Neutral Citation Number: [2014] EWHC 3061 (QB)

Case No: HQ12X04513

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th September 2014

Before :

Mr. Andrew Edis, Q.C, sitting as a Deputy High Court Judge

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Between :

MUSTAFA FARDOUS **Claimant**

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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- -

Mr. Greg Ó Ceallaigh (instructed by **Wilson Solicitors LLP**) for the Claimant
Mr. Ivan Hare (instructed by **Treasury Solicitor**) for the Defendant

Hearing dates: 18th July 2014

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Judgment

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The parties are directed to attempt to agree quantum and to seek a hearing in September 2014 if quantum cannot be agreed. If it can an Order should be drawn up, agreed by the parties and lodged for sealing.

Andrew Edis, QC, sitting as a Deputy High Court Judge said:

1. The Claimant is a national of Morocco who claimed asylum in the United Kingdom on the false basis that he was from the Western Sahara and in a false name. He was granted asylum in 2002 and subsequently granted indefinite leave to remain. The Claimant was in Norway in August 2007 when he claimed asylum there, on a false basis, and was eventually expelled by Norway to the United Kingdom, arriving on 7th September 2009. He was then detained on his arrival in the United Kingdom until he was granted bail on 4th July 2011. This is a period of 22 months. In these proceedings he has claimed that this detention was unlawful throughout, but before me Mr. Ó Ceallaigh has put the case on the basis that the United Kingdom authorities

were entitled to detain the Claimant in September 2009, but that detention became unlawful at some point which I am invited to determine.

2. PROCEDURAL MATTERS:- These proceedings began by way of judicial review on 8th December 2011. The parties agreed that they should have been started under Part 7 of the Civil Procedure Rules and they were transferred to the Queen's Bench Division by an order which was agreed on 30th April 2012, and sealed on 27th September 2012. They culminated in a trial before me which took place on 18th July 2014. I heard no oral evidence on behalf of the Claimant and heard from two witnesses called on behalf of the Defendant whose principal function was to produce documents. Mr. Smith produced a GCID Case Record Sheet, which is a 30 page record of events concerning this Claimant's immigration status within the United Kingdom. Mr. McGovern produced a 348 page bundle comprising various documents produced from the files to which that Record Sheet refers. It is principally on these documents that I am invited to decide the case. There was no substantial challenge in cross-examination to either of these two witnesses. The Claimant did not appear to give evidence in person and there was no application to adduce his evidence by video-link. I was invited to deal with the case on the basis of two witness statements he has made. The first of these is dated 24th October 2011 and is signed. The second is neither dated nor signed, but Ms. Jennine Walker of Wilsons solicitors has made a statement which explains how it was taken and that it is a true version of what the Claimant told her. These statements are both very short. In essence, therefore, I am deciding this case on the documents. I will evaluate the witness statements of the Claimant against the documents in the case and will accord them such weight as I consider they deserve in view of the fact that they are presented as hearsay evidence, and not agreed evidence.

THE LAW

3. The parties are in agreement about the law, and I can therefore set it out fairly briefly.

4. The power which the Defendant exercised arises under paragraph 16(2) of Schedule 2 to the Immigration Act 1971 which provides

> *(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending:-*
>
> > *(a) a decision whether or not to give such directions;*
> >
> > *(b) his removal in pursuance of such directions.*

5. The principles by which this administrative power to detain should be exercised were set out by Woolf J, as he then was, in *R v. Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704. They were considered, approved and re-stated by the Supreme Court in *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. They were both cases of deportation under paragraph 2(3) of Schedule 3 to the 1971 Act, whereas this is a case of removal under Schedule 2. Although it is submitted by Mr. Ó Ceallaigh that the different factual context which gives rise to the distinction is relevant to the exercise of the discretion, it is not

suggested that there is any other difference in the scope of the powers to detain created by these two provisions. It is suggested that the legal scope of the powers is the same, but whether they are to be exercised or not, and, if so for how long, may be affected by whether the proposed departure of the Claimant from the United Kingdom is by way of deportation or otherwise. I accept this submission to the extent that it reinforces the obvious proposition that longer detention will be justified in cases where there is a history of offending, particularly serious offending, creating a risk to public safety if the detainee is at liberty in the United Kingdom.

6. The four *Hardial Singh* principles are as follows:-

   i) The Secretary of State must intend to deport [in this case remove] 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.

7. In *R(I) v. Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196 Lord Dyson said at paragraph 47:-

> *Principles (ii) and (iii) are conceptually different. 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.*

8. In view of the acceptance that detention in the present case was lawful at the start, it is not necessary to consider further the first *Hardial Singh* principle. The detention was exercised for the purpose of effecting removal from the United Kingdom, and the Secretary of State did intend to effect that removal. Those conditions continued to be satisfied throughout the period of actual detention.

