in police custody on the day of his arrest. There is a record on 16 January the he had stated that he wanted to leave the UK to "any other country apart from Iran". He was told that he could only be returned to Iran. He attended court again on 14 February when apparently he was charged.

34. On 18 February Gatwick Border Control telephoned to question whether Deputy Director authority to detain the Claimant had been sought after 28 days. (It is clear that at this time there was some confusion about whether he was detained purely by way of immigration detention or by way of dual detention by virtue of a remand in custody, the confusion not being resolved until 24 February.) During the conversation it appears that the view was expressed that if there was no chance of a prosecution then temporary admission (TA) should be granted. The view was also expressed that "if there is no evidence to suggest he is Iranian he is unlikely to be documented by the Iranian authorities".

35. It appears that the Claimant was arraigned before the Isleworth Crown Court on 13 March when he pleaded Not Guilty. The trial was put over to 24 April when he was found guilty and made the subject of a conditional discharge for 12 months.

36. On 26 April, two days after his court appearance, a file note records the suggestion by HIPU that he be re-interviewed "to see if he is now prepared to comply with the documentation process". If he fails consideration can be given to a further section 35 prosecution although some practical reservations about this were expressed.

37. On 13 May he signed a lengthy letter setting out his (and his family's) background in Iran and asking that his case be re-considered. He speaks of what he says was the killing of his father some 14 years earlier (as a member of the Kurdish Democratic Party of Iran) and the ill-treatment of his mother and sisters by agents of the new government that came to power in August 2005. This letter was intended to constitute further representations.

38. He was seen formally on 17 May when he declined to co-operate with the documentation procedure. When he was warned that he could face up to two years in prison he replied that "Prison is better than Iran." During this interview he did say that he was not Iranian and that he was from Israel although this is not an assertion that was pursued.

39. On 5 June a Chief Immigration Officer recommended to the Deputy Director or Assistant Director that the Claimant be granted Temporary Admission. The officer said he did so "with great reluctance but in reality and in practice, the passenger cannot be documented and cannot be removed." He said that "a section 35 prosecution has already failed to get the passenger to comply" and that the "recent attempt … to be an Israeli national continues a pattern of prevarication." He said that the Claimant was "blocking a bed that could so better and more productively be used" and that "it serves no legitimate or useful purpose to engage in some long term attritional contest to enforce compliance." He continued as follows: "The legitimacy of long-term detention must be underpinned by either a realistic prospect of removal or if there is a significant risk to the public. Neither applies in this case."

40. It seems clear from the contemporaneous documentation that this broad view was accepted and arrangements set in train to try to obtain "section 4" accommodation through the National Asylum Support Service (NASS). The intention was that he would be seen at Heathrow on 18 June 2007 and that he would be granted Temporary Admission at the conclusion of the interview. It appears to have been envisaged that he would fill out a section 4 application to obtain accommodation. The Duty HMI records his view that "[the Claimant] is unlikely to co-operate now and in the circumstances we cannot justify continued detention whilst we await NASS support. I suggest that when [he] attends today we establish an address where he might regularly be found (as the police do in such [circumstances]) to be used as a postal address and make [him] subject to rigorous regular reporting".

41. There seem to be differences of view about what took place next which it would be impossible for me to resolve. However, in summary, the planned release by way of Temporary Admission came to nothing, largely, it seems, because of the problems of accommodation and suggestions that the Claimant would "simply wander the streets" if released and the suggestion that "he could pose a risk to the public" in that situation. The decision was that he would be returned to detention pending further consideration. Part of that consideration was a request for an assessment under the Mental Health Act which was requested "ASAP". On 21 June a Consultant Psychiatrist indicates that Mental Health Act assessments "cannot be performed in Custody". He adds this: "I can assure you that he was seen by my staff grade doctor on 4 occasions as well as the mental health nurse and there is no evidence of major mental illness, and his behaviour is explained by his personality and manipulative behaviour."

42. In the meantime the possibility of a further section 35 prosecution had been raised again. On 26 June it was recorded that "further section 35 is the preferred option to progressing this case" and it is recorded that "[Deputy Director] authority has been given to continued detention … to pursue section 35 prosecution" although it was also recorded that "if there is no progress on this next week we should release."

