Neutral Citation Number: [2010] EWCA Civ 1112

Case No: C4/2009/2397

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Sales
[2009] EWHC 2506 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2010

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE RICHARDS
and
LORD JUSTICE ETHERTON

- -

Between :

The Queen (on the application of MH)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Edward Fitzgerald QC and Laura Dubinsky (instructed by **Refugee & Migrant Justice**) for the **Appellant**
Alan Payne (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 17-18 June 2010

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Judgment

Lord Justice Richards :

1. This is the latest in a line of cases going back to *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704 concerning the length of time for which it is lawful to detain a person pending deportation. In the present case the claimant was detained for a total of 40 months before he finally secured his release on bail. Sales J held that the detention had been lawful for all but the last two months of that period. On the claimant's appeal, brought with permission granted by the judge, it is contended that the detention became unlawful much earlier than that. The claimant seeks declaratory relief and damages for false imprisonment in respect of the period of unlawful detention.

2. The issues in the appeal are heavily dependent upon the particular facts of the case, which were the subject of very detailed and careful consideration by Sales J. Although I shall give an abbreviated account of the relevant facts, I regret that an exposition of some length is needed in order to do justice to the judgment below and the submissions of counsel.

The claimant's background circumstances

3. The claimant is a 31 year old national of Somalia, born in the area now known as Somaliland. He arrived in the United Kingdom in 1994, at the age of 15, and was granted limited leave to remain here with his mother. He was subsequently granted further leave to remain as her dependant until June 1997. He remained thereafter without leave. His mother had made an application for an extension of leave, but unbeknown to him he had not been included in that application.

4. The claimant's subsequent history up to the time when he was served with notice of intention to deport is set out in the following passages taken from the judgment of Sales J:

> "16. On 4 April 1996 the Claimant received his first criminal conviction, a caution for shoplifting. On 17 October 1996 he was sentenced to 30 months detention for robbery. He developed an alcohol abuse problem.
>
> …
>
> 18. Upon his release from custody, the Claimant found himself in difficult circumstances. The absence of authorisation for him to remain in the UK meant that he did not have access to social assistance and benefits. This seems to have increased the risk of the Claimant re-offending.
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> 19. The Claimant received further custodial sentences. On 13 March 1998 he was sentenced to three months detention for possession of a bladed article in a public place and shoplifting. On 30 September 1998 he was sentenced to six weeks detention for taking a vehicle without consent and driving dangerously. On 18 December 1998 he was sentenced to eight months detention for burglary and theft. On 7 April 1999 he was

sentenced to 21 days custody for threatening behaviour, failure to surrender to bail, shoplifting and threatening to damage property. On 18 June 1999 he was sentenced to three years detention for robbery. On 24 January 2001 he was sentenced to six months detention for burglary and theft of about £5 from a café, together with 503 days for breach of the licence conditions under which he had been released from his last offence.

20. By Home Office letter dated 20 November 2001 the Claimant was informed that the Secretary of State was, in light of his offending, considering his deportation to Somalia and inviting representations from him on that issue. The solicitors then representing the Claimant (Stanley & Co) responded by letter dated 18 December 2001, in which they made representations against his deportation. …

21. It appears that no decision was taken to deport the Claimant at this stage. By letter of 21 May 2002 to the Home Office, Stanley & Co pressed for the Claimant's application for asylum to be considered as soon as possible, and pointed out that he was having to sleep rough as his welfare benefits had been suspended due to his inability to provide his social security office with proof of his immigration status. They asked for the Claimant to be granted indefinite leave to remain in the UK. By letters dated 30 May 2002, 4 November 2002 and 28 January 2003 Stanley & Co continued to press for a decision to be made on his application. The material before the court did not contain any reply to these letters. Consideration was given within the Home Office to a proposal that the Claimant be granted leave to remain in the UK for a further three years, but it was not approved.

22. Instead, shortly after the Claimant's release from custody in respect of his latest offence, he committed an offence of theft by stealing a watch from a jacket on 17 August 2003 (for which he was arrested and released on bail) and an offence of burglary on 29 August 2003, while on bail, involving entry to a hotel room and theft of a camera and suitcase. He pleaded guilty to these offences and was sentenced in the Crown Court on 14 January 2004 to a total of 15 months imprisonment.

…

26. Under the sentence imposed in January 2004, the Claimant was due to be released on 16 April 2004. The question therefore arose whether the Claimant should then be deported. On 9 April 2004 the Claimant was served with notice that the Secretary of State had decided that it was conducive to the public good to make a deportation order against him, that he proposed to give directions for the Claimant's removal to

> Somalia and informing him of his right of appeal against the decision."

5. An appeal against the decision to make a deportation order was dismissed by an immigration judge on 25 February 2005. Sales J referred to the immigration judge's determination when rejecting a submission that the claimant's offending was comparatively minor and excusable. The immigration judge, having heard the claimant give evidence, found that he was unlikely to desist from his pattern of offending, took the view that the two offences of robbery were serious offences, also expressed concern about the circumstances of the offence of possession of a bladed article, and attached significance to the recent offences of burglary and theft as indicating the claimant's continuing approach to crime. Sales J saw no reason to doubt the immigration judge's assessment of the gravity of the offences.

The feasibility of returns to Somaliland

6. Because of its central relevance to the history of the claimant's immigration detention, Sales J considered the general position concerning returns to Somaliland before examining the claimant's individual history. I shall follow the same course.

7. Sales J began by summarising matters as follows:

> "30. It is necessary to distinguish between enforced returns and voluntary returns to Somaliland. An enforced return is a return effected without the Claimant's co-operation. A voluntary return is a return effected with the Claimant's co-operation in relation to the means used to implement his removal and transportation to Somaliland. In both cases, the consent of the local authorities in Somaliland is required. The availability of these two types of return has varied over time.
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> 32. On 4 July 2003 a Memorandum of Understanding was signed by the UK Government and the Somaliland authorities dealing with removals from the UK to Somaliland ("the 2003 MOU"). In order to secure their agreement to the return of an individual to Somaliland, the Somaliland authorities required as much information about the individual as possible, including regarding the clan history of the individual (cumulatively referred to as 'bio-data' in the papers), in order to allow them to be satisfied that the individual had the requisite degree of connection with Somaliland to warrant return there. Their usual position is that to be accepted for return to Somaliland an individual needs to come from a clan with a sizeable representation there, and/or to have been born there (or have parents who were born there) and/or to have family currently residing there. The first stage of the information gathering process under the 2003 MOU involved the completion of a bio-data form. Such a form would be forwarded to the Somaliland authorities, who would have a period of time under the MOU in which to confirm whether or not an individual was acceptable for return there. The evidence is that the scrutiny applied by the

> Somaliland authorities is stringent, and that the necessary bio-data is difficult to obtain without the co-operation of the individual concerned.
>
> 32. The position adopted by the Secretary of State … was that the 2003 MOU provided a real prospect of removal of the Claimant to Somaliland, which had been thwarted by the failure of the Claimant to co-operate in the provision of sufficient bio-data to be put to the Somaliland authorities to persuade them to accept his return to Somaliland. The Secretary of State's position in May 2007 was that the 2003 MOU meant that there was 'a real prospect of the Claimant being removed to Somaliland within a reasonable timescale', so that the Claimant remained properly detained at that time …."

