

CO/3586/2009

Neutral Citation Number: [2009] EWHC 1655 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 25th June 2009

B e f o r e:

JOHN HOWELL QC

Between:

THE QUEEN ON THE APPLICATION OF AD_

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT_

Defendant

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(Official Shorthand Writers to the Court)

Ms Amanda Weston (instructed by Messrs Pierce Glynn & Partners) appeared on behalf of the **Claimant**

Mr Niazi Fetto (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

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55. THE DEPUTY: In this case the claimant seeks a declaration that his detention by the Home Secretary has become unlawful. He contends that his detention has now exceeded what may have been reasonable or justifiable. Permission to make this claim was given by Mr Keith Lindblom QC sitting as a Deputy High Court Judge on June 5th 2009.
55. The claimant has been detained by the Home Secretary pending his deportation to Somalia since June 20th 2006 under paragraph 2 of schedule 3 to the Immigration Act 1971. His appeal against the decision to deport him was dismissed by the Asylum and Immigration Tribunal on September 30th 2008 following a reconsideration of an earlier tribunal decision. His application for permission to appeal to the Court of Appeal against that decision has been stayed pending a determination by the Court of Appeal of another appeal against a country guidance case relating to Somalia, HH v Secretary of State for the Home Department.
55. This case is a sad reminder of the continuing difficulties in securing the removal of foreign nationals who commit criminal offences in this country which make their continued presence here undesirable.

The law

55. There has had been little dispute in substance between the parties on the law which falls to be applied in this case. Paragraph 2(2) of schedule 3 to the Immigration Act 1971 provides that:

"Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order."

55. In paragraph 2(2), the word "pending" simply means "until". However, as Toulson LJ stated in R(A) v Secretary of State for the Home Department [2007] EWCA Civ 804 at [43]:

"... the Home Secretary's exercise of the statutory power to detain a prospective deportee until the making of the deportation order or until his removal or departure is not unfettered. It is limited in two fundamental respects. First, it may be exercised only for the purpose for which the power exists. Secondly, it may be exercised only during such period as is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the case."

Those circumstances may include the length of the detention, its effects on the detainee, the nature of the obstacles preventing removal, the diligence, speed and effectiveness of the steps taken to remove them and the prospect of their removal, the likelihood of the individual's absconding and/or offending if not detained and his willingness to accept

voluntary repatriation.

55. In considering whether, and to that extent, a risk of an individual absconding and/or offending may be taken into account in considering what may be a reasonable time for attempting to bring about his removal or departure, as Toulson LJ put it in A at [43], there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or continued detention of the individual, having regard to all the circumstances, including the risk of absconding and the risk of danger to the public if he were at liberty. Toulson LJ also added:

"54 ... where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made...

55. A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. ... The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

55. Thus, as Dyson LJ concluded in R(M) v Secretary of State for the Home Department [2008] EWCA Civ 307 at [14]:

"... the combination of a risk of absconding and a risk of re-offending may justify allowing the Secretary of State, in the words of Simon Brown LJ in R(I) at para 29, "a substantially longer period of time within which to arrange the detainee's removal abroad". The greater the risks, the longer the period for which detention may be reasonable. But there must come a time when, whatever the magnitude of the risks, the period of detention can no longer be said to be reasonable."

55. The function of this court is not limited to asking whether the Home Secretary's judgment was unreasonable. It is for the court to decide whether the period of detention is lawful. As Toulson LJ put it in A at [62]:

"It must be for the court to determine the legal boundaries of administrative detention. There may be incidental questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself, and the court will no doubt take such account of the Home Secretary's views as

may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court at common law and does not depend on the Human Rights Act (although Human Rights Act jurisprudence would tend in the same direction)."

55. Detention for the purpose of deportation also engages, as is well-known, Article 5 of the European Convention and, as Keene LJ stated in the same case, at [75]:

"... it must be for the court to decide whether or not there is such a breach ... But the ultimate decision is, in my judgment, for the court."

