Neutral Citation Number: [2008] EWCA Civ 1204

Case No: C4/2008/0483 & C4/2008/0486

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE MUNBY
CO/10025/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2008

Before :

LORD JUSTICE LAWS
LORD JUSTICE KEENE
and
LORD JUSTICE LONGMORE

- -

Between :

SK (ZIMBABWE)	**Respondent/ Cross Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant/ Respondent**

- -
- -

Mr Andrew Nicol QC and Mr Alex Goodman (instructed by **Lawrence Lupin**) for the Appellant/Respondent
Mr Robin Tam QC and Mr Martin Chamberlain (instructed by The Treasury Solicitor) for the Respondent/Cross Appellant

Hearing dates : 28 July 2008

- -

Judgment

Lord Justice Laws:

INTRODUCTION

1. With permission of the judge below the Secretary of State appeals against the judgment of Munby J given in the Administrative Court on 25 January 2008 by which he granted a declaration that the claimant had been unlawfully detained by the Secretary of State for various distinct periods amounting in all to some 19 months. The judge declined to make an order for the claimant's release, holding that his then current detention, from 21 January 2008, was lawful. The Secretary of State's appeal is directed against this declaration. The claimant also launched an appeal, again with permission of the judge below, against the refusal of an order for his release, but that appeal is now moot: on 13 June 2008 he was granted bail by an Immigration Judge for a period of two months.

2. However the claimant has also applied for leave to amend his claim form and notice of appeal in order to challenge as unlawful his detention during periods in which Munby J held he was in fact lawfully detained, and also the period between Munby J's judgment and the claimant's release on bail. This application is made in the light of matters recently disclosed by the Secretary of State. The Secretary of State does not resist the amendments, and it is in principle agreed between the parties that the new point which thereby falls to be determined should be remitted for decision by the High Court. I will explain these matters at the end of this judgment. The upshot is that this court is now only actively concerned with the Secretary of State's appeal against Munby J's declaration.

THE FACTS

3. I turn to the facts. The claimant is a national of Zimbabwe. On 30 October 2002 he arrived in the United Kingdom and was granted 6 months leave to enter as a visitor. Thereafter he was granted 12 months leave to remain as a student until 30 April 2004. After that date he remained in the United Kingdom without leave. On 9 December 2005 he was convicted on two counts of common assault and one count of sexual assault on a female, and on 24 January 2006 he was sentenced to twelve months imprisonment and ordered to be registered as a sex offender for five years. The sentencing judge made no recommendation for deportation pursuant to s.6 of the Immigration Act 1971. On 7 March 2006 the Secretary of State decided to make a deportation order against the claimant. On 8 March 2006, the next day, the claimant became entitled to be released from custody as regards his criminal sentence, but from that date on he was in detention at the direction of the Secretary of State pursuant to paragraph 2(2) of Schedule 3 to the Immigration Act 1971 which provides:

> "Where notice has been given to a person in accordance with regulations under Schedule 18 to this Act 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 the deportation order."

The letter giving the relevant authority under paragraph 2(2) shows that the basis of the decision to detain was that the claimant was an unlawful overstayer who was likely to abscond if released.

4. On 24 March 2006 the claimant claimed asylum. On 18 April 2006 he launched an appeal against the notice of intention to deport him. Thereafter, in April and May 2006, the Citizens Advice Bureau wrote to the Secretary of State contending that the claimant's continued detention was unlawful. The judge held (paragraph 19(xvi) of his judgment) that this contention was plainly based on the principles expounded by Woolf J as he then was in *Hardial Singh* [1984] 1 WLR 704, to which I will come in due course. These letters went unanswered. The judge described it as "shocking" that they were "simply ignored by the Secretary of State's minions". On 19 May 2006 a bail application made by the claimant was refused. On 19 September 2006 his asylum application was refused. Two days later, on 21 September 2006, his appeals against the decision to deport and refusal of asylum (and also a refusal to grant him relief on human rights grounds) were heard in the Asylum Immigration Tribunal (the AIT), which declined to grant bail: Immigration Judge Chambers noted that the claimant had previously committed a Bail Act offence, his appeals appeared to be without merit, and "there is every likelihood that [the claimant] if granted bail, would abscond", having no family ties in the United Kingdom.

5. On 4 October 2006 the AIT's decision dismissing all three of the claimant's appeals was promulgated. The AIT stated that "believing he had a poor case in resisting deportation he sought to bolster his prospects of success by inventing a false asylum claim". The AIT accepted the Secretary of State's case as to the necessity for deportation in light of the gravity of the claimant's criminal offences. They stated that he was "assessed as presenting a medium risk of sexual or violent offending upon his release".