43. By the end of July further responses from the CPS were awaited. A detention Review on 30 July which suggested that his detention was justified "in that, while its prospect of success is far from guaranteed, the documentation process has not been exhausted in this case. He has already been convicted of a section 35 offence … and he is likely to receive a heavier sentence on any future conviction." The following was also recorded as representing a basis for the decision to invite a further prosecution and to maintain detention:

> "Whether a further warning notice, charge or conviction would elicit the desired cooperation is uncertain, but removal should be pursued, particularly as there are a number of factors in this case which make release undesirable, including considerations of the passenger's own welfare. The passenger's apparent determination to thwart the documentation process is a strong argument for proceeding with further action under section 35 rather than the reverse.
>
> The passenger's detention is permitted under Article 5 of ECHR as its purpose remains his removal from the United

> Kingdom …. The passenger may be detained on the grounds that he is likely to abscond if released (as evinced by his previous absconding to Ireland) and he has already given indication of a current wish to travel to Germany."

44. It is recorded that the prospects of removal are dependent upon "future cooperation with documentation process."

45. There were delays during August and September about setting up another arrest interview and various internal views were expressed about what should be done with the Claimant. One suggestion was that he should be released subject to electronic monitoring. However, this was rejected because it requires a degree of co-operation on the subject's part and his co-operation could not be guaranteed. It was decided that tagging was not an "appropriate option in this case and so maintaining detention remains the best course."

46. On 6 September the Interim Director at Heathrow refused to agree to further detention and said that "even if we get as far as an ETD on this one my understanding is that Iranians require a signed declaration from the returnee to indicate that he is returning voluntarily …." He asks for a reassessment given the length of time in detention already and the prospects for both documentation and removal. There are further notes requesting more rapid action.

47. On 25 September MODCU sent a fax to the duty HMI/CIO at Heathrow Central Casework which stated that "MODCU has recently completed a detention review relating to the above named person and it is consider (sic) that detention is no longer appropriate for the reasons listed below. Could you please arrange for him/her to be released at the earliest available opportunity." The reasons given were (1) we have no prospect of securing a travel document for this person, (2) as such cannot remove, (3) we have requested release previously and (4) the Deputy Director concurs with our findings.

48. On 3 October the Claimant was arrested and charged after refusing to assist the Home Office in obtaining a travel document "and he especially was not willing to attend the Iranian Embassy for an interview". The following day he pleaded guilty to a section 35 offence, acknowledged the breach of the conditional discharge, and was sentenced to 2 months imprisonment on each consecutive, making 4 months in all. He was released back into immigration detention from the prison sentence on 4 December. It appears that the Claimant became distressed at about this time "threatening to kill himself". He was seen on 13 December and was warned on a number of occasions that his failure to co-operate could result in his detention being maintained and that he may face prosecution again. Apparently, his response was "Do it."

49. On 15 December the Duty HMI reviewed the case and said this:

> "Despite his difficult behaviour when detained I do not believe Mr Rostami is a threat to society at large. I am of the view that a further charge and possible conviction under section 35 is not likely to make his removal any more likely. I do not believe it would be in the public interest. As you know there are many nationals of Iran in similar circumstances as this man in that

> they do not wish to return to Iran who are either reporting whilst on TA or are absconders. Obviously if he were released we would instruct him to report regularly but if he failed to do so we would have no control over his movements and he is likely to abscond, perhaps even attempt to leave the UK to find his family in Greece. That would be part of the risk of releasing him.
>
> We have been at this stage before, in June of this year, and I see no real change in this man's circumstances. I do not favour a third charge of section 35."

50. In a handwritten note to that appraisal, the HMI said he would be interested to know what the "policy makers" envisage "we should do with this type of case under the existing legislation." He continued by saying that that he suspects the policy people would say that "we should keep going for a prosecution until such time as the CPS or courts refuse to process. That said I do not see how we can go on prosecuting somebody forever for what is effectively the same offence. We end up blocking up detention space with somebody we cannot remove. More than ever that points to some sort of policy decision being needed on what is desirable for this sort of case. Meanwhile please continue with detention …."

