Neutral Citation Number: [2010] EWHC 2397 (Admin)

Case No: CO/15292/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2010

Before :

MR JUSTICE BLAKE

- -

Between :

The Queen on the application of MXL
- and -
KXS
-and-
ZLS
(Children by MXL their Litigation Friend)
-and- **Claimants**
Secretary of State for the Home Department

Defendant

- -
- -

Stephanie Harrison (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
Jeremy Johnson (instructed by **The Treasury Solicitors**) for the **Defendant**

Hearing date 25 June 2010

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Blake:

Introduction

1. This is an application for permission and if permission is granted the substantive hearing of a claim by MXL and her two minor children for relief in judicial review proceedings including a declaration and damages relating to immigration detention. The claimants are referred to by initials to protect the welfare of the children pursuant to previous orders of the court.

2. The principal claimant (hereafter the claimant) is a Jamaican national who entered the United Kingdom on 15 December 2001 and was granted leave to enter for six months. In 2003 she was granted leave to remain as the spouse of a British citizen. Her two children were born in May 2003 and February 2007 respectively and were accordingly six and two at the time of the events that form the subject of this application.

3. The claimant has a bad criminal record for offences of theft. Her first recorded conviction in February 2002 (within three months of her arrival) was for offence of shoplifting for which she received a community punishment order for 40 hours. In the next six years to the end of 2008 she was convicted of offences of theft on six separate occasions totalling some nineteen offences. She was dealt with by way of fines, community punishment orders, a community rehabilitation order and suspended sentences of imprisonment. In April 2007 two months after the birth of the third claimant she was arrested in connection with a more serious offence of conspiracy to steal. She was initially granted bail but in April 2008 was remanded in custody. On 16 February 2009 following her plea of guilty she was given a sentence of 24 months imprisonment for conspiracy to steal, that the trial judge described as:

> "a serious case of wholesale organised crime involving special arrangements with teams of operatives in the store engaging in different roles, distraction techniques on the store staff and the actual handling of the items to be stolen. Methodology of the thefts was wholesale in the sense that whole lines of clothing were taken from shelves or hangers bundled into bin liners and into the boots of relevant cars in such numbers that on at least one occasion the boot of the car could not be closed."

4. The time spent on remand and serving the balance of the sentence was the claimant's first experience of custody. She served her sentence at prisons within the London area and was due to be released on licence on 16 April 2009. However on 9 March 2009 she was served with a notice indicating that the defendant was contemplating her deportation. In a further letter written to her on 6 April 2009 she was told that it had been decided that she should be detained because she was likely to abscond and there was a risk of re-offending.

5. On 15 April she was told by an immigration officer that she would be detained pursuant to authority issued the previous day. The claimant was interviewed on 21 April in prison but on 22 April the decision to detain was maintained and on 23 April she was transferred to Yarlswood immigration detention centre near Bedford.

6. On 4 June a deportation order was served on her. Authority to continue to detain her was issued on 11 June 2009. She appealed against the deportation decision but the appeal was dismissed by the AIT on 24 August 2009. Preparations were being made to give effect to that removal to Jamaica when on 23 October 2009 Mr Justice Burnett granted an order for reconsideration of the deportation appeal. A reconsideration hearing was listed for 19 January 2010 but there had been a late change of representation and further information was needed and the appeal remains outstanding.

7. The claimant remained in immigration detention until 21 December 2009 when Mr Justice Bean granted her bail following the issue of these proceedings. She had previously been refused bail by immigration judges on at least two occasions.

8. In these proceedings the claimants challenge the detention from 16 April through to December 2009 on four broad grounds:-

   i) The total period of detention in the light of all the circumstances of the case was excessive, and continued detention was unlawful as removal could not be effected within a reasonable period of time, particularly after the order for reconsideration had been made.

   ii) The decisions to detain were procedurally flawed in that they were based on erroneous information and/or irrelevant considerations.

   iii) The decision to detain and maintain detention was inconsistent with relevant policies adopted to regulate the exercise of the power to detain.

   iv) The decision to detain was irrational and also in breach of Article 5 and Article 8 of the ECHR as it failed to take into account properly or at all the welfare of the children as a primary consideration, or accord the factors in favour of release the decisive weight they required.

<u>The Power to Detain</u>

9. The claimant had been sentenced to a term of at least 12 months imprisonment and was thus liable to the automatic deportation regime under the UK Borders Act 2007 s.32(5), subject to the s.33(2) exemption where deportation would breach a person's Convention rights.

10. Section 36 of the UK Borders Act 2007 provides:-

> "(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 the 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 unless in the circumstances the Secretary of State thinks it inappropriate."

11. Schedule 3 to the Immigration Act 1971 paragraph 2(3) provides:

> "Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (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)."

Sub-paragraph (1) refers to deportation following a recommendation by a criminal court, and sub–paragraph 2 to deportation following a notice of an immigration decision under s.105 Nationality Immigration and Asylum Act 2002.

12. The common law has identified limits to the exercise of this power to deport in principles derived from the case of R v Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704. These principles have been summarised by Dyson LJ in R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888, [2003] INLR 196 at paragraph [46] 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 that reasonable period, s/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.

13. The application of these principles to particular cases can be complex. What is a reasonable period depends upon all the material circumstances. Following the case law up to and including R (on the application of A) v the Secretary of State for the Home Department [2007] EWCA Civ 804 at [54-55] the following further propositions may be summarised:-

i) It is reasonable to detain someone who presents a risk of re-offending and a danger to the public for a longer period than someone who is not.

ii) Provided genuine efforts are made to effect removal, it may be reasonable to detain someone who represents a risk of absconding for a longer period than those where the risk is not a significant one.

iii) Nevertheless, there are cases where, whatever the gravity of conduct that justified the deportation in the first place, the prospects of removal are so remote that detention cannot be continued. The prospects of removal may become remote because necessary documentation cannot be provided, the

> receiving state refuses to accept the detainee, or human rights obligations prevent the detainee's removal to the only state to which he could be removed.

14. Lord Justice Dyson in R(I) v Secretary of State [2002] EWCA Civ 888 at [48] noted that it was not possible or desirable to produce an exhaustive list of all the circumstances that are relevant to the question of how long a period is reasonable, but continued:-

> "In my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences".

The importance of criminal offending and risk of absconding in justifying longer than normal detention was emphasised in R (A (Somalia)) v Secretary of State for the Home Department [2007] EWCA Civ 804.

Challenge 1: The Length of the Detention

15. Much of the claimant's case at the hearing was directed to the application of the Hardial Singh principles to her particular case. Relying on the reference Lord Justice Dyson made to "the effect of detention on him and his family" as a material circumstance the claimant submits that by October 2009 at the latest, the detention was unlawful within these principles because it had lasted for six months and removal could not be given effect to in the light of Mr Justice Burnett's order for reconsideration.

16. I don't accept that submission. In my judgment the claimant was intermingling two conceptually different challenges, the first is whether the detention has become unlawful by reason of its prolongation in the light of the relevant circumstances, and the second is whether flawed considerations of fact and policy had played a role in the decision to detain or continue detention. The second challenge is distinct and will be considered below under a separate head.

17. As to the first challenge, there were no obstacles to removal to Jamaica in this case. The claimant had a valid (albeit outdated) Jamaican passport and there was every prospect of an emergency travel document being issued (as it was). There was no absolute prohibition of returning the claimant to Jamaica by reason of an Article 3 risk or something similar. The only reason why she had not been returned by October 2009 was that her appeal on Article 8 grounds was continuing in the light of the application for reconsideration that she had made.

18. The defendant submits that detention during the period when an appeal remains outstanding and where the appeal itself is the only reason why removal cannot be effected will not be a period of unreasonable delay for the purpose of Hardial Singh principle. She relies on a number of judicial observations to this effect (see R (Q) v

Secretary of State for the Home Department [2006] EWHC 2690 (Admin) per Auld LJ at paragraph 20; R (I) (above) per Simon Brown LJ at paragraph 35 and Dyson LJ at paragraph 55; R (Bashir) v Secretary of State for the Home Department [2007] EWHC 3017 (Admin) per Mitting J at paragraph 13; R(A) v Secretary of State for the Home Department [2007] EWHC 142 (Admin) per Mitting J who said:-

> "It is now settled law that generally the date from which the lawfulness of detention falls to be considered is the date on which the appeal rights were exhausted".