6. A reconsideration of his appeals was ordered on 4 January 2007. However on 6 July 2007 the AIT held that there had been no material error of law in the original determination, which accordingly stood. On 24 August 2007 a deportation order was made (after which the relevant powers of detention was paragraph 2(3) of Schedule 3 to the Immigration Act 1971, but nothing turns on this).

7. At length on 12 November 2007, after letters before action went unanswered, judicial review papers were lodged alleging that the claimant's detention was unlawful, and seeking an order for his release together with a declaration and damages. Judicial review permission was granted on 20 November 2007, and the matter was duly heard by Munby J on 18 January 2008. He delivered judgment, as I have said, on 25 January 2008.

SUBMISSIONS BEFORE MUNBY J

8. In essence two submissions were advanced for the claimant before the judge. One was that whatever the position may have been when the claimant was first held in administrative detention under the Immigration Act, the time had long passed since the claimant was reasonably and properly detained, and so he was entitled to be released by force of the principles set out in *Hardial Singh*. The essential reasoning in that case is contained in Woolf J's judgment at page 706 as follows:

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the

> individual is being detained… pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

9. As Munby J noted (judgment paragraph 12) Lord Bingham observed in *A & X v Secretary of State* [2005] 2 AC 68 at paragraph 8 that this decision had never been questioned, and had been followed by the Privy Council in *Tan Te Lam* [1997] AC 97. In *R (I) v Secretary of State* [2003] INLR 196 at paragraph 46 Dyson LJ distilled what was said in *Hardial Singh* to these four propositions:

> "(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal."

10. The other submission made to Munby J was that there had been a failure to carry out regular reviews as required by the Detention Centre Rules 2001 and a Home Office document called the Operations Enforcement Manual ("the Manual"). The Rules are subordinate legislation made under powers granted by the Immigration Act 1971. They include paragraph 9(1) as follows:

> "Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly."

The Rules are supplemented by Chapter 38 of the Manual which contains these following provisions. First, paragraph 38.1 states in part:

> "To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with this stated policy."

Paragraph 38.3 contains these sub-paragraphs:

> "1. There is a presumption in favour of temporary admission or temporary release.
>
> 4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified."

Paragraph 38.5 provides:

> "Although the power in law to detain an illegal entrant rests with the IO [sc. Immigration Officer], or the relevant non-warranted immigration case worker under the authority of the Secretary of State, in practice, an officer of at least CIO [sc. Chief Immigration Officer] rank, or a senior case worker, must give authority. Detention must then be reviewed at regular intervals (see 38.8)."

Paragraph 38.6 states in part:

> "The Government stated in the 1998 White Paper that **written reasons for detention** should be given in all cases at the time of detention and thereafter at monthly intervals." (emphasis in original)

Paragraph 38.6.3 provides in part:

> "It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure that they are always **justified and correctly stated**. A copy of the form must be retained on the case working file." (emphasis in original)

Paragraph 38.8:

> "... Continued detention… must be subject to administrative review at regular intervals. At each review robust and formally documented consideration should be given to the removability of the detainee.
>
> … A formal and documented review of the detention should be made after 24 hours by an Inspector and therefore as directed at the 7, 14, 21 and 28 day points.
>
> **At the 14 day stage, or if circumstances change between weekly reviews an Inspector must conduct the review. (e**mphasis in original)

> … In CCD [sc. the Criminal Casework Directorate] an HEO [sc. Higher Executive Officer] reviews detention up to 2 months. An SEO/HMI [sc. Senior Executive Officer/Her Majesty's Inspector] reviews detention up to 4 months, the Assistant Director/Grade 7 up to 8 months, the Deputy Director up to 11 months, and the Director at 12 months and over."

11. It was submitted for the claimant that his detention had not been reviewed with the frequency required, nor in every instance by persons with the necessary seniority as stipulated in Chapter 38 of the Manual. It was submitted further that such reviews as had taken place had been inadequate.

12. Building on these two sets of submissions it was said that the claimant was entitled at common law to damages for false imprisonment, and his detention was also in violation of Article 5 of the European Convention on Human Rights (ECHR), which of course prohibits detention save for stated purposes and pursuant to proper legal procedures.