8. Sales J then referred to *R (A) v Secretary of State for the Home Department* [2006] EWHC 3331 (Admin), in which Calvert-Smith J found on the evidence before him that the 2003 MOU "was almost completely ineffective because of the difficulties in gathering the bio-data required by the authorities in Somaliland to satisfy them that the person concerned was entitled to reside in Somaliland", and that during the period between 20 August 2004 and 20 July 2006 the 2003 MOU "was effectively a dead letter in respect of Somaliland".

9. There was a body of additional evidence before Sales J. It included information concerning seven individuals who were referred to the Somaliland authorities in 2004 under the 2003 MOU but were rejected; a family of five or six who were referred in early 2004, accepted for return and successfully returned; a referral in February 2006 which was rejected; a visit by British officials to Somaliland in June 2006 during which the Somaliland authorities affirmed that the 2003 MOU remained operational, indicated a willingness to assist with returns and agreed to second an official to the United Kingdom to assist with the identification of those who would be acceptable for return; the identification in late 2006 of an individual identified by that process whom the Somaliland authorities were prepared to accept for return; and the acceptance of an individual for return to Somaliland in May 2007 pending agreement on the further MOU of 3 June 2007. There was also evidence to the effect that between August 2004 and July 2006 the airlines were not willing to accept enforced returns but remained willing to carry individuals who signed disclaimers to confirm that they were returning voluntarily; and that agreement was reached with an airline in late July 2006 for the resumption of enforced returns.

10. The judge considered the evidence at some length before expressing the following conclusions on it:

> "38. Summarising the position as it emerges from the evidence before this court so far as concerns returns to Somaliland between 16 April 2004 and 21 August 2007 (the period of the immigration detention of the Claimant): (i) there were reasonable grounds for the Secretary of State to think that the Somaliland authorities were in principle willing to accept individuals for return to Somaliland if adequate bio-data showing a sufficient connection with Somaliland were provided

> in respect of them …; (ii) the Somaliland authorities applied stringent standards in assessing whether sufficient bio-data were provided, and in practice a substantial degree of co-operation in provision of such bio-data was required from the individual concerned, but on this evidence it would be going too far to say that either the 2003 MOU or the 2007 MOU was a dead letter and of no practical effect (accordingly, on the evidence before me, I do not share the assessment of the 2003 MOU by Calvert-Smith J in *R (A) v Secretary of State for the Home Department* referred to above; I am fortified in that conclusion by the view of Davis J in *R (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin) – *Abdi No. 2* - at [59] that at no stage on the material before him was there a complete impasse on returns to Somalia, including Somaliland); (iii) voluntary removals to Somaliland were possible throughout the period; (iv) enforced removals to Somaliland were possible only up to 20 August 2004 and were only again in contemplation from May 2006 and actually possible from late July 2006 onwards."

The history of the claimant's immigration detention

11. The claimant completed the custodial term of his criminal sentence on 16 April 2004. On the previous day, pursuant to para 2(2) of schedule 3 to the Immigration Act 1971, the Secretary of State issued an authority for his detention pending deportation. The reasons given in the accompanying decision letter included that "[r]emoval could be within a reasonable timescale should you not decide to appeal".

12. Initially the claimant remained in HMP Wandsworth, the prison where he had been serving his custodial term. He was moved to Colnbrook Immigration Removal Centre on 18 October 2004.

13. In the early phase of his immigration detention, the claimant maintained that he was from Mogadishu in Somalia, rather than from Somaliland. Sales J said it strained credulity that the claimant did not at all material times appreciate that he was from Hargeisa in Somaliland, but in the absence of cross-examination the judge did not think it right to conclude that he had deliberately suppressed the truth about his origins. Nonetheless, the judge considered that the claimant's failure at the beginning of his immigration detention to identify his true place of origin as Somaliland prevented the Secretary of State from seeking to explore his removal there from the outset.

14. On 31 August 2004, at a first hearing of his appeal against the deportation order, the claimant said that he had only just been shown his mother's form applying for leave to remain which showed that he came from Hargeisa in Somaliland. For that and other reasons the hearing was adjourned. Further hearings took place on 9 November 2004 and 1 December 2004, with the claimant now saying that he was from Hargeisa and the Secretary of State undertaking to return him only to Somaliland. In his determination of 25 February 2005 the immigration judge dismissed the claimant's submission that return to Somaliland would be in breach of his ECHR rights. The immigration judge also observed that the indications were that the claimant came

from a majority clan and that his mother had been a member of the ruling party in Somaliland. Sales J considered those matters to be relevant "as providing an objective foundation for the Secretary of State to think that there was a real prospect of obtaining information to show that the Claimant had a sufficiently strong connection with Somaliland as might be adequate to satisfy the Somaliland authorities to accept him for return there under the 2003 MOU or 2007 MOU" (para 44).

15. Following an unsuccessful application for reconsideration of the immigration judge's determination, the claimant's appeal rights became exhausted on 26 April 2005. At the end of 2005 he made an out of time application for a review by the High Court, but that was refused on 31 January 2006. Sales J expressed the view that "[w]hilst the Claimant was challenging his deportation at this stage, it was reasonable that the Secretary of State did not seek to interview him to seek further information which might provide the basis for an approach to the Somaliland authorities, since it was unlikely that he would co-operate in his removal at a time when he still hoped to overturn the deportation order against him", but once the position was finally resolved officials again sought to interview him to obtain more information (para 45).

