Neutral Citation Number: [2013] EWCA Civ 1378

Case No: C4/2013/0437

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT,
QUEEN'S BENCH DIVISION
Mr Philip Mott QC
CO64052011

Strand, London, WC2A 2LL

Date: 12/11/2013

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MCFARLANE
and
LADY JUSTICE SHARP

Between :

THE QUEEN ON THE APPLICATION OF JS (SUDAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Mr Stephen Knafler QC and Mr Mark Symes (instructed by Duncan Lewis Solicitors) for the **Appellant**
Ms Julie Anderson (instructed by **the Home Department**) for the **Respondent**
Hearing date : 7th October 2013

Approved Judgment

Lord Justice McFarlane:

1. JS, a 25 year old man who is a Zaghawan originating from the Darfur area of Sudan, was, for a period of just over two years, detained under the Immigration Act 1971 whilst it was determined whether or not his circumstances established a statutory exception thereby avoiding his otherwise automatic deportation on the basis that he was a "foreign criminal". In the event the period of detention terminated following a determination by the First-tier Tribunal (Immigration and Asylum Chamber) to the effect that his was an exceptional case and he was thereby excluded from the automatic deportation scheme. In judicial review proceedings JS sought a declaration that he had been unlawfully detained and he also sought damages. On 25th January 2013 Mr Phillip Mott QC, sitting as a Deputy High Court judge, dismissed the claim for judicial review, holding that the claim failed on all grounds. The appellant now appeals against that decision to this court, permission to appeal having been granted, in part, by Sullivan LJ on 26th March 2013.

2. The focus of the appellant's claim is not upon detention in principle, but upon the length of time that his detention lasted. Relying upon the circumstances to which I will now turn, the appellant's case is that there was no reasonable justification for him to spend any time in immigration detention following the date upon which he was due to be released from a substantial sentence of imprisonment imposed by the criminal court. His secondary case is that even if some period in immigration detention was justified, the significant majority of the lengthy period that he was in fact incarcerated fell beyond the line of what was "reasonable" and therefore must be held to be unlawful.

Factual background

3. The factual background, insofar as it is relevant to this appeal, can be stated shortly. JS arrived in the UK in November 2004 when, apparently, aged 16 years. He arrived surreptitiously in the back of a lorry, but his presence became known to the immigration authorities immediately. He sought asylum on the basis that, being a member of the Zaghawa tribe from Darfur, he and his family were subject to intolerable treatment by the majority population and the authorities in the state of Sudan. His application for asylum was refused in January 2005 on the basis that his claim to be a Zaghawan from Darfur was vague, unsubstantiated and lacking in detail. However, because of his age, he was given discretionary leave to remain in the UK until his assumed eighteenth birthday in October 2006. JS did not appeal against the refusal of asylum.

4. In September 2006 JS made a further application for Humanitarian Protection Discretionary Leave to remain in the UK beyond the expiration of his discretionary leave the following month. In a statement accompanying that application he once again gave details of his life as a Zaghawan living in Darfur. By letter dated 3rd January 2007 the Secretary of State indicated that the fresh application would be entered into the "Legacy Programme" and would be considered in due course.

5. On 5th May 2007 the most significant event in this chronological account occurred. The appellant, along with others, was arrested and charged with serious sexual offences against children. From that date he remained in custody. Following a full trial, he was convicted in the Crown Court on 21st February 2008 and, on 8th May

2008, sentenced to four years detention in a Young Offender's Institution. A brief description of the underlying facts indicates the seriousness of the appellant's offending. He, together with four others, had lured local schoolgirls to a house for the purposes of sexual activity. The three girls involved were aged 13 or 14. In the event, JS was convicted of two offences of sexual activity with a 13 year old girl, which were charged as samples of the course of conduct in which he had engaged with her. He was sentenced on the basis that these were planned offences and he knew the girl's age. In sentencing the judge expressly concluded that the three girls had been targeted by the group of five males.

6. In addition to the substantial custodial sentence, the Crown Court judge recommended that JS be deported. In any event, the provisions of the UK Borders Act 2007 provide that JS, as a "foreign criminal", is automatically to be regarded as a candidate for deportation under Immigration Act 1971, s 3(5)(a) unless one or more of the statutory exceptions in UKBA 2007, s 33 is established. I will in due course set out the relevant passages of those provisions.

7. On 8th May 2009 JS, who had been in continuous custody following his arrest two years earlier, was released from his prison sentence but remained detained under the immigration legislation pending his anticipated deportation.

8. On 13th August 2009 a senior caseworker in the UK Border Agency, acting on behalf of the Secretary of State, instructed that JS's case should be evaluated and reviewed in the light of the circumstances that then existed. A request was made that JS be formally interviewed for that purpose by an immigration officer. That request was made on 17th August 2009 but the interview did not take place until five months later, on 27th January 2010. In the course of the interview JS once again gave details of his life in Sudan.

