Neutral Citation Number: [2015] EWCA Civ 1187

Case No: C4/2015/0232

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE JAY
[2014] EWHC 4299 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2015

Before :

THE MASTER OF THE ROLLS
THE PRESIDENT OF THE QUEEN'S BENCH DIVISON
and
LORD JUSTICE McCOMBE

- -

Between :

THE QUEEN ON THE APPLICATION OF IDIRA	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Richard Drabble QC and Graham Denholm (instructed by **Bhatt Murphy**) for the **Appellant**
Thomas Roe QC and Mathew Gullick (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 02/11/2015
Further written submissions: 03/11/2015 & 05/11/2015

- -

Judgment

Master of the Rolls:

THE APPEAL

1. This appeal is concerned with the respondent's policy of using prisons rather than purpose-built Immigration Removal Centres ("IRCs") as places of detention for time-served convicted foreign national offenders ("TSFNOs") who have served their custodial sentences and are awaiting deportation. The judge regarded the appellant's detention in a prison as in principle contrary to article 5(1) of the European Convention on Human Rights ("the Convention"), but held that he was constrained by this court's decision in *R (Krasniqi) v Secretary of State for the Home Department* [2011] EWCA Civ 1549 to find otherwise unless the prison conditions were "unduly harsh", which he found they were not.

2. Mr Drabble QC on behalf of the appellant submits that the judge (i) was right to regard immigration detention in prison as contrary to article 5(1); (ii) was wrong to hold that he was bound by *Krasniqi* to hold otherwise unless the prison conditions were unduly harsh; and (iii) was wrong not to find that the conditions in which the appellant was detained were unduly harsh. Mr Roe QC on behalf of the respondent takes issue with each of these submissions.

The facts

3. The appellant is an Algerian national. Such leave as he had to remain in the UK expired on 10 July 2004, but he has remained here illegally ever since. He has committed numerous offences here. As long ago as 10 September 2007, the respondent made an order for his deportation on the ground that his presence in the UK was not conducive to the public good. He has not yet been deported because of difficulties with documentation.

4. On 20 November 2012, he was sentenced to a term of imprisonment for theft. He was sent to Wandsworth Prison. The custodial part of his sentence was completed on 14 January 2013. Thereupon, he was immediately detained by the respondent under her powers in the Immigration Act 1971 ("the 1971 Act"). He remained in Wandsworth Prison, although he became entitled to be treated as an "un-convicted prisoner", that is to say, like persons in prison on remand. He stayed there until 7 November 2013 when he was moved to Wormwood Scrubs Prison. On 21 March 2014, he was moved to Harmondsworth IRC and on 31 July 2014, he was released on immigration bail.

5. The 1971 Act does not specify where a person detained under its provisions should be detained. Until 24 January 2012, the respondent's policy was that TSFNOs "should only be held in prison establishments when they present risk factors that indicate they pose a serious risk to the stability of [IRCs] or to the safety of others being held there". To this end, there was provision for "individual risk assessments": see Version 12 of Chapter 55, Section 55.10.1 (and the earlier versions) of the Enforcement Instructions and Guidance.

6. In July 2013, the appellant was assessed as not posing a risk to the stability of IRCs or to the safety of others being held there. By this time, however, the respondent had

reached a new agreement with the National Offender Management Service ("NOMS"), which is part of the Ministry of Justice, under which a number of places in prisons were made available for immigration detention. She changed her policy in the light of this agreement. The policy from 24 January 2012 was (and in substance remains) that:

> "The normal expectation is that the prison beds made available by NOMS will be used to hold TSFNOs before any consideration is given to transferring such individuals to the IRC estate. This position will apply if there are free spaces among the beds provided by NOMS and even if the criteria or risk factors [making detention in prison necessary] are not presented by the FNOs concerned."

7. The reason for the change in policy was as the judge found at para 26 of his judgment:

> "The overall pressures on the system, both physical and financial, conspired to create a state of affairs whereby [the respondent] needed to purchase a number of bed spaces from NOMS and, having done so, those bed spaces needed to be kept as full as possible."

8. The number of prison places available to the respondent under this scheme was initially 600, but it increased to 1,000 in late 2012. The general rule was now that TSFNOs would be held in prison unless the beds they were occupying were required for other detainees, in which case they would usually be transferred to an IRC on a "first in first out" basis.

9. The effect of the policy was that the appellant remained in prison until 21 March 2014, whereas under the old policy he would have been moved to an IRC in about July 2013 on being assessed as not posing any risks requiring that he stay in prison.

The claim

10. The appellant claims that his detention between July 2013 and 21 March 2014 in a prison rather than an IRC, pursuant to the new policy, was (i) unlawful on domestic public law grounds and (ii) in breach of his rights under article 5(1) of the Convention and thus unlawful under section 6(1) of the Human Rights Act 1998.

The judgment

11. The judge held that the policy of using prison for the detention of persons in the appellant's position was unlawful on ordinary public law grounds because (i) it "eschewed any individualised assessment" of the detainee and was "irrational"; and (ii) it was a "blanket policy which admitted of no exceptions". The respondent takes issue with both reasons and advances cogent arguments for doing so. But since the judge granted no relief in respect of this finding of unlawfulness, the respondent could not and did not seek to cross-appeal. Without being taken to agree with the judge's conclusions, I propose to say no more about it.

12. If he had not been constrained by *Krasniqi*, the judge said that he would have held that the appellant's detention in a prison was "arbitrary" and so contrary to article 5(1) of the Convention because there was "no link between the ground or reason for the [appellant's] detention and its location and conditions": (para 51(ii) and paras 59-75). He reached this conclusion after carefully analysing a number of the principal decisions of the European Court of Human Rights ("ECtHR") to which I shall have to refer. I shall return to the judge's reasoning after I have considered these decisions.