51. I might observe in passing that that appraisal seems to me to highlight the nub of the problem. The province of the court is not, of course, policy but the application of the law. However, the law can offer only a partial solution to a situation such as this given the narrow focus of its attention on the legality of the continued detention.

52. Another prosecution did ensue. On 31 December 2007 the Claimant attended an interview at which a request to him to enable a travel document to be obtained was made, a request which he rejected. He was charged on the same day, pleaded not guilty in due course and convicted on 20 February when he was committed to the Crown Court for sentence. On 28 March at Isleworth Crown Court he was sentenced to 8 months imprisonment and recommended for deportation. The Recorder said that the Claimant was "an experienced and knowledgeable evader of the immigration laws of this country [who has] done everything [he] can to frustrate [his] removal from this country." He served that sentence until 2 May.

53. Shortly before his prison sentence came to an end a 'Decision to make a Deportation Order' was made dated 1 May 2008.

54. He appealed against this decision and his appeal was heard by the Asylum and Immigration Tribunal (Immigration Judge M.J. Gillespie and Sir Jeffrey James, KBE, CMG) on 24 July 2008 when the Claimant represented himself. The decision, dismissing his appeal, was promulgated on 6 August 2008. One or two of the paragraphs of the decision need to be quoted:

> 18. The personal history of the appellant is not seriously adverse to him. He is shown to have been otherwise than compliant with immigration rules and this has, most unusually, been made the subject of criminal prosecution. He has thus acquired a criminal record in connection with non-compliance

in removal procedures, where otherwise there is no reason to regard the appellant as having criminal propensity or being in any way a danger to the public interest.

....

20. The appellant's previous criminal record we have already mentioned in detail. It has come about because of the appellant's failure to co-operate in his removal and for no other reason. This Tribunal is regularly called upon to deal with persons who do not co-operate, indeed who actively seek to frustrate removal. This has hitherto been in the context of applications where detained persons whose removal has not been brought about for various reasons, including the obstructiveness of the individuals concerned, seek their admission to bail. Although there is a strong principle whereby prolonged detention pending removal will not be given excessive weight in favour of an applicant where his own recalcitrance has contributed to the delays in removal, it is nevertheless recognised that where prompt removal appears unlikely and detention is prolonged there may come a time where there is no alternative but the granting of bail. This case represents a departure in that the respondent now seeks to criminalise the conduct of such uncooperative persons and to subject them to deportation procedures. This gives rise to certain considerations of principle which we have addressed more fully below.

....

23. The consideration that most forcefully detains us is that the entire process of deportation is founded only upon a clear policy of seeking to criminalise the appellant, as this has been described above, in his non-compliance with removal procedures. It might be said on the one hand that the appellant himself resorted to conduct that he must have known would be criminal, at least after his initial conditional discharge, and has been properly convicted of offences provided in law. Further, it might be added, although the criminal conduct does not relate directly to any offence against individuals or property, nor pose appreciable threat to the general public good, it remains very clearly in the public interest that persons with no right to remain in the United Kingdom should be susceptible of enforced removal. Deportation, as a means of removal, might be said to be appropriately invoked where lack of compliance with removal procedures has amounted to criminal conduct rendering a person liable to deportation and is an expedient which carries with it a further element of compulsion and deterrence.

> 24. As against that, it might well be felt that the resort to the extreme of deportation, merely as a means of enforcing removal where there is no criminal conduct other than lack of cooperation with removal, smacks of oppression. Not only that, but it has no potential effectiveness and will not foreseeably contribute to the success of attempts to remove the appellant. Indeed Mr McKenzie [the Home Office Presenting Officer] has been unable to explain any possible reason why deportation might be an effective recourse where removal thus far has failed. It might on this basis be perceived that the threat of deportation is designed solely to increase punitive consequences on the appellant for his refusal to comply without advancing in any way the likelihood of removal.
>
> 25. The circumstances of the appellant and of the decision to make a deportation order might well leave one with a feeling of some unease at a policy which criminalises persons in the position of the appellant, and with a firm sentiment that the manner of enforcement chosen by the respondent is unlikely to have any practical effect on removal. Nevertheless, the decision to issue a deportation order is one within the power of the respondent and we have concluded that it is not appropriate for a court, certainly one at this level, to be questioning the policy of resorting to this expedient. In addition, one must recognise that the issue of a deportation order, which carries with it certain consequences more serious than those attached to administrative removal, might be seen as providing a further incentive to co-operate and as providing an element of individual and general deterrence to a person fixed upon an attitude of determined obstructiveness as a means of evading removal. We therefore conclude that the presumption enacted has not been rebutted and that the deportation of the appellant is conducive to the public interest.

