Neutral Citation Number: [2002] EWCA Civ 888

Case No: 2002/0743

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
(His Honour Judge Wilkie QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

28th June 2002

B e f o r e :

**LORD JUSTICE SIMON BROWN
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE MUMMERY
and
LORD JUSTICE DYSON**

Between:

THE QUEEN (on the application of "I")	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

**A Nicol Esq, QC & H Southey Esq (instructed by Messrs Fisher Meredith) for the Appellant
A Robb Esq (instructed by Treasury Solicitor) for the Respondent
Hearing dates: 29th May 2002**

**HTML VERSION OF JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN
(SUBJECT TO EDITORIAL CORRECTIONS)**

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Lord Justice Simon Brown:

1. The appellant is a 40-year old Afghani. He arrived in this country on 7 January 1998 and claimed asylum. On 28 March 1998 his asylum application was refused

but he was granted exceptional leave to remain. On 21 October 1999 he was convicted on two counts of indecent assault and sentenced to three years' imprisonment with a recommendation for deportation. He also became liable to register as a sex offender. On 23 January 2001 the respondent Secretary of State signed the relevant deportation order and on 29 January 2001 wrote to inform the appellant that although he was due for release on licence on 7 February 2001 he would in fact continue to be detained under paragraph 2(3) of 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 …"

2. Detention under paragraph 2(3) continued from 7 February 2001 until 29 May 2002 when we acceded to the appellant's submission that it was no longer lawful to detain him and allowed his appeal accordingly (for reasons which we are now giving). Before indicating more of that, however, let me first complete the history.

3. On 9 April 2001 the appellant lodged an invalid destination appeal which the respondent treated as a fresh application for asylum. The asylum interview took place on 2 November 2001 (some weeks, therefore, after September 11, clearly an event of some importance with regard to Afghani asylum seekers). On 17 January 2002 the appellant's solicitors wrote to the Home Office:

> "Our client has been in detention on this basis [ie, under paragraph 2(3)] since January 2001 with no prospect of any removal taking place. He remains in detention indefinitely, as currently the Secretary of State is not removing nationals to Afghanistan, and the resumption of removals does not appear to be imminent. Accordingly, our client remains in detention pending his removal, despite the fact that the Secretary of State has no intention of enforcing this removal. It is argued that therefore paragraph 2(3) cannot justify his continued detention."

4. The Home Office replied on 28 January 2002:

> "It is not true that we have no intention of enforcing [the appellant's] removal. We are, in fact, actively exploring a number of options for removing him and other failed asylum seekers to Afghanistan through neighbouring countries. The process entails discussions and negotiations with the countries concerned. We shall continue to review his case regularly, as we do in all detained cases, but we are satisfied that there are good prospects for carrying out his removal within a reasonable time period."

5. Also on 28 January 2002 the Home Office refused the appellant's fresh asylum claim. The appellant's appeal against that refusal was dismissed by the Adjudicator on 15 May 2002. At the date of the hearing before us, the appellant still retained his right to seek leave to appeal from the Adjudicator's decision to the IAT.

6. On 8 February 2002 the appellant brought linked proceedings respectively for an order of *habeas corpus* and for judicial review of the respondent's continuing decision to detain him. I shall refer to these compendiously as the appellant's challenge: both sides agree that they raise identical issues and must stand or fall

together. The essential basis of challenge is that it had become clear that the appellant's removal within a reasonable time was impossible. On 22 March 2002 His Honour Judge Wilkie QC, sitting as a Deputy High Court Judge in the Administrative Court, dismissed the challenge. As stated, the appeal came before us on 29 May 2002 - by right as to the *habeas corpus* proceedings, by our permission with regard to the judicial review application.

7. The challenge was advanced in the court below both under domestic law and under article 5 of ECHR. Article 5 provides, so far as relevant:

> "(1) Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> > …
> >
> > (f) the lawful arrest or detention … of a person against whom action is being taken with a view to deportation or extradition."