THE JUDGE'S FINDINGS CONCERNING REVIEWS UNDER THE RULES AND MANUAL

13. I should state the relevant facts relating to reviews under the Rules and Manual as found by the judge. The judge observed (paragraph 38) that the claimant's detention should have been reviewed on 10 March 2006 (after 24 hours), 16 March 2006 (7 days), 23 March 2006 (14 days), 30 March 2006 (21 days) and 6 April 2006 (28 days), and thereafter at monthly intervals. Then the judge said this:

> "39. So, following the 28 day review on 6 April 2006, there should have been monthly reviews in each of the remaining 9 months in 2006, in each of the 12 months in 2007 and, finally, on 6 January 2008. Leaving on one side the reviews which should have taken place between 10 and 30 March 2006, there should therefore, in all, have been 22 monthly reviews, the first on 6 April 2006 and the most recent on 6 January 2008. In accordance with paragraph 38.8 of the [Manual], the first two of these (April and May 2006) could be carried out by an HEO. The next two (June and July 2006) should have been carried out by an SEO/HMI, the next four (August – November 2006) by the Assistant Director/Grade 7, the next three (December 2006 – February 2007) by the Deputy Director and the most recent eleven (March 2007 – January 2008) by the Director.
>
> 40. The disgraceful fact is that in the whole period from 9 March 2006 to the hearing on 18 January 2008 there were only ten reviews, only six of which (those in January, May, July, August and October 2007 and in January 2008) were conducted by an official at the correct level of seniority. Even worse, the *first* review did not take place until late January 2007. So there was no review at all during the first ten months of SK's detention!"

14. These failures were known at a high level within the CCD by January 2007. But the position was not properly corrected. From then on there were reviews only in January 2007, March 2007, 22 May 2007, June 2007, July 2007, August 2007, September 2007, October 2007 and December 2007. But not all of these were proper reviews pursuant to the requirements of the Manual. They are described in some detail by Munby J at paragraph 43(i) – (ix). It appears that none save those of May and October 2007 were conducted by an official of appropriate seniority. In each instance a document called "a Monthly Report to Detainees" was provided to the claimant. Although at least some of these reports misdescribed the language in which the claimant's case was being considered, it is plain that at the time of each report the officials looking at the case were of the view that the claimant's detention should be maintained.

15. On the 3 January 2008, 15 days before the hearing before Munby J, the Director of the CCD authorised the claimant's continuing detention; but this was not then communicated to the claimant. More than that: there was a minute from the Director who noted on the file that "removals to Zimbabwe are now in progress". This was untrue. As counsel for the Secretary of State confirmed to Munby J, the policy was still as stated on 16 July 2007, namely that the Home Office "continues to defer the enforced return of failed asylum seekers to Zimbabwe until the AIT has determined *HS* [a case which was to address issues relating to the return to Zimbabwe of failed asylum seekers]." (Munby J paragraph 46)

16. Munby J was very critical of the whole conduct of this case by the Secretary of State. As regards the decision of 3 January 2008, he said:

> "47. … It is astonishing that an official as senior as the Director should seemingly be ignorant of current Home Office policy on a matter as significant as this. It is also disturbing that decision-making exhibiting this degree of ineptitude should be taking place in relation to an individual at the very time that the legality of his detention was under scrutiny by the court."

The judge continued:

> "48. So a man who, according to the Secretary of State's own publicly proclaimed policy – a policy which moreover, as we have seen, proclaims that a detention to be lawful 'must' accord with this policy – was entitled to no fewer than 22 monthly reviews of the lawfulness of his detention has had the benefit of only ten reviews, of which only six were conducted by officials of the requisite seniority. And of these six, Mr Chamberlain [counsel for the Secretary of State] has had to disavow two as fatally flawed.
>
> 49. So SK has had only four of the 22 reviews to which he was entitled. And on top of this, with the sole exception of the 'Monthly Progress Report to Detainees' dated 24 May 2007, every 'Monthly Progress Report to Detainees' sent to SK seems to have pre-dated the actual decision. The casual mendacity of a system under which the written reasons for detention required

> by rule 9(1) of the Detention Centre Rules 2001 to be sent to detainees are dated and signed by junior officials before the decisions have in fact been taken is concerning. To be specific, and by way of example (there are too many others): the 'Monthly Progress Report' which SK received dated 15 August 2007 would plainly have conveyed to him that his continuing detention had been reviewed and approved by the Director on or shortly before 15 August 2007. In fact, as we know, the actual decision was not taken until 30 August 2007. So the document SK received was wholly misleading.
>
> 50. Thus the allegation made on behalf of the Secretary of State, not just in the letter of 9 November 2007 but persisted in as recently as in the detailed grounds of defence dated 14 December 2007, that SK's detention has been 'regularly reviewed' is at best tendentious. How such an assertion could be made in the light of what Mr Goodman correctly characterises as the Secretary of State's blatant failure to follow her own policy in relation to review I do not begin to understand..."