9. It also follows from the acceptance of the lawfulness of the initial detention that its ground, a risk of absconding, was a reasonable basis for deciding to exercise the power. There was no risk to public safety posed by this Claimant, and the only basis on which it could have been judged necessary to detain him in order to achieve the purpose of his removal, was the fear that if released he would abscond.

10. It is therefore necessary to refer to the way in which cases based on risk of absconding, as opposed to public safety, have been dealt with by the higher courts.

11. In *R(I) v. Secretary of State for the Home Department* at paragraph 53, Lord Dyson said:

> *The relevance of the likelihood of absconding, if proved, should not be overstated. 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.*

12. This means, I take it, that the risk of absconding will not automatically outweigh all other relevant factors. In the same case, Lord Dyson listed relevant factors at paragraph 48 as follows:-

> *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.*

13. This passage was set out by Lord Dyson at paragraph 104 of his judgment in *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. Qualifications to it are set out in paragraph 105, but do not apply in the present case. As a list of relevant factors which are to be assessed when deciding whether detention should continue in any case it is therefore to be followed. It is obviously not an exhaustive list and should not be treated as such. It makes it clear that a risk of absconding is a factor to be considered alongside other factors and also, in my judgment, that a risk of absconding may justify detention up to a point, but that there may come a time when the length of the detention can no longer be justified by it and it alone. Whether that is so, and if so, when it becomes so, are matters of judgment on the facts of each case and there are no guidelines as to the length of detention which may be justified by this or any other factor.

14. My attention has been drawn to a number of other authorities which seem to me to be illustrations of the principles which I have just set out to the facts of particular cases. It will, I think, suffice to refer to two of them. These are the decision of the Court of Appeal in *R(A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 and *R(MH) v. Secretary of State for the Home Department* [2010] EWCA Civ 1112.

15. *R(A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 was a case where the Claimant, A, posed a real risk to the safety of the public because of his determination to commit sexual offences of the gravest kind. He was determined to stay in this country "by hook or by crook", see paragraph 29, and the risk was "as high as it could be", see paragraph 58. The factual differences between that case and the present case are obvious. The fact that the Court of Appeal held that a three year

period of detention was lawful in that case therefore has limited relevance to the present. There are remarks about the relevance of the risk of absconding, which must be read in the context that absconding in that case was likely to be followed by very serious crime. Paragraph 55 of the judgment of Toulson LJ explains why that risk is relevant. At paragraph 54 he said:

> *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.*

16. *R(MH) v. Secretary of State for the Home Department* [2010] EWCA Civ 1112 was another case where the risk of serious offending if the Claimant was at liberty was "high", see paragraph 49. The Court of Appeal decided in line with earlier authority that it was not necessary for the lawfulness of the detention that removal should be possible within a particular fixed period, but only that, throughout the period of detention there should be a realistic prospect of removal. Lord Justice Richards said this at paragraph 65:-

> *Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention.*

17. *R(MH) v. Secretary of State for the Home Department* also sets out the role of the court in a case such as this, which is common ground before me. This is not a challenge to decisions of the Immigration Officers on grounds of irrationality. The detention either was or was not unlawful, and whether their decisions were rational or irrational does not matter. They may have been entirely rational in their approach but if I consider that, on the material before the Secretary of State, the decision was wrong then the detention which they failed to bring to an end thereby became unlawful. Equally, if they were irrational but fortuitously right then the detention was lawful. Richards LJ puts it this way at paragraph 49 of the judgment, in describing the approach taken by the judge at first instance. He upheld that approach as correct at paragraph 67

> *First he* [the judge] *found that on the evidence available throughout the detention, the Secretary of State "was entitled to regard the risk of reoffending in potentially serious ways as high" (para 103). He rejected a contention that he should have regard to the actual conduct of the claimant after release, stating inter alia that "although the court is the judge of whether reasonable grounds for detention existed at any particular point in time, it makes that assessment by*

reference to the circumstances as they presented themselves to the Secretary of State".

18. In this case the Claimant did intimate reliance on failures by the Secretary of State to follow relevant policies and also on Article 5 of the EHCR. It is now common ground that these matters do not add anything on the facts of this case to a determination of the lawfulness of the detention under the principles I have set out above, and I shall not therefore consider them further.