16. Sales J went on to deal at some length with the issue of co-operation by the claimant in the provision of relevant information. The claimant was interviewed on a number of occasions by officials seeking to obtain bio-data on the basis of which an application for his return to Somaliland could be made to the Somaliland authorities under the 2003 MOU and then the 2007 MOU. The Secretary of State maintained that he was uncooperative in providing such information. The claimant disputed the point. Having considered the evidence, the judge concluded:

> "47. It is thus clear, even on the Claimant's own evidence, that there was a degree of uncooperativeness on his part at least at certain points in the course of his immigration detention in relation to provision of bio-data required for transmission to the Somaliland authorities. I do not consider that either of the explanations offered by the Claimant for his lack of co-operation in relation to the two specific incidents referred to … is a good one ….
>
> 48. In fact, these instances of lack of co-operation by the Claimant do not stand alone. There is a substantial body of contemporaneous evidence that the Claimant was deliberately withholding his co-operation from the deportation process …."

In thirteen sub-paragraphs the judge then set out the evidence to which he referred, relating to events between February 2005 and May 2007. I shall pick out only a few of those events in what follows.

17. At an interview on 7 February 2005 the claimant gave minimal details in response to questions and refused to sign the bio-data form. A second attempt to get him to complete and sign a bio-data form was made on 15 February 2006, when he provided some information and did sign the form. When asked to complete a third bio-data form at an interview on 31 March 2006, on the ground that the previous one did not have sufficient information on it, he refused to co-operate. As a result he was served with a notice warning him that he could be prosecuted under s.35 of the Asylum and

Immigration (Treatment of Claimants, etc) Act 2004 for non-compliance in answering questions.

18. In April 2006 there were exchanges between officials, as part of the process of internal review of the claimant's detention, in which the possibility of his release was mooted. On 10 April, Mr Nick Hearn (assistant director in the Criminal Casework Division) sent a note to Mr Lambert (senior caseworker), stating:

> "We have reached something of an impasse in this case. The ETD [Emergency Travel Document] is not the only barrier to removal given that we do not return to Somalia against the individual's will. We need to make a decision on this case soon if it becomes clear that [MH] will not co-operate with the documentation process and that therefore removal cannot be effected, we will need to consider release on tagging. Before we do so could you please check with Colnbrook as to whether [MH] is likely to co-operate with the disclaimer."

19. On 19 April Mr Lambert forwarded the note to a Mr Atkinson, asking him to contact Colnbrook and to prepare release on tagging if the claimant was still not co-operating. In a response dated 28 April 2006, Mr Atkinson said that the claimant was still not co-operating and did not wish to sign the disclaimer for voluntary removal, but proposed that detention be maintained for the time being. In putting forward that proposal he noted the claimant's previous convictions, that they included the use of violence, that the claimant had failed to regularise his stay in the United Kingdom and that there was a high risk that the claimant would abscond if released, and he referred to a report from Colnbrook that the claimant was a main player in the distribution of drugs within the centre. The proposal that detention be maintained was evidently accepted.

20. Further exchanges between officials in July 2006 referred to the claimant's continuing lack of co-operation, the possibility of proceeding with the threat of prosecuting him for non-compliance, his history of convictions and propensity to re-offend, and the high risk of his absconding if released. A note of 2 August from Mr Hearn again proposed the continuation of detention, stating:

> "Given his propensity to re-offend and his overall record of non-compliance, [MH] is unlikely to co-operate with any conditions of temporary release. The removal issue is difficult but … [MH] comes from Somaliland and there has been significant progress in routing which means that removal will be a realistic prospect within the next few months."

The proposal was accepted, with the comment that ministers should be alerted and that the submission should contain an update on the improving access to Somalia (*sic*), consider prosecution for non-compliance, and balance the case of detention with the option of tagging.

21. On 13 December 2006 an immigration judge refused an application by the claimant for bail. Sales J considered it significant that the immigration judge did not consider electronic tagging to be a viable alternative to detention in the claimant's case, thus endorsing the view of immigration officials on the point. On 15 January 2007

officials informed the claimant in writing that continued detention was considered appropriate because it was assessed that he was likely to abscond if given temporary admission or released.

22. A further application for bail was refused by an immigration judge on 25 January 2007, though the immigration judge indicated that he would look favourably on any future application if no further progress were made by the Home Office. This prompted the comment in an internal file note that "[w]e therefore need to obtain fresh evidence of refusal to cooperate prior to the next hearing, and also need to try to pursue documenting the subject".

23. On 14 April 2007 the claimant issued his claim form in these proceedings. At a hearing on 8 May, Collins J refused to make an interim order directing the claimant's release but expressed approval of a proposal by the Secretary of State to write to the claimant setting out the information he sought from the claimant and the claimant's family. The letter was sent on 14 May, containing a detailed list of questions. A witness statement dated 27 May by the claimant's solicitor, Miss Tanna, set out the claimant's own responses and also detailed the results of inquiries made of the claimant's family. The claimant also agreed to a further interview, on 29 May, when he filled out and signed another bio-data form. One of the pieces of information he provided on this occasion was his clan name: he claimed that he had been told it by his brother to whom he had spoken. There was an issue before Sales J as to whether he must have received that information from his brother at an earlier date. The judge was unwilling to find that the claimant had had actual knowledge of his clan and had deliberately withheld that information, but he said: "Nonetheless, it is clear that the Claimant's brother knew this, the Claimant had ready access to him, and the fair inference is that the Claimant could easily have checked on this information and supplied it to the immigration officials who sought to interview him, had he been seeking to co-operate in providing them with information" (para 58).

24. In mid-May 2007 the claimant was transferred to HMP Brixton (where he remained for the rest of his period of detention) as a result of his participation in a protest about conditions at Colnbrook.

25. A Home Office internal note of 5 June 2007, reviewing the position after the further interview with the claimant on 29 May and the signing of the 2007 MOU on 3 June, stated that the claimant's case would be put forward under the MOU as a priority removal and on that basis recommended maintaining the detention.

26. A further internal note of 9 July noted that the position on removals to Somaliland had been checked and it had been confirmed that enforced removal was possible to Berbera in Somaliland, though removal to Hargeisa was looking unlikely. It was again decided that the claimant's detention should be maintained, with efforts to be made to expedite his removal. The note concentrated on the viability of removal routes and did not address what steps had been taken to approach the Somaliland authorities to see if the information available about the claimant would satisfy them that he could be returned. Sales J observed that it seemed that by this stage an assessment had been made that the information provided thus far was still inadequate to be passed to the Somaliland authorities. This was supported by a report of 3 August referring to the claimant's lack of co-operation and encouraging him to co-operate further.