THE JUDGE'S CONCLUSIONS

17. I may turn next to Munby J's conclusions on the two sets of submissions advanced before him. As I stated at the outset, he declined to make an order for the claimant's release: after making urgent enquiries of the Treasury Solicitor he was satisfied that a valid decision had been taken on 21 January 2008 authorising his continued detention. As that fact implies, Munby J rejected the claimant's case based on the *Hardial Singh* principles. He addressed this part of the argument by reference to the four propositions stated by Dyson LJ in *R(I)*. On proposition (i) he said this:

> "96. In my judgment it was entirely rational and lawful for the Secretary of State to attach very considerable weight indeed to the combined effect of these two facts – facts as the Secretary of State was entitled to find and facts as I find them to be: that there was and is a substantial risk of SK absconding coupled with his continuing and adamant refusal to accept voluntary repatriation.
>
> 97. On all these grounds I agree with Mr Chamberlain that there is no substance in Mr Goodman's attack insofar as it is based on *Hardial Singh* principle (i)."

As for proposition (ii) (the reasonableness of the length of detention) he said:

> "109. ... I think a weighty factor that has to be built into any evaluation of the reasonableness of the overall time that SK has spent in detention is the fact that during the greater part of that time he was vigorously pursuing through the appellate system both what in common with two Immigration Judges I agree was a transparently fabricated asylum claim and also an appeal

> against the deportation order which was probably always little short of hopeless.
>
> 110. In all the circumstances I do not think that there has yet come to an end what is in all the circumstances a reasonable period during which SK can continue properly to be detained.
>
> 111. That said, I cannot help thinking that it will not be too long before SK will be able to say that it is no longer reasonable to keep him in detention. The Secretary of State will have to keep the matter under review."

The challenge on propositions (iii) and (iv) also failed: paragraphs 117 and 120, which with respect I need not set out.

18. Munby J also rejected (paragraph 78) the distinct submission that the reviews of the claimant's detention which were actually carried out were legally inadequate. But he accepted the claimant's major case on the Rules and Manual. He held, in effect, that compliance with the relevant requirement of the Manual was a condition of the legality of the claimant's detention. At paragraph 62 he said this:

> "62. Mr Goodman says that it is clear as a matter of principle, and if authority be needed it is clear in the light of these authorities, that SK's detention was therefore lawful only during such periods as it had been authorised by a person of appropriate seniority in accordance with paragraph 38.8 of the Operations Enforcement Manual. In the circumstances as I have set them out above, this means, says Mr Goodman, that, quite apart from any other arguments upon which he relies, SK's detention has been unlawful at all times since 10 March 2006 with the sole exception of (i) the period of one month from 20 January 2007, (ii) the period of one month from 22 May 2007; (iii) the period from 2-30 August 2007; and (iv) the period of one month from 30 August 2007. I agree."

19. The judge relied on the decisions of this court in *Nadarajah* [2003] EWCA Civ 1768 and *Roberts* [1999] 1 WLR 662. I shall refer further to these and other cases in due course. Munby J's conclusion on this part of the case is essentially contained in paragraph 68 of his judgment:

> "68. Integral to the scheme endorsed by Parliament in its approval of rule 9(1) of the Detention Centre Rules 2001, and integral to the policy laid down by the Secretary of State in paragraph 38.8 of the Operations Enforcement Manual, is the principle that someone is not to be detained beyond a certain period without there being a review undertaken at regular intervals and moreover, as required by the Secretary of State's policy, a review undertaken at increasingly high levels of seniority within the Home Office as the period of detention grows longer. Those reviews are fundamental to the propriety of the continuing detention, they are required in order to ensure

> that the continuing detention can still be justified in the light of current, and perhaps changed, circumstances, and they are, in my judgment, a necessary prerequisite to the continuing legality of the detention."

20. Munby J also concluded (paragraph 121) that the arguments (essentially based on a failure to comply with the Manual) which went to show that the claimant's detention was unlawful in domestic law, also demonstrated a violation of the claimant's rights under ECHR Article 5. He held however (paragraph 122) that had there been no remedy on the facts under domestic law, the Convention rights would have added nothing.

THE ISSUE IN THIS COURT

21. The issue which we have to decide on this appeal is whether Munby J was right to conclude that the claimant was unlawfully detained for the periods which the judge specified by reason of the Secretary of State's failures to carry out the requisite reviews pursuant to the Rules and the Manual. As I have shown the detention whose legality is in issue was directed under the statutory powers conferred by paragraph 2(2) of Schedule 3 to the Immigration Act 1971. The essential question therefore must surely be, what is the reach of the power so conferred? This is a question of statutory construction.

THE TRUE CONSTRUCTION OF PARAGRAPH 2(2): ROBERTS [1999] 1 WLR 662

22. It is plain that the correct construction of paragraph 2(2) has been the subject of much learning, from *Hardial Singh* onwards. *Hardial Singh* shows that paragraph 2(2) is subject to implied limitations. As I have said the judge found that none of the limitations given by *Hardial Singh* was exceeded, and in the event that position was not challenged before us. Thus the focus of debate has been upon the judge's conclusions as to the consequences of the Secretary of State's failures to carry out the requisite reviews.