55. It is plain that the AIT had some reservations about the policy of repeat prosecutions, a theme taken up (albeit on slightly differently expressed grounds) by Blake J when he considered the Claimant's application for reconsideration of the AIT decision. In his decision dated 16 December 2008 he said this:

> 1. The AIT were entitled to conclude that there was no bar to your removal from the UK by reason of protection claims that have been previously dismissed and no fresh evidence relating to you or your future treatment in Iran has been presented.
>
> 2. It was in principle open to the defendant to deport you having failed to remove you because of your failure to cooperate with measures designed to promote your removal.
>
> 3. It is of concern that you have been prosecuted more than once for such non-cooperation and that has resulted in ever

> increasing custodial terms. You should seek proper legal advice as to these matters as it may be arguable that the offence cannot be committed more than once with respect to one attempted removal and/or if it can repeated prosecution is an abuse where your basis for non cooperation is the same.
>
> ....

56. Notwithstanding that observation, Blake J rejected the application for reconsideration of the AIT decision because that decision disclosed no arguable error of law, the only basis upon which reconsideration could be ordered. All further appeal rights in relation to the proposed deportation order became exhausted in January 2009.

57. On 15 January a further Detention Review took place. It recorded that, his appeal rights having become exhausted on 9 January 2009, "a Deportation Order will be issued against him as a matter of urgency". The caseworker from the Criminal Casework Directorate (CCD) put forward the following recommendation:

> "I propose to maintain detention in this case on the basis that Mr Rostami has demonstrated a high level of non-compliance with the documentation process and therefore could not be relied upon to comply with any conditions of release. He has previously been prosecuted under Section 35 twice and this has not acted as a deterrent therefore, if released it is submitted that Mr Rostami would seek to remain in the United Kingdom illegally in the future and would abscond. He has no further outstanding appeals as this was dismissed, and once appeal rights become exhausted we will seek to obtain a Deportation Order. He may then be a candidate for further prosecution under Section 35 however, with his track record of non-compliance and the fact that he has already been prosecuted on two occasion (sic) under Section 35 I fail to see how the 3rd prosecution under the same act (sic) will bear any deterrent upon him."

58. It will be apparent that the background set out there is mistaken: the Claimant had by then been the subject already of three, not two, prosecutions under section 35.

59. Authorisation was given for the continued detention in the following terms:

> "I am content to authorise detention on the basis of the evidence above. Subject has refused to comply with the documentation process, and would be unlikely to comply with the conditions attached to release. There is also a risk of re-offending in order to frustrate the deportation process."

60. In early March the Claimant retained the services of his present solicitors for the first time. On 24 March they wrote to the Chief Executive of the UK Border Agency about the case, expressing concerns about the repeated prosecutions and asking for further information. On 6 April they wrote to the Manager of the Judicial Review Unit of the UK Border Agency in accordance with the Judicial Review Pre-action

Protocol. The letter invited a withdrawal and revocation (or reconsideration) of the decision to deport on the basis that it was unlawfully made because it arose from "multiple prosecutions for the same offence" which constituted an abuse of process or offended the rule against double jeopardy. The letter also invited the Claimant's release from custody since by then he had been "detained for 29 months and there appears to be no prospect of effecting the machinery of deportation", the assertion being made that his continued detention was unlawful. The letter was acknowledged on 8 April.