And that obviously includes the question of proportionality of the detention.

Background

55. The claimant was born in 1977. He arrived in the United Kingdom on August 2nd 1997 using a different name. He appeared to be a Somali national and he claimed asylum on arrival. His asylum claim was refused but he was granted exceptional leave to remain for one year on April 13th 1998. He applied for further leave to remain on May 25th 1999 but no decision was ever made on that application.
55. Meanwhile, the claimant embarked on a criminal career in this country. He was convicted for 18 offences between 1998 and 2004. These included robbery, for which he was sentenced to two years' imprisonment; assault occasioning actual bodily harm twice, including once on a prison officer whom he claims racially abused him; possession of an offensive weapon, an axe, in a public place without reasonable excuse; using threatening words or behaviour; seven burglaries, including four, for one of which he was for up to three years' imprisonment in 2001; theft; and two convictions for failing to surrender into custody. These offences were mainly committed in circumstances of drug and alcohol abuse and a number were committed whilst the claimant was on bail or subject to licence following release from imprisonment having served the custodial part of the sentence.
55. The claimant was served with a notice of liability for deportation on June 28th 2004. However, notwithstanding that, on October 13th 2004 he undertook a further non-dwelling house burglary in relation to which he was sentenced to two and a half years' imprisonment on May 4th 2005.
55. The claimant was due to be released from custody on June 20th 2006. But on that day he was served with a further notice of intention to deport him to Somalia and he was detained by the Home Secretary. He has been in detention since then. He was transferred to Colnbrook Immigration Removal Centre where he remained until February this year.
55. The claimant appealed against the decision to make the deportation order on June 26th 2006. Both the appeal and the decision to make a deportation order in respect of which it was made were subsequently withdrawn in circumstances which are not entirely clear but in respect of which Ms Weston, who appears on behalf of the claimant, made no

criticism. However, following a further interview, a further notice of a decision to make a deportation order was served on the claimant on August 7th 2007. His appeal against that decision was heard by the Asylum and Immigration Tribunal on January 24th 2008 and dismissed on February 6th 2008.

55. On April 22nd 2008, however, the High Court ordered the Tribunal to reconsider its decision. It had arguably erred in law in its consideration of the issue of internal relocation within Somalia when dealing with the claimant's contention that his removal there would infringe his Convention rights as it would expose him to Article 3 ill-treatment. The Tribunal held a hearing as part of that reconsideration on August 3rd 2008. But it again dismissed the claimant's appeal on September 30th 2008 as, in the Tribunal's view, he would not be exposed to a real risk of ill treatment in Somalia by reason of his clan status.
55. The claimant subsequently applied for permission to appeal to the Court of Appeal on October 9th 2008. That application has been stood out of the list awaiting the determination of a test case by the Court of Appeal about Somalia: HH v Secretary of State for the Home Department. The hearing of that test case was itself delayed pending judgment in two cases relating to Iraq concerning the criteria for the humanitarian protection under Article 15 of the Qualification Directive (Council Directive 2004/83/EC). The Court of Appeal delivered judgment in those two cases yesterday, June 24th 2009: see No 1 QD (Iraq) v Secretary of State for the Home Department [2009] EWCA Civ 620.
55. There have been four other developments to which I should refer.
55. First, on August 7th 2005, the claimant's son was born. The claimant no longer has any relationship with his mother. Given his mother's alcohol problems, however, in June 2007 a guardianship order in respect of the claimant's son was made in favour of the claimant's aunt. He has lived with her and her daughter since then. The claimant apparently applied for a contact order as he thought that his aunt and his cousin did not want him to have contact with his son. On December 2nd 2008, Wells Street Family Court granted the claimant leave to withdraw that application. The claimant says that he did so as he had re-established contact with his aunt and that she had agreed to bring his son to Colnbrook more often. Moreover, he says that she was very old and he realised the prospect of a court appearance was putting her through "quite an ordeal". He says that he has spoken to his son over the phone regularly and his son has been to visit him in Colnbrook. Ms Weston has emphasised to me that his desire to have greater contact with his son means that the claimant would have a strong incentive not to abscond or reoffend if not detained. That is a matter to which I shall return.
55. Secondly, it appears that the claimant was involved in a number of incidents after he was detained at Colnbrook. I have seen records from the detention centre about that matter. These reported incidents include aggressive and abusive behaviour and alleged assaults against other detainees, as well as theft from them. Ms Weston told me that the claimant does not accept that he was involved in any criminal activity at Colnbrook but that he accepts that his behaviour was not as good as it should have been. In February 2009, he was moved to Brook Detention Centre. The reason recorded why that move was