13. On the question of the conditions of detention in the prison estate, the judge held (at para 91) that the evidence adduced by the appellant was "quite insufficient to show anything like the level of 'undue harshness' which Carnwath LJ had in mind in *Krasniqi"*. He added that "this would be so whether 'unduly harsh' is to be understood as meaning 'tantamount to a breach of article 3' or something slightly less serious". The appellant "failed by some margin" to meet the article 5(1) threshold test which the Court of Appeal had in mind in *Krasniqi* (para 92). The claim accordingly failed.

The issues arising on the appeal

14. The issues that arise are whether the judge was right to hold that (i) *pace Krasniqi,* immigration detention in a prison is generally contrary to article 5(1); (ii) he was bound by *Krasniqi* to hold that immigration detention in a prison is not contrary to article 5(1) unless the conditions of detention are "unduly harsh"; and (iii) (applying *Krasniqi*) the appellant's conditions of detention were not "unduly harsh".

The first issue: is immigration detention in a prison rather than an IRC generally contrary to article 5(1)?

15. Mr Roe is right to say that the correct starting point is the text of article 5(1) itself which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

16. The text is silent as to whether a person who is being detained in any of the permitted cases must be detained in any particular sort of institution or accommodation. There is no basis in principle for saying that immigration detention must *prima facie* be a breach of article 5(1) if the institution in which it occurs is formally designated as a prison. As is apparent from an examination of the Strasbourg jurisprudence, the court is concerned with substance and not form.

The Strasbourg jurisprudence

17. The starting point is *Ashingdane v United Kingdom* (1985) 7 EHRR 528. This was an article 5(1)(e) case (lawful detention of persons of unsound mind). After being convicted of a number of offences, the appellant was made the subject of a hospital order on the grounds of his paranoid schizophrenia. He was sent to Broadmoor, but in 1978 became well enough to be transferred to a form of detention on a closed ward of an ordinary hospital, Oakwood. His transfer was, however, delayed until 1980 because the unions at Oakwood had indicated that the transfer there of any offender would be likely to result in industrial action. The applicant claimed that his detention in Broadmoor from 1978 until 1980 was in contravention of article 5(1).

18. The court rejected the claim. At para 44, it said:

> "it follows from the very aim of Article 5(1) that no detention that is arbitrary can ever be regarded as "lawful". The Court would further accept that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution authorised for that purpose. However, subject to the foregoing, Article 5(1)(e) is not in principle concerned with suitable treatment or conditions."

19. The claim was dismissed because as the court said at para 47:

> "although the regime at Oakwood was more liberal and, in view of the improvement in his mental state, more conducive to his ultimate recovery, the place and conditions of the applicant's detention did not cease to be those capable of accompanying "the lawful detention of a person of unsound mind". It cannot therefore be said that, contrary to Article 17, the applicant's right to liberty and security of person was

> limited to a greater extent than that provided for under Article 5(1)(e)."

20. *Bouamar v Belgium* (1987) 11 EHRR 1 was an article 5(1)(d) case (detention of a minor by lawful order for the purpose of educational supervision). The applicant was placed in a remand prison where, he claimed, he could not receive supervised education. The court noted (para 50) that "confinement of a juvenile in a remand prison does not necessarily contravene article 5(1)(d) even if it was not in itself such as to provide for the person's educational supervision." But the state was "under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the [domestic] Act in order to be able to satisfy the requirements of Article 5(1) of the Convention" (para 52). The court held that there was a breach of article 5(1)(d) on the facts of that case. The detention of the applicant "in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim". The state was therefore in breach of article 5(1).

21. The statement in *Ashingdane* about the need for "some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention" was repeated and applied in *Aerts v Belgium* (1998) 29 EHRR 50. This is another article 5(1)(e) case. The applicant was detained on the grounds of his mental illness. He complained about a failure to follow medical advice that he be transferred from a secure unit (the psychiatric wing of Lantin Prison) to a more liberal one. Lantin Prison had a single psychiatrist whose role was to treat not only 35-55 inmates on the psychiatric wing, but also the remaining 700 or so inmates in the prison as a whole. He worked for only 10 hours a week. There were no qualified nurses and there was no psychologist and no occupational therapist. Other than for acute problems, the inmates of the psychiatric wing received no treatment at all.

22. The court stated (para 49) that "the Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind, the latter not receiving either regular medical attention or a therapeutic environment" and that "[t]he proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient". The article 5(1) claim, therefore, succeeded. By a majority, the court rejected the claim under article 3 of the Convention on the ground that there was "no proof of a deterioration of Mr Aerts's mental health" (para 66). The minority would have found a violation of article 3 as well.

23. In *Mayeka v Belgium* (2008) 46 EHRR 449, the second applicant was five years old when she was separated from her family, sent to an immigration detention centre and held for two months in the same conditions as adults. Nobody was assigned to look after her, although by good luck she was taken under the wings of two inmates who were themselves mothers and who did their best to care for her. She was, as the court put it, "left to [her] own devices" (para 51). The court found that her treatment was in breach of article 3 and article 8. As regards article 5, the case fell within the scope of article 5(1)(f) (detention of a person against whom action was being taken with a view to deportation). At para 103, the court noted that the conditions in which the second applicant was detained were "not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied minor". For that reason it concluded at para 104 that the Belgian legal system "did not sufficiently

protect the second applicant's right to liberty". Article 5(1) was, therefore, contravened.

