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Case No: CO/10702/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2009

Before :

Mr Neil Garnham QC
Sitting as a Deputy Judge of the High Court

- -

Between :

THE QUEEN ON THE APPLICATION OF MOHAMMOUD EGAL	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Alex Goodman (instructed by **Public Law Project**) for the **Claimant**
John-Paul Waite (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 4 November 2009

- -

Judgment

Mr Neil Garnham QC, sitting as a Deputy HCJ:

Preliminary procedural issues

1. This is a claim by Mr Mohammoud Egal for an Order directing his release from immigration detention.

2. The matter came before me on 4 November 2009 as an application for permission to apply for judicial review which was to be "rolled up" with a substantive application if permission was granted. The Claimant was represented by Mr Alex Goodman; the Defendant by Mr John-Paul Waite. At the beginning of the hearing, I indicated that I proposed inviting Mr Goodman to develop his submissions in full, after which I would rule on whether permission should be granted in the light of the Defendant's written submissions. I said that if I granted permission I would then invite Mr Waite to respond to the substantive application. Both Counsel were content with that course. Having heard Mr Goodman, I gave permission to apply and Mr Waite responded to Mr Goodman's submissions.

3. In opening his case, Mr Goodman indicated that his client had an application to amend his grounds by adding what were called "Supplementary Grounds of Claim".

A copy of those Supplementary Grounds (a copy of which can be found in the hearing bundle at page 337) had been served on the Court and on the Defendant on 2 November 2009. They are lengthy but, in essence, challenge the lawfulness of the Claimant's detention between 16 September 2008 and 14 April 2009. I was told that they were based on documents disclosed by the Secretary of State late in the proceedings. Mr Goodman indicated at the outset that he was not inviting the Court to decide on that challenge during the present hearing, but instead hoped to persuade the Court to deal with the claim for release from detention immediately, with the issue of unlawful detention between 16 September 2008 and 14 April 2009 being dealt with at a subsequent hearing. Mr Waite said that the Secretary of State was content with that approach provided the Secretary of State was given the chance to oppose the grant of permission in respect of that challenge.

4. I indicated that I would rule on that application having heard the substantive submissions. I did so by way of a short ex tempore Judgment at the end of the day. Counsel agreed to prepare a note of that Judgment. In essence, I ruled that the Claimant should have permission to amend his Grounds to add the Supplementary Grounds, that the grant of permission I had given at the close of Mr Goodman's submissions would apply only to the claim for release from detention, that the Secretary of State should have an opportunity to respond in writing to the supplementary grounds and that a Judge of the Administrative Court should then be invited to rule on whether or not the Supplementary Grounds disclosed an arguable case. If he or she ruled that they did, the claim in respect of the unlawful detention should come on for hearing in the usual way. I made clear that it would not be necessary for that matter to be reserved to me but could be heard by any Judge or Deputy Judge of the Administrative Court. Both Counsel indicated they were content with that proposed method of dealing with the problem created by the late application to amend and I made an Order in those terms.

5. In consequence, the one matter that now falls for decision is the application for an immediate Order requiring the Secretary of State to release the Claimant from immigration detention and it is to that that I now turn.

The Statutory Scheme

6. It is convenient first to set out the relevant statutory provisions that govern the powers of the Secretary of State to detain when deportation is contemplated.

7. Paragraph 2(2) of Schedule 3 to the Immigration Act 1971 provides as follows:-

> *"Where notice has been given to a person … of a decision to make a deportation order against him… he may be detained under the authority of the Secretary of State pending the making of a deportation order. "*

8. Sub-paragraph 3 of paragraph 2 provides:-

> *"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…".*

9. Section 32 of the UK Borders Act 2007 provides as material:-

> *"(1) In this section "foreign criminal" means a person:*
>
> *(a) who is not a British citizen,*
>
> *(b) who is convicted in the United Kingdom of an offence and*
>
> *(c) to whom condition (1) or (2) applies.*
>
> *(2) Condition (1) is that the person is sentenced to a period of imprisonment of at least twelve months.*
>
> *(3) [Condition (2) is not yet in force…]...*
>
> *(5) The Secretary of State must make a deportation order in respect of foreign criminal (subject to Section 33 [which does not apply here])*