requested was that:

"Mr D has been detained at Colnbrook IRC for some time and has frequently been in situations which have seen him relocated to Rule 40 and placed on standard regime. He has got involved with the wrong crowd during his time at Colnbrook and has been involved in several incidents of theft and intimidation of other detainees. Recently relocated to Rule 40 for an alleged assault on a detainee. Mr D was warned by other detainees that he should relocate off the unit for his own safety."

He was subsequently moved from Brook Detention Centre to HMP Bedford in May this year. His solicitors were told that he:

"... has been risk assessed and [the UKBA] are satisfied that he should be held in prison accommodation due to his behaviour whilst in an IRC which has made him unsuitable for detention in an IRC. This is due to reasons of security control; Mr D assaulted a detainee with a telephone and pen stabbing to the victim's head. A search of his room revealed several items adapted into weapons which contained razor blades attached. As a result threats have been made against his life by more than one detainee if he goes back into the centre ... in addition to yesterday's incident he has today secreted a blade and has self harmed."

After an initial period at HMP Bedford, it appears from a statement from the National Offender Management Service that the claimant:

"... conducts himself well and has a good relationship with others on the wing and the director of wing staff. He attends education and has worked well in this area."

55. Thirdly, as will emerge from what I have already said, the claimant has already harmed himself whilst in detention, a matter to which I shall return. A number of occasions are recorded in the notes relating to his conduct at Colnbrook IRC.
55. Fourthly, the claimant has recently participated in a language analysis interview. The results suggest in the Home Secretary's view that he speaks a form of Swahili found in parts of Kenya, although he claims to have remained in Kenya only for five months. Whether he is in fact a Kenyan who can be deported to Kenya is a matter that the Secretary of State is currently investigating.

Consideration

55. In any case, the reasonableness of detaining an individual pending deportation is inevitably sensitive to the particular facts of that case. There is therefore limited benefit in considering in detail how other judges have approached the circumstances in other cases. My attention has been drawn to a number of such other cases and I am grateful to have had my attention drawn to them and I have borne in mind what was said in them.
55. The starting point in this case, in my judgment, is the time which the claimant has already

spent in detention. He has already been detained for three years. This is a very lengthy period indeed and it requires a clear justification. As I have mentioned, Ms Weston does not criticise what occurred between June 2006 and August 2007. But it did mean the decision to deport, against which proceedings are still continuing, was only made once the claimant had been in detention for over a year. The rest of the period has been consumed by the process of his appeal against that decision which is still outstanding. That does not require the lengthy period of detention which he has already undergone to be disregarded, indeed it cannot be ignored, but it is a factor that is not irrelevant in considering its reasonableness.