24. *Saadi v United Kingdom* (2008) 47 EHRR 17 (a decision of the Grand Chamber) concerned the "detained fast-track regime for asylum-seekers" under which the applicant was detained in Oakington Reception Centre. It was another article 5(1)(f) case. At para 67, the court stated that article 5(1) requires that any deprivation of liberty "should be in keeping with the purpose of protecting the individual from arbitrariness". At para 69, it said:

> "One general principle established in the case law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Art.5(1). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention."

25. The authorities cited in support of this paragraph included *Bouamar* and *Aerts.* At para 73, the court said that the principle that detention should not be arbitrary must apply to detention under the first limb of article 5(1)(f) (preventing unauthorised entry into a country) in the same manner as it applies to detention under the second limb (action with a view to deportation). At para 74, it said in relation to the first limb of article 5(1)(f):

> "To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith. It must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that:
>
> > '[T]he measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'
>
> and the length of the detention should not exceed that reasonably required for the purpose pursued."

26. The court dismissed the claim. It found that the authorities had acted in good faith in detaining the applicant and that his detention was "closely connected to the purpose of preventing unauthorised entry" (para 77). As regards the third criterion (the place and conditions of detention should be appropriate) the court noted that Oakington Reception Centre was specifically adapted to hold asylum seekers and that various facilities for recreation, religious observance, medical care and, importantly, legal assistance were provided. Although there was an interference with the applicant's liberty and comfort, he made no complaint regarding the conditions in which he was held and the court found that there was no arbitrariness under this head.

27. At para 80, it said by way of conclusion that it found that:

> "given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers, it was not incompatible with Art.5(1)(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily. Moreover, regard must be had to the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers."

28. In *Riad v Belgium* (unreported, 24 January 2008), the authorities detained the applicants on their arrival at Brussels airport and, when ordered by a domestic court to release them, did so into the "transit zone" (airside at the airport) and refused them permission to cross the border-control posts. They remained in the transit zone for about a fortnight before they were admitted into the country. The court found that the detention was in breach of article 3. As regards article 5(1), it cited *Aerts* and *Mayeka* and reiterated (para 77) that there must be "some relationship" between the ground of permitted deprivation of liberty and the place and conditions of detention. It observed that the transit zone was "not an appropriate place of residence" and that the applicants "had been left to their own devices…without humanitarian or social support of any kind" and that the government had failed to explain on what legal basis the applicants had been transferred to and confined in the transit zone (para 78). The court held that there had been a breach of article 5(1).

29. In *Kanagaratnam v Belgium* (2012) 55 EHRR 26, the applicants (a mother and her three children) were asylum-seekers. They were detained in a closed transit centre while their application was being considered. As regards the children, the court held that, for the reasons given by the court in *Mayeka,* the detention was in breach of article 5(1)(f). As for the mother, the court said that it had to apply the approach set out in cases such as *Saadi.* At para 94, it stated its conclusion that "the applicant's detention in a place which was clearly inappropriate for the needs of a family, in conditions that the Court itself considers, as regards the children, to be in breach of art 3 and for a particularly long time, was arbitrary". A breach of article 5(1) was, therefore, established.

30. Other Strasbourg authorities were cited to us. In my view, the cases which I have reviewed are sufficient for the purposes of determining the first issue that arises on this appeal.

The judge's approach to the Strasbourg jurisprudence

31. At para 72, the judge said that a correct approach to the link between the ground of permitted deprivation of liberty (meeting the risk of absconding in an immigration context) and the place and conditions of detention could not ignore (i) the link that the respondent herself advanced as satisfying the requirements of article 5(1)(f) and (ii) the mass of international and other materials of high-standing to which he had referred at paras 13 to 16 of his judgment. It is unnecessary to describe this material in detail. It is sufficient to say that the judge referred to para 43 of the opinion of

Advocate-General Bot in *Adela Bero v Regierungspräsidium Kassel* (C—473/13, CJEU 30 April 2014); article 17(1) of the International Convention on the Protection of all Migrant Workers and Members of their Families (1990); the Council of Europe (PACE) Resolution 1707 (2010), 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers (paras 9.2.2, 9.2.5 and 9.2.6); and the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment Standards 2011, page 65. All these materials draw a clear distinction between penal establishments (such as prisons) and immigration detention centres; and they emphasise the desirability of accommodating those who are subject to immigration detention in centres designed for that purpose. The judge rightly acknowledged at para 18 of his judgment that these materials did not provide definitive answers to the key questions arising in these proceedings. But he said that they were "illuminating, particularly since the Defendant's previous policy was aligned to those standards".

32. He pointed out at para 73 that it had never been disputed by the respondent that there are material differences between the prison and IRC regime. The principal difference is that IRCs are designed to allow detainees as much freedom as possible whilst preventing absconding. Thus detainees in IRCs are able to use mobile phones and access the internet; there is freedom of movement and association; and visitors, including the families of other detainees, are encouraged and, when visiting, are not limited to specified visiting areas. Immigration detainees have access to publicly funded immigration legal aid advice, subject to the statutory means and merits test for legal aid. This is via the Detention Duty Advice scheme which is operated by the Legal Aid Agency. It seems, however, that advice is more readily available in some IRCs than others.