27. An application for bail was dismissed on 31 July, but the claimant's detention came to an end on 21 August 2007 when a yet further application for bail was successful.

The legal framework

28. Section 3(5)(a) of the Immigration Act 1971 provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. Paragraph 2(2) and (3) of schedule 3 to the Act provide that a person may be detained under the authority of the Secretary of State pending the making of a deportation order and, where a deportation order is in force, pending removal from the United Kingdom. The principles to be applied in determining the length of time for which a person may be so detained were stated by Woolf J in *R v Secretary of State for the Home Department, ex parte Hardial Singh* [1984] 1 WLR 704 and have since been considered and refined in a number of cases.

29. In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 (to which I will refer as "*I (Afghanistan)*"), Dyson LJ summarised the principles set out in *ex parte Hardial Singh* as follows:

> "46. … [T]he 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;
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> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.
>
> 47. Principles (ii) and (iii) are conceptually 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."

30. The court in *I (Afghanistan)* had to determine what considerations were relevant to the assessment of whether removal was going to be possible within a reasonable time. At

paras 26-36 Simon Brown LJ said that they included the fact that the appellant had been in administrative detention for nearly 16 months and there was no indication as to when enforced removal might be possible; the likelihood or otherwise of the detainee absconding and/or re-offending (such that if, say, one could predict with a high degree of certainty that upon release the detainee would commit murder or mayhem, that would justify a substantially longer period within which to arrange removal); the appellant's refusal to accept voluntary repatriation; and the fact that the appellant had been pursuing a claim for asylum which would in any event have prevented his being returned. Simon Brown LJ concluded at para 37 that, given that the appellant had been in administrative detention for nearly 16 months by the date of the late-May hearing 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 than existed in the case would be necessary to have justified continuing his detention for an indeterminate further period. It was true that the appellant could have agreed to a voluntary return, but that possibility arose only on the day before the hearing and it would not be right to subject him to an indeterminate period of further detention merely on that account.

31. Mummery LJ, dissenting, placed much greater weight on the appellant's refusal to co-operate in relation to voluntary return. Dyson LJ considered that it was not possible or desirable to produce an exhaustive list of all the circumstances that were or might be relevant to how long it was reasonable for detention to continue. In relation to the issue of lack of co-operation he said this:

> "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. Mr Robb [counsel for the Secretary of State] submits that a refusal to leave voluntarily is relevant for two reasons. First, the detained person has control over the fact of his detention: if he decided to leave voluntarily, he would not be detained. Secondly, the refusal indicates that he would abscond if released from detention. It is this second feature which weighed heavily with Mummery LJ.
>
> 51. I cannot accept that the first of Mr Robb's reasons is relevant. Of course, if the appellant were to leave voluntarily, he would cease to be detained. But in my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable. If Mr Robb were right, the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter however long, provided that the Secretary of State was doing his best to effect the deportation.

> 52. I turn to Mr Robb's second reason. I accept that *if* it is right to infer from the refusal of an offer of voluntary repatriation that a detained person is likely to abscond when released from detention, then the refusal of voluntary repatriation *is* relevant to the reasonableness of the duration of a detention. In that event, the refusal of voluntary repatriation is no more than evidence of a relevant circumstance, namely the likelihood that the detained person will abscond if released."

32. In *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 (to which I will refer as "*A (Somalia)*"), Toulson LJ expressed the core principles slightly differently from the formulation by Dyson LJ in *I (Afghanistan)*:

> "43. There is no dispute that the word 'pending' in schedule 3, paragraph 2(2) … and paragraph 2(3) … simply means 'until' …. However, the Home Secretary's exercise of the statutory power to detain a prospective deportee until the making of the deportation order or until his removal or departure is not unfettered. It is limited in two fundamental respects. First, it may be exercised only for the purpose for which the power exists. Secondly, it may be exercised only during such period as is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the case.
>
> 44. Those principles were first established by Woolf J in his judgment in *Hardial Singh* ... which has been cited with approval in subsequent cases …. After stating those principles, Woolf J continued:
>
> > '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.'
>
> 45. In some later judgments that sentence has been treated as a third principle. It seems to me that it is really a facet or consequence of the first and second. Be that as it may, a pertinent question in this case is whether, and to what extent, a risk of the individual absconding and a risk of him re-offending may be taken into account in considering what may be a reasonable time for attempting to bring about his removal or departure. The way I would put it is that there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty. Counsel for both parties agreed with that approach as a matter of principle."

33. Toulson LJ went on to consider the significance of a refusal to return by consent, pointing to the lack of clear unanimity of view on this issue in *I (Afghanistan)*. His own approach to the matter was as follows:

> "54. … 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."

34. In concluding that a period of approximately four years' detention had been lawful in the circumstances of A's case, he said this:

> "58. The period of A's detention after he would otherwise have been entitled to release at the end of his custodial sentence was lengthy. However, throughout that period it would have been possible for him to be transported to Somalia, if he had not refused to go, and there was moreover some prospect of the Home Secretary being able to carry out his enforced removal, although there was no way of predicting with confidence when this might be. In the meantime, on the judge's findings, the risk of A absconding if he were at liberty was as high as could be. There was also a high risk of him re-offending, and, given the nature of his previous offending, this would have been a very worrying prospect …."

35. Longmore LJ agreed with the judgment of Toulson LJ. Keene LJ also agreed, but added a few comments of his own, including the comment that he did not regard a refusal to return voluntarily "as wholly irrelevant in its own right or as having a relevance *solely* in terms of the risk of absconding", since it was relevant that the individual could avoid detention by his voluntary act, but he did not accept that such a refusal was of the fundamental importance contended for in that case by the Secretary of State (para 79). In his view, the combination of a very high risk of absconding and a high risk of sexual re-offending, together with the fact that A could have returned voluntarily to Somalia but had refused to do so, meant that continued detention was reasonable even though "it must be exceptional to regard lengthy administrative detention as lawful when there is some prospect of removal but no clearly predicted date for it" (para 82).

36. The approach taken in *A (Somalia)* towards a detainee's lack of co-operation was followed in *R (WL (Congo) and Others v Secretary of State for the Home Department* [2010] EWCA Civ 111, in which Stanley Burnton LJ, giving the judgment of the court, stated:

> "102. In our judgment, the fact that a FNP [foreign national prisoner] is refusing to return voluntarily, or is refusing to cooperate in his return (for example, by refusing to apply for an emergency travel document, as initially did WL) is relevant to

> the assessment of the legality of his continued detention: see [*A (Somalia)*] …."