10. Section 36 provides:-

> *"(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State*
>
> *(a) Where the Secretary of State considers whether Section 32(5) applies and*
>
> *(b) Where the Secretary of State thinks that Section 32(5) applies, pending the making of a deportation order.*
>
> *(2) Where a deportation order is made in accordance with Section 32(5), the Secretary of State shall exercise the powers of detention under paragraph 2(3) of Schedule 3 of the Immigration Act 1971 … unless in the circumstances the Secretary of State thinks it inappropriate."*

The History

11. The Claimant was born on 29 November 1988 in Somalia. On 24 January 1990, when he was one year old, the Claimant, his mother and siblings moved to the United Kingdom. He grew up here and has lived in this country ever since. The family were granted exceptional leave to remain for four years and thereafter were granted indefinite leave to remain.

12. In 2004, the Claimant first came to the attention of the police when he was cautioned for an offence of burglary of a non-dwelling. He was subsequently convicted, on 19 May 2006, of burglary and theft from a dwelling house and common assault. He received a community order with supervision and a curfew was imposed. He breached the terms of the curfew and was therefore sentenced to twelve months

detention and training. On 6 June 2006, he was convicted of robbery and failing to surrender custody.

13. On 30 January 2007, the Defendant made a decision to deport the Claimant following the latter two convictions. The Claimant appealed against that decision and that appeal was allowed by the Asylum and Immigration Tribunal (AIT) following its consideration of Article 8 of the European Convention on Human Rights (ECHR) against the background of the facts then obtaining. There is a copy of the Determination at page 43 in the bundle. The Determination included the following passage at paragraph 8.7 – 8.8:

> *"The only family he has contact with are in the United Kingdom. We accept that the Appellant and his family have no remaining relatives in Somalia … We further accept that having come to the UK when he was a year old, he will not have any recollection of Somalia. We find that the Appellant has not been entirely truthful as to the extent to which he speaks Somali… However, we accept that he does not read or write Somali. Bearing in mind what is known about the unstable situation in Somalia, we accept that it would be extremely difficult for him without any contacts and limited knowledge of the language and with only such limited funds as his mother might from time to time be able to send him, to make any kind of life for himself there or possibly even survive. For all those reasons, we find that removal would be disproportionate.*
>
> *We wish to make it clear that the Appellant should not take from this that he is immune to deportation regardless of his conduct. We allow his appeal based on the facts as they currently are, including in particular the Appellant's relative youth. Those facts may change or may be viewed differently if the Appellant's pattern of offending were to continue."*

14. Since the date of that Determination, the Claimant has been convicted of further offences. First, on 7 May 2008 he was convicted of two counts of assaulting a constable and sentenced to eight months imprisonment. Second, on 10 April 2008, he was convicted of causing grievous bodily harm and sentenced to ten months imprisonment, to be served concurrently with the sentence for the assaults.

15. The automatic release date for the latter sentence was 16 September 2008. On that day, he was made subject to immigration detention. The letter informing him of that decision, addressed to him at the Young Offenders Institute at Feltham, was dated 16 September 2008 and can be found at page 53 of the bundle. The letter includes the following:-

> *"The Secretary of State is considering whether Section 32(5) of the UK Borders Act 2007 (Automatic Deportation) applies in your case. Consequently you are liable to detention under Section 36(1) of said Act. While each case will be considered on its merits, the presumption is that the public interest*

> *requires the detention of foreign criminals. Only in exceptional circumstances, or if a person poses the lowest risk to the public and the lowest risk of absconding, will this presumption be outweighed."*