19. I accept the defendant's submission on this point. This is not a case where Home Office conduct has unreasonably prolonged the hearing of the appeal. Nor is it a case of where, independent of the appeal, it is apparent that removal could never be effected; in such a circumstances continued exercise of the power to detain could be unlawful even before the appeal has been exhausted. The Secretary of State has acted promptly to give consideration to deportation upon expiry of the claimant's sentence and whether she should be detained pending such a decision or appeal against it. The decision to detain pending appeal has been reviewed at regular intervals.

20. The power to detain was being exercised for the purpose of effecting the removal that the Secretary of State intended to make unless and until the claimant succeeded in her appeal that she had a human rights exemption from automatic deportation. In those circumstances the question of whether as a matter of law the period of detention had exceeded a reasonable period to give effect to the removal simply did not arise. As a consequence neither did the application of the factors to which Lord Justice Dyson referred at [48] (see above [13]) fall for determination as a subordinate part of the process of assessing what was reasonable in the particular circumstances of the case.

21. In my judgment, no arguable point arises on this aspect of the case and I would refuse permission for judicial review on this ground. There was power in law to detain the claimant throughout the period of the detention.

22. This does not mean that the court is unconcerned by the fact that the claimant, a mother of two small children, had been detained for six months following the conclusion of her sentence for organised stealing from shops where there were obvious family life issues that required detailed and sensitive consideration. Those factors go to the other three heads of argument developed by the claimant which I conclude are seriously arguable and I therefore grant permission in respect of them.

Challenge 2 Flawed Consideration of the Discretion to Detain

The applicable law

23. On the basis that the power to detain could still be exercised against the claimant throughout the period in question, the second question is whether the exercise of discretion to detain was flawed by failing to take into account material considerations or by reason of other procedural irregularity. The claimant submits that if this is the case, then the authority to detain was unlawful and affords no defence to an action for damages for wrongful imprisonment.

24. The claimant relies upon the decision of the Court of Appeal in D v The Home Office [2005] EWCA Civ 38 [2006] 1 WLR 1003. Having examined previous authority Brooke LJ declined to follow the case of Ullah [1995] Imm AR166 that would once have been a complete answer to this limb of the claim for damages. At paragraph [121] Brooke LJ said :-

> "In short it appears to me that we are at liberty, unconstrained by binding authority, to interpret Schedule 2 to the 1971 Act without any pre-conceived notions. If we do so, there is nothing there to suggest that Parliament intended to confer immunity from suit on immigration offices who ask themselves the wrong questions, so that their decision to deprive an immigrant of liberty were a nullity and consequently unlawful. This is a conclusion at which one can arrive with a measure of satisfaction because it seems entirely wrong that someone has been wrongly detained by the executive because of a filing error or some other incompetence in their offices should not be entitled to compensation as a right. I see no reason incidentally, in relation to a claim against the first actor, to obtain first either a declaration that detention was unlawful or a quashing order; it is sufficient that the claimant was unlawfully detained on his authority and suffered damage as a result."

25. To this the defendant responds with the case of R (on the application of WL (Congo) and another) [2010] EWCA Civ 111 19th February 2010 (unreported). The case was concerned with the issue of whether detention of people facing deportation for criminal conduct pursuant to Schedule 3 of the 1971 Act could claim to be unlawfully detained by reason of an adverse undisclosed policy that was not accessible at the material time.

26. The Court of Appeal first approved the proposition established in the case of R (SK) v Secretary of State for the Home Department [2008] EWCA Civ 1204 that for damages to be claimed any failure to follow applicable rules or policy must be causative of the detention as opposed merely a procedurally flawed consideration of the merits.

27. Continuing with the consideration under the sub heading "causation", Stanley Burnton LJ at [84-86], giving the judgment of the court, clearly found difficulty with Lord Justice Brooke's analysis in D v The Home Office. He noted the distinction between the detention of foreign national prisoners under Schedule 2 (detention for the purpose of examination or removal) and Schedule 3 paragraph 2 (1), where the statutory language indicated that the prisoner would be detained unless the Secretary of State took the decision to the contrary. That distinction is also reflected in the language of Section 36(2) of the UK Borders Act 2007. He concluded as follows:-

> "88. We consider, first, that it is necessary to distinguish between the detention of (foreign national prisoners) FNP's under sub paragraph 1 of paragraph 2 of Schedule 3 to the 1971 Act and detention under sub paragraphs 2 or 3. Sub paragraph 1 is itself a legislative authority for the detention of an FNP who has been sentenced to imprisonment and who has been

> made the subject of a recommendation for deportation. If an unlawful decision is made by the Secretary of State not to direct his release, the court may quash the decision and require it to be retaken, but the legislative authority for his detention is unaffected. It follows that the FNP will have no claim for damages for false imprisonment in such circumstances. Furthermore, SK is authority, binding on us, that a failure in breach of procedural rules to review his detention does not necessarily render the detention unlawful.
>
> 89. The position is different when the decision to detain is made under sub paragraph 2 or 3. In these cases, there is no lawful authority to detain unless a lawful decision is made by the Secretary of State. The mere existence of internal, unpublished policy or practice at variance with, and more disadvantageous to the FNP than the published policy will not render a decision to detain unlawful. It must be shown that the unpublished policy was applied to him. Even then, it must be shown that the application of the policy was material to the decision. If the decision to detain was inevitable, the application of the policy is immaterial, and the decision is not liable to be set aside as unlawful. Once again however, once a decision to detain has lawfully been made, the review of detention that is unlawful on *Wednesbury* principles will not necessarily lead to his continued detention being unlawful.
>
> 90. For completeness we would add that the test of materiality may not be precisely the same as in the context of an application for a quashing order in judicial review in that context, a court, faced with a judicial review claim may promptly follow in the original decision, would be likely to quash a decision, and require it to be retaken, even if the evidence showed only a risk that it might have been affected by the legalities. However, in the context of a common law claim in tort, which is concerned not with prospective risk, but with actual consequences, we think it would be entitled, if necessary, to look at the question of causation more broadly and ask whether the illegality was the effective cause of the detention (see *EG Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1374; and the discussion of "Causation in the Law" in Clerk and Lindsell "*The Law of Tort*" 19th Ed, paras 2-69 to 71."

28. The present case is an automatic deportation case under the UK Borders Act 2007. The language of Section 36 (2) indicates a presumption of continued detention under Schedule 3 Immigration Act 1971 unless the Secretary of State decides that such a course is inappropriate. WL (Congo) is the most recent decision of the Court of Appeal on the question and is binding on me. It decides that a legally flawed decision to misapply the presumption does not of itself make the detention unlawful in domestic law and susceptible to a claim for damages in tort.

29. Having regard to the present state of authority, I conclude that the common law is as follows:-

i) It is a defence to an allegation that detention is unlawful if it was open to a reasonable Secretary of State to make the decision to detain.

ii) A procedural failure (including a failure to take relevant circumstances into account) will not necessarily render the detention consequent on such a flawed decision unlawful if there is statutory authority and a presumption of detention. Such a failure may require the decision to be remade if challenged in judicial review proceedings.

iii) There must be a direct casual link between the factor making the exercise of discretion to detain unlawful and the detention, i.e. the breach of the policy, practice, promise or duty to consider an important factor must be the effective cause of the detention.

iv) An exercise of discretion to detain that is irrational or perverse in the sense that no reasonable Secretary of State could have made it on the information then known to him/her will not amount to an authority to detain that can be relied on in proceedings to challenge the legality of the detention.

v) There is no procedural exclusivity in judicial review proceedings and such a decision can be challenged by way of a claim for false imprisonment.

The relevant policy

30. It is next necessary to look at the decision-making process in this case with some care and in the light of any relevant policy. A serious procedural flaw may be relevant to the question of whether the detention was irrational as a matter of domestic law, and/or arbitrary and not in accordance with the procedure regulated by law within the meaning of Article 5 ECHR.

31. When the claimant was first detained s.21 UK Borders Act 2007 was in force. This provision required the UK Border Agency (UKBA) to have regard to a Code of Practice issued by the Secretary of State designed to ensure that in exercising its functions it takes appropriate steps to ensure that children are safe from harm while in the United Kingdom. On 2 November 2009, s.55 of the Borders Citizenship and Immigration Act 2009 came into force and replaced the s.21 duty under the 2007 Act. Under the heading 'Duty regarding the welfare of children" s.55 provides as follows:

> "(1) The Secretary of State must make arrangements for ensuring that–
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are–

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer

……..

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

……

(6) In this section–

'children' means persons who are under the age of 18."