55. The second matter which in my judgment is of considerable significance, given the very considerable period already spent in detention, concerns the prospect of removing the claimant from this country.
55. The Secretary of State is investigating whether the claimant is a Kenyan and, if so, whether he can be deported there. The reason why this matter is only now being investigated is apparently because of a trial programme in which the claimant agreed to take part which led to his language interview. Whether the claimant may be deported to Kenya, however, is entirely speculative at this stage. The Home Secretary has not yet established to his own satisfaction that the claimant is a Kenyan. If he reaches that conclusion and, if a decision is taken to deport him there, as Mr Fetto (who appeared for the Home Secretary) accepted, the claimant may have a right of appeal to the Asylum and Immigration Tribunal or he may be able to apply for judicial review. He may be expected to use whatever route of challenge he may then have in such circumstances as the Asylum and Immigration Tribunal has already found him to be a Somali of a particular clan on the basis of expert evidence. In my judgment the prospect of his being removed to Kenya in any reasonable period is thus wholly speculative and it is not one to which any significant weight can now be put on the basis of the material available to me. The Secretary of State is concurrently detaining him pending deportation to Somalia and it is to that prospect that the most consideration must be given.
55. The Secretary of State considers that there remains a real prospect of removal to Somalia. The Secretary of State notes, as the Immigration Appeal Tribunal has found, that he is a member of the Maheran sub-clan of the Darod clan, which is not a minority clan in Somalia, and that the Maheran clans dominate the Gedo region of southern Somalia where he could be safely located. That would involve a return to Somalia via Mogadishu.
55. The claimant contends, however, that there is no imminent prospect of his removal to Somalia and in my judgment that must be correct. The claimant's application for permission to the Court of Appeal was stayed until the Court of Appeal's decision on the country guidance case HH had been heard. That case was itself stayed until judgment had been delivered by the Court of Appeal, as it was yesterday, in No 1 QD (Iraq). The Court of Appeal there found that the approach which the Asylum and Immigration Tribunal has been adopting to the test for determining entitlement to humanitarian protection under Article 15 of the Qualification Directive was flawed and it remitted the cases involved to the Asylum and Immigration Tribunal for reconsideration. I am informed by Ms Weston that one of the grounds of the claimant's appeal relates to such

protection.

55. Unsurprisingly, Mr Fetto could not tell me whether the Secretary of State intends to appeal against that decision. But, assuming that he does not, it appears that the Asylum and Immigration Tribunal adopted the same approach to humanitarian protection in HH (which was a country guidance case relating to Somalia). It is possible, therefore, that there would need to be a further country guidance case in respect of Somalia, taking into account not only a revised test for humanitarian protection but also the changed conditions in Somalia. Between the first country guidance case relating to Somalia, HH, and the judgment in the Court of Appeal in No 1 QD (Iraq), but notably after the Asylum and Immigration Tribunal's judgment in the claimant's case, the Asylum and Immigration Tribunal has reviewed its country guidance for Somalia in a further decision, AM and AM v Secretary of State for the Home Department [2008] UKAIT 00091, delivered on 27th January this year.
55. There may also be further litigation relating to Somalia that needs to be taken into account in assessing the prospects for the claimant's removal to Somalia. It appears from a letter from the Registrar to the European Court of Human Rights, dated March 2nd this year, that the European Court of Human Rights had been granting Rule 39 requests for interim measures to restrain removals to Mogadishu; that that court will give a judgement upon returns to Mogadishu once the Court of Appeal in this country has given judgment in HH v Secretary of State for the Home Department; and that the interim measures granted will not be lifted until then.
55. Plainly how all this may affect the claimant's case must be a matter for some speculation. Mr Fetto was unable to provide me with any estimate of the earliest realistic date by which the Home Secretary anticipated the claimant could be removed. But I should be surprised, given the likely nature of the further litigation to which the test of humanitarian protection gives rise and other cases involving the return of Somalia nationals, even leaving aside any prospect of future changes of conditions in Somalia, that there is any realistic possibility of the claimant being removed until well into next year, even if he cannot show in any new Asylum and Immigration Tribunal hearing, if one is required, that he satisfies the new test propounded by the Court of Appeal. Given the possibility of further appeals, that prospect of removal may itself be over optimistic. The position therefore, in my judgment, is that the claimant may be facing over four years' detention before he may be removed.
55. In that respect, I must take into account the evidence that I have heard about the effect of detention on the claimant. He claims that his continued detention is having a adverse effect on his mental health. In his witness statement, he asserts that he suffers from depression and some form of Post-Traumatic Stress Disorder. He said that he was diagnosed as being depressed while in Colnbrook and given counselling but that he stopped attending the sessions there. It appears from a record by Dr Hajioff, a consultant psychiatrist, who has been employed by the Home Office as a visiting psychiatrist at Pentonville prison for the past 15 years, that the claimant has been proscribed anti-depressant medication.
55. The claimant also says that he has felt suicidal. There have been incidents in which he