THE FACTS

19. I have considered the documents referred to above, and will now set out a summary of events. It is not necessary to mention every communication or action. The overall picture is that the Secretary of State was, through officials, making very considerable efforts to obtain an ETD from the Moroccan authorities. It was always thought likely that in the end these would succeed, but there were inexplicable delays. Although there were regular Detention Reviews, the true picture seems not to have been fully appreciated by those conducting them and despite mounting evidence to the contrary they commonly recorded that the granting of an ETD was expected within weeks. In July 2010 the Claimant stopped making bail applications, which is very hard to understand and which he has not explained. Instead he issued some Judicial Review proceedings in Scotland which were based on a false premise, and when he eventually issued a further bail application in July 2011 he was rapidly released. He did not then abscond but secured an ETD within a further 3 months, and went to Morocco where he now is.

20. The Claimant had a "poor and unusual immigration history", as he recorded in his Petition in Scottish Judicial Review proceedings which he started in 2010. Those proceedings were issued and withdrawn during the period of detention. I refer to them at this stage simply to record his version of some of the background facts which predate his detention in this case. At paragraph 5 of the Petition he said this:-

> *5. The Petitioner is a citizen of Morocco. He has a poor and unusual immigration history. He initially arrived in the United Kingdom and sought asylum in 2001. The Petitioner was recognised as a refugee and in accordance with the Secretary of State's practice at the time was granted indefinite leave to remain in the United Kingdom. His claim for asylum was in a false name. The Petitioner subsequently left the United Kingdom and travelled to other European countries. He did so using a travel document issued by the Secretary of State on or about 28th January 2008. In particular the Petitioner travelled to Norway where he claimed asylum in a different identity. Records obtained by the Secretary of State also appear to indicate that the Petitioner had identified himself to the German and Spanish authorities as an Algerian citizen named Saleh Ben Kadour. He travelled to Italy and Norway using his true identity.*
>
> *6. The Petitioner states that he claimed asylum in Norway in a false identity after he had lost his travel document……*

21. I have read the adjudication of his claim for asylum by Mr. P.J Burns in April 2002. This was granted because the claimant said in oral evidence that his name was

Mustafa al Mansouri (a lie) and said that Western Sahara was his home country and his nationality (a second lie). He said he had left Western Sahara in 1996 because he was in great danger having been required to serve in the Army on pain of death (a third lie). He said he feared that if he was returned to Western Sahara as an absconder he would "disappear, be killed by the highest generals." In the absence of any evidence but that of the claimant, Mr. Burns accepted what he was told and the Claimant was granted asylum.

22. Between April 2002 when he was granted asylum and September 2009 when he was expelled from Norway the position is unclear. I have set out the version of the facts from the Petition in the Scottish proceedings above. In 2006 he applied for naturalisation in the United Kingdom. The same lies as had been the basis of his asylum application were repeated, as far as necessary, and he further failed to declare pending prosecutions in the United Kingdom for offences in 2004, 2005 and 2006. This last failure was detected and his application failed.

23. There is a dispute of fact about what happened next. It is one which, having regard to the way in which these proceedings have been conducted, I am not well placed to resolve. In the end, as I have indicated above, the question is whether the detention was lawful by reference to the circumstances as they presented themselves to the Secretary of State. The Secretary of State was probably even less well placed than I am to make factual determinations and it may therefore not be necessary to make a formal finding of fact about where the probabilities lie. The matter arises in this way. In its letter to the United Kingdom authorities when it expelled the Claimant in September 2009, the Norwegian Police Immigration Service conveyed certain information which was said to have been recorded with the National Police Immigration Service and other immigration services in Norway about the Claimant. In summary the information was as follows:-

i) On 7th August 2007 the Claimant had applied for asylum in Norway. He had no identity documentation. He gave his true name, but claimed to have originated from Western Sahara. He said that the reason for his asylum application was that he had deserted from the military after 25 years of service. He said he faced imprisonment or the death penalty if returned. This was not true in a number of respects. The Claimant does not appear to have told the Norwegian authorities about his indefinite leave to remain status in the United Kingdom, and the identity document on which he had travelled which would have revealed the truth was not produced. He later claimed he had lost it.

ii) The Norwegian authorities conducted a language test and determined that he was probably Moroccan and obviously not from Western Sahara. In November 2007 they recorded a fingerprint hit from Italy and received information from Italy that this person was taken into custody there in October 1998 for illegal border crossing, and gave his place of birth as Western Sahara.

iii) In April 2008 the Claimant had written to the Norwegian authorities telling them that his real name was Mustafa Al Mansouri citizen of Western Sahara. He told them that he had lived legally in the United Kingdom between 2001 and August 2007.

iv) In August 2008 there is a reference to a trip to Finland.

v) His application for asylum was refused in August 2008. He then claimed that he had United Kingdom citizenship but that his passport had been stolen which was why he had claimed asylum in Norway. He said he wanted to return to the United Kingdom and gave his false name again. He later said he did not have any "legal residence" in the United Kingdom and tried again to have his claim for asylum upheld, but failed.