33. A significant number of immigration detainees who are detained in prison are not held as un-convicted prisoners. Even where they are held as un-convicted prisoners, they have limited freedom of movement and association. There are no national guidelines for immigration detainees in prison and the degree of freedom accorded to detainees is at the discretion of prison governors. The Prison Reform Trust has given a detailed account of very restrictive regimes in "many local prisons" (22-23 hours' lock up per day). Typically, the periods of lock up in IRCs are less restrictive. Detainees in prison are not permitted to have mobile phones. Although they have access to legal advice, it is said on behalf of the appellant that this is less readily available than for detainees in IRCs.

34. The judge then said:

> "74. Mr Denholm also relies on paragraph 17 of the judgment of Bean J in Rozo-Hamida [sic], where he refers to the views of CPT (see paragraph 16 above):-
>
> > 'Although this opinion is not binding on me, the views of the CPT are entitled to great respect. Certainly it would be disturbing to most people's sense of fairness that an immigration detainee who has not been convicted of any criminal offence should be confined in a prison save in the most exceptional circumstances'.

> 75. Approaching the issue at this stage without reference to binding Court of Appeal authority, my approach would be very similar. My sense of fairness is simply disturbed. However I am not sure that holding immigration detainees in prison requires "the most exceptional circumstances". It does require a sound and proper justification within the context of Article 5(1)(f), and the policy matrix which the Defendant has devised and implemented. A policy which either systematically or invariably (it matter not which for this purpose) has a consequence of holding those in the Claimant's position in prison, rather than in an IRC, cannot be properly justified. Moreover, the implementation of such a policy severs the requisite link which must exist in cases such as these to justify detention under Article 5. The severance of that link is conclusively demonstrated in the Claimant's case by the fact that he was assessed as being suitable for detention in an IRC on 3rd July 2013. On balance, therefore, if the matter were free from authority, I would hold that the Defendant's incarceration of the Claimant between 3rd July 2013 and 14th March 2014 was in breach of his rights under Article 5(1)(f) of the ECHR; and a sufficiently serious breach to sound in damages."

35. Mr Drabble QC supports the judge's reasoning in its entirety.

My conclusion on the article 5(1)(f) issue

36. No decision of the ECtHR has been drawn to our attention which states that persons in the appellant's position must not be detained in a prison (or in a place which is significantly different from an IRC). I accept Mr Roe's submission that the principles developed in Strasbourg do not support the judge's view that immigration detention in a prison is of itself generally contrary to article 5(1).

37. Mr Roe's primary case is that the statement in *Ashingdane* that, subject to exceptions, article 5(1)(e) is not generally concerned with the suitability of treatment and conditions must by necessary implication apply to the other sub-paragraphs of article 5(1) as well. He submits that the principle underlying the decisions in *Aerts* and *Bouamar* is that the state cannot argue that it has detained the individual for a permissible purpose under article 5(1) when its actions have been apt to defeat the very purpose for which the individual has been detained. In *Aerts's* case, this was by detaining a person of unsound mind in such a way as to deny him the treatment which might make his mind sound again; and in *Bouamar's* case, by detaining a minor so as neither to bring him before a competent legal authority nor to educate him. Mr Roe submits that neither case decides that article 5(1) implicitly confers on the court a jurisdiction to make (as the judge suggested at para 62) "a broad evaluative assessment" as to whether the place and conditions of the detention are "appropriate" in the light of their "link" to the purpose of detention, and to declare the detention "arbitrary" and "unlawful" if they are not "appropriate" in that sense.

38. I accept that the language used in these three cases appears to lend support to the idea that the court is not concerned with the appropriateness of the place and conditions of detention in a broad sense, but rather with the narrow question whether the place and

conditions of the detention are closely connected with the purpose for which the person is being detained.

39. But Mr Roe realistically accepts that the outcomes in *Mayeka* and *Riad* are not readily accommodated in this analysis. Thus, in *Mayeka* the court did not hold that there was a breach of article 5(1) on the grounds that the dreadful conditions of the applicant's detention were not linked with the permitted article 5(1)(f) purpose of the prevention of unlawful entry. Indeed, it might be thought that the more appalling the conditions of detention, the more effectively the detention furthers the permitted purpose of preventing unlawful entry.

40. In my view, however, the most important Strasbourg authority is the Grand Chamber decision in *Saadi* which was plainly intended to set out authoritative guidance as to the correct approach to article 5(1). Para 74 states that the requirement that the detention "must be closely connected to the purpose of preventing unlawful entry" is distinct from the requirement that "the place and conditions of detention should be appropriate". The latter requirement is referred to in para 78 as "the third criterion". Mr Roe seeks to interpret the third criterion as if the court had said that the place and conditions of detention should be "appropriate for the relevant article 5(1) purpose". But that is not what the court said.

41. In my view, para 78 shows that the court had in mind a broader evaluative exercise than that for which Mr Roe contends. On Mr Roe's approach, it would have been irrelevant that the Oakington Centre had the various recreational and other facilities mentioned by the court. The use of the phrase "suitable conditions" in para 80 also indicates that the court had in mind a broader exercise.

42. The national court must, therefore, decide whether the place and conditions of detention are appropriate or suitable. I find support for this broad approach in (i) the plain and natural meaning of the language used by the court in paras 69 and 74; and (ii) the fact that in para 74 the court stated that the place and conditions of detention should be appropriate "bearing in mind that the measure is applicable 'not to those who have committed criminal offences, but to aliens who, often fearing for their lives, have fled their own country'"

43. The significance of (ii) is that it shows that the court envisaged an evaluative exercise which takes into account all material facts and not only the question whether the detention furthers the relevant article 5(1) purpose. In most cases, the immigrant detainee will not have committed criminal offences. The fact that at para 74 the court mentioned this as a relevant factor in determining whether the place and conditions of detention are "appropriate" indicates that it envisaged a broad evaluative exercise.