61. The present proceedings were served on 22 April and matters have proceeded from there.

62. I understand that a Deportation Order was in fact made on 12 May.

63. No witness statement has been served on behalf of the Secretary of State in this case. The most recent articulation of the view of those acting on his behalf is to be deduced from the Detention Review shown to me during the course of the proceedings dated 24 June this year. The caseworker proposal is in familiar terms (see paragraph 57 above):

> "I propose to maintain detention in this case on the basis that Mr Rostami has demonstrated a high level of non-compliance with the documentation process and therefore could not be relied upon to comply with any conditions of release. He has previously been prosecuted under Section 35 twice and this has not acted as a deterrent therefore, if released it is submitted that Mr Rostami would seek to remain in the United Kingdom illegally in the future and would abscond. He has no further outstanding appeals as this was dismissed, and he became ARE [appeal rights exhausted] on 09 January 2009. He may then be a candidate for further prosecution under Section 35. However, with his track record of non-compliance and the fact that he has already been prosecuted on two occasions under Section 35 …, I fail to see how the 3rd prosecution under the same Act will bear any deterrent upon him."

64. There is an additional observation from a Mr David Wood, who I am told is a senior official within the UK Border Agency, in these terms:

> "Subject is a persistent immigration offender who, based on his background, is highly likely to abscond if released. There is also a risk that he will re-offend in order to frustrate removal and aid absconding. He has previously been prosecuted under s35. However, he is unlikely to return voluntarily to Iran meaning that removal is unlikely to be imminent. Release on restrictions may mitigate against the risk of absconding and we will refer to Chief Executive. However, unless this is agreed, I believe the presumption of liberty is outweighed by the risks detailed above."

65. The decision of the CCD Deputy Director was in these terms:

> "This subject continues not to comply with the ETD process. He has been convicted twice under Section 35. He now has an outstanding JR which needs to be resolved before he can be deported.
>
> Based on the presumption to release, I have considered whether the continued detention of Feridon Rostami is lawful. In light of his risk of further offending and the harm that this may cause, as well as his likelihood of absconding, I consider these additional factors outweigh the presumption to release. I therefore think continued detention for a further 28 days is appropriate."

66. It is unfortunate that the mistake as to the number of prosecutions continues to be perpetuated in these decisions. Whether it makes any difference is doubtful. However, it is to be noted that the Deputy Director on this occasion was prepared only to sanction a further 28 days.

Conclusions

67. In the review of the sequence of events to which I have referred reference has been made to the views of various officials. It is, however, important to remember that these views are merely that: they do not represent the final decision that is made on behalf of the Secretary of State. The various officials will see a recommendation made from the viewpoint that they occupy. It is, of course, legitimate to consider what has been said, but only as one aspect of the analysis.

68. In relation to the question of how long the Claimant's period of immigration detention has been, I must reject Mr Sarabjit Singh's submission that I should restrict it notionally to a period of 7 months or so since the appeal process against the decision to deport had run its course. I do not propose to subject the issue to detailed analysis. It seems to me, in the circumstances of this case, that I should look at the total length of his detention. It is arguable that about 6 months of the total period could be taken out of account because he was in prison for the offences of which he was convicted. However, since those offences arose out of the very reason he was in immigration detention anyway, it is rather difficult to see the justification for distinguishing between the two forms of detention for this purpose. Whether one is considering 34 months or 28 months, the period is a long one and, of course, needs to be judged in the light of the prospects of it coming to an end in the near future. To that issue I must turn.

69. Ms Harrison makes the fair point that since no witness statement has been served on behalf of the Secretary of State setting out the basis for his current position in relation to the Claimant, the court is left in a state of some uncertainty. Indeed it left Mr Sarabjit Singh having to put forward arguments without a great deal of evidential material to support them. Without, I hope, doing an injustice to the well-formulated and clearly articulated arguments, they amounted to little more than the following: (a) "If only the Claimant would change his stance, there is a chance that we can make the necessary arrangements to send him back to Iran"; (b) "there may be a possibility

that the Iranian authorities will change the policy concerning the evidence needed to confirm the identity of someone the UK authorities wish to return to Iran." Understandably, he drew attention to the perceived risk of absconding and the Claimant's refusal to accept voluntary repatriation as matters of significance, even decisive significance (see *The Queen on the Application of A v Secretary of State for the Home Department* [2007] EWCA Civ 804, paragraph 77). He submitted that the detention was not unlawful "as yet", but was unable or disinclined to indicate when it might be so.