vi) In April 2009 Interpol from Germany and Spain gave a positive response in relation to his fingerprints. They said he had been in those countries, using the name of Salah Ben Kadour, date of birth 1st January 1969, place of birth Algeria. The Claimant in his witness statement denies claiming asylum in those countries (1st witness statement paragraph 5) and denies ever using the name Saleh Ben Kadour. It is of interest in this context that he gave the Norwegian authorities a date of birth of 1st January 1969 when claiming asylum in the name of Mustafa Saleh Fardous in August 2007, and apparently gave the Italian authorities the same name and date of birth in 1998. He admits visiting Italy. He usually gives the date of birth of 25th March 1968, but when Interpol from Rabat confirmed his Moroccan citizenship to the Norwegian authorities on 28th May 2009 they said he had been born in 1969. In his Petition in Scotland, quoted above, he said that after leaving the United Kingdom in August 2007 he had travelled to "other European countries". By that time he was aware of the content of the Norwegian letter and he does not refer to any errors in it. More significantly, as I will set out below, there were bail proceedings in this case. The Secretary of State opposed bail, relying in part on the Norwegian letter. The Immigration Judges refused bail (until 4th July 2011) setting out the factual basis for this in a series of rulings. They nowhere recorded any dispute by the Claimant of the facts in the letter. These rulings were given on 12th January 2010, 11th March 2010, 19th April 2010, 27th May 2010, and 2nd July 2010. It is a remarkable fact that although the Judge in July 2010 gave a strong hint that a renewed bail application would be successful if removal did not take place soon, the Claimant issued Scottish Judicial Proceedings which were withdrawn, but no further bail application until July 2011. On 19th April 2010 the Immigration Judge said that he refused bail because the applicant had used "5 different nationalities in 5 different countries". Those nationalities would be Western Sahara, Algeria, and United Kingdom, which is three rather than five. The countries, however, would be United Kingdom, Norway, Italy, Finland, Germany and Spain, which is six. It may be that the Immigration Judge had some other information which I do not have, but it would be expected that before the next bail application the Claimant's solicitors would take steps to ensure that they had instructions on where he had been, and in what name. The next hearing was on 2nd June and paragraph 8 of the Reasons records the Claimant's solicitor's submission as follows:-

> *Mr. Foulis told me that the Applicant did accept that he left the United Kingdom in 2007 and went to a number of other countries but that it was the immigration history within the United Kingdom which was relevant today. Mr Foulis further told me that when the Applicant returned to the United Kingdom he held up his hands to being in other countries and voluntarily relinquished his refugee status.*

24. I propose to evaluate the case on the basis that the facts set out in the Norwegian letter are correct. I find for the reasons given in this paragraph that they are, on the balance of probabilities, correct. The letter is admissible to prove the truth of its contents as hearsay evidence. The Claimant had opportunities in the bail proceedings to challenge them if he wished, but did not do so. He may also have set out his case in the Petition in Scotland, had he wished, but did not. The first challenge is in the first witness statement. This is a rather suspect document because his second witness statement starts with a correction, accepting that he had omitted his visit to Finland and saying that he had forgotten about it. This is a surprising memory lapse because he was arrested there and expelled. It is apparent that the Immigration Officers acting on behalf of the Secretary of State regarded the Claimant as a man whose word was not to be trusted, and so do I.

25. Approaching the matter on the basis of the facts as they presented themselves to the Secretary of State (and to a series of Immigration Judges) it seems to me that I should find that over a period of years prior to 2009, and over a large part of Europe, the Claimant had manipulated the system dishonestly for his own benefit. This was his fault, and he cannot sensibly complain if everything he said to the United Kingdom authorities when he was returned against his will to this country from Norway was regarded with a high degree of scepticism. This is plainly relevant to whether I should accept that his detention should have been terminated as soon as he said that he did not want to stay in the United Kingdom, but rather that he wanted to go home (by which he meant to Morocco) as soon as he could. Had I been an Immigration Officer considering his detention on behalf of the Secretary of State, I would have held that this assertion did not, at least initially, dispel the obvious risk of absconding which a man with this record presents. I would have held at each stage where the question arose that the Claimant's immigration record was evidence of a risk of absconding, although some of the matters I have referred to were not known at the start, including most obviously the conduct of the later bail applications. The conduct of the asylum application in 2002, the naturalisation application in 2006, and the matters set out in the Norwegian letter are, together, enough to justify that conclusion. The fact that it appeared during the detention that the Claimant did not dispute the content of the letter would tend to strengthen the reliance to be placed on it. However, in truth the question was not whether there was a risk of absconding but whether it justified 22 months detention.