23. If those conclusions are to be upheld, then as it seems to me a further limitation upon the power to detain must be found, such that on the proper construction of paragraph 2(2) the power is subject to compliance with the Rules and the Manual. It is I think clear that that was the judge's own view, expressed in paragraph 68 of his judgment which I have set out.

24. What might be the nature and source of such a limitation? The judge appears to have been influenced, as I have said, by *Roberts* [1999] 1 WLR 662. In that case this court held that the continued detention of a suspect by police after a particular point in time was unlawful for failure to conduct a review of his detention by that time. Mr Nicol QC for the claimant submits that this authority was rightly relied on by Munby J. But in my judgment it is not only distinguishable from the present case, but serves to point an important contrast. The plaintiff in *Roberts* was detained under powers contained in s.37 of the Police and Criminal Evidence Act 1984 (PACE). S.34(1) of PACE provided:

> "A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act."

S.40 of PACE fell within "the provisions of this Part of this Act" (Part IV). It required reviews of the detention of persons in police custody at stated intervals. The requirement was not fulfilled. Clarke LJ as he then was said (at 667):

> "Mr Benson submits that, so long as circumstances existed which were or would be sufficient to justify continued detention, the respondent could not be fairly be said to be detained without lawful excuse. I am, however, unable to accept that submission. From 5.25am the respondent was not being detained in accordance with Part IV of the 1984 Act because no review was carried out as required by section 40(1) and (3)(a). As I see it, it is nothing to the point to say that the detention would have been lawful if a review had been carried out or that there were grounds which would have justified continued detention. Part IV of the Act exists in order to ensure that members of the public are not detained save in certain defined circumstances. In all other circumstances every member of the public is entitled to his or her liberty...
>
> In this case the respondent was entitled to the benefit of a review before 5.25am. In the absence of a review he was in principle entitled to his liberty. His further detention was therefore unlawful. In short he was being deprived of his liberty without lawful excuse. It follows that this was a case of false imprisonment..."

25. Thus in *Roberts* the requirement of periodic review, on the proper construction of the statute, had to be satisfied as a condition precedent to the legality of the suspect's detention. It was made so by the express terms of s.34(1). But there is no analogue to s.34(1) of PACE to be found in paragraph 2(2) of Schedule 3 to the Immigration Act 1971. There is no reference in the sub-paragraph, express or implied, to the Rules or the Manual, or to any Rules that might be made under powers in the Immigration Act or to any manual, or instructions, that might be issued by the Secretary of State. I cannot see how compliance with the letter of the Rules or Manual could be said to be a *sine qua non* of a lawful exercise of the power to detain unless paragraph 2(2) (or other main legislation) made it so. But it does not. Munby J was in my judgment wrong to hold, as I understand him to have done at paragraph 68 of his judgment, that such compliance was "a necessary prerequisite to the continuing legality of the detention". Breach of the Rules or Manual might attract other remedies in public law: indeed on the judge's findings I should have thought that the claimant would be entitled to a declaration that the Secretary of State had unlawfully failed to comply with both. However that has not been sought, and even if it had been its availability would not of itself turn a paragraph 2(2) detention into a false imprisonment.

THE TRUE CONSTRUCTION OF PARAGRAPH 2(2): THE AVOIDANCE OF ARBITRARY DETENTION

26. Those considerations (if my Lords agree with them) seem to make a short end to the whole case; but there may be another way of looking at the matter. Although the *Hardial Singh* principles confine the power of detention under paragraph 2(2), it remains a power to detain with no specified limit of time, and in that sense indefinitely. It is elementary that the courts will not allow such a discretionary power to be exercised arbitrarily. This is a basic imperative, for which I need cite no common law authority. We have to consider what are the implications of this imperative in the present context. While for reasons I have given compliance with the Rules and the Manual is not as such a condition precedent to the legality of a detention under paragraph 2(2), might the repugnance of arbitrary power demand that the Secretary of State have in place some effective mechanism or mechanisms, not necessarily the same as those in the Rules or Manual, by which the detention will be regularly monitored to ensure that the purpose of the detainee's confinement remains capable of fulfilment within a reasonable time and that there are no countervailing factors which should mandate his release?

27. It is helpful first to recall that arbitrary detention is no less repugnant to the law of the ECHR as it is to the common law. In *Winterwerp v Netherlands* (1979) 2 EHRR 387 the applicant was detained as a mental patient (a species of detention catered for by Article 5(1)(e)). He complained of the procedures followed in connection with his detention. At paragraph 45 of its judgment the Strasbourg court said this:

> "The Court for its part considers that the words 'in accordance with a procedure prescribed by law' essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary."