70. As to (a), all the evidence of the last 33 months suggests that there is no prospect at all of a change of heart on behalf of the Claimant despite two spells in prison in consequence of having failed to cooperate with the authorities. I am bound to say, having read the Claimant's letter of 13 May 2007 (see paragraph 37), it seems to me that his position is likely to have become even more entrenched with the recent re-election of the government from the influence of which, I infer, he fled originally in 2005. I think that the only legitimate conclusion I can draw on the evidence is that he has a firmly settled intention not to return to Iran and that he will do nothing to facilitate any process by which that will be achieved. As to (b), this can be nothing more than speculation on the evidence before me. I am alive to the fact that before Wyn Williams J in *Qaderi* there was some evidence that suggested that there might be some loosening of the requirements usually thought to be required, but my interpretation of what Wyn Williams J said in his judgment (at paragraph 31 in particular) is that documentary support for the individual's identity was still required. All that, in any event, was over a year ago and there is no up to date evidence of the present position of the Iranian authorities. It is, of course, a country that has not been out of the news in recent weeks and months and current policies in relation to the issues that arise in this case may remain to be formulated.

71. If I apply conscientiously, as I must, the test established by previous cases of whether the Secretary of State has proved on the balance of probabilities that there is a reasonable prospect of securing the Claimant's removal within a reasonable time, then the answer on the evidence before me is clear – the Secretary of State has not established this. If anything, the evidence is weaker than it was in the case of *I* (see paragraphs 13-15 above) where all that was established was a hope that removal might be achieved within a few months. I do not think that the evidence even reaches that height in this case. In each of the cases of *Qaderi* and *Jamshidi* there was some, albeit arguably slight, basis for the court to think that there was a prospect that the Secretary of State would be able to secure the removal of the two individuals concerned within a reasonable period. On the evidence before me, I am quite unable to conclude that this is so in relation to the Claimant.

72. I do not reach the conclusion to which I have referred with much enthusiasm given that it is the Claimant's own failure to co-operate that leads to it. It brings to mind the comments of Goldring J to which I drew attention in paragraphs 18 and 19 above. However, as the cases to which my attention has been drawn and to some of which I have referred make clear, that may be the inevitable consequence of applying the test thus established. At least in the Claimant's case, there is no basis for thinking that he will represent a threat to the public by the commission of the kind of serious criminal offences that those in other cases have committed. His only brush with the law is his resolute failure to co-operate with securing his return to Iran. It is impossible to say

that there is no risk of him absconding given the resolute nature of his attitude to returning to Iran. However, that cannot now, in my view, override the consideration that his period in immigration detention should now be brought to an end. The kind of provisions that will be put in place on his release will be designed to minimise the risk of absconding without, of course, being able to remove the risk completely.

73. For those reasons, it seems to me that there is no alternative but to declare that the Claimant's detention is now unlawful. I am unable to say, without receiving full evidence and argument, when the detention became unlawful and, whilst this might affect any claim to compensation the Claimant may have, I doubt that that is a very material matter so far as he is concerned. If that matter is to be pursued, the circumstances in which it is to be pursued will need to be addressed. He may well face a formidable argument that his own recalcitrance is the true cause of any loss. I think I should also say that, whatever view might be formed ultimately about this aspect of the case if it proceeds, it is difficult to see how the Secretary of State can deal with the problem of the non-cooperative illegal immigrant or failed asylum-seeker without being afforded a good while in which to see whether arrangements for removal can be made. Otherwise such an illegal immigrant or failed asylum-seeker could argue that from the moment he or she indicates a refusal to co-operate, a right to liberty (and compensation) exists. I cannot conceive that to be the law.