We were told that the decision in that case is under appeal to the Supreme Court, but it represents the present state of the law by which we are bound.

37. There are two other authorities to which it is helpful to refer at this stage. The first is *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207, which concerned liability to detention pending removal, pursuant to paragraph 16(2) of schedule 2 to the 1971 Act. Lord Brown of Eaton-under-Heywood, with whom the other members of the House agreed, explained that a person might remain liable to detention even though it had become unreasonable actually to detain him:

> "32. The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until' …. 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 (i.e. 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 paragraph 21.
>
> 33. To my mind the *Hardial Singh* line of cases says everything about the *exercise* of the power to detain (when properly it can be exercised and when it cannot); nothing about is *existence* …."

38. Finally, the submissions for the claimant placed considerable weight on *R (A and Others) v Secretary of State for the Home Department* [2008] EWHC 142 (Admin), in which Mitting J said this about the detention of A:

> "16. In those circumstances, for continued detention to be lawful two questions have to be capable of being answered. First, by when does the Secretary of State expect to be able to deport A? Secondly, what is the basis for that expectation? Mr Patel, on instructions, is understandably unable to answer either of those questions, other than by the generality that the Secretary of State expects to be able to deport him within a reasonable time. Mr Patel realises that that begs the question. In my view, against the history that I have recited, there is simply no basis for concluding that A can be expected to be deported within the near future, nor can anybody, let alone the Secretary of State, give an answer to the first of those questions. An impasse has been reached in A's case. It has been reached after the lapse of many months of detention. His detention has now become unlawful.

> 17. I reach that conclusion notwithstanding that he has committed a serious criminal offence and that there is in his case the risk of absconding. Those are factors which have to be weighed in the balance. Were there grounds for believing that his application for emergency travel documents would soon be resolved favourably, then those factors would have led me to uphold the lawfulness of his detention. But absent any basis for concluding that he can soon be deported, those factors do not outweigh the claim that he has to conditional release …."

The judge's conclusions

39. Sales J dealt first with the claimant's grounds that (1) there was never any realistic prospect of removal of the claimant and (2) the detention of the claimant was unreasonably long. His conclusions on those grounds were bound up with his analysis of the relevant authorities, to which I need make only limited further reference. In the course of the discussion he identified three conditions which had to be satisfied before the claimant could be removed to Somaliland: (i) the willingness of the Somaliland authorities to accept removals in appropriate cases, (ii) a route via which removal could be effected, and (iii) sufficient bio-data about the claimant to satisfy the Somaliland authorities that he had sufficient links with Somaliland.

40. Sales J said at para 79 that in addressing ground (1) the court had to ask itself whether there was "some prospect" of the claimant being removed within a reasonable period, and he referred in that connection to the observations of Lord Brown in *R (Khadir) v Secretary of State for the Home Department* (see [37] above). He continued:

> "79. … It is for the court to assess whether the period in contemplation was a reasonable one in all the circumstances. The court is not confined to applying *Wednesbury* principles to assess whether the Secretary of State himself rationally held the view that the period in contemplation was reasonable. But at the same time, in a case such as this, where a judgment about the availability of removal depended in a significant way upon an assessment of how a foreign government would react, the court will be slow to second-guess the assessment in that regard which is made by the executive …."

41. At para 81 he said that the lack of detailed evidence about the conduct of negotiations with the Somaliland authorities and about the type and quantity of bio-data which they have in fact accepted as sufficient in relation to cases where returns have been made "makes it difficult for the court, and must also have made it difficult for the Secretary of State, to form any clear, final view about whether the Claimant might – if he had co-operated fully with the attempts to obtain bio-data about him – have been able to provide sufficient bio-data to satisfy the Somaliland authorities that he should be accepted for removal to Somaliland" (para 81). He considered, however, that there were objective grounds to support the assessment of the executive that, in an appropriate case, the Somaliland authorities would accept removals; and at para 83 he concluded that the Secretary of State had reasonable grounds throughout the period of the claimant's immigration detention to believe that the first condition would be fulfilled.

42. In para 84 he said that the possibility of the other two conditions being fulfilled was linked with the question of the co-operation of the claimant in the removal process: for the period until late July 2006 the Secretary of State could not remove an individual to Somaliland unless he signed a form indicating his consent, which the claimant declined to do; and the claimant was unforthcoming about details of his background in Somaliland.

43. Having reviewed the authorities bearing on the issue of lack of co-operation, the judge concluded at para 91, in relation to the second condition, that the claimant's refusal to sign a disclaimer so as to allow his voluntary removal was a factor of considerable weight tending (alongside other factors) to justify the claimant's detention.

44. As to the third condition, the judge considered that the claimant's failure to co-operate with the attempts to gather information about his links with Somaliland was significant in three ways. First, "the failure of the Claimant to co-operate and his obstructiveness mean that he bears a considerable degree of responsibility for the situation in which the Secretary of State found himself over a substantial period" (para 93). This was a factor of considerable weight in support of the legality of his detention over a long period of time, though the judge accepted that it could not justify the indefinite maintenance of detention and that "the relative weight to be given to other factors, and in particular the individual's interest in being at liberty, will increase over time and eventually outweigh this factor" (*ibid*.).

45. Secondly, once the claimant acknowledged that he was from Somaliland, the Secretary of State "had reasonable grounds for thinking that it might be possible to obtain further information from him about his connections with Somaliland" (para 95) and at that stage the lack of co-operation fostered the impression that he might well have significant information which he could provide but was deliberately withholding. The impression that he might well be able and willing to assist if he wanted to was supported by occasions when he appeared to soften his stance and to indicate that he would co-operate, only to retreat into obstruction again.

46. Thirdly, the lack of co-operation and obstructiveness "constituted objective grounds supporting the Secretary of State's assessment that there was a serious risk that he would abscond in order to defeat the removal process if he were released" (para 97).

47. At para 98 Sales J said that the main thrust of the judgment of Simon Brown LJ in *I (Afghanistan)* was to emphasise that the reasonableness of a period of detention will depend on the circumstances of the particular case and that a range of circumstances might be relevant:

> "98. … The degree of risk of absconding and the degree of risk of re-offending, as well as the seriousness of the re-offending in prospect, all have a bearing on the question. The higher those risks and the more serious the possible offending which is in contemplation, the longer will be the period of detention allowed under Schedule 3 to the 1971 Act to enable the Secretary of State to arrange the detainee's removal abroad …. The likelihood or otherwise that removal will in fact prove to be possible is also relevant, as is the period of time during which the claimant has already been subject to immigration

> detention …. The refusal of the claimant to cooperate with the process for his removal is also a relevant factor to be added to the list. The burden is on the Secretary of State to satisfy the court on the balance of probabilities that the claimant is being properly detained 'pending removal'."