44. For these reasons, I cannot accept Mr Roe's primary case. His alternative case is that the authorities show at least that an article 5(1) claim based on the unsuitability or inappropriateness of the place and conditions of detention cannot succeed in the absence of a finding that they involved a violation of article 3 or something close to it or, as the judge put it when summarising the effect of *Krasniqi* at para 85 of his judgment, "approximating" to it.

45. It is time to refer to *Krasniqi.* This case concerned a claim for damages for wrongful detention pending deportation in prison rather than in an IRC. It was alleged *inter*

alia that the detention was in breach of article 5(1). At para 18 of his judgment, Carnwath LJ (with whom Moses and Sullivan LJJ agreed) said:

> "Mr Roe accepts that, in accordance with decisions of the Strasbourg court, detention will not be lawful if it is "arbitrary", which might include detention in bad faith, or not genuinely for the purpose of the relevant exception, or where there is not "some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention" *(Saadi v United Kingdom* [2008] 47 EHRR 17, paras 68-74). However, none of the cases relied on supports a claim based solely on an irregularity in the selection of the place of detention, at least in the absence of any evidence that the conditions of detention were unduly harsh."

46. As I understand it, the "irregularity in the selection of the place of detention" was a reference to the fact that, under the Secretary of State's then policy, the appellant in that case should have been moved to an IRC. Carnwath LJ was making the point that an article 5 claim will not succeed solely because the detention is "irregular", for example, because it is in breach of some rule of domestic law. More is required. His reference to conditions that are "unduly harsh" is a gloss on the *Saadi* third criterion. The gloss is not articulated in *Saadi* itself or in any of the authorities to which we have been referred. It seems to be based on Carnwath LJ's assessment of the *effect* of the case law, although the only authority to which he referred was *Saadi*.

47. Mr Drabble submits that the gloss is unwarranted. The third *Saadi* criterion for avoiding arbitrariness is that the place and conditions of detention should be "appropriate". Conditions may be "inappropriate" even if they are not "unduly harsh".

48. I have already said that I consider that what is required by the third criterion is a broad evaluation of the appropriateness of the conditions of the detention in all the circumstances of the case. First, what is appropriate for those who have committed criminal offences is likely to be different from what is appropriate for those who have not (even if they are assessed as no longer posing a risk): see para 74 of *Saadi.*

49. Secondly, all that is required is that the conditions are appropriate, not that they are the *most* appropriate for the detained person. This is an important qualification. In *Saadi,* the court referred to *Aerts* and *Bouamar.* The claim in *Aerts* succeeded because the Lantin psychiatric wing "could not be regarded as an institution appropriate for the detention of persons of unsound mind" because necessary treatment was not being provided *at all.* The claim in *Bouamar* succeeded because the state *wholly* failed to "put in place appropriate institutional facilities which met the….educational objectives of the [domestic statute]". I have referred to *Riad* and *Kanagaratnam* at paras 27 and 28 above. These are further examples of cases whether the conditions of detention were severe and seriously inappropriate. There had been a violation of article 3 in *Riad* and *Kanagaratnam* (as regards the three children).

50. Thirdly, it should not be overlooked that the overarching purpose of article 5 is to protect the individual from arbitrariness. The three principles described in *Saadi* are

criteria for determining whether detention is arbitrary. The first is that detention infected by bad faith or deception on the part of the authorities is arbitrary. The second is that detention which is not in furtherance of one of the purposes permitted by article 5(1) is also arbitrary. Both of these principles are fundamental and central to a fair and rational detention scheme. The third is that detention in an inappropriate place and in inappropriate conditions is also arbitrary. In my view, when articulating this third principle, the court must have had in mind serious inappropriateness. It would be difficult to describe anything less as "arbitrary" or belonging to the same category of seriousness as the other two principles. This conclusion is consistent with what the Supreme Court said in *R (Kaiyam) v Secretary of State for the Home Department* [2014] UKSC 66, [2015] 2 WLR 76 at para 25:

> "In this as in other contexts, the Convention has not infrequently resorted to a concept of 'arbitrariness' to explain what it means by unlawfulness. The natural meaning of this English word connotes some quite fundamental shortcoming. But it is also clear that, when used at the international level, its sense can depend on the context."

51. The judgment of Lord Mance and Lord Hughes went on to explore the meaning of unlawfulness of detention in different contexts. *Kaiyam* was an article 5(1)(a) case. But I do not consider that there is anything in their judgment which suggests that in the context of an article 5(1)(f) detention, the concept of "arbitrariness" should connote anything other than some quite fundamental shortcoming.

52. In these circumstances, it seems to me that the phrase "unduly harsh" captures the essential point that the place and conditions of immigration detention must be seriously inappropriate before a detention can properly be described as "arbitrary" and therefore unlawful. The cases to which I have referred show that the ECtHR has held a detention to be in breach of article 5(1) only where this high threshold has been crossed. The concept of undue harshness is applied in a number of immigration contexts, most notably in the jurisprudence on internal relocation in Refugee Convention cases. It is true that it is not to be equated with article 3 ill-treatment: see per Lady Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at para 22. Nevertheless, it is a useful term to describe the level of unsuitability or inappropriateness that is required to meet the third criterion.

53. Fourthly, in determining what conditions are appropriate for a detained person, the court should always bear in mind any practical problems on which the state relies to justify its decision: see *Saadi* para 80.

54. I have referred earlier to what the judge said at para 72 of his judgment: see para 31 above. In addition to his reading of the case law, the judge supported his view by reference to three other factors. These were: (i) "the link the [respondent] herself advances" which the court "cannot ignore"; (ii) "international and other materials of high-standing"; and (at para 75) his "sense of fairness".