26. I shall now evaluate the position at the start of the period of detention, on the Claimant's return from Norway to the United Kingdom in August 2009. Setting out the factors listed by Lord Dyson in *R(I)* referred to above, the position was as follows:-

    i) *The length of the period of detention;* This was not known. The RGDU, the Returns Group Documentation Unit, operates under Guidance in relation to Morocco which is still, as I was told, current in all important respects. The problem was that the Claimant, although he said he wanted to return to Morocco and rapidly removed any obstacles to that happening, did not have a travel document and needed to be issued by the Moroccan authorities with an Emergency Travel Document (ETD). He had little by way of documentation to prove who he was. This means that the authorities need to be satisfied by fingerprint identification and perhaps in other ways too, that he is who he says

he is, and is therefore a Moroccan citizen. In such cases the Guidance suggests that it might take the Moroccan authorities "Up to 12 months plus" to issue an ETD. As things turned out, they had not issued an ETD by the time bail was granted in July 2011, and did not do so for a further 3 months after that. This was all in the future, but it is apparent from the Guidance that it was envisaged that the period of detention would be of uncertain duration and that it may be quite long. In the result, the delay was described to me in evidence as "unprecedented" although I gained the impression that periods of 12 months and over were not as unusual as one would wish them to be. Clearly, therefore, right at the start, this was properly to be regarded as a case where any decision to detain might involve lengthy detention, subject of course to regular reviews by the Immigration Officers and also to the Claimant's right to apply to a Judge for bail.

ii) *The nature of the obstacles which stand in the path of the Secretary of State preventing a deportation;* I have addressed this feature above. The obstacle was a lack of documentation and it was properly to be understood that this would be forthcoming after a long period of time. It was not to be anticipated that "unprecedented" delay would occur. Therefore, removal was likely to be possible eventually.

iii) *The diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles;* At the initial stage it would be sensible to take into account that there was a system whereby the RGDU existed and had the task of securing travel documents for detained people. It was to be assumed that it would do its job with reasonable diligence. In the result it did so, except, so far as the Claimant's case is concerned, in one respect.

iv) *The conditions in which the detained person is being kept;* No relevant aspect of the conditions has been drawn to my attention by either side as militating for or against detention at the outset, or indeed its later continuation.

v) *The effect of detention on him and his family;* The Claimant had left Morocco voluntarily in the 1990s and had not returned. Although he does have family there, and close family too, this fact would militate against great or decisive weight being attached to this consideration. It would grow stronger though, with the passage of time.

vi) *The risk that if he is released from detention he will abscond;* This was the major factor in his initial detention and in its continuation thereafter. As I have found, the previous conduct of the Claimant was such that I would regard this risk as being a substantial one, and that, if he did abscond, such was his knowledge of the system that it might prove to be difficult to find him again.

vii) *The danger that, if released, he will commit criminal offences.* There was no identifiable risk of this kind. This is a factor which obviously distinguishes this case from others where very long detention has been held to be lawful.

27. The Claimant was therefore detained. As I record above, it is now accepted that this was lawful. Efforts began to be made to secure the ETD and almost immediately the Claimant asked to be removed. He made this clear as early as 16th September 2009

when he asked for an interview with an Immigration Officer. The clarity of his request was somewhat reduced by the continued use of the false name and place of origin in which he had obtained asylum in 2002. Mustafa Al Mansouri wanted to go back to the Western Sahara, he said. On 19th October 2009, still using the false name, he signed a Disclaimer in the case of Voluntary Departure form. On the 23rd October 2009 he relinquished his refugee status and indenfinite leave to remain, and availed himself of the protection of Morocco. Within a day or so, the application for an ETD was submitted to the Moroccan Embassy. Thus far, no sensible criticism can be made of the diligence of the United Kingdom authorities. It was, however, now to be anticipated that he may not be successful in securing the ETD for 12 months or more, see the Guidance referred to above. The reasonable time had not elapsed but it was necessary to consider the third *Hardial Singh* principle. Was it going to be possible to remove the Claimant within a reasonable period of time? My conclusion about this is that the United Kingdom authorities feared that it may not be, but that they intended to do what they reasonably could to secure removal as soon as possible. They did not know when removal would occur. They had no reason at all to think that it would take as long as it eventually did. Therefore, they had no reason to conclude that the detention would involve detention for more than a reasonable time at this stage.

28. On 2nd November 2009 an application was forwarded to Morocco for fingerprint confirmation. At this time prospects for removal were recorded as being "excellent" but it was noted that the process could be "lengthy".

29. On 1st December 2009 bail was refused. Efforts were being made to obtain the ETD, and to ascertain when it might be available.