16. The hearing bundle contains copies of a Home Office case record file. The entries in that record are revealing of what the Defendant believed was the status of the Claimant whilst in detention. Thus, the entry for 8 September 2008 indicates that the Claimant "*was sentenced to ten months imprisonment on 4/9/08"* but that HMP Weyland subsequently indicated that "*the sentence was one year two months"*. The entry for 16 September 2009 reads: "*Case fits CCT criteria assessment, as non-EEA national, has received a custodial sentence of one year, one month and 27 days, is subject to automatic deportation under the new UK Borders Act 2007 …"* The custody authority sheet which is found at page 52 of the bundle indicates that the Claimant was a *"foreign national who has served a period of imprisonment and the Secretary of State is considering whether Section 32(5) of the UK Borders Act 2007 applies."* A case file entry for 15 October 2008 (page 95) indicates that: "*This is an automatic deportation case"*. A three month detention review (at page 100) also suggests that the Home Office were treating the Claimant's case as one to which the 2007 Act applied. The same can be said of a six month detention review dated 16 March 2009 which is found at page 115.

17. Curiously, however, whilst the Home Office internal documentation suggested that the Claimant was being treated as a person subject to detention under the 2007 Act, monthly progress reports to the detainee himself suggested that the Claimant was being detained under Schedule 3 to the Immigration Act 1971. That can be seen from the monthly progress report of 12 November 2008 (page 98), December 2008 (page 103), January 2009 (page 108), February 2009 (page 113) and for March 2009 (page 116).

18. It appears, (although this may be the subject of dispute at the subsequent hearing in this case), that it was in about March 2009 that the Home Office realised that the Claimant ought to have been detained, if at all, under paragraph 2(2) of Schedule 3 of the 1971 Act. That that was the case emerges from the custodial authority form at page 118. On 8 April 2009, the Home Office wrote to the Claimant indicating that his deportation would be conducive to the public good (page 124). The decision to make the deportation order is found at page 130.

19. The fact that in March or April 2009 the Home Office had recognised that they had been treating this case as an automatic deportation case under the 2007 Act, rather than a conducive case under the 1971 Act, appears to be confirmed by the seven month detention review at page 133 in the bundle. The apparent change in the basis for the detention may be of considerable significance in the supplementary claim the Claimant advances as to the lawfulness of his detention. For present purposes, however, this history is relied upon by Mr Goodman primarily because, he says, it demonstrates substantial inefficiency or incompetence on the part of the Secretary of State. He submits that that goes to the question (to which I will return below) of whether the Secretary of State has acted with due diligence in handling this man's case.

20. On 08 April 2009 the Secretary of State decided to deport the Claimant and on 14 April 2009 issued a notice of decision to make a deportation order. The Claimant alleges that he attempted to appeal that Notice. It appears, however, that he erroneously faxed the appeal forms to the wrong address. There is no evidence that that appeal form was received either by the AIT or by the Home Office. However, the Secretary of State decided that the Claimant ought to have the opportunity of appealing the deportation decision to the AIT and accordingly reissued the decision in late October 2009. The Claimant appealed that decision to the AIT on 2 November 2009. That appeal is currently outstanding.

21. The Claimant has remained in detention since April 2009. It is important to note that he makes no assertion in the course of his challenge to his continued detention that his detention since 14 April 2009 has been unlawful. The Grounds, prior to their amendments, challenged the lawfulness of past detention, but the Court was not invited to rule on that. That claim is only mounted in the Supplementary Grounds which I gave the Claimant permission to add by way of amendment. The subject of the current challenge is the Claimant's detention as at today's date and hereafter.

The Competing Submissions

22. The question for today, therefore, is whether the Claimant's continued detention is lawful.

23. Mr Goodman for the Claimant makes five principle submissions. First, he says that the case of *Hardial Singh* [1984] 1WLR 704, applies to the present case and that in consequence the essential question is whether the Secretary of State can properly assert that removal of the Claimant will be effected within a reasonable period. It is Mr Goodman's case that removal is unlikely at all given the strength of the Claimant's immigration case, but that even if removal were to become possible, detention would be a very long way off. Further, he points to the practical difficulties facing the Secretary of State in removing to Somalia and invites the Court to approach that issue as did Davies J in *Abdi v SSHD (No 2)* [2009] EWHC (add ref).