32. In discharge of these statutory duties chapter 55 of UKBA's enforcement instructions and guidance dealt in detail with how detention decisions should be taken in the context of deportation, how the interests and welfare of children were to be safeguarded, and how decisions to detain and deport should be made compatible with human rights, notably Article 5 and Article 8. The following extracts and my summaries are illustrative of the material parts of the guidance as in force in February 2010. The words in italics are quotations from the policy where I have supplied the emphasis.

i) With reference to detention of those with family members it is stated:

> "It may be necessary on occasion to detain the head of the household or another adult who is part of the care arrangements for the children, thus separating a family. Depending on the circumstances of the case, this may represent an interference with Article 8 rights…. It is .. arguable that a decision to detain which interferes with a person's right to family life in order to enforce immigration control and maintain an effective immigration policy pursues a legitimate aim and is in accordance with the law. *It is only by considering the needs and circumstances of each family member that a determination can be made as to whether the decision is, or can be managed in a way so that it is, proportionate.* … Even though the decisions may have been taken to avoid detaining the children their head of family, or other adult who is part of their care arrangements, in the interests of their welfare, *the impact of the separation must be considered carefully.* Any information concerning the children that is available or can reasonably be obtained must be considered. The conclusion reached will depend on the specific facts of each case and will therefore differ in each case. *Regular reviews of detention should consider proportionality with regard to each individual, including any new information that is obtained*." (55.1.4.2).

ii) The Manual contrasts more serious offences and less serious offences. The more serious offences are indicated in 55.3.2.1 as violent, sexual, drug related and other serious offences with the consequence:

> "A conviction for one or more serious offences is strongly indicative of the greatest risk of harm to the public and a high risk of absconding. As a result of the high risk of public harm carries particularly substantial weight when assessing if continuing detention is reasonably necessary and proportionate. So, in practice, it is likely that a conclusion of such a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean detention is not appropriate. Case workers must balance against the increased risk including the particular risk to the public from re-offending and the risk of absconding in the individual case the type of factors normally considered in non FNP (Foreign National Prisoner) detention cases."

By contrast :

> "while these factors remain important assessing whether detention is reasonably necessary where a person has been convicted of a less serious offence, *they are given less emphasis than where the offence is more serious, when balanced against other relevant factors again, the types of other relevant factors include …whether their release is vital for the welfare of the child or child dependents"*. (55.3.A)

iii) The factors influencing a decision to detain are set out at 55.3.1 they include the following points:

> likelihood of person being removed and when,
>
> evidence of previous absconding
>
> evidence of previous failure to comply with conditions of temporary release for bail;
>
> determined previous attempt to breach immigration laws;
>
> previous history of complying with immigration control by making appropriate application;
>
> ties with United Kingdom including close relatives, children or vulnerable adults;
>
> settled address and employment.

iv) Two particular factors relevant to the present application should be quoted:

> "What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, *an application for judicial review or representations which*

> *afford incentive to keep in touch?* Is there a risk of offending or harm to the public (*this requires consideration of the likelihood of harm and the seriousness of the harm if the person does offend)?"* .
>
> Decisions to maintain detention wherever the FNP has provided evidence of a family life and detention results in splitting the family should be countersigned at Grade 5/Director level (55.3.2.3).

v) More detailed information as to risk of harm to the public is given at 55.3.2.6:

> "It will be assessed by NOMS unless there is no offender assessment system (OASYS) or pre-sentence report available. There will be no licence and OASYS report where the sentence is less than 12 months. NOMS will only be able to carry out a meaningful risk assessment in these cases where a pre-sentence report exists (details of which can be obtained from the prison) or where the subject has the previous conviction resulting in a community order. The case owner should telephone the offender manager for an update in cases where the risk assessment has been obtained less than 6 months before…where NOMS can provide an assessment, it can be obtained directly from the offender manager in the probation service in the same way that information is obtained in bail cases and should be received within 3 days. The bail process instruction includes details on how to contact the offender manager and identify the probation areas single point of contact. The form below should be completed and sent by fax to the offender manager with a copy in all cases to the SPOC, a record should be kept of the date formally sent to the date returned."

vi) The guidance continues that where NOMS are unable to produce a risk assessment the offender manager advises that this is the case; case owners will need to make a judgment on this risk of harm based on the information available to them. Those with the long record of persistent offending are likely to be rated at high or medium risk

vii) 55.3.2.11 gives important guidance as to the outcome of risk assessment for the purposes of detention or bail:

> "*Those assessed as low or medium risk should generally be considered for management by rigorous contact management under the instructions in 55.20.5.* Any particular individual factors relating to the profile of the offence for the individual concerned must also be taken into consideration and may indicate that maintaining management by rigorous conduct management may not be appropriate in an individual case."

> The instructions in 55.20.5 refer to release upon conditions on reporting twice weekly and the subject to electronic monitoring.

The Defendant's Decisions: April to July

33. Against the background of these policies and the applicable legal regime it is now necessary to turn to the evidence of the decision making process resulting in the claimant's detention.

34. The claimant first focuses on the decision making to decide to detain her and to maintain that decision in the period from 6th April to 12th June 2009. During that period the following decisions were made and recorded:-

i) 6 April 2009: A letter from UKBA to the claimant in detention informed her that it had been decided to detain her because there was a risk of further offending and she was likely to abscond if released. A number of her offences, her past use of aliases, her breach of a community rehabilitation order and conditional discharge were relied upon as factors. Whilst acknowledging that she had a husband and two children it was stated:

> "There is no evidence that your relationship with them are (sic) subsisting. It is therefore not clear that your husband would be able to exert control over you to ensure that you comply with any release conditions."

The decision letter explains also that detention will be a proportionate interference with the right to respect family and private life because even if the relationships are subsisting, detention supported the legitimate aim of prevention of crime and disorder. This decision appears to have been made on the basis of a minute prepared on the same date in which it is also stated:

> "It is believed that the risk of re-offending is high and that by the same measure the risk of harm to the public is high".

ii) 14 April a minute concluded:

> "She has a high risk of re-offending and a medium risk of harm. She has a husband and two children but the status of the relationships are not known. I consider that the presumption in favour of release is outweighed in this case".

iii) On 21 April the claimant was interviewed in detention and mentioned that her children had been looked after by Jacqueline Ellis in Chingford whilst she (the claimant) was in detention and although her marriage was subsisting her husband had not visited her in prison. A further decision letter was sent to the claimant on 22 April no longer disputing that the relationship with her two children was not subsisting but otherwise maintaining detention for essentially the same reasons as had previously been communicated.

iv) On 6 May 2009 a reference was made to the Office of the Children's Champion within the UKBA for advice on continued detention of the claimant and whether the claimant should be deported to Jamaica. Amongst the information that had been gathered for that reference was the fact that risk had been assessed by the Criminal Case Directorate case owner as a copy of the claimant's licence conditions had not been provided to UKBA by the prison after this was requested at least twice. Risk of harm was assessed as medium because of habitual re-offending. Further UKBA received information from the London Borough of Waltham Forest Social Services Department expressing concern that the claimant's two children "have no one caring for them who has parental responsibility".

v) On 8 May 2009 an email sent at 09.53 by the Children's Champion asked various questions as to who had been caring for the children before the claimant went to prison, the prospects of the father making a claim for their care and the time needed to determine the In-Country Appeal. In this first email it was stated:

> "My concern is that we need to maintain the relationship between mother and children so that we are able to remove them together. If they are separated this will make it much more difficult for the children."

vi) On 8 May 2009 at 13.57 UKBA responded that the social services were not aware of the father playing any role in the children's lives and that the claimant had stated in her representations against deportation (unfortunately not before the court):

> "I miss my children so much and being away from my family had an impact on our lives, my five year old is withdrawn from the family and I am on anti depressants to cope with not being there. She keeps asking if I will be there for her birthday because I missed last year".

The note continues:

> "We can only therefore assume that she had care of her children prior to her imprisonment. The claimant claims whilst in prison she has been in contact with her children and sees them at least once every two weeks and also on children's day held at HMP Bromsfield".