9. By the end of March 2010 the internal UKBA records show that the case had been re-evaluated by a caseworker and a new legal team on behalf of JS had submitted a full written response to the Secretary of State's initial "warning letter" issued in February 2010 indicating an intention to deport under the automatic deportation scheme. Despite the relevant material being available for analysis by the end of March 2010, the records show that the case was not reviewed by the senior caseworker until 23rd June 2010. The senior caseworker accurately pinpointed the crucial point in the case. It was accepted that if JS was a non-Arab Darfuri then, because of what was known of the likely treatment of members of that ethnic group in Sudan, it would not be possible to enforce his automatic deportation. The senior caseworker however concluded that the evidence failed to establish that JS was Sudanese, as opposed to being a Zaghawan from a neighbouring country. Although the administrative decision to refuse JS leave to remain was taken by that caseworker on 23rd June, the decision letter was not sent to him until 12th August 2010.

10. The decision letter of 12th August triggered JS's right to appeal against the decision to the First-tier Tribunal ('FTT'). The appeal was initially determined on 2nd December 2010. His appeal on asylum grounds was dismissed on the basis of a statutory presumption arising from his criminal convictions, but his appeal on human rights grounds, based upon the potential for torture, inhuman or degrading treatment or punishment sufficient to satisfy European Convention on Human Rights, Article 3, was adjourned for a full hearing.

11. That hearing took place before the FTT on 23rd February 2011. On the basis of evidence from JS, together with the evidence of an acknowledged expert on Sudan, Mr Verney, the FTT concluded that there was " overwhelming evidence" that JS was a Zaghawan from Darfur. His appeal against automatic deportation was therefore allowed on human rights grounds, in particular those under Article 3. The Secretary of State was refused permission to appeal by the FTT and, on 17th May 2011, the Upper Tribunal also refused permission to appeal. Seven days later, on 24th May, JS was released from detention.

12. In summary, the total period of immigration detention was 2 years and 2 weeks [8 May 2009 to 24 May 2011]. The period between the commencement of immigration detention and the Secretary of State's decision to proceed with deportation was 15 months [8 May 2009 to 12 August 2010]. The period between the decision and the exhaustion of any potential appeal was 9 months and this was followed by the final seven days before release.

The statutory context

13. It is convenient at this stage to set out the relevant parts of the statutory scheme:

Immigration Act 1971, s 3(5)

A person who is not a British citizen is liable to deportation from the United Kingdom if:
(a) the Secretary of State deems his deportation to be conducive to the public good; or
(b) another person to whose family he belongs is or has been ordered to be deported.

UK Borders Act 2007, s 32

Automatic Deportation

(1) In this section "foreign criminal" means a person—
  (a) who is not a British citizen,
  (b) who is convicted in the United Kingdom of an offence, and
  (c) to whom Condition 1 or 2 applies.
(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
(3) Condition 2 is that—
  (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c 41) (serious criminal), and
  (b) the person is sentenced to a period of imprisonment.
(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c 77), the deportation of a foreign criminal is conducive to the public good.
(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

UK Borders Act 2007, s 33

Exceptions

1) Section 32(4) and (5)—
(a) do not apply where an exception in this section applies (subject to subsection (7) below), and
(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
(a) a person's Convention rights, or
(b) the United Kingdom's obligations under the Refugee Convention.
(3) ...
(4) ...
(5) ...
(6) ...
(6A) ...
(7) The application of an exception—
(a) does not prevent the making of a deportation order;
(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
but section 32(4) applies despite the application of Exception 1 or 4.

UK Borders Act 2007, s 36

Detention

(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State—
(a) while the Secretary of State considers whether section 32(5) applies, and
(b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.
(2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.

Immigration Act 1971, Sch 2, para 2

(1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence

> or order of any court, he shall, unless the court by which the recommendation is made otherwise directs, or a direction is given under sub-paragraph (1A) below, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail.
> (1A) ...
> (2) ...
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless [he is released on bail or] the Secretary of State directs otherwise).

The *Hardial Singh* principles

14. It is well established that the four principles that were first identified in *R (Hardial Singh) v Governor of Durham Prison* [1984] 1 WLR 704 apply generally to the exercise of the Secretary of State's powers of detention for the purposes of immigration control. In recent times the Hardial Singh principles have been re-stated by Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 (paragraph 22):

> 'It is convenient to introduce the *Hardial Singh* principles at this stage, since they infuse much of the debate on the issues that arise on this appeal. It is common ground that my statement in *R (I) v Secretary of State for the Home Department* [2003] INLR 196, para 46, correctly encapsulates the principles as follows: (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 a 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.'

15. In *Hussein v Secretary of State for the Home Department* [2009] EWHC 2492 (Admin), Nicol J was required to consider the application of the *Hardial Singh* principles in the particular context of detention pending automatic deportation under the UK Borders Act 2007, s 32 and, at paragraph 44 of his judgment, Nicol J concluded as follows:

> 'Mr Husain [counsel for the applicant] submitted that some adaptation of these principles was necessary to reflect the nature of the power to detain under s.36(1)(a) of the 2007 Act. Mr Eadie [counsel for the Secretary of State] accepted that a degree of modification was necessary. In the end I am not sure that there was any significant difference between the positions canvassed by the parties. In any case, I would express the implied limitations in this context in this way:

i) The Secretary of State must intend to deport the person unless one of the exceptions in s.33 applies and can only use this power to detain for the purpose of examining whether they do.