24. Second, he says that the length of detention to date, some 13½ months, is relevant in itself and points to a conclusion that no further detention can possibly be acceptable.

25. Third, he says that the risk of the Claimant absconding were he to be released from detention now would be low. He says that the Claimant is integrated into British society; he has close family ties here; he has been living in this country since the age of one and he had a strong case for being allowed to remain here. It is suggested that conditions such as reporting conditions and perhaps electronic tagging would adequately meet any risk of absconding.

26. Fourth, he says that the risk of the Claimant re-offending is not such as would justify his continued detention. Mr Goodman says that it is for the Secretary of State to prove justification for detention and observes that there is no evidence, whether from the National Offender Management Service or otherwise, to justify a conclusion that there is a significant risk of refunding. He says that the last offence, what he calls the "*index*" offence, was at the lower end of the scale for offences of grievous bodily harm as is reflected in the relatively modest sentence of ten months imprisonment.

27. Finally, Mr Goodman says that the Secretary of State has failed to act with proper diligence. It is argued that the history demonstrates that for six months, the Secretary of State was acting under the misapprehension that he had power to detain under the automatic deportation provisions of the 2007 Act when in fact those provisions did not apply.

28. Mr Waite, on behalf of the Secretary of State, underlines the fact that for the purposes of these present proceedings, there is no challenge to the lawfulness of the period of detention between 14 April and the date of issue of the proceedings. So, says Mr Waite, the sole question is whether the decision of the Secretary of State today to continue detaining is a reasonable one. He says regard may properly be had to the previous length of detention and the possible future length of detention but no regard should be had to any suggestion of unlawfulness in past detention.

29. With that in mind, Mr Waite makes six submissions.

30. First, he says, the Secretary of State relies on the risk of the commissioning of further offences. Second, he relies on the risk of the Claimant absconding. Third, Mr Waite says that the time for assessing whether removal can be completed in a reasonable period has not yet arisen because the Claimant's appeal rights are not yet exhausted. Fourth, he says that the fact that the appeal has not yet been heard is evidence that a reasonable period has not yet elapsed. Fifth, he says that there is no clear operational or practical impediment to the Claimant's removal to Somalia. Sixth, he says that the overall period of detention of this Claimant is not out of step with what has been regarded as lawful in other cases.

Discussion

31. The case concerns the liberty of an individual. It is well established that the Court's role in a claim for an order for release from detention is a primary one and is not simply a matter of review. The Court itself decides the lawfulness and reasonableness of detention; it does not simply consider whether the Secretary of State's conclusion on the issue is one reasonably open to him. In *R(oao A) v Secretary of State for the Home Department* [2007] EWCH Civ 804 at paragraph 60-62 Toulson LJ said:

> *"It must be for the Court to determine the legal boundaries of administrative detention. There may be incidental questions of fact which the Courts may recognise that the Home Secretary is better placed to decide than itself, and the Court will no doubt take such account of the Home Secretary's views as may seem proper. Ultimately, however, it must be for the Court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions beings often inextricably interlinked."*

32. The proper approach to be adopted in determining the lawfulness of detention under immigration powers was authoritatively determined in *R v Governor of Durham Prison ex p Singh* [1984] 1 All ER 983. That case turned on the proper construction of paragraph 2(3) of Schedule 3 to the Immigration Act 1971. By contrast, as is common ground between the parties, this Claimant is currently detained pursuant to the powers under paragraph 2(2) of Schedule 3. It seems to me perfectly plain,

however, that the principles enunciated by Woolf J. there apply with equal force to the present case.