30. On 12th January 2010 the Claimant had been accepted for Assisted Voluntary Return, and had waived any appeal rights. The only barrier to his removal then was the absence of a travel document. By this stage, the evidence that the Claimant was actually genuine in his desire to go to Morocco and not abscond so that he could remain in the United Kingdom was beginning to mount. However, I consider that the decision that the risk of absconding based on his persistent deceit was still a factor of sufficient weight to justify continued detention. I am fortified by the decisions of Immigration Judges to this effect to which I have already referred.

31. The first time when it became apparent that things may not be going as smoothly as had been hoped was the end of January when the International Organisation for Migration ("IOM") indicated a fear that they had never obtained an ETD for a Moroccan national in detention. The IOM, the Claimant and his family were all in contact frequently with the Moroccan authorities, but no substantial response had been received from them since November 2009. In mid-February the Defendant's records contain the sentence "He appears very eager to return to Morocco." It appears to me that the evidence was now tending to suggest to the Immigration Officers that the Claimant was actually genuine in his desire to leave the United Kingdom, and that as time went on this fact tended to suggest that the risk of absconding was actually not as high as had been thought at the start. It was reasonable to treat these assertions sceptically at the start, but they should have been given more weight as time went on and the evidence that they were genuine mounted. No-one who actually dealt with the Claimant recorded any scepticism about this declared intention after this time. Contacts continued and the British Embassy in Rabat became involved. The Claimant was raising concerns about delays both with the Defendant and by making direct

contact with the Moroccan authorities. He was also asking for a face to face interview. This was declined because other methods of communication were available.

32. On 9th March 2010, approximately 6 months into the detention, the Defendant's records show a concern that redocumentation could be a "long drawn out process" and a review was recommended on 29th March 2010. The regular Detention Review process was also continuing and expressed the view that "documentation will be available within a matter of weeks." This proved to be wrong because on 11th March 2010 the Claimant's application for an ETD was rejected. A second application was submitted on 15th March 2010, and it was noted that the result "should not be expected too quickly".

33. The monthly Detention Review documents all record the view that travel documentation would be available "within a matter of weeks", without recording what the basis for that view was. It was certainly contrary to the more gloomy assessments given by those who were directly dealing with the Moroccan authorities. I am not impressed by this phrase continuing to appear in these documents without any assessment of the apparent falsity of the belief they assert. It should have been clear to all at all times that there was no certainty or even likelihood that the ETD would be available imminently. No-one knew when it might be forthcoming, although it was reasonable to think that it would be granted eventually.

34. It was not until June 2010 that the Moroccan authorities accepted that the Claimant was a Moroccan national and that discussions began about his attendance at the Embassy in person to secure his ETD. On 21st June the British Embassy in Rabat obtained official confirmation that the prints which had been supplied were those of the Claimant, in his true name and his Moroccan nationality. One might reasonably then expect that things would now move quite quickly.

35. In my judgment up to this date, the detention was lawful. What is a reasonable time inevitably involves an assessment of the reason for the delay and its likely length. Now, 9 months into the period of detention, the Claimant was apparently on the verge of success. It was therefore reasonable to continue to detain him.

36. However, on 30th June 2010, the second ETD application was rejected. It is clear that the Claimant had wanted to visit the Embassy in person and an official had noted on 18th June 2010 that "It might be worth a shot to arrange an in-person interview……He does seem desperate to return home". Perhaps if this had happened, the application would have succeeded. I do not think that I can make any firm finding that it would have done: I do not know. This is the single criticism which the Claimant makes of the Secretary of State's diligence in the attempts which were made to secure the ETD. He claims that a face to face interview at which he attended the Embassy not in handcuffs would have secured the ETD. The Returns Liaison Unit clearly thought it might succeed and suggested in July that a visit should be arranged.

37. On the 2nd July 2010 a bail application was made and refused. The Judge expressed the view that if no ETD was secured quickly a further application would no doubt be made. 5 days later a further Detention Review recorded the expectation that the ETD would be secured within "a matter of weeks". I cannot find any sensible basis for that expectation in the situation as it stood as at July 2010. I have recorded above my

view of the repeated use of this phrase in the Review documents despite the absence of any proper basis for it. The contrast between those documents and the other contemporaneous material is telling. On 8th or 9th July 2010, an official in Morocco said

> "I have been at the police HQ this week trying to extract an answer. All the ducks lined up, just waiting on the reply to go through… Not sure what the delay is…"

38. On the 13th July 2010 an official recorded the following telling observation:

> "We have, in all likelihood, very little time left to secure a return of Mr. Fardous from detention, and if he's given any kind of release it is quite unlikely we will succeed in removing him at all."