28. Decisions of the English courts show the same approach to Article 5, often cross-referring to the Strasbourg jurisprudence: see for example *Ex p. Evans* [2001] 2 AC 19 *per* Lord Hope of Craighead at 38 and *Nadarajah* [2003] EWCA Civ 1768 (to which I have already referred in passing) *per* Lord Phillips of Worth Matravers MR, as he then was, giving the judgment of the court. In the latter case it is stated at paragraph 54:

> "... [T]he relevance of Article 5 is that the domestic law must not provide for, or permit, detention for reasons that are arbitrary. Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow."

29. We have to consider, then, whether by force of the common law or the ECHR the Secretary of State is required to have in place some effective mechanism or mechanisms, not necessarily the same as those in the Rules or Manual, by which the detention will be regularly monitored. The question concerns the practical standards set by the law's rejection of arbitrary power.

30. The first such standard is an obvious one: the requirement of control by the courts. Detention under paragraph 2(2) is an executive act of public authority. Nothing is more elementary than that such an exercise of State power is subject to the supervision of the High Court by way of judicial review. The ECHR imposes a like standard. Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

As it happens a detainee in the present context may not only seek judicial review in relation to his detention but also enjoys a statutory right under the immigration legislation to apply for bail: the claimant has had recourse to both.

31. It is elementary and undoubted that access to the courts, in particular by way of judicial review, is a requirement of central importance for the prevention of arbitrary detention. Mr Tam QC for the Secretary of State submits that it is sufficient for the purpose. Absent a provision analogous to s.34(1) of PACE, by which fulfilment of measures such as the Rules and Manual would constitute a statutory condition precedent of a lawful detention, he does not accept that there exists any further mandatory standard set by the law's rejection of arbitrary power. Accordingly he does not accept that the Secretary of State must have in place some effective mechanism or mechanisms by which the detention will be regularly monitored to ensure that the purpose of the detainee's confinement remains capable of fulfilment within a reasonable time and that there are no countervailing factors which should mandate his release. As it seems to me the appeal turns on the question whether the law imposes such a standard.

THE TRUE CONSTRUCTION OF PARAGRAPH 2(2): MANDATORY MONITORING PROCEDURES?

32. Clearly if *no* steps were taken by the Secretary of State to see that the *Hardial Singh* principles were being kept, any detention would be vulnerable to challenge on the footing that the detainee was as liable to remain incarcerated in breach of the principles as in fulfilment of them, so that his detention would necessarily be arbitrary. Thus without some means in the hands of the Secretary of State to ensure the continued justification of a paragraph 2(2) detention, the detainee would be extremely likely to obtain his release (and compensation – Article 5(5)) in judicial review proceedings because the Secretary of State would be in no position to establish by evidence that the *Hardial Singh* principles were systematically met.

33. However, the means by which such a state of affairs is to be avoided are not in my judgment prescribed by the ECHR any more than by the common law. Article 5(1)(f) provides:

> "... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

In *Munjaz* [2006] 2 AC 148 the House of Lords was concerned with a Code of Practice published by the Secretary of State containing guidance for hospitals and medical staff on the use of seclusion for detained psychiatric patients. One of the issues was whether seclusion involved a violation of the patient's right to respect for his private and family life under ECHR Article 8. Lord Bingham dealt with one particular argument as follows:

> "34. Mr Gordon, on behalf of Mind, submits that the interference is not 'in accordance with the law' because not prescribed by a binding general law. I cannot for my part accept this. The requirement that any interference with the right guaranteed by article 8(1) be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied..."

The words "in accordance with the law" appear, of course, in Article 8(2). Plainly the language of Article 5(1) – "in accordance with a procedure prescribed by law" – is not the same, but the two provisions impose, I think, kindred requirements: "to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules". Here the "rules" are the *Hardial Singh* principles. Their fulfilment in any given case saves a detention from the vice of arbitrariness. A system of regular monitoring is, no doubt, a highly desirable means of seeing that the principles are indeed fulfilled. But it is not itself one of those principles. The words in Article 5(1) "in accordance with a procedure prescribed by law" no doubt require appropriate formalities, so that any order for detention "should issue from and be executed by an appropriate authority" (as it was put in *Winterwerp*); and they certainly prohibit arbitrary action. But they do not necessarily require the imposition of any specific system of internal mechanics as the means of avoiding it.