The Secretary of State must have this conditional intention because otherwise it would not be possible for him to say that detention was pursuant to action with a view to deportation. It is clear that the s.36(1)(a) power may be used by the Secretary of State while the issue of whether one or more of the exceptions in s.33 is applicable. There was some debate at the hearing as to whether this power could also be used while the Secretary of State examined whether any of the other conditions on which the automatic deportation depended were fulfilled. Could he, for instance, rely on this power if the detainee claimed that he was in truth a British Citizen (and so not a 'foreign' criminal)? Mr Eadie was inclined to argue that he could. The consequence would be that even if the detainee was to persuade the Secretary of State (or a court) that he was indeed British, his detention in the meantime could have been lawful. I agree with Mr Husain that that would be a dramatic extension of the law. It may have been achieved by the 2007 Act, but this issue does not arise for decision on the facts of the present case. It would be better in my view for it to be answered in a case where it does.

ii) The detainee may only be detained for a period that is reasonable in all the circumstances.

No change is needed to this statement of principle.

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.

No change is necessary to the formulation here, but this principle will be infringed if detention continues even though it is apparent that either resolution of the question of whether any of the exceptions in s.33 is applicable, or any subsequent deportation, or both together, will take more than a reasonable time.

iv) The Secretary of State should act with reasonable diligence and expedition to determine whether any of the exceptions in s.33 is applicable.

An analogous limitation to Dyson LJ's fourth principle is clearly to be read into the s.36(1)(a) power, but some adaptation is necessary to reflect the exercise on which the Secretary of State is engaged. Of course, if none of the exceptions in s.33 apply and the automatic deportation obligation in s.32(5) arises and detention is continued under s.36(1)(b) , that power will be subject to the implied limitations as formulated by Dyson LJ. The Secretary of State will then have to act with reasonable diligence and expedition to effect deportation. What is reasonable will no doubt take account of the totality of the period that the person concerned has spent in detention after the conclusion of his criminal sentence pursuant to immigration powers.'

16. During submissions before this court it was common ground that the adaptations described by Nicol J in *Hussein* were accepted and I, for my part, would endorse them as being of application to cases, such as the present, of immigration detention pending automatic deportation at the conclusion of a prison sentence.

Three first instance decisions

17. The question of whether or not there is a duty upon the Secretary of State to commence assessment of an application for exception to automatic deportation at some point before the end of the prison term has been considered in three first instance decisions. In the first, *R (Mohammed) v Secretary of State for the Home Department* [2010] EWHC 3323 (Admin), HHJ Robert Owen QC (at paragraphs 91 and 92) held that it would be unreasonable and unrealistic to impose a universal duty on the Secretary of State to take steps prior to the date of release on licence. In so holding he stated that the 'reasonableness of the detention or the duration of a reasonable period must depend on the facts of the individual case'.

18. In the second case, *R (AE) (Libya) v Secretary of State for the Home Department* [2011] EWHC 154 (Admin), HHJ Stephen Davies took a similar line and declined to hold that there was some form of positive obligation [and the judge stresses the word 'obligation' by underlining it] on the Secretary of State to take steps in advance of the date when the obligation to deport arises.

19. The third case is the decision of Nicol J in *Hussein v Secretary of State for the Home Department* [2009] EWHC 2492 (Admin) to which reference has already been made. In common with HHJ Owen and HHJ Davies, Nicol J declined to hold that there was a universal duty to commence the assessment of a claim for exception from automatic deportation before the conclusion of the prison term, but he did describe a general category of cases in which, on their individual facts, it would be 'sensible' for such an early assessment to take place (paragraph 52):

> 'it may be that the [Secretary of State] could have started the process of deciding whether any of the exceptions in s 33 applied at an earlier stage and before the custodial term of the Claimant's sentence had almost expired. In the future it would be sensible for him to do so in many cases. It may not be practicable if the person concerned has spent a lengthy time on remand which is ordered to count against his sentence so that the custodial term comes to an end shortly after he has been sentenced. On the other hand, if a lengthy term of imprisonment has been imposed, there are obvious disadvantages in starting too early the consideration of what the position will be when the custodial sentence comes to an end. Things may change. But in cases such as the Claimant's where there are a few months between sentence and the automatic release date neither concern will apply. As [counsel] argued, if the initiation of the process is delayed, it is likely to prolong the period of s 36(1)(a) detention.'