has harmed himself recorded at Colnbrook. Dr Hajioff states:

"He did not carry out any deliberate self harm before 2007. He began by hitting his head against a wall and went on to cutting his left arm, chest and upper abdomen. On one occasion he smashed a window with his right hand, causing cuts on the little finger of his wrist. On another occasion he broke off a fragment of a razor blade and swallowed it.

I examined him and found scars on his head and face, his chest and upper abdomen, his left arm and right risk and right shin, where there is an underlying deformity of the bone ... The scars were evaluated on the Istanbul Protocol and I enclose a note of classification. On that scale I regard the scars on his chest and arm as highly consistent with his account of how he inflicted them. His scars on the head, right shin and right wrist are consistent with this account."

55. Mr Hajioff did not confirm the claimant's suspicion that he has PTSD but he did find that he was depressed and he stated that:

"I believe that his detention separated from his son would contribute to his continued depression. His bad conduct in prison is probably related to frustration from being separated from his son and remaining uncertain about what will happen to him. Prolonged detention will make him more depressed and frustrated and lead to irritability and aggressive behaviour."

55. I remind myself of what Dyson LJ said in R(M) v the Secretary of State for the Home Department [2008] EWCA Civ 307 at [39]:

"... the critical question in such cases is whether facilities for treating the person whilst in detention are available so as to keep the illness under control and prevent suffering."

There is nothing to indicate that the claimant cannot receive appropriate treatment for depression if he remains in detention. Nonetheless, I bear in mind that he will need to receive treatment for it. He also says that he feels frustrated because he has had to see his son in detention and would like to see more of him. I accept that the claimant considers this detention has prevented him, and will continue to prevent him, playing a greater role in the upbringing of his son and that he would wish to do that. But I also bear in mind that the Asylum and Immigration Tribunal considered that his deportation would result in his separation from his son but would not be a disproportionate interference of his rights under Article 8. I consider therefore that continued detention is likely to cause the claimant continued depression, although he can receive treatment for it, and it will restrict the opportunities he has for developing a relationship with his son, which will no doubt add to his frustration and continuing depression.

55. The Secretary of State not unreasonably refers to the risk of the claimant reoffending and absconding if he is not detained. I have referred to the claimant's record of offending. It is continuous and serious. So far as threats to persons are concerned, he has been

convicted of robbery (he received a sentence of two years) and assault occasioning actual bodily harm twice, for which the larger of the two sentences was four months, quite apart from being found in a public place with an axe without reasonable excuse. Moreover, the cause of his having been placed in HMP Bedford appears to have been a serious assault. Moreover, offences against the person are not the only serious offences of which he has been convicted. The claimant has been convicted of six dwelling house burglaries in addition to two non-dwelling house burglaries. As the Home Secretary rightly points out, when at liberty the claimant has demonstrated a pattern of repeated criminal behaviour and it appears that a probation service report before he was sentenced in May 2005 assessed the claimant as having a high risk of reoffending and as presenting a medium to high risk of harm to members of the public.