8. It was common ground before us, rightly as I believe, that the Strasbourg jurisprudence really adds nothing to the domestic law in this case and accordingly we concentrated on the proper approach to detention under paragraph 2(3). Three particular authorities bear helpfully on this and it is convenient to refer to them at once.

(i) Re Hardial Singh [1984] 1 WLR 704

9. Following a two-year prison sentence for burglary the applicant was served with a deportation order and detained for five months under paragraph 2(3) whilst the Home Office attempted to obtain for him a travel document from the Indian High Commission. Woolf J said this:

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained … pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

10. In the event, Woolf J adjourned the hearing for a few days with an indication that the applicant should be released unless it proved possible to remove him "within a very short time indeed". Amongst the considerations to which he appears to

have had regard were (a) that the applicant "is quite prepared to return to India", (b) "the Home Office have not taken the action they should have taken and nor have they taken that action sufficiently promptly", and (c) "the applicant had become distressed by his continuing detention and had made an attempt to take his own life".

(ii) Re Wasfi Suleman Mahmod [1995] Imm AR 311

11. The applicant was an Iraqi who had been granted asylum in Germany. On entering England as a visitor he was found in possession of opium and sentenced to four years' imprisonment with a recommendation for deportation. Like **Hardial Singh** (and the present appellant) he was served with a deportation order during the term of his imprisonment and detained under paragraph 2(3) from the date when otherwise he would have been released. His application came before Laws J after some ten months during which time the Home Office had been making unsuccessful efforts to persuade the German authorities to take him back. Having referred to ***Hardial Singh***, Laws J said this:

> "While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards. In this case I regard it as entirely unacceptable that this man should have been detained for the length of time he has while nothing but fruitless negotiations have been carried on."

He expressed himself "entirely satisfied" that whatever would have been "a reasonable period for this man's continued detention … has certainly now been exceeded" and ordered his immediate release by *habeas corpus*.

(iii) Tan Te Lam -v- Tai A Chau Detention Centre [1997] AC 97

12. The applicants were Vietnamese boat people, who were refused refugee status and detained in Hong Kong for periods of up to 44 months under the Immigration Ordinance. Delivering the judgment of the Privy Council Lord Browne-Wilkinson said this:

> "The principles enunciated by Woolf J in the ***Hardial Singh*** case [1984] 1 WLR 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain 'pending removal' their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

13. Lord Browne-Wilkinson then, however, pointed to the "the contrary indications in the statute [the Hong Kong Ordinance]":

> "What section 13D(1A) does is to provide expressly that, in deciding whether or not the period is reasonable, regard shall be had to all the circumstances including (in the case of a person detained pending his removal from Hong Kong) 'the extent to which it is possible to make arrangements to effect his removal' and 'whether or not the person has declined arrangements made or proposed for his removal.' Therefore the subsection is expressly based on the requirement that detention must be reasonable in all the circumstances (the ***Hardial Singh*** principle) but imposes specific requirements that in judging such reasonableness those two factors are to be taken into account."

14. Thus it was that later in the judgment (albeit it was unnecessary for the Privy Council to decide whether in fact the judge had been right to hold the length of detention there to be not unreasonable) Lord Browne-Wilkinson, pointing out that had the applicants applied for voluntary repatriation they would have regained their freedom, said this:

> "In their Lordships' view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable."