55. I agree with Mr Roe that it is not clear what the judge meant by the first of these factors. It is difficult to see how the lawfulness of the appellant's detention in prison

can be affected by the way the respondent's submissions on that question had been put.

56. As regards the second factor, as Mr Roe points out, none of the international materials constitutes or evidences any rule of international law such as might be admissible to construe article 5(1) of the Convention pursuant to article 31(3)(e) of the Vienna Convention on the Law of Treaties. I shall take the points made by the judge in turn.

57. Advocate-General Bot's Opinion in *Bero v Regierungspräsidium Kassel* [2015] 1 CMLR 17 is an Opinion on a reference concerning a European Union Directive (2008/115) which expressly forbids the use of prisons for immigration detention in most circumstances (see article 16), but from which the United Kingdom has opted out (see recital 26). The Opinion's reference to article 5(1) was not repeated in the judgment of the Court of Justice; and, far from revealing that the use of prison for immigration detention falls below current international standards, para 13 of the Opinion shows that:

> 'of the 16 Länder which make up the Federal Republic of Germany, 10 do not have specialised detention facilities, with the result that third-country nationals awaiting removal are detained in prisons and subject, in some cases, to the same rules and restrictions as ordinary pensioners.'

58. The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families is not an instrument to which the United Kingdom is a party (nor indeed are more than a handful of the parties to the [Human Rights] Convention). In any event, it does not have anything to do with the detention of foreign criminals pending their deportation.

59. The judge quoted 'Council of Europe (PACE), Resolution 1707 (2010), 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers' (which include a 'rule' forbidding the use of prison for immigration detention) without making clear that these are not rules but merely recommendations by the Parliamentary Assembly of the Council of Europe as to rules which ought to be adopted. Such recommendations are not binding: see article 23(a) of the Statute of the Council of Europe.

60. As for the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment Standards, the judge quoted a passage from page 65 of the 2011 revision of its 'CPT standards', stating that immigration detainees 'should be accommodated in centres specifically designed for that purpose'. But these too are merely recommendations by a committee which takes the view that '[a] prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence' (para 28 on page 65 of the 2011 revision). It is also important to note that the passage at page 65 showed that the committee's view was not universally shared viz: "The Committee is pleased to note that such an approach [sc not using prison for immigration detention] is *increasingly being followed* in Parties to the Convention' (emphasis added)".

61. I acknowledge at once that detention in an IRC is *generally* more appropriate for immigrant detainees than detention in prison. This includes TSFNOs who have been

assessed as not posing a risk to the stability of IRCs or to the safety of others being held there. But I do not accept that detention in a prison would *generally* be arbitrary and therefore in breach of article 5(1). For some vulnerable detainees, detention in prison may be seriously inappropriate and on that account arbitrary. But it must always depend on the vulnerability of the detainee and the nature of the prison conditions. Prison regimes are not uniform. Open prisons are very different from high security prisons. By the same token, the conditions of IRCs are not uniform either. In my view, the question whether a person is being detained in a place and subject to conditions which are seriously inappropriate must be answered by having regard to all relevant circumstances. A prison is not an inappropriate (still less a seriously inappropriate) place in which to detain an able-bodied man who is due to be removed from the country on the ground that his criminality makes his departure conducive to the public good and whom the public interest requires to be detained while that is arranged.

62. I conclude, therefore, that immigration detention in a prison rather than an IRC is not generally contrary to article 5(1). In answering the general question, I have explained why I consider that it was not contrary to article 5(1) to detain the appellant in prison in the circumstances of the present case.

63. I should add for completeness that Mr Roe advanced a further argument in support of his submission that the judge's reasoning on the general question was wrong. The argument is based on the decision in *Kaiyam* which was handed down 9 days before the judge's decision in the present case and was apparently not drawn to his attention. The background to that case was the fact that the applicants were serving indefinite sentences of imprisonment for public protection ("IPP"). They had become eligible for release if they could persuade the Parole Board that they were rehabilitated. But they could not do this without attending rehabilitation courses which the Secretary of State had failed to provide. The ECtHR held that the failure to provide the courses rendered the detention arbitrary and therefore unlawful. The Supreme Court held that there had been a breach of an ancillary duty that is to be implied into the overall scheme of article 5 which did not affect the lawfulness of the detention. Mr Roe submits that, if a failure to provide an IPP prisoner with an appropriate rehabilitative course cannot make his detention "arbitrary", nor can the selection of an "inappropriate" place of detention for an immigration detainee.

64. I am not convinced that the reasoning in *Kaiyam* (an article 5(1)(a) case) can be applied to all article 5(1) cases. As we have seen, the Supreme Court said that the meaning of arbitrariness can depend on the context. Since I have concluded for other reasons that the judge's decision on the first issue was wrong, I do not find it necessary to explore the contours of *Kaiyam.*

The second issue: was the judge right to hold that he was bound by Krasniqi?

65. This raises the question of whether para 18 of Carnwath LJ's judgment was part of the *ratio* or no more than *obiter dicta.* The judge wrestled manfully with this at paras 79 to 86 of his judgment. But since, for the reasons that I have given, I substantially agree with it, I see no point in engaging in the intellectually intriguing exercise of deciding whether the judge was right or wrong in holding that it was part of the *ratio* of Carnwath LJ's judgment.

The third issue: was the judge right to hold that the detention of the appellant was not unduly harsh?