Dismissal of judicial review claim

20. Before Mr Phillip Mott QC, JS, through his counsel, Mr Mark Symes, put forward four grounds in support of his application. In summary they were:

    i) Failure to engage with the merits of the claim which, it was asserted, was so strong that the Secretary of State should have granted bail at any early stage and, if not then, certainly pending the resolution of any potential appeal process following the FTT decision.

    ii) Undue delay in addressing the claim was excessive on the basis that JS had made an in-time application for further leave to remain in September 2006 and the delay in processing his application and subsequent claims.

    iii) An ECHR, Article 5, point claiming that JS had not been informed of the precise provision under which he was detained. In the event permission to proceed with judicial review was not granted in relation to this ground.

    iv) Unreasonable assessment of the risk of re-offending, this being likely to affect the decision to keep JS in detention rather than to grant him bail.

21. In the context of the *Hardial Singh* principles, the first principle, namely the Secretary of State's intention to deport, was never in doubt. The main challenge centred upon the second principle, whether the detention was for a period which was reasonable in all the circumstances, and the fourth principle, the requirement for the Secretary of State to act with reasonable diligence and expedition to effect removal. Finally, there was an issue based on the third principle (realisation that the Secretary of State would not be able to effect deportation within a reasonable period) to the effect that the final seven days in detention following the Upper Tribunal's refusal of permission to appeal were not justified as, by then, the Secretary of State's avenues to appeal the FTT decision had been exhausted.

22. The judge distilled the issues succinctly as follows in paragraph 36:

> "Accordingly, the issues essentially resolved themselves to two. Chronologically, the first is whether there was unreasonable delay in deciding whether the exceptions in section 33 applied. The second is whether the claimant should have been granted bail once the strength of his Article 3 claim was appreciated, even though it was not unreasonable for the defendant to challenge that claim. Finally I must look at the last seven days of detention, once permission to appeal to the Upper Tribunal had been refused."

23. In analysing the issues the judge divided the chronological history into three stages:

    a) September 2006 (JS's fresh application) to 8th May 2009 (end of custodial sentence);

    b) 8th May 2009 to 27th January 2010 (interview by immigration officer);

    c) 27th January 2010 to 12th August 2010 (decision letter sent to JS).

24. In relation to the first period the judge rejected consideration of September 2006 as the relevant date upon which the clock started. He held that the whole picture changed with the arrest and conviction of the claimant for serious sexual offences resulting in the sentence of May 2008. The judge noted that there were apparently conflicting first instance decisions (see paragraph 17 above) as to the point at which the Secretary of State was obliged to start the process of decision making; in particular whether that was before or after the date upon which an individual moved from being a serving prisoner to detention under the immigration legislation. He considered that that issue was likely to be fact specific. On the facts of this case the judge concluded that there was no requirement on the Secretary of State to begin the decision making process before the expiration of the criminal sentence. He summarised his reasons at paragraph 40:

> "In this case, prior to May 2009 the claimant had been refused asylum, and had not appealed that decision. He had not raised his ethnicity as a relevant factor, nor had it been flagged up as a potential problem in the Defendant's Operational Guidance. He was by then an adult, and had been serving a long custodial sentence as a result of which he was subject to the automatic deportation regime. Even if given the option of remaining in the UK, he would be released on licence and subject to the requirements of being on the Sex Offenders Register and might very well prefer to be assisted in leaving the UK. I can see no good reason for requiring consideration of his case prior to 8th May 2009."

25. In the present appeal Mr Knafler QC, who leads Mr Symes for JS before us, argues firmly to the contrary effect and asserts that, not only should the decision making process have started during the currency of the criminal sentence, but it was unreasonable for the Secretary of State not to have concluded her determination before JS was due for release.

26. In relation to the period between May 2009 and the interview in January 2010 the judge concluded that, whilst the Secretary of State had a duty to act with reasonable diligence and expedition, it was not a one point case where the only issue was the claimant's ethnicity. The judge apparently accepted the Secretary of State's evidence that her officers were required to investigate four matters:

i) The specifics of the claimant's claim at that time to be at risk of persecution;

ii) Confirmation of his Sudanese origin;

iii) Whether he could find internal relocation to overcome his difficulties; and

iv) Whether there were other family members remaining in Sudan.

In addition the judge concluded that no doubt there was a changing picture in Sudan which required up to date evaluation.

27. Taking those matters into account, together with some account of the workload of the department, the judge concluded that it was "not surprising" that the obtaining of the

statement of evidence and the conduct of the interview did not occur until January 2010. At paragraph 42 he noted:

> "The reality is that, even if the information had been obtained earlier, it would still have needed checking, and the possibility of internal relocation would have been a live one until November 2009."

28. In relation to the final period from January to August 2010 the judge again noted that this was not just a one point case relating to whether or not the claimant was a Zaghawan from Sudan. At paragraph 43 he says:

> "A reasoned decision was required on the application of the refugee convention as well as an analysis of the evidence of ethnicity. The background of the automatic deportation provisions of the 2007 Act meant that it was reasonable for this evidence to be tested thoroughly. Indeed, Mr Symes accepts that the decision letter rejecting the claim to be a Sudanese Zaghawa was not irrational."

29. Pausing there, with respect to the judge, I do not consider that his summary in paragraph 43 identifies any additional point which goes beyond establishing whether or not JS was a Zaghawan from Sudan.