33. That that is correct emerges from the Court of Appeal's decision in *R (SK (Zimbabwe)) v SSHD* [2008] EWCA Civ 1204, [2009] 1WLR 1527, a case to which Mr Goodman took me. At paragraph 35 in the Judgment, Laws LJ held:-

> *"In seeking to formulate the issue before us, I pose the question, what is the reach of the power conferred by paragraph 2(2) of Schedule 3 … and characterised it as a question of statutory construction. …I would summarise my conclusions on this issue as follows …(ii) avoidance of the vice of arbitrary detention by use of the powers conferred by paragraph 2(2) requires that in every case the Hardial Singh principles should be complied with."*

34. Those principles were conveniently summarised by Dyson LJ in R *(oao I) v SSHD* [2002] EWCA Civ 888:

> *"In my Judgment … the following four principles emerge:*
>
> *(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*
>
> *(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;*
>
> *(iii) If, before 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 the reasonable diligence and expedition to effect removal."*

35. The second, third and fourth of those four principles are directly applicable here. Mr Egal may only be detained for a period that is reasonable in the circumstances of his case. If it has become apparent that the Secretary of State is not going to be able to remove him to Somalia within that reasonable period, he should be required to release him now. In judging what a reasonable period is, I should have in mind the obligation on the Secretary of State to use reasonable diligence and expedition in arranging the removal.

The reasonableness of the period

36. It is accepted by both parties that relevant to the question as to what is a reasonable period for detention is the risk of re-offending or absconding. That is now well established. Thus, for example, in *R (oao I) v SSHD*, Simon Brown LJ (as he then was) said at paragraph 29:

> *"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."*

37. At paragraph 55, Toulson LJ said:

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

38. It is accordingly common ground that I should have regard to the risk of Mr Egal reoffending in deciding whether a reasonable period has been exceeded in this case. In my judgment, Claimant does pose a real risk. It is, in my view, highly material that in their determination of 30 July 2007, the AIT warned the Claimant that he should not regard his success in that appeal as making him immune to deportation regardless of his future conduct. They told him that the strength of his case would change if his pattern of offending were to continue. Despite that warning, the Claimant continued to offend.

39. Mr Goodman suggested that his offences were not of the most serious character. Certainly, there are more grave offences, but it would be quite wrong to underplay the seriousness of an offence of grievous bodily harm. Mr Goodman is right to say that there is no expert evidence about the risks of future offending. But in my view, the Court cannot shut its mind to the fact that this Claimant has a significant history of offending, that offending has continued despite the warning contained in the AIT decision and that the offending is serious. In my view, the Claimant continues to represent a significant threat to the public and there remains a real risk of his continuing to offend if released.

40. There has been authority of somewhat conflicting effect as to the significance of a risk of absconding. In *R (oao I) v SSHD* Dyson LJ said (at paragraph 53),:

> *"Carried to its logical conclusion (the risk of absconding) could become a trump card carried by 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."*

41. By contrast, in *R (oao A) v SSHD*, Toulson LJ, said at paragraph 54 (in a passage which Mr Goodman accepted remained an accurate statement of the law):

> *"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, there is 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… "*

42. Lord Justice Longmore agreed with the Judgment of Lord Justice Toulson in A. Lord Justice Keene also agreed. He addressed the significance of the risk of absconding at paragraph 77. Absconding, he said:

> *"To my mind, that makes the risk of absconding in any given case a matter of the greatest important, since if a person in question were to abscond, and it would prove difficult to trace him, the whole purpose of the deportation order would be frustrated. To that extent, I respectfully disagree with that part of the Judgment of Dyson LJ in R(I) at 53, where he stressed the need not to overstate the importance of the risk of absconding. It is, in my Judgment, a factor which in most cases will be of great importance."*

43. In the light of those authorities, it seems to me that the proper approach recognises that the risk of a detainee absconding will always be an important factor in determining the reasonableness of a person's detention, that in many cases that risk will be decisive, but that the risk of absconding is not a trump card in the sense that its existence obliges the court to disregard every other factor. Nonetheless the importance of this factor is difficult to overstate because the detainee's absconding would frustrate the very purpose of the statutory power to detain pending deportation.

44. On the facts of the present case, there is, in my judgment, a very significant risk of the Claimant absconding. Mr Goodman fairly made the point that the Claimant's family are well established in this country and the Claimant has been here himself since the age of one. However, the Claimant also has a significant history of failing to comply with conditions imposed upon him. He has a previous conviction for failing to surrender to custody. He has been in breach of a curfew order. In addition, the findings of the AIT on a bail application by the Claimant (dated 29 December 2008) are, in my Judgment, highly material in this context.