This must mean that this official felt that the reasonable time during which detention was lawful was rapidly coming to an end. It also means that this official adhered to the view that absconding was likely if the Claimant was released. As I have recorded above, the evidence for this view was weakening as the real determination of the Claimant to go home if released was becoming more apparent. The time for a thorough reappraisal of the Claimant's detention was now approaching.

39. On 14th July the IOM advised that the only real course of action that could be followed was to restart the ETD application process. They also said that meetings were being set up with the Moroccan Embassy through the IOM but that this would be a lengthy process.

40. After further consideration, a new ETD application was prepared over a period of weeks and submitted on 12th August 2010. Further evidence was accumulating that a visit to the Embassy by the Claimant may help. At this stage an error occurred. The belief arose that the ETD had been granted and that the purpose of the visit was to enable the Claimant to collect it. This was the basis for the Scottish Judicial Review proceedings which were issued on 1st September 2010. This was not true, which is why they were not proceeded with. The Claimant was moved from detention in Scotland to detention in England in September 2010, which may be why his Scottish lawyers did not make any further bail applications for him, but as I have recorded above it is surprising that, given his evident anxiety at the delays and at his continued detention, he did not cause any application for bail to be made until July 2011. On 10th August 2010 his distress at missing his daughter's wedding because of these delays was recorded.

DISCUSSION AND CONCLUSION

41. Inevitably any assessment of the lawfulness of detention which is lawful at the outset but which may become unlawful because either a reasonable period has expired or it has become clear that removal will not occur within a reasonable time involves a somewhat arbitrary cut-off point. What may be reasonable in one case may not be in another. The assessment involves a consideration both of the actual length of the detention, the risk consequent upon ending the detention, and the likely length of time before removal can occur. To my mind in cases where the detention is very long, a risk of absconding will carry less weight than would a risk of harm to the public. In

cases where public safety is at risk from a detainee, long periods of detention may be justified. In other cases that is less likely to be true. I consider that a period of detention of 12 months or more will always require anxious scrutiny. Such periods of detention may well be lawful, and may continue to be so for substantially longer periods, but great care is required in concluding that this is so in any particular case.

42. On the same day that the latest ETD application was received by the Moroccan Authorities, the 12th August 2010, the Detention Review again recorded that the ETD would be obtained within "a matter of weeks". This was not right. Leaving aside the error over whether or not it was actually granted during August 2010, there was no basis to believe that it would be. A number of things were now evident.

i) The detention had already been in place for very nearly a year.

ii) There was no sound reason to think that removal was imminent. Lara at the RGDU said that the new application could take six months to process and would still take a few months even when she was told that documents had already been submitted directly to the UK Embassy in Rabat.

iii) There was mounting evidence that a visit by the Claimant in person to the Embassy might assist, and certainly the Claimant said that this was his belief on 24th August 2010. The IOM suggested that this was so on 10th August 2010. This was reflected in the Detention Review for October 2010 which stated that the necessary arrangements for him to attend would be made. It also asserted, again, that the ETD would be obtained within a matter of weeks.

iv) The officials dealing with the Claimant were by now persuaded that his desire to return home was genuine. If true this obviously reduced the risk that he would abscond if released, and thus avoid removal. This was an important factor. They knew that he was complaining directly to the Moroccan authorities constantly and that his family were doing likewise. On 10th August they recorded

> "He really wants to go back with IOM."

43. In my judgment it should have been apparent to the Secretary of State, through her officials, that the first anniversary of the detention required a thorough reappraisal of its purpose and reasonableness. The factors I have identified in the previous paragraph required assessment. The email which I have quoted at paragraph 37 suggests that at least that author was of the view that the risk of absconding was high, and that detention could only be maintained for a short further period. This may have been because he expected a bail application to be made or it may have been because he expected that proactively the Secretary of State, through her officials, would act to bring it to an end. I think that he was right to think that, one way or another, detention could only be maintained for a relatively short further period, and he was writing on the 13th July 2010. In the event, detention continued for another 12 months. I consider also that on the facts of this case it would have been reasonable in the light of the evidence of the Claimant's real desire to return home to approach the case on the basis that the risk of absconding was now lower than it had seemed at the start of the detention. It would also be appropriate to recall when considering it that this was not a case where the detainee presented any threat to public safety.

44. I have come to the clear conclusion that 22 months was, in this case, too long. It was the obligation of the Secretary of State, through her officials, to approach the case throughout with the developing evidence firmly in mind to ensure that continuation of detention was lawful. I am now required to undertake this exercise myself on the material available to the Secretary of State and to fix a date at which what had been lawful detention became unlawful.