48. In the following paragraphs he said that the conditions of detention, including in particular the fact that the claimant, while in immigration detention, had been in prison subject to the same regime as a convicted prisoner, were also a relevant factor. He continued:

> "102. It is clear from these judgments that the lawfulness of an individual's detention for the purposes of removal depends upon an overall assessment from time to time of a range of factors. As is emphasised in all the authorities, each case depends upon its own particular facts."

49. He proceeded to his evaluation of the legality of the claimant's detention in the present case. First, he 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" (para 105).

50. Secondly, he referred to the fact that the claimant has been assessed throughout to present a high risk of absconding, an assessment which "was reasonable and supported by objective grounds" (para 107). In his view, the rulings of the immigration judges who had periodically endorsed the Secretary of State's assessment by dismissing the claimant's applications for bail could not be faulted. Electronic tagging had been considered but clearly rejected as a solution; and "[p]articularly in light of the high risk of absconding that the Claimant presented, I think the Secretary of State and the Immigration Judges were entitled to think that release of the Claimant subject to electronic tagging was not a suitable and effective way of meeting the risk that he would go to ground" (para 109).

51. Thirdly, he referred to the repeated attempts made by the Secretary of State to obtain information from the claimant which would have enabled his removal to Somaliland. The essence of the judge's analysis at para 110 is that it was reasonable until a very late stage for the Secretary of State to assess that if pressed further the claimant might well provide information which could be put to the Somaliland authorities with a reasonable prospect of it being accepted by them.

52. Fourthly, the judge found that the Secretary of State was entitled to hold the view that the 2003 MOU and the 2007 MOU were not a dead letter but "provided a realistic and viable possibility that removals could be effected to Somaliland in appropriate cases" (para 111). There was also a viable route for the claimant's removal to Somaliland throughout the period, either on the basis of voluntary return or, later on, also on the basis of enforced return.

53. The judge continued:

> "112. These all seem to me to be powerful factors in favour of justifying the detention of the Claimant and supporting its legality. Against them, however, must be weighed the very long period of time during which the Claimant was subjected to immigration detention and the ordinary prison conditions in which he was being held from mid-May 2007. I consider that this latter factor is of comparatively lesser weight, because the Claimant had brought about his own transfer from Colnbrook IRC to secure prison conditions by his refusal to accept the rules and controls in place at the centre ….
>
> 113. The long period of time over which the Claimant was detained is a factor of considerable and increasing importance as the situation dragged on. In my view, especially in the latter stages (from late 2006) the Secretary of State should have been giving particularly anxious consideration to the question whether it remained viable to suppose that there was a realistic possibility of removal to Somaliland, such as to justify the detention of the Claimant. Apart from the inherent unattractiveness of continuing to detain the Claimant at that stage after such a long period of detention, an Immigration Judge had given warning at the bail hearing on 25 January 2007 … that the situation should be resolved soon.
>
> 114. In my judgment, the sending of the letter of 14 May 2007 (with the support of Collins J at the hearing on 8 May 2007) represented a crystallised final opportunity to seek to obtain additional helpful bio-data from the Claimant. He had already been in detention for a very long time by then, but by responding positively to the letter appeared to indicate a new-found willingness to co-operate. The witness statement of Ms Tanna of 25 May 2007 made it clear that she had taken further inquiries of his family as far as could reasonably be expected. For the first time, the appearance was given that the Claimant was seeking to be candid and helpful, and that serious steps to assist the Secretary of State had been taken.
>
> 115. Particularly after the long time in which the Claimant had been in detention at that stage, I consider that this final provision of information by Ms Tanna and then by the Claimant at interview on about 29 May 2007 should have brought matters to a head. The Secretary of State then had as much information as it was ever likely he could obtain, and he had the benefit of the new impetus in relations with the Somaliland authorities created by the signing of the 2007 MOU. The internal assessment on 5 June 2007 was that the Claimant's case should be treated as a priority. The Secretary of State was entitled to a short period after this to give the new situation careful consideration, to consider whether any further

> avenues of inquiry might be possible and whether any viable approach to the Somaliland authorities might be made on the basis of the information which was available. In my view, that period should not have exceeded 14 days.
>
> 116. There is no evidence to suggest that at that stage there was any realistic way forward which might have allowed the Claimant's removal to Somaliland. The information available was assessed to be insufficient. At that point, there was no serious prospect of supplementing it. Rather, the case seems simply to have been allowed to drift towards the increasingly likely grant of bail which eventually occurred. In my judgment, therefore, the Claimant's detention became unlawful from 20 June 2007. He is therefore entitled to damages for false imprisonment for the period from 20 June 2007 to his release on 21 August 2007, to be assessed. … The Claimant is also entitled to a declaration that his detention between 20 June 2007 and 21 August 2007 was unlawful.

54. The judge then turned to consider the claimant's third and final ground of challenge, that continued detention was in breach of the Secretary of State's policy as set out in Chapter 38 of the Operational Enforcement Manual ("the OEM"), which provided that detention must be used sparingly and for the shortest period necessary and that "[a]ll reasonable alternatives to detention must be considered before detention is authorised". The argument was that there were reasonable alternatives to detention, notably the option of release with electronic tagging. The judge did not consider there to be any substance in this ground, which in his view added nothing to the case on grounds (1) and (2). He said that alternatives to detention, such as release on tagging, were considered and were rejected on good grounds. Detention was clearly the most appropriate solution to ensure effectiveness of the removal process.

The claimant's case on the appeal

55. Mr Fitzgerald QC, for the claimant, made clear that for the purposes of the appeal he was accepting the principles laid down in *I (Afghanistan)* and *A (Somalia)* (subject to a gloss he sought to introduce, as explained below, by reference to the judgment of Mitting J in *R (A and Others) v Secretary of State for the Home Department*) but that he reserved his position in relation to those decisions should this case go further.