15. Before seeking to apply the principles established by those three cases to the facts of the present case, it is necessary first to indicate rather more fully the Home Office's evidence as to the prospects of returning the appellant to Afghanistan as it stood respectively before Judge Wilkie below and before us. In his statement of 7 March 2002 Mr Simon Bentley (the writer of the Home Office's letter of 28 January 2002) had said this:

> "23. The current position with respect to removal to Afghanistan is as follows.
>
> 24. There are certainly no direct international flights between the United Kingdom and Afghanistan.
>
> 25. If the claimant is prepared to return voluntarily to Afghanistan, arrangements can be made for his return via the International Office for Migration (IOM). Although the IOM has facilitated voluntary returns to Afghanistan in the past, the IOM is not currently able to return people to Afghanistan. However, there is a target of early summer for the resumption of such voluntary returns.
>
> 26. The British Government is planning negotiations with the neighbouring countries to facilitate enforced returns to Afghanistan. The planning of those negotiations and the negotiations themselves are very sensitive and it may jeopardise the success of those negotiations to reveal more details at this stage. However, I can say that it is hoped that arrangements for enforced and voluntary removal will be in place by early Summer."

16. In a second statement dated 28 May 2002 (the day before the appeal hearing) Mr Bentley stated:

> "4. There are currently no direct international passenger flights from the United Kingdom to Afghanistan. However, there are direct flights to Afghanistan from other countries, notably Pakistan and the United Arab Emirates.
>
> 5. The position in relation to forced returns is that the British Government has been endeavouring to negotiate agreements with countries neighbouring Afghanistan that would enable removals to take place through the auspices of these countries. The negotiations are sensitive and to reveal details of what has taken place would jeopardise the success of the negotiations. Government officials have visited Afghanistan and have had talks with the representatives of the interim Government there, as well as various NGOs based in the country. In addition, talks have also taken place with similar officials in the neighbouring countries and the talks are on-going, with further talks and visits scheduled to take place next month.
>
> 6. If the appellant is prepared to return voluntarily to Afghanistan, then arrangements can be made to return him there via the [IOM]. The IOM has resumed returns recently after they were suspended for a time earlier in the year. Several persons referred to the IOM by the Government recently have been successfully returned to Afghanistan. The respondent assists the IOM in making the requisite administrative arrangements to carry out voluntary returns and meets the costs if required.
>
> 7. I would mention that voluntary returns can be negotiated also through the Afghan Embassy in the United Kingdom. The embassy is now issuing passports to Afghan citizens and encouraging voluntary returns. Arrangements for such returns are made via the IOM. The IOM has in place a fixed route in respect of voluntary returns, and as far as the timescale for the logistical arrangements is concerned, this is approximately two-three weeks. Again, the respondent is willing to assist, if necessary, with the administrative arrangements and pay the costs."

17. In short, the position before the judge below was that it was "hoped" to have in place arrangements for both enforced and voluntary removal "by early summer", the former as a result of negotiations which the British Government was "planning". The position before us on 29 May was that voluntary returns had been resumed and could be achieved within some two - three weeks; negotiations with regard to forced returns were taking place and were to be continued "next month".

18. It is convenient at this stage to note also the appellant's evidence below as to his situation in detention. He was subject to the same prison regime as a convicted prisoner, being kept in his cell for 19½ hours out of 24. He was doing no English classes and no work, there being no places available on the educational and work programmes. He needed medication to help him to sleep, and was very upset, depressed and unable to concentrate. Unsurprisingly, he was desperate to be released.

19. As I have already indicated, the challenge is based essentially on the second of the three limitations to the exercise of the paragraph 2(3) detention power

identified by Woolf J in ***Hardial Singh*** - the limitation which was then reformulated by Lord Browne-Wilkinson in *Tam Te Lam* as follows:

> "if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised."

20. It seems to me plain that the reference there to "a reasonable time" is to a reasonable further period of time having regard to the period already spent in detention.