It indicates that there was a bail hearing due on 12 May where she was hoping to be released to an address to reside with the husband though three different addresses have been given for the husband previously and the husband was not a bail surety. The note concluded:

> "In view of her impending AIT bail I would be grateful if you could also confirm whether you recommend her release to reunite her with her children in line with her request".

vii) On 8 May 2009 at 14:36 there was a prompt response to this letter from the Children's Champion stating:

> "My concern is the welfare of the children. My preference is to release her so that she can maintain the care and the relationship with her children. We can then plan to remove them together".

viii) It appears from a file note in the claimant's case papers that bail was refused on 12 May. This fact is not referred to in the chronologies provided by either counsel and it does not appear that either the bail summary or the Immigration Judge's reasons for this decision have been provided to the court. It is equally unclear whether the recommendation of the Children's Champion had been brought to the attention of the Immigration Judge (IJ) at this stage.

ix) On 13 May 2009 a file note noted that this is a difficult case as the claimant's offending pattern indicated that she would:

> "Almost certainly re-offend in respect of property offences there is less risk of physical harm although she does have odd conviction for assault".

The note continues:

> "She has two young children and social services have some current concern re them and the OCC recommends release for the sake of the children. She would not seem to be the most ideal mother given her offending behaviour and I am not sure we have the full picture of the family set up and the real benefits of release in respect of the children. I do not recommend release now but I would like us to meet with Social Services and understand the issues and risks to the children. If the other viable care option for the children must involve the mother I feel this may provide a basis for release. Are you content for me to arrange that meeting and organise release only if judge a release is imperative to the welfare of the children?"

x) This note was provided to the Chief Executive of UKBA personally who decided on 15 May that release should not take place.

xi) On 28 May 2009 a deportation order was signed and served on the claimant on the 4 June 2009. She appealed against this on the 8th June.

xii) On 11 June 2009 the claimant's detention was reviewed. It was noted that in the light of the number of convictions the risk of re-offending was high but that the risk of harm to the public was considered to be low. Previous breaches of court orders indicated a risk of absconding. The claimant had little incentive to remain in contact with authorities if released on restrictions. It was noted that the case had been assessed for release with the current criteria outlined in Chapter 55 of the Enforcement Instructions and Guidance. However, release was not deemed appropriate for the above reasons.

xiii) On 7 July 2009 Immigration Judge McCarthy refused bail after a hearing at which he appears to have received evidence. His reasons for doing so were in the following terms:-

> "There were a number of material discrepancies between the applicant's evidence and the evidence given by her husband and by Mrs Williams. For example the applicant said she had always lived with her husband where as he said he moved out of the family home from about two years after their marriage, only returning to the family home after the applicant was incarcerated because of her criminal activities. The applicant told me that Mrs Williams had known about some of her offences where as Mrs Williams said she had not known about any of them. These and the other discrepancies mean that I am unable to trust the applicant's evidence and therefore cannot be satisfied that she would be influenced by her husband or her surety to an extent that she would comply with any conditions that I might impose. As I cannot trust the appellant I am not satisfied that she will comply with any condition I might impose. In reaching my decision to refuse to grant bail, I have taken into account the fact that the applicant has a pending appeal. However, given her criminal history, which I am not satisfied, this is sufficient to ameliorate a risk of absconding. The applicant is aware that she faces deportation and does not wish to leave the United Kingdom. This indicates to me that there is a high likelihood of the applicant to abscond."

Procedural flaws April to July

35. The claimant makes a number of powerful criticisms of the picture this information reveals about the decision-making process and inconsistencies with the policy document as to its outcome.

36. First, it is somewhat surprising to find that the papers disclosed for the purpose of this hearing did not include any pre-sentence report, or any OASYS report about her response to prison for the purpose of release from the sentence part of her detention. As a mother of two young children looking after them before she went to prison who was sentenced to a term of imprisonment for the first time, it would be very surprising if there was no pre-sentence report. If there had been, the report might have been a useful source of background on the state of the claimant's family life when she went into custody and would form a readily available assessment as to the nature of her family ties on release and the position of the children.

37. Second, it is of concern that UKBA was unable to obtain the claimant's licence conditions from the prison where she served her sentence. That document is now before the court and unsurprisingly reveals that during the period of licence from the 25 April 2009 to the 16 April 2010 there were eight stringent conditions requiring good behaviour, residence at a supervised address, regular contact with a supervising

officer and such like. The requirement to comply with such conditions at risk of recall to prison never seems to have been taken into account by UKBA or the immigration judges considering bail as a way of reducing risk of offending or absconding.

38. Third, it is equally serious that no NOMS assessment of likelihood of re-offending or seriousness of harm to the public in the event of re-offending was obtained. It does suggest that the mechanisms for information transfer referred to in UKBA's guidance document (at 55.3.2.6 noted at [32] (v) above) were not being achieved by joining up the two relevant sections of government.

39. Fourth, there is a striking inconsistency in the difference of approach between the assessments of the case workers with respect to risk of harm to the public. On 6 April it was considered that because there was a high risk of re-offending there must equally be a high risk to the public. That does not follow at all if the guidance had been properly applied. The guidance (at 55.3.2.1 see [32] (ii) above) clearly provides that a high risk of harm to the public is only likely to arise in cases of serious offences involving drugs, violence, sexual conduct and the like. By no stretch of the imagination could offences of stealing from shops be so described. This was recognised from the 22 April onwards when the risk was assessed as medium, and subsequently as low. The guidance further suggests (at 55.3.2.11 see [32] (vii) above) that where risk of harm to the public is either medium or low then the presumptive or usual response should be bail with appropriately stringent conditions, but this was never the outcome proposed in the claimant's case.

40. Fifth, although there were understandable doubts that were never resolved about the strength of the relationship between the claimant and her husband, access to the criminal justice report and indeed the records held upon the claimant when she was serving her sentence at HMP Bromsfield would have been likely to reveal the continuing contact between her and her two young children placed in the temporary care of Ms. Ellis during the remand and sentence. Such a factual assessment would have precluded the starting point adopted on 6 April that the defendant was not satisfied that there was any evidence that the relationship between the claimant and her children was subsisting. It would have enabled UKBA to focus upon the true position earlier than they did in about May 2009. In any event, it is both common sense and the case law of the Strasbourg court that the links between a mother and her children of a tender age should be presumed to exist unless there was evidence that they had been severed.

41. Sixth, it is a matter of concern that when detention was reviewed after the decision of 15 May, no reference was made to: i) the earlier referral for consideration of rigorous contact management; ii) the opinion of the Children's Champion, iii) the fact that Chapter 55 recommended release on stringent conditions where the risk of harm to the public was low, and iv) that in assessing risk outside the most serious class of case, the interests of children should be considered. Further it is very surprising that at no time during this review was the claimant's relationship with her two minor children taken into account as a reason against the risk of absconding. The guidance recognised the importance of such links (see 55.1.4.2. quoted above at [32] (i)). Even apart from the developmental harm that may be caused by separating two young children from their mother, it is very much more difficult to abscond with minor children who need to be in education and have daily care needs. Further, the claimant

would have probably been aware that the most important issue at any forthcoming deportation appeal would be the quality of her relationship with her children.

42. Seventh, there is no indication in the file notes during this period that UKBA had taken a position on the dilemma identified by the Children's Champion. If it was intended that the claimant should be deported to Jamaica and take her children with her then she should have been released to care for her children before removal. This would restore the daily care bond that existed before she was sent into custody and promote the welfare of the children by returning them to the daily care and contact of the person who it was envisaged would be looking after them with sole responsibility thereafter. If it was concluded that the mother's care was so poor or intermittent that the best interests of the children required them to be supervised in the future by the social services and/or they should be permanently separated from their mother, it would have highlighted the degree of intended interference with the family life of mother and children that would become the focal point at the Article 8 appeal. The recommendation of the Children's Champion for release was a powerful one and even though not a matter that was determinative of the decision of the Chief Executive of UKBA, it was a factor that should have been treated as a very weighty consideration throughout the period of immigration detention. The office of Children's Champion is one important way in which the UK seeks to give effect to the welfare principle most clearly articulated in the UN Convention on the Rights of the Child (see below).

43. Cumulatively, these are powerful points, and I have little doubt that if there had been a challenge to the legality of the Home Office's decision to detain by way of judicial review brought in or about May/June 2009 they may well have resulted in an order setting aside that decision and requiring re-determination in accordance with applicable law, policy and the best interests principle.

44. However, this is not the nature of the present application. In the light of the guidance of the decision in WL (Congo) and my understanding of the present state of the law, I conclude that a flawed decision to detain does not necessarily mean that the detention first authorised or subsequently maintained in pursuant of such a decision is unlawful as a matter of domestic law with the consequence that the claimant has an entitlement to damages for false imprisonment.