56. The first three grounds of appeal are closely related and became even more closely intertwined in the course of oral submissions. First, Mr Fitzgerald submitted that the period of 38 months' immigration detention found by Sales J to have been lawful was simply too long and was unreasonable in all the circumstances. Detention became unreasonably long and therefore unlawful from April 2006, by which time the claimant had been detained for some 24 months.

57. Mr Fitzgerald drew attention to a number of decided cases as furnishing, in his submission, important indicators of the outer limits of reasonable detention. In addition to those already mentioned above, they included *R (Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin) and *R (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin). In *Bashir*,

Mitting J said that "23 months on any view must be at or near to the top of the period during which detention can lawfully occur" (para 21). It should be noted, however, that the total period of detention in that case was 32 months and that the judge referred to 23 months in the passage quoted because he had said that the claimant could not complain about the first 9 months since they were the result of an appeal and other matters for which the claimant was responsible. In *Abdi*, Davis J ordered the release of a recidivist sex offender who had spent 30 months in detention. Mr Fitzgerald had identified only four cases, including *A (Somalia)* and *WL (Congo)*, in which detention for a period comparable to, or greater than, that of the present claimant had been upheld. He submitted that each was concerned with an exceptional risk to the public (grave offending or a national security risk), whereas the present claimant's offending was not in such a serious category and, even with a risk of absconding and re-offending, did not justify detention of the same length.

58. Secondly, Mr Fitzgerald submitted that even if the period of detention was not otherwise unreasonable it became unlawful from April 2006 because by that date there was no real prospect that the claimant's removal would take place within a finite period: an impasse had been reached. He relied on the questions asked by Mitting J in *R (A and Others) v Secretary of State for the Home Department*: "by when does the Secretary of State expect to be able to deport A?" and "what is the basis for that expectation?" (see [38] above). He submitted that what was required was a well founded expectation of a specific date by which, or predictable period within which, removal could be effected; and that on the facts as found by the judge that test was not satisfied.

59. Whilst arguing that the Secretary of State must be able to say by when he expects to be able to remove a detainee if he is to maintain the detention, Mr Fitzgerald sought at the same time to accommodate that test within the framework of a sliding scale whereby the reasonableness of detention depends both on the prospect of removal and on the weight to be given to other factors, including the risk of absconding and of re-offending and the length of time already spent in detention. He submitted that *A (Somalia)*, in which there was no clearly predicted period within which removal would occur, was exceptional and represented the extreme end of the sliding scale as to uncertainty of prospects.

60. Thirdly, Mr Fitzgerald submitted that, to the extent that the claimant was uncooperative, it did not justify his continued detention for such a long period. The failure to sign the disclaimer for voluntary removal was not determinative: the primary question was whether the claimant would be accepted by the Somaliland authorities. The criteria applied by the Somaliland authorities were so stringent that their agreement to his return was, as a matter of objective fact, unachievable: this could be seen, for example, from the rejection of the seven individuals put forward by the United Kingdom in 2004. The level of information required was such that even when the claimant did co-operate the information was not enough. Accordingly, his lack of co-operation was immaterial. There was in any event no realistic prospect of his removal.

61. Mr Fitzgerald contended that Sales J not only reached an erroneous conclusion but fell into a number of specific errors in his approach to the issues. Instead of forming his own assessment, by reference to the objective circumstances, on whether removal was a realistic prospect, the judge deferred unduly to the Secretary of State, holding

that the Secretary of State was entitled to take the view he did. The judge also applied the wrong test in finding that there was a "possibility" of removal, rather than asking himself whether there was a realistic prospect of removal within a finite period: he relied erroneously on the reference to "some prospect" in *R (Khadir) v Secretary of State for the Home Department* (which related to the existence of the power of detention, not to its exercise), and he failed to adopt the approach of Mitting J in *R (A and Others) v Secretary of State for the Home Department*. Moreover, he failed to balance the risks of absconding and re-offending against any consideration of the uncertainty of removal or of the length of time remaining before removal could actually occur.

62. A separate and alternative ground of appeal, though not one developed at any length in Mr Fitzgerald's oral submissions, was that the claimant's continued detention was contrary to the Secretary of State's policy as set out in chapter 38 of the OEM and was for that reason unlawful. There were alternatives to detention. One, to resolve the destitution and homelessness which were associated with his offending behaviour, was release on hard cases support. Another, alone or in combination with the first, was release on a regime of electronic tagging. These were reasonable alternatives, but there is no evidence that after April 2006 any or any proper substantive consideration was given to release on tagging or to any other alternatives to detention.

Discussion and conclusion

63. I have found this an anxious case. The period of 38 months' detention held by Sales J to have been lawful is a very long period indeed for administrative detention pending deportation. Detention for that length of time merits the most anxious scrutiny. The fact is, however, that it received the requisite degree of scrutiny from the judge, whose judgment was stoutly supported by Mr Payne on behalf of the Secretary of State. The judge addressed the issues with commendable thoroughness. He might have expressed himself differently in certain respects if he had heard the argument as it was developed by Mr Fitzgerald before us, but I am not persuaded that his analysis involved legal error or that he was wrong in the conclusion he reached. He made a balanced assessment in holding that the claimant's detention became unlawful in June 2007. I do not accept that he ought to have found that the detention became unlawful in April 2006 or at some other time earlier than June 2007.

64. There is little room for debate about the relevant legal principles, given Mr Fitzgerald's acceptance at this level of *I (Afghanistan)* and *A (Somalia)*. Save in relation to the relevance of lack of co-operation, I see no material difference between the statements of principle in those two cases, but the approach of Toulson LJ in *A (Somalia)* seems to me to be particularly helpful when considering the issues raised here about the prospect of securing the claimant's removal to Somaliland. As Toulson LJ said, there must be a "sufficient prospect" of removal to warrant continued detention, having regard to all the other circumstances of the case (see [32] above). What is sufficient will necessarily depend on the weight of the other factors: it is a question of balance in each case.

65. I do not read the judgment of Mitting J in *R (A and Others) v Secretary of State for the Home Department* as laying down a legal requirement that in order to maintain detention the Secretary of State must be able to identify a finite time by which, or period within which, removal can reasonably be expected to be effected. That would

be to add an unwarranted gloss to the established principles. In my view Mitting J was not purporting to do that but was simply asking himself the questions "by when?" and "on what basis?" for the purposes of his own consideration of the case before him. 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. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a *sufficient* prospect of removal to warrant continued detention when account is taken of all other relevant factors. Thus in *A (Somalia)* itself there was "some prospect of the Home Secretary being able to carry out enforced removal, although there was no way of predicting with confidence when this might be" (per Toulson LJ at para 58); and that was held to be a sufficient prospect to justify detention for a period of some four years when regard was had to other relevant factors, including in particular the high risk of absconding and of serious re-offending if A were released.