34. It is important to notice that if this approach is wrong, it means that a detention will be unlawful in the absence of (or failure to fulfil) a system of internal monitoring *even though* it can be shown on the particular facts that the detention, far from being arbitrary, is wholly justified. Such a position, however, is at odds with authority in this jurisdiction which tends to show that a failure of a published procedure which a detainee is entitled to have applied to him will not of itself invalidate his detention. Thus in *D* [2006] EWHC Admin 980 an asylum-seeker held at a detention centre was not given a medical examination within 24 hours of her arrival at the centre as required by Rule 34 of the Detention Centre Rules 2001. Davis J (judgment

paragraph 95) referred to an unacceptable "cross-the-board" failure to comply with the Rule, and granted appropriate declaratory relief. But he stated at paragraph 108:

> "It is common ground that the fact that D and K were wrongfully denied a medical examination within 24 hours of admission contrary to Rule 34 does not of itself mean that they were wrongfully detained. It is common ground that it is for each of D and K to show that had they received (as they should) such examination within 24 hours then they would have been released at an earlier time than in fact they were..."

In *Saadi* [2002] 1 WLR 3131 the claimants were Turkish Kurd asylum-seekers who challenged their detention. The Manual (that is, the Manual we are concerned with in these proceedings) required by paragraph 38.5.2 that each detainee be given a "Reasons for Detention" form. The forms given to the claimants contained wrong or inappropriate reasons. Lord Slynn of Hadley stated at paragraph 48:

> "It is agreed that the forms served on the claimants here were inappropriate. It was, to say the least, unfortunate but without going as far as Collins J in his criticism of the Immigration Service, I agree with him that even on his approach the failure to give the right reason for detention and the giving of no or wrong reasons did not in the end affect the legality of the detention."

THE TRUE CONSTRUCTION OF PARAGRAPH 2(2): CONCLUSIONS

35. In seeking to formulate the issue before us I posed the question, what is the reach of the power conferred by paragraph 2(2) of Schedule 3 to the Immigration Act 1971, and characterised it is a question of statutory construction. In light of all the matters I have canvassed I would summarise my conclusions on this issue as follows:

i) Compliance with the Rules and Manual as such is not a condition precedent to a lawful detention pursuant to paragraph 2(2). Statute does not make it so (contrast s.34(1) of PACE, and the case of *Roberts* [1999] 1 WLR 662). Nor does the common law, or the law of the ECHR.

ii) Avoidance of the vice of arbitrary detention by use of the power conferred by paragraph 2(2) requires that in every case the *Hardial Singh* principles should be complied with.

iii) It is elementary that the power's exercise, being an act of the executive, is subject to the control of the courts, principally by way of judicial review. So much is also required by ECHR Article 5(4). The focus of judicial supervision in the particular context is upon the vindication of the *Hardial Singh* principles.

iv) In the event of a legal challenge in any particular case the Secretary of State must be in a position to demonstrate by evidence that those principles have been and are being fulfilled. However the law does not prescribe the form of such evidence. Compliance with the Rules and the Manual would be an

effective and practical means of doing so. It is anyway the Secretary of State's duty so to comply. It is firmly to be expected that hereafter that will be conscientiously done.

THE FACTS REVISITED

36. What is the impact of those conclusions on the facts of the present case? On the judge's own findings the *Hardial Singh* principles were complied with throughout the period in which the claimant was detained. He was so satisfied on the evidence, notwithstanding the Secretary of State's cumulative failures to comply with the Rules and the Manual. He was in my judgment entitled to be so satisfied. Since on my view of the case neither compliance with the Rules and Manual, nor the fulfilment of any comparable specific procedures, is a condition precedent to the legality of a paragraph 2(2) detention, the conclusion of the judge resolves the challenge to the claimant's detention in the Secretary of State's favour. However given the importance of the issue I will refer briefly to some particular features of the facts.

37. As the judge held, there were no reviews at all between 9 March 2006 and January 2007, the first ten months of the claimant's detention. In fact the claimant was detained in prison, rather than a detention centre, until (as I understand it) at least April 2007. There is of course no viable argument that the monitoring requirement somehow had less force, or was even inapplicable, during the claimant's incarceration in gaol rather than a detention centre, although it is right that the letter of the Detention Centre Rules 2001 did not apply during that period (the Manual should have been applied in any event).

38. Mr Tam points to the fact that during the period March 2006 – January 2007 the claimant made two unsuccessful bail applications. I have already noted (paragraph 4) Immigration Judge Chambers' observations refusing bail, namely that the claimant had previously committed a Bail Act offence, his appeals appeared to be without merit, and "there is every likelihood that [the claimant] if granted bail, would abscond", having no family ties in the United Kingdom. It is in the circumstances quite unreal to suppose that at any point between March 2006 and January 2007 the claimant's detention was not strictly justified.