Consideration of the welfare of the children

45. Further I cannot accept the claimant's submission that the evidence revealed that *no* regard was had at the outset of the period of immigration detention to the welfare of the children as an important consideration in the case. On the contrary, within a short period of time of the claimant being interviewed in prison and making her representations based upon her relationship with her children, the matter was explored with the Children's Champion, the local social services department and the matter was referred to the highest level in UKBA for decision in what was undoubtedly a difficult case.

46. The children could not be detained with their mother as they were British citizens. The decision to maintain detention did not lead to a first separation of mother and children as the claimant had first been detained pursuant to the decision of the Criminal Court in April 2008. To some extent, therefore, detention was the

maintenance of the status quo pending further investigations as to the strength of the family ties and the outcome of the appeal.

47. The view expressed on 6 April 2009 that there was no evidence of a subsisting relationship between the claimant and her children could not in any event be causative of any decision to detain. The claimant was lawfully detained pursuant to the criminal sentence until at least 16 April. The subsequent decision to detain taken by UKBA on 22 April was made without any reliance upon that factor, flawed as I consider it to be.

Conclusions on the defendant's decision making April to July

48. Despite the cumulative strength of the seven factors identified earlier, I am unable to reach a conclusion on the material now available that any decision to oppose bail between April and June would have been perverse, or one that no reasonable decision maker properly evaluating all relevant considerations could lawfully have reached. I am conscious that I have not seen the summary grounds for opposing bail.

49. This was a case where the nature of the family life actually enjoyed by the claimant appears to be a matter of dispute, particularly in terms of her claimed continuing relationship with her husband. His late re-appearance on the scene as a witness in the bail proceedings may justifiably have raised credibility concerns. The evidence about this relationship did not satisfy the IJ hearing the bail application, nor subsequently did it satisfy the panel of the AIT hearing the substantive deportation appeal in August 2009. If the claimant was an unreliable historian about these matters doubt may well have been thrown on the weight to be attached to other aspects of her account.

50. UKBA and the IJ were entitled to be concerned by the claimant's past history of lack of regard for court orders. Although there is a danger in relying upon merely a summary of convictions which do not reveal the date of the underlying offences and whether they were committed in breach of previous court orders, it appears that on 13 October 2003 the claimant was dealt with for breach of a community rehabilitation order for shoplifting imposed in February of that year. A further conviction for shoplifting on the 6 July 2004 may have been a breach of a curfew order made a month earlier. The offence of shoplifting dealt with on 24 February 2005 appears to have been committed whilst serving a community punishment order of 40 hours imposed on 8 November 2004. It is clear that on 4 February 2008 the sentence of two months imprisonment suspended for two years was imposed for another offence of shoplifting that was itself a breach of a conditional discharge imposed on 16 October 2007 for a similar offence. She was also convicted of common assault on that date and given the same sentence.

Challenge 3: Continued detention

The Decision to Maintain Detention from July to December 2009

51. Following the refusal of bail by the IJ on 7 July 2009, the claimant's case was regularly reviewed as required by the relevant rules in August, September, and October. The monthly reviews raised no new material factors. It was noted that removal to Jamaica could be effected reasonably speedily if the appeal was dismissed as she had a valid Jamaican passport and an emergency travel document was being sought.

52. From the end of April 2009 the claimant was detained at Yarlswood Detention Centre outside Bedford. She makes the point that it was much more difficult for Ms Ellis to take the two children to visit her there from East London as train fares and taxi fares to Yarlswood (in a remote location not readily accessible by public transport) became disproportionate for someone on a modest budget. There appears to be no consideration by the defendant of the impact on the relationship with the children that detention in such a location causes.

53. On 24 August 2009 the panel of the AIT who had earlier heard her appeal dismissed it. It drew attention to further evidence of misconduct by the claimant in declaring herself to be of good character in immigration applications when she plainly was not. It also found the claimant's husband to be a nervous and uncomfortable witness whose evidence did not satisfy them. The panel noted the remarks of the sentencing judge that this was an offence of professional criminal activity and considerably more serious than isolated incidents of shoplifting.

54. At paragraph [44] it considered the claimant's future conduct:

> "We have considered her contention that as a result of her imprisonment she is now a reformed character. We give due weight to the fact that she has managed to gain some educational achievements in prison. We do not doubt that she regrets the situation that she now finds herself in and the consequences to her. We are far from persuaded that she has mended her ways and will not re-offend in the future. On the contrary it is our belief she will continue to re-offend".

The evidential basis for such an assessment is not apparent from the determination. The panel did not have a NOMS or OASYS assessment before them as to assessment of the risk of re-offending at the time of completion of her criminal sentence. The determination continues:

> "46. We accept that there exists family life between the appellant and her two children. The issue before us is whether the removal of the appellant would constitute a proportionate interference with the appellant's family life with her children. We must balance her right to a family life with her children against the respondent's right to maintain immigration control and prevent crime.
>
> 47. The children are now aged six and two. They are both British Citizens. There is some evidence that the imprisonment of the appellant has caused psychological problems to K in that she very much misses her mother. That is understandable. She is now settled into school. However, on the evidence before us (or rather the lack of it) she does not suffer from any serious medical or psychological conditions. There is no medical evidence relating to Z and therefore we assume that she is in good health.
>
> 48. On the entirety of the evidence before us we find that the children are not likely to encounter serious difficulties with regard to their ages in the adjusting to life in Jamaica we find that it is reasonable for them to accompany their mother to Jamaica. In this regard the father says he will commence legal proceedings to prevent their removal. He is of course free to do so but we

> must consider the position as it is today and we are not prepared to speculate on the likely outcome of such an application to the Family Court.
>
> 49. We must consider the impact on Mr Sanderson of the deportation of the appellant to Jamaica and the possibility that she made decide to take the children with her rather than to leave them with him or with Miss Ellis. To utilise the expression of their Lordships in *Beoku-Betts* he has to be considered as a potential victim himself as we have found the appellant and Mr Sanderson not to be truthful witnesses and we do not accept that their state of mutual intention is to effect a reconciliation and re-commence that life. In our view they have no such intention. The reason for stating that they wish to get back together as a family is a deliberate attempt to mislead this tribunal in order to enhance the prospect of success of appeal. Accordingly we find that Mr Sanderson had no family life with the appellant and the children from about 2005 onwards and this notwithstanding that Z must have been conceived after they separated. …we therefore find the removal of the appellant with the consequence that the children accompany her is a proportionate response by the respondents.
>
> …….
>
> 55. It seems to us there are three options in respect of the children. The first is that they accompany their mother to Jamaica, in which case Mr Sanderson can accompany them as well. We find that it is not unreasonable to expect him to do so. He is of Jamaican origin albeit now a British Citizen and has not lived in Jamaica since he was 13. We understand that he is working in the United Kingdom but we are provided with no further information no reason has been given to us as to why he could not obtain employment in Jamaica. The second option is that the children remain with him in which case the appellant can maintain contact by way of letters and telephone and that they can visit her in Jamaica. The third option is that the children remain in the foster care of Mrs Ellis and the appellant can maintain contact the same way and Mr Sanderson can have regular access to them.
>
> 56. ….We consider the weight of the evidence and find that the decision to deport the appellant is in all the circumstance a proportionate response."

55. A re-examination of the merits of the panel's determination as to Article 8 is now pending as an appeal to the Upper Tribunal pursuant to the order made by Mr Justice Burnett. It is not for this court when examining the legality of the claimant's detention pending deportation to express any conclusions on the cogency of the panel's conclusions as to whether she could be deported without a breach of the right to respect for family life.

56. However, in so far as UKBA relied on the panel's reasons in justifying subsequent detention, it can be observed that there is some tension between the finding of the panel that the claimant and Mr Sanderson were not intending to resume a relationship of husband and wife, and the conclusion that Mr Sanderson could relocate in Jamaica to pursue any contact with the children in those circumstances. He is a British citizen with employment here. It is hard to see why it would be reasonable to expect him to permanently relocate to Jamaica simply to have contact with his children. If as a

consequence, deportation was likely to lead to a split between the children and their parents, the panel do not seem to have engaged with the consequences of separating children from father (option one) or mother (options two and three).

57. It seems unlikely that the panel had any input from Social Services into this case, or were aware of the Children's Champion's recommendation. The information available to them about the impact of detention and removal on the children and their relationship with their mother appears to have been minuted in the Criminal Case Directorate UKBA dated 16 October 2009 which records that Waltham Forest Children's Services had informed UKBA that the children should return with their mother if she were to be deported. An emergency travel document had been issued on 13 October for return to Jamaica.