45. I consider that the first period of 12 months was lawful. It was anticipated at the outset because of the Guidance (the Guidance actually says 12 months plus) that this period may be required, and the Claimant clearly demonstrated a risk of absconding which might prevent his removal from the United Kingdom. Therefore it would be reasonable to approach the case on the basis that when detaining the Claimant at the start, the Secretary of State had done so knowing that it might be for a period of 12 months or so, and that the Immigration Judges had refused bail knowing this also. These hopes were not realised and the matter needed to be reassessed. The Claimant's expressed wish to leave the United Kingdom was, at least at the outset, not simply to be taken at face value. His history of manipulative dishonesty dictated that approach. When that period had elapsed, however, it was necessary to decide what, if any further period of detention could be justified.

46. It is clear that the first anniversary of detention coincided with a setback. The ETD application had been inexplicably rejected and a further one issued, accompanied by gloomy predictions that it would take months.

47. I consider that a careful 12 month review of the detention would have concluded:

    i) The risk of absconding was lower than had been thought, but was still present. The Claimant was still to be regarded as a manipulative and dishonest man.

    ii) The detention must be brought to an end within a short further time and during that time all possible steps to secure the ETD must be taken, and taken vigorously.

    iii) There was still a prospect of obtaining an ETD within the next two months.

    iv) If that view had been taken on 7th September 2010, it would have been reasonable to allow a further two months to secure the ETD.

48. Efforts were made to secure the ETD in August-October 2010. The case was included on a priority list for discussion with the Moroccan Authorities. The case was escalated to the RGDU Business Expert to pursue the Moroccan consulate for an outcome, but it is not clear to me what actually happened as a result of that step. On 27th October 2010 a telephone interview was arranged. It seems to me that it was reasonable to take this step, instead of a face to face interview, if the Moroccan Embassy was willing to participate. In the end, on 2nd November the Embassy's telephone was not answered so nothing happened. I consider that when the telephone interview failed, and the other steps which I identify had failed to bear fruit within the period of 2 months from the 12 month anniversary of the start of detention it should have been clear that the detention was now longer than was lawful and that even if the reasonable period had not elapsed (I think it had) there was not likely to be a removal during such period of that reasonable period as remained. There was a Detention

Review to be held within the next few days and I consider that this decision should have been reached then.

49. It is worth setting out an email from Mr. Ed Megarry sent on the day of the failure of the telephone interview.

> "I must underline to you that almost every attempt we have made in the past 15 months to elicit a response from [the Moroccan Authorities] both here and in Morocco has met with failure….this man has been in UKBA detention, awaiting a document for 15 months and wishes to return home. We have submitted applications on 3 occasions along with a good deal of supporting evidence supplied by Mr. Fardous. Furthermore we have had verbal confirmation from the police liaison in Morocco that the fingerprint bureau there have positively identified him from the prints we submitted…it seems plain to me that this case should be raised directly with the Moroccan authorities by RGDU…"

50. Five days later the November Detention Review recorded "It is accepted that [the Claimant] wishes to return to Morocco". On 8th November the opinion was recorded that unless the ETD was obtainable with a short time frame "we have to consider whether continued detention is proportionate if there is no realistic prospect of removal in the short to medium term."

51. In my judgment that Detention Review in November 2010 marks the point at which the detention of the Claimant ceased to be lawful under *Hardial Singh* principles. It is agreed that quantum will be decided after hearing further argument in the light of my decision, if it cannot be agreed. I have held that 8 months of the 22 months of detention was unlawful.

52. I shall not further review the history of events between November 2010 and July 2011, except to say that vigorous attempts continued to be made to try to secure an ETD for the Claimant. They fell on stony ground and very frequent telephone calls to the Moroccan Consulate were made which did not get through to anyone who could discuss the case. The UK officials were becoming increasingly frustrated. An interview finally took place between the Claimant and a Moroccan official on 13th June 2011 at which it was agreed that the ETD process would be "expedited". Yet further fingerprints were then requested. The Claimant was granted bail on 4th July 2011. The ETD was finally issued on 21st October 2011 and the Claimant was removed on 25th October 2011.

53. I wish to make three things clear:

i) I accept that many people worked very hard to try to secure a better outcome both for the Claimant and for this country than was ultimately achieved. I make no finding of fault against anyone in this regard. I am not concerned to review anyone's decisions, but to make my own.

ii) It is extremely unfortunate that the failure of the Moroccan authorities to respond more quickly to reasonable requests by the Claimant and by the UK authorities have created a situation where he was detained for 8 months longer than was lawful with the result that these proceedings have been necessary

with consequent expense to the United Kingdom government. I do not know why this happened and have not heard from the Moroccan authorities.

iii) Although these proceedings are brought against the Secretary of State it is not alleged that she was personally involved in any of the relevant events. The finding of unlawfulness I have made is not a finding against her personally.