30. Unfortunately, at this point the judgment lacks any detail or clarity as to the judge's reasoning. Having made reference to the overall start date of the Secretary of State's evaluation in August 2009 the judge's conclusion, at paragraph 45 is simply stated in the following words:

> "Thereafter more expedition would have been ideal, but the delay was not unlawful. I note, whilst making it clear that it is by no means decisive, that the claimant made no attempt to get bail or to start judicial review proceedings between May 2009 and August 2010."

31. Finally, in relation to the last seven days of detention, the judge correctly refers to the fact that, as a result of the serious sexual nature of his conviction, JS could not be released until multi-agency public protection arrangements ("MAPPA") had been put in place; immediate release was not, therefore, an option. The judge concluded that the earliest possible release date to contemplate would have been Thursday 19th May. The release in fact took place on Tuesday 24th May. The judge had no specific evidence as to what had happened in the interim period but concluded that "a period of seven days in a case like this is not unreasonable, even if some of the time was spent on unprofitable consideration of an assumed further right of appeal."

32. On that basis the judge therefore refused the appellant's claim for judicial review in its entirety.

The appellant's case

33. The two issues upon which permission to appeal has been granted are:

a) Whether or not the time taken by the Secretary of State to reach a decision was a "reasonable period" indicating the deployment of "due diligence" in the administrative process; and

b) Whether or not detention for all or part of the last seven days between refusal of permission to appeal and eventual discharge was lawful.

34. In presenting the case for JS Mr Knafler rightly stresses the fundamental importance attached as a matter of common law to the personal liberty of individuals. He asserts that it is an important duty of the courts to protect individuals from any deprivation of personal liberty by the executive which is not strictly justified. He asserts that the Secretary of State has a duty to do everything that is reasonably practical to progress matters both before the expiration of any period of imprisonment under the criminal regime as well as once the period of imprisonment has come to an end. He invites the court, in assessing what is reasonable in this context, to have regard to what he asserts is the "normal yardstick" for determining asylum claims, namely six months, as well as "the generally accepted European yardstick" of six months. He firmly submits that at all times the burden of proof is on the Secretary of State to establish a convincing explanation for any delay.

35. Talk of "yardsticks" and "delay" begs the question of the point at which the clock starts ticking. Mr Knafler joins issue with the judge that this question is "fact specific". He submits that the burden is on the Secretary of State to demonstrate that she has done everything reasonably possible, including before the prison sentence has expired, to avert or minimise the period of immigration detention.

36. On a specific matter relating to the judge's finding that JS had not raised his ethnicity as a relevant factor before May 2009, Mr Knafler is able to point to the consistent reference to this point that appears on each occasion that JS is interviewed or files a statement from December 2004 onwards.

37. In relation to the period generally, the appellant's case is that the only step that was administratively required was that of interviewing JS and in short terms Mr Knafler's case is that the delay both in achieving that interview in January 2010 and in announcing the resulting decision over seven months later can only be seen as unreasonable and unjustified. The decision making progressed, he claims, "at glacial pace".

38. In response, Ms Julie Anderson for the Secretary of State first of all draws this court's attention to the way in which the appellant's arguments have expanded from those deployed below to the extent that it is now asserted that the burden of proof is upon the Secretary of State to do everything that is reasonably possible, including before the prison sentence has expired, to avert or minimise immigration detention. Be that as it may her case, in round terms, is that, when considered properly, there is no basis for saying that the Secretary of State's actions were so lacking in reasonable diligence as to constitute illegality to a degree which would lead to the quashing of the right to detain and the establishment of an entitlement to compensatory damages.

39. Before leaving the presentation of the appeal as a topic, it is, unfortunately, necessary to say one or two words as to the preparation of the documents for this hearing, and, presumably, for the Administrative Court at first instance. This case is about the

reasonableness of the time taken by the administrative process. It therefore follows, as night follows day, that the court will need a detailed understanding of the relevant documents and their place in the chronological history. Those who have prepared and presented the case for each side before us have, I am afraid, signally failed to assist the court's understanding in this regard in three respects:

a) Assembly of the documents into a coherent chronological sequence;

b) Provision of a chronology annotated with the relevant bundle page numbers; and

c) Contemplating that the court would need to have a detailed understanding of what was, or was not, occurring during the period in question.

40. The bundles prepared for the court did contain all of the right documents, but they were not in any chronological order. The bundle of documents, which runs to over 700 pages, had apparently been assembled in categories related to their theme or topic, with the result that pages which were immediately chronologically related, the one to another, might be found in different ring binders. The detailed chronology provided by counsel for the appellant included no bundle page numbers at all. As a result it was necessary to ask Mr Knafler early on in his oral submissions to provide a detailed chronological exposition, which he was able to do. The fact remains that neither party had provided a chronological route map through the bundle of documents either at first instance or prior to the appeal hearing. It is difficult to understand how a party might contemplate a tribunal being asked to adjudicate upon the reasonableness or otherwise of time taken in administrative decision making without the tribunal being exposed to the detail of that administrative process in advance of the hearing.