58. On 23 November 2009 a detention review noted material developments and the previous arguments. Its conclusion is summarised as follows:-

> "The case has been assessed under current guidance with the presumption of release but is deemed unsuitable through rigorous contact management despite close ties with the United Kingdom in the form of a husband and two children who are all British citizens. Approval has been given to split the family by director level, and consideration of the children's welfare has been undertaken. The risk of absconding is high, the risk of re-offending is also high and the risk of harm to the public is assessed as being low. "

The author of the memo was aware that reconsideration had been ordered by the High Court. Despite the panel's finding as to the breakdown of the relationship between the claimant and her husband, reliance was still placed upon the fact that there was a significant risk of absconding because "your husband was unable to prevent you from committing the offences for which you were convicted". The same point was made in a letter of 20 November 2009 to the claimant were it was said:

> "There is also no evidence that your husband and children would be able to exert sufficient influence over you to ensure that you comply with any conditions imposed as part of your release".

59. A bail application was lodged on 27 November 2009 when the claimant had the assistance of the organisation Bail for Immigration Detainees and for this application the Home Office bail summary is available. The claimant's husband and a friend were offered as sureties in the sum £500 and £1000 respectively. The bail address offered was Miss Ellis's address. NASS accommodation had been offered to the claimant on a provisional basis were she to be successful in the bail application. The grant of bail was strongly supported by Miss Ellis in a letter she wrote on 28 November detailing the distress felt by the two minor children. It was also supported by the Children's Society in a letter dated 19 November to the same effect.

60. The bail summary was prepared for the bail hearing on 1 December 2009. In addition to the history and reasons that had previously relied upon for refusing bail the following can be noted:-

> i. The claimant's offender manager had assessed her as posing a medium risk of serious harm to the community by further re-offending.

ii. She was assessed as having a high likelihood of re-offending. Her offender manager is reported as stating that:

> " (she)has not complied with her previous orders and has committed offences whilst under probation".

iii. The amount of recognisance offered was not considered sufficient to act as an incentive for proposed surety.

iv. The surety had not provided evidence that funds that are available to cover the recognisance. Despite the proposed surety's friendship with the claimant she was not proposing to reside with her. Therefore it was unclear how the surety would be able to exercise any control over her to ensure that she would comply with any conditions of release and make contact with UKBA.

v. Her reconsideration hearing listed for 19 January 2010 was not considered to be sufficient incentive to remain in touch with officials.

vi. The reasons for opposing bail were that she would fail to surrender to custody. However if bail was granted four conditions were sought to secure attendance, to sleep each night at the bail address, to report daily or weekly to an UKBA reporting centre, that she should be fitted with an electronic monitoring tag as instructed by UKBA and she should notify any application to change her address or bail.

61. Bail was refused by IJ Parks with reasons being recorded on 3 December 2009 as follows:-

i) The claimant was found at the hearing on 7 July 2009 and also the deportation hearing to have lied and to be an unreliable witness.

ii) The claimant was in the same position as 7 July 2009 except now she had the further adverse findings against her.

iii) She had a very poor criminal history.

iv) The surety had previously failed to contact the claimant. There is nothing to show she would have any more success in the future.

v) The claimant still faced deportation and there is a high likelihood of her seeking to abscond

62. It can be seen from the material for this period, that UKBA appears by this stage to have had access to the offender manager's reports but the reports are not exhibited in the defendant's evidence in this judicial review. The quotation from the report that is cited in the bail response (see [60] (ii) above) is undated but it appears to be from a pre-sentence assessment as it refers to previous orders and offending before the two year sentence imposed by the court. What would obviously have been of importance is the offender manager's assessment of how the claimant had responded to her custodial sentence. The assessment that the claimant posed a medium risk of serious harm is directly contrary to the assessments of low risk made by UKBA every month since June 2009. It does not appear that any of these assessments were placed before

the IJ. Nor indeed was the UKBA policy that bail on the kind of stringent conditions of bail identified in the bail summary were appropriate in cases of medium or low risk of harm.

63. Further it is difficult to understand in the light of: i. the previous history, ii. the material deployed by the claimant for this application, and iii. the coming into force of s.55 Borders Citizenship and Immigration Act 2009, that there is no reference in the bail summary either to the interests of the children in being able to be with their mother or to the impact that the children would have on the claimant in cooperating in the appeal and with the conditions of bail. Section 55 had come into force on 2 November with the consequence that there was a statutory duty to make arrangements to ensure that regard was had "to the need to safeguard and promote the welfare of children".

64. In summary, I conclude:

    i) The advice of the Children's Champion appears to have been forgotten.

    ii) The representations from Waltham Forest, Ms Ellis, and the Children's Society, as well as the claimant personally that she should be with the children were not identified as strong pointers to where the interests of the children lie.

    iii) The proportionality of the detention having regard to the welfare of the children had not been kept under review and updated in the light of new information as required by the policy (55.1.4.2).

65. It is equally surprising that neither factor is mentioned in the summary of the IJ's reasons for refusing bail. Irrespective of the statutory duty and the policy guidance these are important considerations in human rights law that the judge was under a duty to apply, for reasons to be considered later in this judgment.

66. Shortly after this refusal of bail, these proceedings were commenced. On 21 December 2009 after an opposed application Mr Justice Bean granted the claimant bail with residence at accommodation provided by NASS and other restrictions include the wearing of a tag. I was informed that following this order the children are in daily contact with the mother although they still live with Ms. Ellis for practical reasons relating to the availability of housing accommodation. Waltham Forest Social Services have approved return of the children subject to resolution of the housing issue.

67. There is no indication that the claimant has breached any of her conditions of bail and she attended the hearing of this judicial review application on Friday 25 June 2010.

Conclusions

68. In my judgment there was no material change of circumstances in favour of the claimant's case to be admitted to bail until Mr Justice Burnett ordered reconsideration of the deportation decision on 23 October 2009; however, that was a highly material event in this already extensive history, and combined with the representations made and the application for bail by BID should have led to a fundamental review of the continued detention in this case.

69. Once again the claimant has some compelling criticisms of the decision made:

i) The order for the reconsideration was likely to lead to delay before the appeal could be determined and (if unsuccessful) removal could be effected. The strength of the case for release on bail grows with each passing month.

ii) The first option in the assessment of the AIT in the deportation appeal was that this was a case where the children's best interests were to be with their mother and to return with her to Jamaica. This was also the advice tendered by Waltham Forest Social Services in October. In those circumstances the case for release of the claimant to be with the children pending resolution of the question whether she should be deported was compelling. This was precisely the recommendation of the Children's Champion which should have been revisited in the light of the AIT's factual findings as to family situation and the interests of the children. There is no indication that it was. If the judicial assessment of the interests of the children required them to be reunited with mother, then to maintain the separation seems inexplicable in the absence of compelling contra-indicative factors

(iii) The evidence of the AIT, the London Borough of Waltham Forest, Ms Ellis, the Children's Society, and the representations of the claimant itself point to the strength of the relationship between the two children and the mother. In the light of the previous findings of fact there seems no reason to reject this evidence. It amounted to a powerful factor as to why she would honour the conditions of her release in order not to lose contact with her children. That powerful factor against the possibility of absconding does not seem to have been considered at all.

(iv) The reference to the medium risk of harm to the public presented to the IJ contradicted by the low risk assessment consistently made by UKBA over the previous five months was positively misleading. The proper assessment was low risk and the failure to relate this assessment to the UKBA policy Manual is particularly unfortunate.

(v) The risk of the claimant's absconding had been based entirely on her criminal conduct before she was remanded in custody in April 2008. There appears to have been no assessment of what the effect of that remand and the two year sentence had been on her, or the likely impact of the licence conditions to which she would be subject if released.

(vi) The claimant is an independent adult of full capacity. She must take responsibility for her own actions. The references to a relative failing to prevent offending seem to be a regular feature of UKBA bail summaries in immigration cases. I have serious doubts whether they should be. A surety's function is prospective to ensure that the person bailed attends when required. In any event, to apply this reasoning to minor children or an estranged partner is absurd and a case of some pro- forma factor influencing a decision where it has no relevance.