21. Judge Wilkie below dealt with limitation 2 as follows:

> "46. The position as far as paragraph 2(3) of Schedule 3 is concerned is, or may be, different [from that under article 5(1)(f), a point which, as I have already indicated, is not pursued on the appeal]. The test formulated by the Divisional Court in ***Hardial Singh*** is: must it be apparent to the Secretary of State that he is not going to be able to operate machinery provided for removing persons within a reasonable time? The Secretary of State is not, it seems to me, in a position to say that they will be able to remove him within any particular period of time, let alone one that is reasonable.
>
> 47. It seems to me also that Mr Bentley in his letter of 28th January somewhat overstated the position in saying that there was a reasonable prospect that he would be removed within a reasonable time. What Mr Bentley is saying is that the Secretary of State is working to try to effect a mechanism by which the machinery for removal may be operated, and hopes that by early summer that will be in place. I accept that these efforts are *bona fide* and substantive, and not merely a ritual going through the motions. There is no expectation nor is there a reasonable prospect, but there is a hope. It seems to me that standing those findings of fact, it is not open to me to say that presently it must be apparent to the Secretary of State that he is not going to be able to operate the machinery provided within a reasonable time. The Secretary of State seems, on the face of it, to be stating that a reasonable time is the summer of this year. There is a broad concurrence between that view and the hesitant view I have expressed that the end of his nominal sentence may constitute some kind of watershed."

22. The last sentence of paragraph 47 refers back to the judge's earlier observation that the appellant's "nominal sentence … does not expire until August 2002" and that, although he was entitled to be released at the half-way stage, had he been released he would have remained liable for recall for the remaining 18 months if he had either failed to comply with his supervision or committed a further offence.

23. Mr Nicol QC subjects the judge's reasoning in those paragraphs to a number of criticisms. The fact that the appellant's nominal sentence remained unexpired was, he submits, wholly irrelevant (Mr Robb for the Secretary of State does not suggest the contrary). Perhaps more importantly, Mr Nicol points out that the Secretary of State's *bona fides* were never in question here: rather the critical issue was whether it was going to be possible to remove the appellant within a reasonable time. So far as that was concerned, given that the appellant had already been subject to administrative detention for 13 months, the mere "hope" of removing him by "the summer", without there being any "expectation" or

"reasonable prospect" of achieving it, was, submits Mr Nicol, plainly insufficient to satisfy limitation 2. In considering what was "a reasonable time", moreover, the judge appears to have given no weight whatever to the fact that the appellant had already spent 13 months in detention.

24. To my mind all these criticisms are soundly based and I have the greatest difficulty in accepting the judge's approach.

25. It was agreed, however, that we should determine the appeal not by reference to the correctness or otherwise of Judge Wilkie's approach but rather on the basis of the up-to-date material before us. On this basis, of course, we had to have regard to the fact that the appellant had already been detained for a further ten weeks since the first instance hearing, but also to the countervailing consideration that negotiations were by then under way with a view to arranging enforced removals.

26. The question for us, therefore, was this: as at the date of the appeal hearing on 29 May had it become clear that the appellant's removal was not going to be possible within a reasonable time? The appellant had by then already been in administrative detention for nearly 16 months and there was no indication as to when enforced removal might become possible, the Secretary of State's evidence being merely that negotiations are now in progress. Those considerations were plainly relevant to the question before us. Three points were at issue, however, as to what other considerations were relevant to our determination. Each is a point of principle and I must address them in turn.

(i) **Risk of absconding and re-offending**

27. It is the Secretary of State's view that, if the appellant is released from detention, he will "go to ground" so as to make himself unavailable for any enforced removal if and when that becomes a possibility. This risk, moreover, carries with it a further risk, namely that in going to ground the appellant will fail to comply with his obligation to register as a sex offender, an obligation itself designed to afford some protection against the possibility of his re-offending. Mr Robb further submits that the very fact that the appellant has been prepared to remain in detention in this country rather than voluntarily return to Afghanistan (as he now could) indicates the intensity of his desire to remain and the likelihood, therefore, that he will abscond.

28. Mr Nicol submits to the contrary that the question whether the appellant will go to ground if released and the risk of his doing so (and then re-offending) is irrelevant to the question whether his removal is going to be possible within a reasonable time.

29. On this issue, I am in favour of the Secretary of State. As Woolf J said in ***Hardial Singh***:

> "The period which is reasonable will depend on the circumstances of the particular case."