41. As a result of the assistance that we were eventually given by counsel on both sides, and following further time spent with the documents prior to preparing this judgment, it must inevitably be the case that this court has had the benefit of a more thorough understanding of the administrative chronology than it would have been possible for the judge to acquire at the first instance hearing given the lack of a coherent bundle and/or an annotated chronology.

Discussion

Burden of Proof

42. In support of his submission that the burden of proof was upon the Secretary of State to establish that any period of time in detention was lawful, Mr Knafler referred to the House of Lords decision in *R v Home Secretary, ex pte Khawaja* [1984] 1 AC 74. *Khawaja*'s case concerned judicial review of a decision to detain an individual as an illegal entrant under IA 1971, s 33(1) pending summary removal. The appellant in that case had initially been granted leave to enter the UK on the basis that he was a dependent of his father; however, it later transpired that by the time of entry he had already been married. His detention and proposed removal, therefore, arose from the Secretary of State's assertion that the original leave to enter the country had been obtained by fraud. Mr Knafler was able to point to passages within the speeches of

each of the five members of the House in which, either overtly or by implication, the burden of proving facts relied upon was accepted to be upon the Secretary of State (pages 97 G-H, 105 E-H, 112 A, 124 C-G and 128 C-D).

43. Mr Knafler also referred to the judgment of my Lord, Lord Dyson JSC, in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 in which, at paragraph 65, my Lord said:

> "All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said in *R v Deputy Governor of Parkhurst Prison, ex pte Hague* [1992] 1 AC 58: 'the tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it'".

44. Miss Anderson in response argued that, once authority to detain is established, the burden for that being on the Secretary of State, it is for the claimant to show that any particular length of time was unlawful and therefore the burden in that respect is upon the claimant. Miss Anderson also submitted that the issue of whether or not a period of time was "reasonable" was a matter for assessment rather than strict evidential proof. She therefore questioned whether the concept of "burden of proof" was actually appropriate in this context. On that latter point Mr Knafler accepted that if the court was to undertake the important role of assessing whether or not a particular period of time was reasonable, then the need for reliance upon the strict burden of proof would fall away.

45. I consider that whether or not the burden of proof is strictly engaged on a particular issue is largely dependent upon context. In *Khawaja* the issue was "entry by fraud" and plainly the Secretary of State had to make good that assertion. Where, however, as in the present case, the issue relates to a period of detention, the basic facts relating to the dates upon which an individual was detained and the administrative steps that were undertaken are unlikely to be in issue. The initial burden of proof would be upon the claimant to establish the fact of detention; thereafter the burden will shift to the Secretary of State to establish lawful authority for detention as a matter of principle. The main focus of the hearing, however, is likely to be the evaluation of whether or not what had occurred was, in all the circumstances, "reasonable". In that context consideration of the burden of proof seems to be neither apt nor useful.

46. In the light of my conclusion that the "burden of proof" is inapt in the context of assessing reasonableness, I consider that it is not necessary to dwell upon Mr Knafler's further submission that the "standard of proof" in such cases is in some way at an enhanced level.

Evaluating "reasonableness"

47. Before turning to the central question of whether or not the period of detention in the present case was reasonable, it is necessary to look at a number of matters which may, or may not, assist a court in evaluating the reasonableness or otherwise of a period of immigration detention.

48. Mr Knafler made various submissions designed to insert some definite parameters into the concept of "reasonableness", and I propose to consider two in particular, namely his submission that the Secretary of State was under a duty to start the evaluation process prior to the termination of the individual's custodial sentence and his submission that a yardstick of six months for the evaluation process to be completed should be the norm.

49. I have already referred (paragraph 17) to the three first instance cases in which the issue of the process of evaluation starting during the custodial period of detention was considered (*R (Mohammed) v Secretary of State for the Home Department* [2010] EWHC 3323 (Admin); *R (AE) (Libya) v Secretary of State for the Home Department* [2011] EWHC 154 (Admin); *Hussein v Secretary of State for the Home Department* [2009] EWHC 2492 (Admin)). In the first two cases the judges declined to hold that there was some form of universal positive obligation on the Secretary of State to start the work before the period of custody ended. In the third case, Nicol J indicated that it would be sensible for the Secretary of State, where the factual circumstances permitted it, to start the process before the term of custody ended. However, on the facts of that case Nicol J did not hold that the Secretary of State was acting unreasonably in failing to do so on that occasion.

50. I consider that there is no conflict between these three first instance decisions. The question of whether or not the Secretary of State is acting unreasonably where she has not started the process of evaluation during the term of custody will turn upon the specific facts of each case and form part of the court's overall assessment of reasonableness in the light of all the relevant circumstances. In *R (Mohamed)* and *R (AE) (Libya)* HHJ Robert Owen and HHJ Stephen Davies must be right in holding that there is no blanket positive obligation to start the evaluation process during the prison sentence in every case. Equally, Nicol J's statement that, on the facts, in many cases it would be sensible for the Secretary of State to start the process during the prison term is also sound. Certainly, the question of whether or not it was reasonable for the Secretary of State to start the process earlier than the commencement of the period of detention is a valid and relevant question for the court when considering the overall reasonableness of the period of detention in the context of the circumstances of each case.