70. It cannot be assumed that a two year sentence on a woman who has never served a custodial sentence before and who is the mother of two young children from whom she has been separated throughout that sentence and have missed her would have no effect upon her. Notwithstanding, the unreliability of the account of her matrimonial life, and recognising that there was always some risk of future re-offending in such a

case, I cannot see how a fair assessment of all the information that was by this stage available could have lead anyone fairly assessing the case to conclude that the risk of re-offending was unusually high.

71. I am also troubled by the reasoning that because the claimant's deportation is being sought there was no incentive to comply with the terms of bail. The claimant had no adverse immigration history of going to ground. To apply such reasoning generally would suggest that nobody should be granted bail in a deportation appeal. That is not the law or the policy even in a case in which there is no strong family interest to be considered. This, however, was a case where there were two children, one of whom had started attending school.

72. In my judgment, the reasons relied on for denial of bail were weak, inconsistent and in breach of UKBA's own policy. The reasons for granting it were compelling and were not addressed adequately or at all. The cumulative effect of these flaws, set in the context of the lengthy period of immigration detention and the legitimate criticism that could be made of the decision- making process in the previous period, strongly suggest that this was not a decision that was open to a reasonable decision maker to maintain. I conclude that the decision to object to bail on stringent terms was irrational and caused the claimant's subsequent detention.

73. I appreciate that the defendant can point to the fact that the IJ refused bail in December. As a matter of law, this is not a complete answer to the contention that the decision to detain was unlawful. It is not the IJ's function to decide on the legality of the detention or the rationality of the exercise of the power to detain. He or she must assume that the detention is lawful but may be mitigated in the exercise of discretion by admission to bail.

74. Further, making every allowance as to how the case was presented to him, I very much doubt that IJ Parkes was entitled to reach the conclusion that he did. In particular the failure to consider the impact of continued detention on the welfare of the children is a serious flaw. I shall consider this aspect further in the claimant's final ground of challenge.

Challenge 4: Breach of Human Rights

75. The claimant submits that the decision to detain both in April and in November was a violation of Article 5 and Article 8 ECHR. To assess that submission I am required by the Human Rights Act 1998 to have regard to the case law of the European Court of Human Rights in Strasburg (ECtHR).

76. I note that the present state of the Convention case law has been recently set out by the ECtHR in the case of Medvedyev v France 29 March 2010 where it said as follows:

> "79. The Court further reiterates that where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires

that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness.

80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail."

77. The principles applicable to immigration detainees had been considered earlier by the Grand Chamber in the case of Saadi v United Kingdom (2008) 47 EHRR 17 where the Court said:

67. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above § 37; *Amuur*, cited above, § 50; *Chahal*, cited above, § 118, and *Witold Litwa*, cited above, § 78). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

68. While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see further below).

……

70. The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Witold Litwa,* cited above, § 78; *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004; *Enhorn v.*

> *Sweden*, cited above, § 44). The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty (see *Vasileva v. Denmark*, no. 52792/99, § 37, 25 September 2003). The duration of the detention is a relevant factor in striking such a balance (ibid., and see also *McVeigh and Others v. the United Kingdom*, applications nos. 8022/77, 8025/77, 8027/77, Commission decision of 18 March 1981, DR 25, pp. 37-38 and 42).

78. An issue in the present case is whether a decision to detain where there is power in law to detain is nevertheless arbitrary and not in accordance with the law because it is taken without regard to or contrary to the terms of a relevant policy promulgated by the decision taker for application within the jurisdiction.

79. The ECtHR has previously concluded with respect to immigration cases that the failure to have a published policy that was accessible to the claimant and the reviewing court made the detention arbitrary: see Amuur v France 25 June 1996 (at paragraph 50) and Al-Nashif v Bulgaria Case No 99/50963 (20 September 2002).

80. The case of Al-Nashif demonstrates that a similar approach is taken to the term "in accordance with the law" under Article 8 as under Article 5. Having found a violation of Article 5 in respect of the detention pending removal the Court observed at [119]:

> "The phrase "in accordance with the law" implies that the legal basis must be "accessible" and "foreseeable". A rule's effects are "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. *It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference*". (Emphasis supplied)

81. In my judgment the published policies of the executive designed to inform as to how the discretion to detain should be exercised, are relevant criteria within this principle and thus form part of the measures cumulatively representing the quality of the law from the point of view of Articles 5 and 8.

82. I accept that normally Article 8 would add little to Article 5 in terms of the justification of detention. However, where children of tender years dependent on their mother are concerned, the impact of detention on them is a consideration best examined within the context of Article 8. UKBA's guidance on this at 55.1.4.2 (see para 32 (i) above) recognises that in such circumstances detention *may* engage Article 8. I agree with the guidance and conclude that it does. This means that the detention

of the mother must be compatible with Article 8 in order to be in accordance with the law and proportionate under Article 5.

83. Once Article 8 is engaged, the exercise of judgment in a case falling within its ambit must comply with the principles identified by Strasbourg. In a case where the interests of children are affected this means that other principles of international law binding on contracting states should be complied with. In the case of children those principles are reflected in Article 3 (1) of the UN Convention on the Rights of the Child 1989 to which the UK is now a party without any derogation in respect of immigration decision making. As the Committee on the Rights of the Child explain in its General Comment of 2003:

> "Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children.
> The article refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children."

84. By this route, the principle that the interests of the child are a primary consideration should be applied by public officials (including immigration judges) when making immigration decisions that have an impact on the welfare of children. See: Pini v Romania (2005) 40 EHRR 13 at [139]; Uner v Netherlands [2006] EHRR 873; Pardepan Singh v ECO New Delhi [2005] EWCA Civ. [2005] INLR 564. It is not necessary to consider whether the same result is achieved by reason of the UK's ratification of the UN CRC, the principle in the EU Charter of Rights that reflects rights already established in Member States, or the statutory language of s.55 Borders Citizenship and Immigration Act. Whilst it has been judicially recognised that a primary consideration is not the same as a paramount or determinative consideration (see DS (India) **v** Secretary of State for the Home Department [2009] EWCA Civ 544, [2010] Imm AR 81 at [35], it must at least mean a consideration of the first importance.

85. In my judgment, the failure of the decision maker or the IJ to take account of a consideration of the first importance in a case that obviously had serious implications for the welfare of the children is unlawful. On this basis alone it might be said that the decision to continue the detention and thereby interfere with the right to respect for family life is not in accordance with the law and therefore incapable of justification. However, there is also the fact that UKBA's policy requires consideration to be given to this feature of the case, and in the decisions made in autumn 2009 no such consideration appears to have been given.

86. There is a substantial body of UK case law to the effect that a failure to follow executive policy relevant to the issue means that the decision is not in accordance with the law within the meaning of the ECHR. Law in this context means not merely

the domestic law but the principles developed by the Strasbourg Court to prevent arbitrariness. In the case of R (Nadarajah) v Secretary of State for the Home Department [2003] EWCA Civ 1768 [2004] INLR 139 the Court of Appeal considered that detention in breach of an open policy pursuant to an unpublished policy that was not accessible was unlawful both as a matter of domestic law and Article 5 of the ECHR. The approach in the Nadarajah was relied upon in D v The Home Office [2005] EWCA Civ 38 [2006] 1 WLR 1003 noted above.

87. In AB (Jamaica) [2007] EWCA 1302 the Court of Appeal was concerned with the relationship between Article 8 to be applied by immigration judges and Home Office policy designed to give executive guidance as to how Article 8 was to be applied before the Human Rights Act was enacted. Sedley LJ observed:

> "25. There appears to be little if any authority on this question. It is common ground that a failure by the Home Secretary to apply his own policy will render his decision "not in accordance with the law" within ground (e) of the permissible grounds of appeal set out in s.84(1) of the Nationality, Immigration and Asylum Act 2002. But it is the Home Secretary's contention that if a Home Office decision fails this test before the AIT, the immigration judge has no power to apply the policy and is limited to remitting the case so that the Home Office can do so. This is what the AIT in *AG (Kosovo) v Home Secretary* [2007]UKIAT 0082, §51, considered to be the situation. For the rest, Parishil Patel for the Home Secretary submits that the proper course of reasoning is to ask first whether the case comes within the Rules and if – like this case – it does not, to proceed to consider it under the Convention. As to whether, in doing this, any weight can be given to the Home Secretary's own policy, he was unwilling to commit himself.
>
> 26. The starting point, as it seems to me, is that no principle of law makes inadmissible on an appeal to the AIT a policy used by the Home Secretary for the very purpose which the AIT is now addressing in the light of the Home Office's submissions. Indeed, I find it troubling that the Home Office presenting officer does not appear herself to have drawn the immigration judge's attention to the policy or to have sought to put forward a case consistent with it. Doing so might well have involved accepting that the Home Office did not regard a simple breach of immigration control, once there was a qualifying marriage, as by itself a sufficient reason for removal or deportation. It would also have involved pointing out that the Home Office did, however, regard insufficient proof of unreasonableness in relation to the settled spouse as justifying removal.
>
> ……
>
> 29. It follows in my view that the determination is further flawed by its failure to bring into the assessment of the proportionality of removing the appellant the fact that the executive as a matter of policy does not regard an overstayer who is now in a qualifying marriage as ordinarily liable to removal if the settled spouse cannot reasonably be expected to go too. The immigration judge appears to have directed himself that policy is for the executive (which is what I take him to have meant by "the elected powers in the state") and not for him. For the reasons given above, he was right in the first half of this proposition but wrong in the second."