66. Sales J committed no error by asking himself first whether there was "some prospect" of removal: he referred in that connection to *R (Khadir) v Secretary of State for the Home Department*, where the focus was on the existence rather than the exercise of the power of detention, but the same language is to be found, as I have said, in *A (Somalia)*. "Some" prospect in this context plainly means a realistic prospect, and I do not read Sales J's judgment as proceeding on any other basis. Of course, *A (Somalia)* shows that the court needs to go on to consider the degree of certainty or uncertainty affecting the prospect of removal and to ask itself whether the prospect is *sufficient* to warrant detention in all the circumstances of the case; but it seems to me that Sales J had that point in mind as well. At para 86 of his judgment he set out the relevant passage in *A (Somalia)*; and at para 98, citing the judgment of Simon Brown LJ in *I (Afghanistan)*, he referred to the range of circumstances to be taken into account in determining the reasonableness of a period of detention, including "[t]he likelihood or otherwise that removal will in fact prove possible". Reading his judgment as a whole I am satisfied that he carried out the requisite balancing exercise, taking the likelihood or otherwise of removal properly into account.

67. It is also clear from the judgment as a whole that Sales J did not approach the matter on the basis that his role was to determine whether the Secretary of State's assessment was a rational one, rather than to make his own assessment of the reasonableness of the length of detention; nor did he defer unduly to the Secretary of State's assessment. He stated in terms that "[i]t is for the court to assess whether the period in contemplation was a reasonable one in all the circumstances" and that "[t]he court is not confined to applying *Wednesbury* to assess whether the Secretary of State himself rationally held the view that the period in contemplation was reasonable" (para 79). Similarly, he stated later that "the court is the judge of whether reasonable grounds for detention existed at any particular point in time" (para 105). It is true that he said on a number of occasions that the Secretary of State "was entitled" to hold a particular view, but I read those passages as an endorsement of the Secretary of State's view,

not merely as a finding that the Secretary of State's view was a rational one. The judge did defer to the Secretary of State in the sense that he acknowledged that the executive was better placed than the court to assess the attitude of the Somaliland authorities towards acceptance of persons for return (paras 79-83); but I see no legal error in his approach to that issue.

68. It seems to me that the judge's assessment of the various factors to be taken into account in determining the lawfulness of continued detention was comprehensive and sustainable. In particular:

i) The judge took the view that the risk of the claimant re-offending "in potentially serious ways" was high. In my judgment, that was a fair assessment. The claimant's offending history was not at the gravest end of the spectrum, but he had spent the major part of his time in this country in custody, serving sentences for criminal offences which included two offences of robbery; he had continued to offend despite a warning that he risked deportation; and the immigration judge who heard his appeal against the deportation order found that he was unlikely to desist from his pattern of offending. It was legitimate to consider that he posed a potentially serious risk to the public if released.

ii) The judge's findings that the claimant presented a high risk of absconding and that electronic tagging was not a suitable and effective way of meeting the risk of absconding were also properly open to him on the evidence.

iii) The judge considered that the claimant's lack of co-operation was relevant to the assessment of the risk of absconding. *I (Afghanistan)* and *A (Somalia)* show that that was a legitimate process of reasoning. The judge also considered the lack of co-operation to be relevant in two other ways: it meant that the claimant bore a considerable degree of responsibility for the situation in which the Secretary of State found himself, and it gave the Secretary of State the impression that the claimant might well have information which could be put to the Somaliland authorities with a reasonable prospect of being accepted by them. Again, I regard that as a permissible line of reasoning.

iv) I do not accept Mr Fitzgerald's submission that the lack of co-operation was immaterial because there was no possibility in any event of sufficient information being provided to the Somaliland authorities for them to accept the claimant for return. The judge examined with great care the evidence concerning the approach of the Somaliland authorities to returns, including the cases where individuals had been rejected for return and the cases (albeit few in number) where they had been accepted. It was open to him to find as he did that the 2003 MOU and 2007 MOU were not dead letters, that removals to Somaliland remained a realistic and viable possibility in appropriate cases, and that it was only at a very late stage that it became clear that it was not going be possible in the claimant's case to provide sufficient information to secure his acceptance by the Somaliland authorities.

v) The judge gave proper weight to the very long period of time during which the claimant was subject to immigration detention, and rightly treated it as a factor of considerable and increasing importance as the situation dragged on. As the

> period of detention gets longer, the greater the degree of certainty and proximity of removal I would expect to be required in order to justify continued detention. The judge evidently had that point in mind when he observed that especially in the latter stages, from late 2006, "the Secretary of State should have been giving particularly anxious consideration to the question whether it remained viable to suppose that there was a realistic possibility of removal to Somaliland, such as to justify the detention of the Claimant" (para 113).

69. Taking all the circumstances of the case into account, therefore, I am not persuaded that the period of 38 months' detention, although very long, exceeded a reasonable period. Nor am I persuaded that there was insufficient prospect of being able to effect the claimant's return to warrant his continued detention from April 2006 up to the date in June 2007 when Sales J found that the detention became unlawful.

70. As to the alternative ground of appeal concerning breach of the Secretary of State's policy, I share the view of Sales J that there is no substance in it. I do not accept that there was a failure to consider alternatives to detention, and in any event I agree with the judge that the argument does not add anything to the main grounds of appeal. If continued detention was reasonable and lawful on the basis of the principles discussed above, I see nothing in the Secretary of State's policy that was capable of rendering it unlawful. Furthermore, it is plain that release subject to electronic tagging was considered by the Secretary of State and was rejected; and it seems to me that, *a fortiori*, release without tagging could not realistically have been regarded as an appropriate alternative in the circumstances. A very different situation arose once the claimant was released on the basis that his detention had exceeded a reasonable length: it cannot be inferred that the regime to which he was subject at that stage ought to have been applied at an earlier stage.

71. Accordingly, for the reasons given, I would dismiss the appeal.

Lord Justice Etherton:

72. I agree.

Lord Justice Longmore:

73. I agree with my Lord that this is an anxious case. But the principles which first instance judges have to apply are not now subject to serious doubt. That does not make their task easy because they have to make a judgment taking a range of (often competing) factors into account. But once a judge has done that, it will be a rare case in which it would be right for this court to interfere.