51. Although Mr Knafler's argument in support of the introduction of a six month yardstick was supported by reference to its application in other contexts, for my part I do not consider that importing a finite, and inevitably arbitrary, period of time is of assistance. Indeed it may be that, given that the liberty of the subject is involved, and each day of detention is therefore to be considered anxiously, the introduction of a fixed temporal yardstick may, in some cases, cause the authorities and the courts to accept a period of detention, for example six months, as being the norm and thereby fail to consider shorter periods of detention which, on the specific facts of each case, would otherwise be seen to be unreasonable and therefore unlawful.

52. The focus of this case is upon the period of detention and the administrative activity, or inactivity, that took place during that time. It is, however, necessary to stress that the assessment of what is a "reasonable" time needs to reflect the overall context. That context is of a foreign national, who has no right to remain in this jurisdiction, who has been convicted of serious criminal offences, in relation to whom the criminal court has made a recommendation for deportation and in respect of whom, as a matter

of law, the Secretary of State is required to implement deportation unless the individual is seen to fall within one of the narrow statutory exceptions. Moreover the determination by the Secretary of State of whether, despite the strong policy and statutory impetus favouring deportation, such an individual should, exceptionally, be given leave to remain is a serious and important matter requiring proper and careful evaluation which, of necessity, will occupy a period of time. Any evaluation of the reasonableness of that period of time must, therefore, reflect the gravity of the decision that is to be taken.

53. Again, looking at aspects of reasonableness in this context, it will be the case that the individual has committed a serious criminal offence. The individual will, however, only be in immigration detention because has already served the full term of the sentence imposed by the criminal court. His past criminal offending, of itself, cannot be any justification for implementing or extending his time in immigration detention.

54. A further factor in the context of reasonableness is that the individual will have no statutory right to challenge the Secretary of State's decision, if it is to proceed with deportation, until that decision has been made. In the present case JS had no opportunity to make an application to the FTT until the decision letter was sent on 12th August 2010; he lodged his notice of appeal two days later.

55. Finally when looking at reasonableness it is important for those evaluating the issue to bear clearly in mind the distinction made by Lord Justice Carnwarth (as he then was) in R *(Krasniqi) v Secretary of State for Home Department* [2011] EWCA Civ 1549 at paragraph 12:

> "The *Hardial Singh* principles, though approved as such by the Supreme Court, are not the equivalent of statutory rules, a breach of which is enough to found a claim in damages. As I understand them, they are no more than applications of two elementary propositions of English law: first, that compulsory detention must be properly justified, and, secondly, that statutory powers must be used for the purposes for which they are given. To found a claim in damages for wrongful detention, it is not enough that, in retrospect, some part of the statutory process is shown to have taken longer than it should have done. There is a dividing-line between mere administrative failing and unreasonableness amounting to illegality. Even if that line has been crossed, it is necessary for the claimant to show a specific period during which, but for the failure, he would no longer have been detained."

The reasonableness of the period of detention in this case

56. Given the lack of focus on the factual context in the manner in which this case was originally presented to the court, it was necessary during the hearing and thereafter to undertake a detailed chronological evaluation of the factual history. The following matters stand out from that evaluation and are plainly relevant to the question of the reasonableness of the overall period of detention.

57. In this case, as a matter of fact, the Secretary of State did begin the evaluation of JS's claim during the period of his prison sentence. A letter was sent in November 2008 asking JS to state his reasons why deportation should not take place. He responded swiftly and a case review occurred the following month. The decision to proceed with deportation was taken on 31st March 2009, five or six weeks prior to his release from custody. It therefore seems that no point can be taken against the Secretary of State in this case for failing to get on with the process of evaluation prior to the end of the prison term.

58. Following JS's discharge from prison custody on 8th May 2009 a period of three months went by before the senior caseworker concluded on 13th August 2009 that it was necessary to start the process of evaluation from scratch and necessary to conduct an interview with JS. Thereafter a further three months went by between the request for interview (17th August) and an immigration officer being sent to see whether JS could be interviewed in English (24th November). Following the immigration officer's visit on 24th November a further two months expired before the interview took place on 27th January 2010. Thus a total of five months passed between the request for interview and the interview taking place.

59. The third period of time that is of note runs from 30th March 2010, when JS's new legal team had sent in a full written response to the Secretary of State, to 23rd June, three months later, when the senior caseworker re-evaluated the case. A further six weeks then passed before 12th August when the decision letter was sent out, making a total period of four and a half months in all.