88. Of course, as a matter of domestic law and practice there is a clear distinction between rules of law and the current state of executive policy that does not have the force of law. The domestic classification of current policy as something not having the force of law is not conclusive. As already observed the term "law" is broader than national law provisions. It embraces a range of materials and considerations all designed to ensure that detention is not maintained for any longer that necessary or for any purpose that is not consistent with the Convention. The case for detention whether criminal or immigration should be capable of review by the courts to assess whether it is in accordance with both domestic law and the principles behind the European Convention of Human Rights. In making that assessment the national court should have regard to all current policies and rules designed to restrain detention in these circumstances.

89. The decisions in both Nadarajah and D have been the subject of some critical scrutiny in subsequent Court of Appeal cases. In SK (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ 1204 the Court at [31], [33] and [34] concluded that there was no duty upon the Secretary of State to have in place effective mechanisms by which detention would be regularly monitored.

90. It also appears from paragraph [27] that the Court concluded that the prevention of arbitrariness which is the central purpose of Article 5 could be sufficiently accommodated by the Hardial Singh criteria. The decision in WL (Congo) has already been noted. At paragraphs [53] to [58] the Court noted that there are different categories of policy or practice and observed that the normal remedy for failing to apply policy was to quash the decision for re-determination. Commenting upon the case of Nadarajah the Court concluded as follows:

> [77]. In fairness to the judge, we acknowledge that his reliance on the *Sunday Times* case gained apparent support from the judgment of this court in *R (Nadarajah) v Home Secretary* [2003] EWCA Civ.1768, paras 64-67 to which he also referred. Although we respectfully agree with the actual decision, and indeed most of the reasoning, of the court in that case, we have some difficulty, with respect, in understanding one aspect of the reasoning. The two cases there under consideration concerned the Home Secretary's policy, as understood from published documents, not to treat removal of an unsuccessful asylum-seeker as "imminent" (thus justifying detention), where proceedings to challenge removal had been initiated. Unpublished policy guidance indicated that in deciding whether removal was imminent, no regard would be paid to statements, even by legal advisers, that proceedings were about to be initiated. The unpublished guidance was at odds with the published policy. As a result, solicitors acting for the asylum-seekers were unaware that a formal letter indicating that proceedings were about to begin would not prevent their client's detention: the solicitors believed, on the basis of the published policy, that their letter before claim would suffice to avoid his detention. The court held that a decision to detain, made in reliance on the unpublished guidance, was unlawful. In a passage headed "Is the policy accessible?" Lord Phillips MR (in a judgment with which his colleagues agreed) quoted the same passage from the *Sunday Times* case, as indicating that "the law" must be "accessible" (para 64-5). He then moved, without further discussion of the principle, but after considering the evidence, to the conclusion that the Secretary of State's "policy" was not accessible (paragraph 67). The

explanation for this apparent *non-sequitur* may possibly be found in an earlier passage, in which he stated, after reference to the rule against arbitrary detention in Article 5 of the Convention, and by way of introduction to the four questions said to be raised by the case:

> "Our domestic law comprehends both the provisions of Sch 2 to the Immigration Act 1971 and the Secretary of State's published policy, which *under principles of public law, he is obliged to follow*." (para 54, emphasis added)

The court (quite possibly reflecting the argument as it had been developed before it), thus appears to have accepted as a starting-point, without further analysis, that at least in the context of Article 5 published policy was equivalent to law, and that unpublished policy, at least so far as inconsistent with published policy, was unlawful.

78. Given the lack of discussion of this point, we do not with respect regard ourselves as bound by this judgment to accept that, whether for the purposes of the *Sunday Times* principles or otherwise, policy is to be equated with law. We have no difficulty in accepting the decision so far as it depended on the inconsistency of the published and unpublished policies. In that respect it is readily explicable under principles of legitimate expectation, as already discussed. Thus in *N*'s case (the other case was said to be "even stronger": paragraph 70), the Master of the Rolls accepted that the claimant had arguable claims for judicial review, that there was no reason to doubt the genuineness of his solicitor's intentions, and that had she been aware of the unpublished policy she would have instituted proceedings before the detention (paras 68-9). He observed:

> "Those acting for N could reasonably expect, having regard to those aspects of the Secretary of State's policy that had been made public, that N would not be detained on the ground that his removal was imminent. The only basis upon which the Immigration Service could treat his removal as imminent was by applying that aspect of the Secretary of State's policy which had not been made public, namely that no regard would be paid to an intimation that judicial review proceedings would be instituted. The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy, as made public. (paragraph 68)"

79. That, to our mind, is the language of legitimate expectation, rather than of a specific legal requirement. Thus, as in the present case, the vice was not the lack of publication, but the operation of the unpublished policy in a manner inconsistent with the published policy."

91. In the present case the court is not concerned with whether or not there was a duty to publish a policy, nor with a situation where the central question was simply the length of detention. Here there was a detailed published policy designed to restrict the use of the power to detain in low or medium risk cases of criminality and where the detention affected the welfare of minor dependant children. If these policies had been taken into account and applied to the particular decision in November 2009 I conclude

that on the balance of probabilities that bail on restrictive terms would not have been opposed. The failure to apply the policy was therefore causative of the ensuing continued detention. I cannot see that the fact that disregard of applicable policy is unlawful in domestic law because it is a breach of legitimate expectation rather than a statutory provision matters much when considering whether the consequent detention is in accordance with the law for the purposes of Article 5 or Article 8. A disregard of an applicable policy designed to regulate the exercise of the power to detain is a procedural rule to prevent arbitrariness as well as giving rise to a substantive legitimate expectation.

92. In my judgment the Strasbourg principles make clear that:-

i) There need to be criteria for the exercise of a broad power to detain foreign nationals afforded under the primary legislation. This is particularly the case where substantial periods of detention may result from assessment of claims or enforcing removals. Criteria for immigration detention and review of it should be published and accessible if the exercise of the power is not to be characterised as arbitrary.

ii) The duration of detention is a very important factor in control of arbitrariness but not the only one, certainly where detention impacts on the interests of the child.

iii) A failure to apply published criteria to an individual case means that the individual has not been detained in accordance with the procedural rules promulgated by the national authority to regulate detention.

iv) National law, in any event, includes the doctrine of legitimate expectation whereby a failure to have regard to applicable policy will render the decision unlawful.

v) The notion of law in Article 5 and Article 8 extends beyond domestic statutory requirement to all indicia applied nationally and internationally that are required to prevent detention becoming disconnected from its purpose, disproportionate, and arbitrary.

vi) In both domestic and ECHR law the principles of good government and the prevention of arbitrariness walk hand in hand: ‘say what you mean and mean what you say’.

93. Judged by these criteria, the defendant’s decision to continue to detain the claimant after the order for reconsideration was communicated and considered by him/her took no account of the applicable policy of UKBA and was not in accordance with the law for this reason as well. It was therefore a violation of both Article 5 and Article 8 without the need to go on to consider justification.

94. Even, if the stage of justification is reached in the Article 8 analysis, I conclude that continued detention was disproportionate and not necessary in a democratic society. Both the risk of absconding and the risk of committing further offences of theft on release from the first experience of custody were not unusually high ones and did not

require mother to be detained to the prejudice of the family links with the children that it was intended should be restored and maintained.

Conclusions

95. For all these reasons I conclude that the claimant was unlawfully detained from 23rd November (the date of the first detention review after communication of Burnett J's order of 23 October) until 21st December. I will make a declaration to that effect. This conclusion also entitles the claimant to an appropriate award of damages, but the parties accept that the award should be referred elsewhere for assessment if not agreed.