45. The AIT noted that *"The Applicant has previously been granted bail and has failed to report to an immigration officer…"*. The adjudicator rejected the submission in the course of that bail application to the effect that the Applicant's family would be able to exert effective control over him and he found that the Applicant would be likely to commit further offences and would be likely to abscond if granted bail. That finding was made after an oral hearing and provides, in my view, powerful independent evidence about the risks of absconding.

46. Mr Goodman suggested that the significance of the determination by the adjudicator was undermined by the fact that the adjudicator was proceeding on the basis that the Applicant was liable to automatic deportation under the 2007 Act. I accept that it can be said that on that basis, the adjudicator might have expected a rather speedier deportation than has in fact been the case, but in my view that does not negate the significance of those findings.

47. It follows that in my judgment, there is a very significant risk that if the Claimant is released, he will abscond. It may well be right that his family are well settled in this

country. It may also be right that he has some real prospects of successfully challenging the deportation order. But his history reveals that he is not a man who is prepared to place his trust in the mechanics of the law to ensure his best interests. In my view, he is unlikely to take the chance and, if released, may well instead simply disappear.

The likelihood of removal

48. There are two potential obstacles to the Secretary of State's early deportation of the Claimant. First the practicalities of removal to Somalia; second the Claimant's appeal rights.

49. There was considerable debate in the course of argument as to the practicalities of returning deportees to Somalia. Mr Goodman referred at length to the analysis of Davis J in *Abdi* on this topic. It was the practical difficulties in returning Mr Abdi to Somalia that led Davis J to say at paragraph 76 "*I think that the time has come in this particular case to say that enough is enough … It is time now, in my view, that Mr Abdi be released from detention …*" and Mr Goodman says that for precisely the same reasons, precisely the same outcome should follow here.

50. However, on the morning of this hearing, by consent Mr Waite put before the Court a witness statement from Mr Clive Wools, an inspector in the Returns Liaison Unit of the UK Border Agency. Mr Wools' statement describes the mechanics for effecting returns to Somalia. He explains that they are effected by the use of a European Union format letter. He says that where a birth certificate or passport is not available, then a "biodata form" is completed. He explains that save for a short period when Mogadishu International Airport was closed from mid-September to mid-October 2008, removals to Somalia have continued.

51. Mr Goodman submits that Mr Wools speaks in generalities and provides little hard evidence that it will be possible to effect removal in the Claimant's case when the time comes. The difficulty with that argument, however, is that the Secretary of State cannot attempt removal for the present whilst the Claimant's appeals subsist. In the light of Mr Wools' statement, however, it can, in my judgment, be said that a process now exists by which returns can be effected to Somalia and there is no obvious reason why that should not be put into effect in the Claimant's case if and when his appeals finally fail. It is right that the practical application of that process cannot yet be tested in Mr Egal's case but nor can it be said that it does not exist.

52. As to the second obstacle, it is common ground between the parties that there is no power in the Secretary of State to effect deportation until the Claimant's appeals are exhausted. The question arises whether the consequence of that is that the period whilst appeals are being pursued should be disregarded for the purposes of assessing the reasonableness of continued detention. In support of the contention that they should, Mr Waite relied on what Lord Justice Auld said at paragraph 20 in *R (oao Q) v SSHD* [2006] EWHC 2690 (Admin).

> *"The appropriate period for considering the delay for the purpose of these proceedings is from Q's withdrawal … of his appeal against deportation …Until then the Secretary (of State)*

> *could not know whether or when he would have power to deport him…"*

53. Similar observations were made in the case of I by Simon Brown LJ and Dyson LJ and by Mitting J in *R(Bashir) v SSHD* [2007] EWHC 3017 (Admin).