55. The Claimant points out, however, that the offences were committed over five years ago when he was younger and drug dependent. He says that he has addressed his problems of substance abuse and is now no longer addicted to alcohol and drugs and he has produced a negative test this month which he undertook in HMP Bedford. He says that the reason he offended previously after release was that he remained in contact with the group taking drugs and committing crimes, with whom he is no longer in contact. He complains that there has been no reassessment of the risk to the public following the completion of his custodial term and that his desire to maintain better contact with his son provides him with a powerful incentive not to reoffend.
55. The prospect of his reoffending was considered by the Asylum and Immigration Tribunal in February 2008. In their decision, the Tribunal stated:

"While he states that he is now no longer dependent on harmful substances, having eliminated this dependence while in custody, he has in the past been in custody for lengthy periods of time during which he would perforce have abstained from addictive substances and eliminated his dependency upon them, only to return to criminal behaviour and misuse of substances. While he states that he is now committed to reforming his behaviour in order to provide his son with a dependable father, the risk of the appellant returning to criminal behaviour is not shown adequately to be eliminated. The report of the appellant's forensic psychiatrist, Dr Khatan, contains the observation:

'Because of his history of using illegal drugs and alcohol, it is not possible to say with certainty that he presents no risk of reverting to drug and/or alcohol abuse were he to be released ... and allowed to remain in the United Kingdom.'

We consider this to be, at least, a properly cautious assessment. Dr Khatan goes on to express the probability that given a realistic threat of deportation the appellant would not revert to using abusive substances. We are unable to accept as persuasive this hopeful assessment because past experience shows that previous threat of deportation did not prevent the appellant from further offence. More particularly, having been served with notice of a decision to make a deportation order on 28th June 2004, the appellant nevertheless went on to commit further a further serious offence of

burglary, according to his established pattern of offending, on 13th October 2004. The further opinion of Dr Khatan, that given proper medication, supervision, treatment, testing and counselling, the appellant may be able to control misuse of substances and accordingly to remove a factor to which his criminal behaviour is tightly lined ... appears to us to demonstrate rather than to show as adequately eliminated, the risk that the appellant continues to pose to the public.

...

While it may well that with sufficiently intensive support the appellant may have some prospect of reformation, particularly if he has a genuine concern for his son (as appears to us to be case), we nevertheless conclude that there remains a considerable risk to the public in placing him at liberty. We do not consider that there is demonstrated such a change in circumstances or outlook for the appellant at present, when compared with previous occasions when he has been set at liberty; that the risk to the public recognised in all relevant reports has been reduced. In all the circumstances, the evidence for the appellant on this point does not serve to rebut the presumption, strongly supported by evidence of the appellant's criminal history, that the appellant constitutes a danger to the community of the United Kingdom."

55. The Home Secretary also refers to the record of the claimant's behaviour in the detention centres that ultimately led to his removal to HMP Bedford. I have already referred to what Dr Hajioff said about that. I am prepared to accept that his frustration in detention may have contributed to his behaviour there but in my view it is more likely than not that the incidents recorded did in fact take place and the claimant's concern to see his son more did not inhibit such behaviour which it was obvious would retard that prospect. In my view therefore, there is plainly a risk of him re-offending but the type of offences which he may commit are not in my judgment of the most grave sort, serious though they undoubtedly are.
55. I must also consider the risk of the claimant absconding. The claimant points out that he claimed asylum on arrival and did not seek to evade the attention of the immigration authorities before he was jailed in 2005, notwithstanding the fact that his exceptional leave to remain ran out in April 1999. The last occasion on which he was convicted of failing to surrender to custody was in 1998 and he says that that was a result of his then unsettled life. I have already referred to the strong incentive which he claims to have not to abscond in the shape of family ties, in particular his relationship with his son, which he wishes to develop. I am sceptical about this profession. The claimant has every incentive to abscond. He faces deportation to a country he now manifestly does not want to go on to. He has used, it would appear, some 13 aliases and has been convicted twice of failing to surrender to custody and he has convictions of offences for dishonesty. The Tribunal did not accept he had told them the truth about his departure from Somalia. He has also not always co-operated with the immigration authorities. The Home Secretary has made a number of requests for biographical data interviews, on September 13th 2007, September 29th 2007, December 26th 2007 and March 29th 2008, but the claimant