66. I refer to para 61 above. The appellant was in his early 30s when he was in immigration detention. So far as I am aware, he was in good health and had no particular vulnerability. There was nothing particularly harsh or seriously inappropriate about the conditions of the prisons in which he was detained. The judge was right to hold that his detention did not meet the test enunciated in *Krasniqi.* He could have added that a further relevant fact was that the appellant was detained pending deportation on the grounds that, by reason of his criminal record, his presence here was not conducive to the public good.

Overall conclusion on the main appeal

67. For the reasons that I have given (which differ from those of the judge), I would dismiss this appeal

THE COSTS OF THE RESPONDENT'S NOTICE

68. On 23 July 2015, the respondent applied for permission to file a respondent's notice out of time. On 17 September 2015, Master Meacher allowed the application and ordered the respondent to pay the appellant's costs of and occasioned by the application for an extension of time for filing the respondent's notice on the indemnity basis. The respondent appeals against this order (for which she gave careful reasons). But before I come to these, I need to set the scene.

69. Jay J dismissed the appellant's claim on 19 December 2014. By consent, the time for appealing was extended from 9 to 23 January 2015. The appellant's solicitors filed the appellant's notice on 23 January, but contrary to PD 52C para 3(3)(g) did not file a skeleton argument at the same time. The respondent consented to an extension of time until to 27 February. On 25 February, the appellant's counsel asked the court for a further extension to which the respondent consented again. The appellant's skeleton was finally filed on 12 March.

70. The hearing of the appeal was listed for 2 or 3 November. On 23 July, 19 weeks after the filing of the appellant's skeleton argument and 14 weeks before the scheduled hearing date, the respondent filed her respondent's notice and applied for an extension of time in accordance with PD 52C para 12. The notice was accompanied by the respondent's skeleton argument. A sealed copy was served on the appellant on 5 August.

71. In the notice, the respondent asked the court to dismiss the appeal on the additional grounds that (i) the judge ought to have rejected the article 5(1) claim as being wrong irrespective of the decision in *Krasniqi*; and (ii) the judge ought to have refused the appellant's application to adduce evidence that his conditions of detention were unduly harsh. Both of these points had been argued by the respondent before the judge.

72. The appellant opposed the application for an extension of time. Master Meacher rightly treated the application for an extension of time as one that fell to be determined in accordance with the principles stated in *Denton v TH White* [2014]

EWCA Civ 906, [2014] 1 WLR 3926: see *Salford Estates (No 2) v Altomart* [2015] 1 WLR 1825.

73. Master Meacher reasoned as follows. Although the delay in filing the respondent's notice was substantial, it was not likely to have any impact on the course of the proceedings or cause undue prejudice to the appellant. The delay was, therefore, not "serious or substantial in the sense in which those expressions were used in *Denton"*. The reasons given by the respondent for the delay were mainly pressure of work on counsel and the need for the respondent to consider her position carefully in this significant appeal. Master Meacher said that these reasons were "inadequate". Finally, she said that she had to consider the circumstances of the case generally. There had been a clear breach of the time limit set by the rules. But it was no part of the courts' function to impose sanctions merely for punitive purposes. The hearing date of the appeal would not be jeopardised by granting the extension of time. Of particular weight was the fact that the issues raised in the respondent's notice constituted "by far the bulk of her case in this appeal"; it was a significant appeal; and it was in the public interest for the court to consider the points raised in the respondent's notice.

74. She concluded by saying that, although she was persuaded to grant the extension of time, the delay was "excessively long and no sufficient excuse had been provided for the failure to comply with the rules. The delay had put the appellant to expense. The respondent should pay the appellant's costs on the indemnity basis".

75. The respondent seeks a reconsideration of Master Meacher's decision under CPR 52.16(6). The case advanced by Mr Roe is as follows. No reasonable litigant in the position of the appellant would have opposed the respondent's application for an extension of time for filing the respondent's notice. First, there never was any possibility of the time-table for the appeal being disrupted or the appellant being prejudiced by the delay in filing the respondent's notice. Secondly, it is difficult to see how the appeal could sensibly have proceeded if permission had been refused. That is because, if the appellant had succeeded in persuading the court that the judge was wrong to think that he was constrained by *Krasniqi,* the court would have been reluctant to declare that the appellant's detention in a prison was a violation of article 5(1) solely on the basis that it was bound to agree with Jay J because the respondent's notice was late.

76. Mr Roe submits that it was obvious that an extension of time was appropriate in this case. A reasonable and cooperative litigant in the position of the appellant would have consented to the application. Instead, the appellant embarked on satellite litigation to try to take tactical advantage of the respondent's default. Mr Roe also complains that the appellant's written submissions were so worded as to necessitate a detailed and time-consuming answer from the respondent. In short, the appellant did not behave reasonably. This is illustrated by the fact that he requested that, if the court extended time for the respondent's notice, it should order the respondent to pay the costs of the entire appeal, win or lose, on the indemnity basis.

77. For these reasons, Mr Roe submits that the costs of and occasioned by the application for an extension of time (save for the respondent's own costs of making the application) should be paid by the appellant on the standard basis in any event. This follows from the fact that the appellant behaved unreasonably and opportunistically in

forcing the respondent to engage in a contested application and from the principle that:

> "[h]eavy costs sanctions should…… be imposed on parties who behave unreasonably in refusing to agree extensions of time": *Denton* at para 43.

78. Mr Denholm on behalf of the appellant seeks to uphold the decision of Master Meacher for the reasons that she gave. He makes the point that the appellant would not have objected to further time for the respondent's notice to take account of the late skeleton argument. Any reasonable further extension sought in advance with an appropriate explanation would have been agreed. But no request for a further extension was made. He submits that, in view of the long and largely unexplained delay on the respondent's part and the narrow central issue prior to the respondent's notice (the proper bounds of *Krasniqi*), it was not so obvious that time would be extended by the court that it was improper to resist the application.