54. All of these cases are discussed at length by Davis J in *R (oao Abdi) v SSHD* [2009] EWHC 1324 (Admin). I gratefully adopt Davis J's analysis of these cases and agree with his conclusion that they do not demonstrate a *"general and inflexible rule"* to the effect that in assessing the reasonableness of a period of detention, any period during which a detainee is appealing is to be wholly disregarded. However, the fact that the reason that detention is continuing is because of a detainee's pursuit of an appeal will always be, in Davis J's words (at paragraph 36) *"A highly relevant factor"*. Davis J went on in that passage to say:

> *"Commonly, no doubt, in cases where there is also a risk of absconding and of re-offending, it may be a decisive one where the only operative bar to removal is pursuit of the very appeal process."*

55. Mr Goodman submits that the appeal process may be very lengthy indeed in this case. Not only does the Claimant have available the right of appeal in domestic law but he also has the possibility of seeking a Rule 39 indication from the European Court of Human Rights and then pursuing a case to Strasbourg, as other have done. There are other Somali cases ahead of him and it is likely to be some time before all legal obstacles to the return of someone in the Claimant's position have been removed, even if the appeals were ultimately to fail.

56. It is in that context, however, that the observations of Davis J at paragraph 36 of his Judgment in *Abdi* are of particular significance. As I have held above, this is a case where there is a significant risk of absconding and of re-offending. In such a case, the fact that it is the pursuit of an appeal, whether domestically or to Strasbourg, which prevents removal is likely to lead, in my judgment, to a conclusion that the period of detention is not unreasonable. I say "is likely" to do so because, in my view, there can be no hard and fast rule to that effect; these are fact-sensitive judgements. To be weighed in the balance will be the nature and magnitude of the risk of re-offending and of the Claimant absconding, the timeliness of the Claimant's pursuit of his appeal rights, the diligence and expedition of the Secretary of States' pursuit of deportation and the likely period of delay before the appeals process has concluded.

57. It is impossible to say how long the appeals in this case will take. Mr Waite sought to argue that, in consequence, it was premature now to assess the lawfulness of detention. I reject that argument. It is for the Secretary of State to justify the detention and it is for the Court closely to examine the reasonableness of the detention at the date the matter comes before it. The Court cannot defer the assessment of the lawfulness of the detention. However, for reasons for which the Claimant must take some responsibility, his appeal against deportation has only just been launched and I cannot say in all the circumstances of this case that the mere fact that those appeals may take some time to resolve means that the detention today is unlawful.

The errors of the Secretary of State

58. Mr Goodman, quite properly in my view, made much of the evidence of inefficiency on the part of the Secretary of State in the conduct of this case. It is not for me here to decide whether the apparent errors that were made by officials in identifying the correct statutory provision entitling the Secretary of State to detain the Claimant, removed the lawful basis for the detention at that time. But it is clear to me that there were errors and it is likely that those errors have caused some delay in the processing of this case towards deportation. Those factors are relevant in assessing the reasonableness of the Secretary of State's continued detention of the Claimant. But they do not, in my view, come close to outweighing the significance of the risks of further offending, the risks of the Claimant absconding or of the fact that what currently prevents the Claimant's deportation is his pursuit of appeals.

59. Finally, I should record that I was addressed by both Counsel about the length of periods of detention in other cases. Mr Waite sought to show that longer periods of detention than obtained in the present case had been found to be unlawful; Mr Goodman sought to show that in other cases, release had been ordered after shorter periods of detention. I find this sought of comparison largely unhelpful. Each case turns on its own facts and the Judge in each case makes his assessment not just on the basis of the length of detention but on all the circumstances in the case.

Conclusion

60. This application for an Order requiring the Claimant's release from detention fails. In reaching that conclusion the following features of the case have seemed to me of particular significance:-

    i) There is a real risk of the Claimant committing further offences if released;

    ii) There is a significant risk of the Claimant absconding if released;

    iii) Although as yet untested in the Claimant's case, removal to Somalia now appears to be possible;

    iv) The reason why the Claimant cannot be removed at present is that he is appealing the deportation decision;

    v) Although there appears to be evidence of inefficiency by the Secretary of State in the conduct of this case, that does not outweigh the significance of the other features of this case.

61. I will hear counsel on the orders that are now required for the future conduct of these proceedings.