refused to co-operate. Indeed, it is also reported that the claimant had told an immigration officer that "he would never do anything to help immigration". I note that some biographical data was received by fax on December 10th 2008 and that the claimant attended a language interview in March this year. He contends that he has been co-operating with the immigration authorities and providing them with data "for a few months now", although there is an issue about how full that the co-operation had been. In my judgment, therefore, the risk of his absconding cannot be dismissed as insignificant, even bearing in mind what he says about his desire to spend more time with his son.

55. In considering the position overall, there is clearly a tension between (a) the risk of the claimant re-offending and the risk of his absconding, which I do not minimise, and (b) the length of the Claimant's detention, the lack of any imminent prospect of his removal and the effect it is having on him. Nonetheless, I bear in mind, as Simon Brown LJ, as he then was, put it in R(I) v Secretary of State for the Home Department [2002] EWCA Civ 888 at paragraph 19:

"... 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."

In my judgment, in all the circumstances, removal is not going to be possible in such a time. I find therefore that the claimant's continued detention would be unlawful. The relief which I propose to grant, subject to submissions to counsel, is that he should be admitted to bail on stringent conditions which would include tagging, daily reporting to an immigration officer or police station and residence at an address to be identified or agreed by the Secretary of State and until those conditions are in place he should not be released.

55. MS WESTON: I am most grateful for the careful attention my Lord has given this case.
55. One matter arises from my Lord's suggestions regarding terms and conditions. I have had an opportunity to discuss them with my learned friend and we had discussed weekly reporting.
55. THE DEPUTY: Right.
55. MS WESTON: And there are some practical difficulties around being able to access reporting centres as frequently as that and also it would interfere with the claimant's attendance on drug support schemes, so --
55. THE DEPUTY: Could I ask, if you have had a discussion about it, is it likely that you may reach agreement about a set of conditions?

55. MS WESTON: It is likely that we will be able to reach a complete agreement, save in respect of stay in contact with some aunt's address and how that will be managed in the tagging framework. But I understand from my learned friend that the Secretary of State would require 48 hours to set up the framework of conditions in any event and I am wondering whether we might try and agree an order within a timeframe like that.
55. THE DEPUTY: Certainly. Could I suggest this as a practical way forward. Obviously it is desirable to try and agree the conditions. If you could draw up an agreed order granting bail and setting out the conditions and submit it to me, I suspect I would not need to come back into court to deal with it. If anything arises, or if you cannot agree, could I suggest that you consider whether the matter can be dealt on the basis of written submissions.
55. MS WESTON: Could I just raise one other technical point and that is that technically if the detention is unlawful the question of bail does not arise. It would be temporary admission on conditions, I think.
55. THE DEPUTY: I am simply doing what I think Mitting J did in another case called Bashir. I am not sitting next week. I am here tomorrow if you can agree anything. I shall be here in the building. But I can no doubt make himself available next week, if you cannot agree anything by tomorrow. What I suggest we do, therefore, is I will rise now, subject to anything else you may wish to raise with me, and if you could inform me about where you have got to and what you would like to do about it, I will arrange either to deal with it on paper or to come back to court to deal with it.
55. MS WESTON: My Lord yes. The only issue that I wanted to raise was costs.
55. THE DEPUTY: Yes.
55. MR FETTO: My Lord, I have not heard an application but, as I am assuming there is an application, I do not resist it, my Lord.
55. THE DEPUTY: The claimant will have his costs to be taxed if not agreed on the standard basis.
55. MS WESTON: I am grateful. I will put the wording detailed assessment of any publicly funded costs in the order, my Lord.
55. THE DEPUTY: Certainly.