39. And this is yet more plainly the case in relation to the claimant's detention from January 2007 onwards. As I have stated, there were reviews of the claimant's detention in January, March, May, June, July, August, September, October and December 2007. Only two of these, however, (May and October 2007) were conducted by an official of appropriate seniority. But as I have indicated Munby J rejected (paragraph 78) the distinct submission that the reviews of the claimant's detention which were actually carried out were legally inadequate. This is what he said:

> "I confess to being not very impressed with the quality of the analysis revealed by the file which has now been disclosed. But I do not think that such shortcomings as there may be are sufficiently grave as to give rise to any independent ground of complaint. The decision-making was adequate if unimpressive."

40. It is to my mind plain that the claimant was lawfully held in compliance with the *Hardial Singh* principles throughout the period of his detention.

41. For all the reasons I have given I would allow the Secretary of State's appeal, subject only to a further order which falls to be made arising out of the new point raised by the claimant, which I explain below.

POSTSCRIPT: THE CLAIMANT'S NEW POINT

42. As I stated at the beginning of this judgment, the claimant has applied for leave to amend his claim form and notice of appeal in order to challenge as unlawful his detention during periods in which Munby J held he was in fact lawfully detained, and also the period between Munby J's judgment and the claimant's release on bail. The Secretary of State does not resist the amendments, and it is in principle agreed between the parties that the new issues which thereby fall to be determined should be remitted for decision by the High Court. I should give a brief account of the background to this development.

43. On 26 June 2008, in the course of another case (*Lumba* CO/9222/2007), the Secretary of State disclosed a statement by Mr David Wood, a senior official in the Borders and Immigration Agency. It showed, or apparently showed, that instructions had been given to caseworkers to operate a presumption in favour of detaining foreign nationals, who had been imprisoned for criminal offences, at the end of their sentence. On 18 July 2008 the Secretary of State disclosed a statement by Mr Gareth Redmond, who was temporarily stationed as a Director in the CCD. He deals (I summarise) with the impact, or lack of it, of the new instructions on the claimant's circumstances. In light of these new instructions the claimant now seeks to challenge the legality of his detention during periods when Munby J found he was lawfully detained and also the period between Munby J's judgment and his release on bail on 30 June 2008.

44. There are, we are told, other cases pending in the High Court which concern these instructions. As I have said the Secretary of State does not oppose the claimant's proposed amendments, nor an order remitting this issue for determination in the Administrative Court. If my Lords agree I would make orders reflecting this agreed position. Counsel will no doubt oblige us by producing an appropriate draft.

Lord Justice Keene:

45. I agree. I was initially troubled by the breaches of rule 9 of the Detention Centre Rules 2001, a piece of subordinate legislation laid before Parliament and thus of greater significance than the Manual. As Laws LJ has described, rule 9(1) requires the Secretary of State to provide a detained person with written reasons for his detention on a monthly basis. On a large number of occasions that did not happen in this case. It is clearly implicit in that rule that the Secretary of State has to reconsider the justification for detention, month by month, in the light of changing circumstances. So there are two elements to rule 9: the reviewing each month of the reasons why a person is being detained, and the provision to that person each month of a written statement of those reasons.

46. These are not unimportant features of the regulatory regime. The need for such regular reviews stems from the necessity for the Secretary of State to monitor

changing circumstances in a given case, lest his power to detain, on the principles set out in *Hardial Singh*, no longer exists. Even if the power still exists, he has a discretion to exercise which he must also keep under review. The importance of the detainee receiving regular statements of the reasons why he is still detained is self-evident: he needs to be in a position to know whether he can properly challenge the Secretary of State's decision in the courts by way of an application for habeas corpus or judicial review or whether he can apply for bail on a meaningful basis. So the requirements imposed by rule 9 cannot be treated lightly, especially when one is dealing with administrative detention which deprives a person of his liberty without a court order.

47. However, with some hesitation I am persuaded that these breaches do not render unlawful the detention of the respondent. In particular, I see the force of Laws LJ's point that compliance with the 2001 Rules is not a pre-condition for the exercise by the Secretary of State of his powers contained in Schedule 3 of the Immigration Act 1971. Those Rules are not made under any power contained in that Act. They are made under various provisions in the Immigration and Asylum Act, 1999, namely sections 148(3), 149(6), 152(2) and (3), 153 and 166(3) and certain parts of Schedules to that Act. Those provisions are essentially ones concerned with the management and administration of removal centres/detention centres. Thus section 153 requires the Secretary of State to make rules for their "regulation and management," and subsection (2) of that section provides that such rules

> "among other things, make provision with respect to the safety, care, activities, discipline and control of detained persons."

None of those parent provisions seems to intend that the rules made under them should curtail or limit the Secretary of State's power to detain as such.

48. Consequently, important though the requirements of rule 9 are, I accept that a failure to comply with them will not of itself render the detention unlawful. I too, therefore, would allow this appeal.

Lord Justice Longmore:

49. I also agree that this appeal should be allowed.