The likelihood or otherwise of the detainee absconding and/or re-offending seems to me to be an obviously relevant circumstance. If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit murder or mayhem, that to my mind would justify allowing the Secretary of State

a substantially longer period of time within which to arrange the detainee's removal abroad.

(ii) **The appellant's refusal to accept voluntary repatriation**

30. Mr Nicol contends that this too is an irrelevant consideration. The question we are considering is the legality or otherwise of the appellant's continuing detention pending an enforced removal. The very premise of the question is his unwillingness to go.

31. On this issue, too, I prefer the submissions made on behalf of the Secretary of State. Woolf J in ***Hardial Singh*** clearly regarded it as a factor in the applicant's favour that he was "quite prepared to return to India"; why should not the converse be relevant? And it is noteworthy that in both that case and *Mahmod* the applicants had been unable to return voluntarily. Clearly, of course, the position here is not as it was in Hong Kong where, because of the express provisions of the Ordinance, it was regarded as "of fundamental importance" that the applicants' detention was "self-induced by reason of the failure to apply for voluntary repatriation". But that is not to say that the court should ignore entirely the applicant's ability to end his detention by returning home voluntarily.

32. As it seems to me, however, this consideration is of relatively limited relevance in the circumstances of the present case. After all, the option of voluntary repatriation only arose on the day before the appeal hearing.

(iii) **The appellant's asylum claim and appeal**

33. Is it relevant to the question posed in this case that ever since 9 April 2001 (ie from just two months after the period of administrative detention began) the appellant has been pursuing a claim for asylum which would in any event have prevented his being returned to Afghanistan? This, to my mind, is the critical issue in the case.

34. That a prolonged period of detention pending the final resolution of an asylum claim is sometimes permissible cannot be doubted: *Chahal -v- United Kingdom* (1996) 23 EHRR 413 illustrates the point well. The applicant was a Sikh separatist leader detained in custody for the purpose of deportation for some 3½ years (until the House of Lords' final refusal of leave to appeal). The reason for his long detention pending removal, however, was because the Secretary of State regarded him as a threat to national security; but for his asylum claim there would have been no difficulty in returning him; on the contrary, the Indian government were anxious to secure his return.

35. What *Chahal* illustrates is that a detained asylum seeker cannot invoke the delay necessarily occasioned by his own asylum claim (and any subsequent appeal(s)) to contend that his removal is clearly "not going to be possible within a reasonable time", so that he must be released. That, however, is by no means to say that where, as here, a detainee, whom for reasons quite other than his asylum claim the Secretary of State is unable to remove, chooses during his detention to claim asylum, that claim, whilst unresolved, precludes his asserting that limitation 2 of the ***Hardial Singh*** principles is not satisfied. Nor, indeed, did Mr Robb for the Secretary of State put it that high. On the contrary, he made little of the point and suggested no more than that this appellant's asylum claim is a factor in the case.

36. What, then, should the approach be? For my part I found the following illustration (suggested by Mr Nicol) a useful one. Prior to September 11 there was no question of returning Afghanis to Afghanistan. Consider during that period the position of two prospective deportees, one of whom claims asylum, the other not. Could it seriously be argued that there was power to detain the first but not the second? Surely not. Consider, indeed, this very case. The Secretary of State, as it happens, was prepared to regard the appellant's invalid destination appeal in April 2001 as a fresh asylum application (see paragraph 3 above). Assume that he had not done so - or, indeed, assume that the fresh claim (and the subsequent appeal process) had been determined rather more expeditiously (as, perhaps, it should have been). It would then be clear that it was the political impossibility of removing the appellant which alone was responsible for his continuing detention. Should his position be worse because he can seek to take his asylum claim further still? And would it then improve if he chose not to? The answer to these questions is surely no. I am not saying that if, for whatever reason, whilst a properly detained asylum seeker's claim is being resolved, a short-term political difficulty arises which would in any event have delayed his return, he thereby necessarily become entitled to be released. I do, however, say that where, as here, there has been no lengthening whatever of the detention period as a result of the asylum claim, the relevant and substantial cause of the detainee's non-removal should be regarded as the political impossibility of returning him, rather than his claim for asylum.