60. These three periods during which little or no administrative activity was taking place, and measuring in turn three months, five months and four and a half months, total over 12 months in all during a total period of fifteen months detention prior to 12th August 2010. On the face of the papers this administrative delay is unaccounted for. Its existence requires explanation and it was to be expected that the Secretary of State would have filed a witness statement explaining in sufficient detail what had occurred. No such statement was filed. The only statement provided by the Secretary of State was from the senior caseworker. That statement simply describes the decisions that were taken without any reference to the timescale at all. In submissions Miss Anderson, on behalf of the Secretary of State, accepted that if there is a period during the detention which self-evidently requires justification, then the Secretary of State must provide evidence by way of explanation. The witness statement filed in these proceedings by the senior caseworker is wholly inadequate for the purpose of explaining the periods of unaccounted for delay that I have identified. The lack of any explanation makes it difficult to hold that the period of detention was reasonable. In making that observation I am keen to stress that the evaluation is focussed upon what is, or is not, "reasonable". There is no requirement upon the Secretary of State to account for every single day or every single week. These cases are very fact specific but, where, as here, a significant proportion of the total period of detention is marked by an apparent absence of any administrative activity, and no explanation for that state of affairs is proffered, then a court, standing back and looking at all of the circumstances, is entitled to come to the view that a proportion of the total period of detention was unreasonable and therefore unlawful.

61. It seems plain that this court now has a far greater understanding of what was taking place administratively during the fifteen months of JS's immigration detention prior

to the Secretary of State's decision to deport than was the case at first instance. That observation is not meant in any way as a criticism of the deputy High Court judge; the case has been presented to this court in a way which has exposed us to the necessary detail. The judge was not in a position to analyse the history and identify the three periods of unaccounted for delay totalling over 12 months. That circumstance alone justifies this court in evaluating the matter afresh on the basis of the information that is now identified.

62. In any event the evaluation of reasonableness undertaken by the judge was not, in my view, satisfactory. Firstly, the judge fell into significant error at paragraph 40 where he stated that, prior to May 2009, JS "had not raised his ethnicity as a relevant factor". As the chronological history plainly shows, at every turn JS had asserted that he was a Zaghawan from Darfur; that is what his case was about and the Secretary of State plainly knew that from every occasion upon which JS had been interviewed and/or had submitted written material.

63. Secondly, at paragraphs 41 and 42 the judge holds that "it is not surprising" that a period of eight months between May 2009 and January 2010 elapsed before JS was interviewed. The lack of judicial surprise is explained by accepting the need for the Secretary of State to investigate the specifics of JS's claim, confirmation of his Sudanese origin, and what his circumstances would be if he returned to Sudan. In addition it is said that there was, no doubt, a changing picture in Sudan. Finally, reference is made to the realities of the workload in the department. The judge makes no reference to the detailed activities recorded in the file and does not comment upon the fact that the Secretary of State apparently took no steps to investigate any of the matters that the judge accepted needed investigation other than by interviewing JS. Finally, the evaluation at paragraphs 43 to 45, concluding with the simple comment that the period of twelve months from August 2009 to August 2010 indicated that "more expedition would have been ideal, but the delay was not unlawful", is, in my view, a totally inadequate analysis of whether or not the deprivation of this individual's liberty was reasonable in all the circumstances.

64. In consequence of the criticisms that I have, unfortunately, felt it necessary to make of the judge and in consequence of the fact that this court is seised of the detail in a way that does not seem to have been available to the lower court, it is necessary for this court to undertake the analysis of reasonableness itself.

65. In the course of the observations that I have made thus far I have effectively set the ground for that re-evaluation by indicating the relevant factors to be taken into account and the detailed timeline in this case. Something of the order of 12 out of the 15 months detention prior to the deportation decision is unaccounted for in terms of administrative activity. The Secretary of State has wholly failed to file any evidence purporting to provide an account for those periods. The decision whether or not to exempt JS from automatic deportation was a serious and important decision. It was not a decision that should have been rushed, but it required processing in a proportionate manner having regard to the fact that JS was deprived of his liberty for the duration of the decision-making period.

66. On the facts of this case a finding that the entire unaccounted for period of twelve months was unlawful would not be justified. Identifying where, during that twelve month period, the dividing line between mere administrative failing and

unreasonableness amounting to illegality, as identified in *Krasniqi,* is drawn is inevitably an exercise in judgment rather than mathematics. On that basis, however, it is plain to me that at least two thirds of the twelve month period, and therefore eight months, can only be seen as falling on the unreasonable side of the line and I would therefore hold that eight months of the total period of fifteen months in immigration detention was unreasonable and therefore unlawful.

67. With regard to the separate claim relating to the last seven days of detention, I consider that the judge's evaluation was justified on the evidence, having particular regard to the need for the MAPPA provided by other agencies to be in place.

68. Having identified significant errors in the judge's analysis, and having concluded that the facts in this case do indeed establish that a period of eight months of the total period of detention was unlawful, I would allow this appeal, direct that the order of the judge be set aside and replaced with a declaration in the following terms:

"that the Appellant was detained unlawfully for 8 months by the Respondent". The claim is remitted to the High Court for assessment of the quantum of damages.

Lady Justice Sharp:

69. I agree.

The Master of The Rolls:

70. I also agree.