74. The direction for the 'rolled up' hearing was in relation to the issue of the legality of the Claimant's continued detention. It did not deal with the questions of whether the prosecutions represented some kind of abusive process or with the argument that is now sought to be advanced in relation to the deportation order. As indicated at the outset of this judgment, although the Skeleton Arguments on each side dealt with these matters, and Mr Sarabjit Singh put forward some brief oral submissions as to why the arguments were, as he submitted, misconceived, I have not heard Ms Harrison on them. In the circumstances, I will say nothing more about them. Ms Harrison indicated that she would take stock of the position once my decision on the question of detention had been made. As things stand, the Claimant does not have permission to apply for judicial review in relation to these matters, but neither has it been refused. I will simply adjourn consideration of those matters on terms upon which I will hear Counsel.

75. Although, as I have indicated, I feel that the conclusion I have reached has been forced upon me by the evidence and it is one I have reached without enthusiasm, it does have to be said that, subject to any psychiatric evidence about his present mental state and to the arrangements that may be made for living in the unfamiliar world of the UK until he is removed, the Claimant appears to represent no threat to the public if he is released. That was the conclusion reached by those who have observed him closely in the past (see paragraphs 39 and 49 above) and by the Asylum and Immigration Tribunal last year (see paragraph 18 of its decision quoted in paragraph 54 above) and, subject only to the matters to which I have referred, there is no basis for concluding otherwise now. As I have already said, he is not someone who, unlike some in respect of whom the Secretary of State and the courts have had to reach conclusions in the past, has any history of serious criminal offending or obvious anti-social behaviour.

76. The position in this case is unusual. I was told by Ms Eileen Bye, the Claimant's solicitor, in her fourth witness statement dated 3 August 2009, that she has had

concerns recently about his capacity to give her instructions. She had, very properly in the circumstances, taken steps to bring the attention of the Official Solicitor to the Claimant's case. I understand that she had received no response from the Official Solicitor prior to the commencement of the hearing. It is, of course the holiday period for many people. Because these concerns have been raised, but have not been fully resolved, I would need to be satisfied that the Official Solicitor has at least had an opportunity to consider whether to intervene on the Claimant's behalf. I shall direct that a copy of this judgment, once handed down, shall be sent to the Official Solicitor.

77. That is one matter. Another, not wholly unrelated matter, is this: if the Claimant is *prima facie* entitled to be freed from detention, given that he has no roots in the UK at all and, leaving aside any issue as to the conditions upon which he might be released (which I would expect to involve at a minimum electronic tagging and frequent reporting to the police), there is the question of where he would reside upon his release. That would have to be approved by the Secretary of State or by the court in default of approval by the Secretary of State. It is going to take a little while for arrangements to be put in hand. I am mindful of the fact that an earlier decision to release him apparently foundered on this requirement (see paragraphs 39-41 above).

78. In order for both these matters to be addressed, I propose that the declaration that would otherwise fall to be made to give effect to my decision shall not be drawn up and sealed (CPR 40.3) until 28 days have elapsed from the handing down of this judgment. I am taking this course as much in the Claimant's own interests as for any other reason. I have noted one particular passage in the fourth witness statement of Ms Bye when she refers to the focus of the frustration that the Claimant has expressed. She said this: "He has indicated anger about his prolonged detention and various court proceedings but also real anxiety and agitation about the possibility of release and coping with the terms of possible release." This is something that plainly needs to be addressed and, whilst I am conscious that it is the Claimant's liberty that is at issue, I do not think it would be in anyone's interest, least of all his, for an immediately effective declaration to be made with the possible effect of him being required to leave a period of prolonged detention with nowhere to go and no kind of (even very modest) support system in place. That is neither in his interest nor the wider public interest.

79. As I have said, I propose that the order giving effect to today's decision is not drawn up and sealed until 28 days from today, the Claimant's solicitors to be responsible for drawing it up. Once the order is drawn up and sealed, subject to any argument to the contrary, there will be permission to the parties to apply in relation to the implementation of any matters pursuant to the declaration.

80. I am grateful to Ms Harrison and Mr Sarabjit Singh for their helpful written and oral submissions and to Mr Grieves for his industry in preparing the very useful Appendix to the Claimant's Skeleton Argument.