37. I come finally to consider the case in the round as it stood before the court on 29 May, bearing in mind that the burden lay on the Secretary of State to satisfy us on the balance of probabilities that the appellant was being properly detained "pending removal" - see *Tan Te Lam* at p115E. Given, as stated, that the appellant had by then been in administrative detention for nearly 16 months and that the Secretary of State could establish no more than a hope of being able to remove him forcibly by the summer, substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period. True, the appellant could, by the date of the appeal hearing, have agreed to return voluntarily to Afghanistan. But, as already observed, that possibility only arose on the day before the hearing and it would surely not be right, given his unwillingness to go (and, indeed, his asylum claim) to subject him to an indeterminate period of further detention merely on that account.

38. In short, I came to the clear conclusion that on 29 May it was simply not justifiable to detain the appellant a day longer; the legal limits of the power had by then been exhausted. That is why I allowed his appeal and ordered his release that day.

Lord Justice Mummery:

39. The relevant facts and the law are set out in the judgment of Simon Brown LJ, which I have read in draft. I have, however, reached a different conclusion. I would dismiss the appeal for the following short reasons.

40. The appellant remains unwilling to return to Afghanistan voluntarily, even though this can now be arranged for him. The necessary arrangements can be made via the International Office for Migration and through the Afghan Embassy in London. The UK government is prepared to assist with the administrative arrangements

and to meet the cost of his airfare. But he would rather remain in the United Kingdom than return home to Afghanistan.

41. As the appellant does not want to go back to Afghanistan, refuses to co-operate with the authorities to return voluntarily and has so far had no success in his asylum claims, there are, in my judgment, reasonable grounds for believing that, given the chance, he will probably seek to frustrate attempts to remove him under the deportation order before it is possible to carry it into effect. So, there is a real risk that, if he is now released from his present detention under paragraph 2 (3) of schedule 3 to the Immigration Act 1971, he will probably abscond and never return to Afghanistan.

42. I agree that there has been a long period of detention to date since his release on 7 February 2001 from serving a sentence of imprisonment for a serious offence. If it is to remain lawful, its continuance must be justified by a satisfactory explanation establishing that it is reasonably necessary in all the circumstances for the detention to continue for the purpose of his removal.

43. In my judgment, the Secretary of State has supplied a valid justification of the detention to date and of the need for it to continue for a longer period. In addition to the risk that the Appellant will probably abscond if he is now released, the Secretary of State reasonably relies on continuing efforts on his behalf to operate the machinery for the appellant's removal by sensitive negotiations for an agreement with countries neighbouring Afghanistan, for example Pakistan, which would enable removal of the appellant to take place through such a country pursuant to the deportation order.

44. The stage has not yet been reached when it can be said that the negotiations will probably fall through and that there is no real prospect or possibility of the Secretary of State being able to operate the machinery for removing the appellant within a reasonable period. The detention of the appellant continues to be with a view to his deportation under an order remaining in force. It has not been suggested that he is being detained for some other purpose. It has not become unreasonable to enforce the deportation order. There has not therefore been any breach of Article 5.1(f) of the Convention: see *Chahal v. United Kingdom* (1996) EHRR 413 at paragraphs 112-113.

45. In those circumstances I agree with the judge that the detention has not yet become unlawful.

Lord Justice Dyson:

46. There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in *Re* ***Hardial Singh*** [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:

    i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

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

iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.

47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.

48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But 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.