79. Mr Denholm submits that the appellant's delay in lodging his skeleton argument was not comparable with the respondent's delay in lodging its notice. The appellant sought and was granted extensions of time and produced the skeleton argument within the further period agreed by the respondent and granted by the court; whereas the respondent made no attempt to update the appellant's advisers or the court as to her position.

Conclusion

80. At para 43 in *Denton,* this court said that parties should not "adopt an unco-operative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions". It added: "it is unacceptable for a party to try to take advantage of a minor inadvertent error….". I would emphasise the words "unreasonably" and "minor inadvertent". A party is not required to agree to an extension of time in every case where the extension will not disrupt the time-table for the appeal or will not cause him to suffer prejudice. If the position were otherwise, the court would lose control of the management of the litigation.

81. In determining whether to grant an extension of time for filing a respondent's notice, the court should apply the three stage approach set out in *Denton.* This is precisely what Master Meacher did in the present case. There is a further consideration which is peculiar to respondents' notices. If a respondent's notice raises an issue which goes to the heart of the appeal, the court will usually be reluctant to prevent the respondent from raising it, unless to do so would disrupt the appeal or cause real prejudice to the appellant. The court will want to decide the appeal on a proper consideration of all relevant issues. This is particularly important where the appeal raises a point of law which may have implications for other cases.

82. Master Meacher was right to recognise that this consideration was relevant in the present case. As she said, it was in the public interest that the points raised in the respondent's notice were considered by this court (as they have been). In these circumstances, and in view of the fact that the introduction of the issues raised by the respondent's notice would not disrupt the appeal or cause prejudice to the appellant, she was right to grant the extension of time sought by the respondent.

83. On the other hand, the delay was substantial and unjustified. The case did not fall within the ambit of para 43 of *Denton* i.e. the appellant was not unreasonably seeking to take advantage of a minor error on the part of the respondent. Master Meacher rightly applied what this court said at para 21 in *Altomart* and asked whether the respondent should be granted an indulgence or whether "the application should be refused in the interests of encouraging more rigorous compliance with the requirements of the rules and promoting a more disciplined approach to litigation generally".

84. In my view, her decision struck the right balance on the facts of this case. I agree with it.

President of the Queen's Bench Division

85. I agree.

Lord Justice McCombe

86. I agree entirely with the Master of the Rolls that the appeal should be dismissed for the reasons given by him. In particular, I agree that the four points articulated in paragraphs 48 to 53 of the judgment encapsulate conveniently the thrust of the various authorities, domestic and European, to which we were referred. I add only a few words of my own by way of overview of how this case appeared to me in the light of those authorities.

87. As the Master of the Rolls has said, the starting point is *Ashingdane* which gave us, in one sentence in paragraph 44 of the judgment, the broad principle that there must be some relationship between the ground of permitted deprivation of liberty and the place and conditions of detention. In cases such as *Aerts* and *Bouarmar* detention was for specific purposes identified in Article 5(1) (e) and (d) respectively and it could be shown that the location of detention seriously failed to meet the purposes so defined. In the present case, detention was for the purpose identified in paragraph 5(1)(f) in which action was being taken to effect deportation. That was the exclusive basis for the deprivation of liberty with no superimposed requirement of treatment or education.

88. Clearly, a national court confronted with a challenge to the deprivation of liberty must decide whether the place and conditions of detention are appropriate and suitable, even for persons subject to deportation on the basis of past offending, but where the purpose of the detention is the narrow one relevant in this case, the requirements are likely to be less stringent.

89. Reality dictates that there will always be a range of detention facilities available to the State for the detention of those whose removal from the country is required on various grounds. Some facilities are likely to be "better", in common parlance, than others. Ideally, all would be detained in dedicated immigration detention facilities, and it seems clear that the respondent aims to achieve that end but is constrained by resources in doing so. I see no objection to the type of "pipeline" arrangement that the respondent has put in place for TSFNOs with the aim of securing this objective, if removal cannot be effected beforehand. If space is not available for all TSFNOs within immigration detention centres, then it seems to me that those who are not being

removed because of offending have a greater claim on the limited spaces available, with the "pipeline" operating to feed past offenders into the more desirable facilities as time progresses.

90. If the dedicated detention centres are full, but a past offender subject to deportation has to be detained to prevent absconding, it cannot be right that it becomes unlawful to detain him at all. To make the detention unlawful it would have to be shown that the place or conditions of the detention in his case are seriously inappropriate.

91. In my judgment, the detention in this case did not infringe the principles derived from the cases which the Master of the Rolls fully explained.

92. As for the costs of the Respondent's Notice, I agree with the Master of the Rolls that the Master's decision was correct. In this context, I would refer to the judgments in this court in *R (Sabir) v Secretary of State for the Home Department* [2015] EWCA Civ 1173 (18 November 2015) paragraphs 26 and 27 in which it was noted that concern has arisen as to a pattern of delays on the part of this particular respondent in complying with the rules relating to the time for filing of respondents' notices. I said there, in a judgment with which the Master of the Rolls and Davis LJ agreed, that the court does not view favourably the type of relaxed approach to the timing of the submission of Respondents' Notices that was adopted in that case and in this case. For this reason, in addition to the reasons given by the Master of the Rolls in paragraphs 68 to 84 above, I agree that the Master struck the right balance in the present case by the order that she made.