49. Simon Brown LJ has identified the three main points of principle which were in issue in the present appeal, namely the risk of absconding and reoffending, the appellant's refusal to accept voluntary repatriation, and the asylum claim and appeal. As I have already stated, the risk of absconding and offending or reoffending is relevant to the reasonableness of the length of a detention pending deportation. It is, as Simon Brown LJ says "an obviously relevant circumstance" (paragraph 29): see also per Lord Phillips MR in *R v (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] 4 All ER 961, [2001] EWCA Civ 1512, paragraphs 65-67.

50. As regards the significance of the appellant's refusal of voluntary repatriation, there appears to be agreement between Simon Brown LJ and Mummery LJ that this is a relevant circumstance, but Mummery LJ considers that it is decisively adverse to the appellant, whereas Simon Brown LJ considers that it is of relatively limited relevance on the facts of the present case. I too consider that it is a relevant circumstance, but in my judgment it is of little weight. Mr Robb submits that a refusal to leave voluntarily is relevant for two reasons. First, the detained person has control over the fact of his detention: if he decided to leave voluntarily, he would not be detained. Secondly, the refusal indicates that he would abscond if released from detention. It is this second feature which has weighed heavily with Mummery LJ.

51. I cannot accept that the first of Mr Robb's reasons is relevant. Of course, if the appellant were to leave voluntarily, he would cease to be detained. But in my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable. If Mr Robb were right, the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect the deportation.

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

53. But there are two important points to be made. First, the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake.

54. Secondly, it is for the Secretary of State to satisfy the court that it *is* right to infer from the refusal by a detained person of an offer of voluntary repatriation that, if released, he or she will abscond. There will no doubt be many cases where the court will be persuaded to draw such an inference. I am not, however, satisfied that this is such a case. It is not at all surprising that this appellant has refused voluntary repatriation. He has not yet exhausted the asylum process, which, if successful, would permit him to remain in the United Kingdom. In these circumstances, why should one infer from the refusal of voluntary repatriation that, if released, he would abscond? In my judgment, the most that can be said is that there is a risk that if he is released the appellant will abscond. But that can be said of most cases. I do not consider that the fact that he has refused the offer of voluntary repatriation adds materially to the evidence that such risk is present in the instance case.

55. As regards the relevance of the appellant's asylum claim and appeal, I agree that for the reasons given by Simon Brown LJ, this is not material to the reasonableness of the length of detention. The reality in the present case is that the appellant has been detained "pending removal" since 7 February 2001, and that, as a matter of fact, the reason why he has not been removed is not because he has been pursuing an asylum claim. It is because the Secretary of State is unable to remove persons to Afghanistan whom he wishes to deport to that country.

56. Taking account of all the circumstances of the case, I am of the opinion that by 29 May 2002, the appellant had been detained for a period that was longer than was reasonable. I take account of the difficulties facing the Secretary of State in effecting removals to Afghanistan and the fact that he has been conducting sensitive negotiations with neighbouring countries to enable removals to take place with their assistance. I also take account of the fact that the appellant has been convicted of criminal offences for which he was sentenced to three years' imprisonment and that he became liable to register as a sex offender. On the

other hand, there is no evidence that he is liable to reoffend. I accept that there is a risk that he will abscond. I find it difficult to assess the seriousness of this risk, but I am not persuaded on the material that has been placed before this court that he will probably abscond. The nature of his detention and its effect on him have been summarised by Simon Brown LJ at paragraph 18 above. Taking account of all these circumstances, I am satisfied that 16 months detention is unreasonably long.

57. I would, therefore, allow this appeal on the simple basis that, on an application of principle (ii) above, by 29 May 2002 the appellant had been in detention for an unreasonable period. If I were of the opinion that a reasonable period had not expired by that date, then I would have to consider principle (iii) and decide whether it has become apparent that the Secretary of State will not be able to effect deportation within a reasonable period I prefer not to express an opinion on this alternative question. There are obvious difficulties in deciding when a reasonable period *will* expire when one has already decided that a reasonable period *has* expired.