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*Hardial Singh.*  
Principles and  
Practice

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PART 1

# Key principles

Donnchadh Greene

# DETENTION

*“Freedom from executive detention is arguably the most fundamental right of all”.*

- Lord Brown in *R (Lumba) v SSHD* [2012] 1 AC 245 at §341 endorsing Lord Bingham’s extrajudicial statement

# UNLAWFUL DETENTION

Detention will be unlawful where:

1. There is no power of detention;
2. Detention is in breach of the *Hardial Singh* principles;
3. A decision to detain is tainted by material public law error (e.g. failure to have regard to or lawfully apply published policy);
4. Detention breaches an article of the European Convention on Human Rights (e.g. arts 5 or 3/8).

# ***FOUR 'LIMBS' OF HARDIAL SINGH***

- In *R (I) v SSHD* [2003] INLR 196 at §46 Dyson LJ identified four distinct propositions governing the legality of Immigration Act detention emerging from Woolf J's judgment in *Hardial Singh*:
  - 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 reasonable diligence and expedition.

# THE COURT'S APPROACH

- The Court makes its own judgment when applying the *Hardial Singh* principles and is not limited to a reviewing jurisdiction: *R(A) v SSHD* [2007] EWCA Civ 804, per Toulson LJ at §62
- However:
  - “[t]here 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” (A at §62).

# THE COURT'S APPROACH

- In making its own judgment on the lawfulness of SSHD's decision to detain, the decision is made on the basis of evidence as known or ought to have been known to SSHD when she made the decision. Hindsight is no part of the exercise: *Fardous v SSHD* [2015] EWCA Civ 931 at §42.

# BURDEN OF PROOF?

- The burden is on the SSHD to establish lawful authority for detention (*Lumba* at §65).
  - In the *Hardial Singh* context *“The main focus of the hearing ... is likely to be the evaluation of whether or not what had occurred was, in all the circumstances, “reasonable”. In that context consideration of the burden of proof seems to be neither apt nor useful”* (*Saleh v SSHD* [2013] EWCA Civ 1378 at § 45)
  - *Cf ZA (Iraq) v SSHD* [2015] EWCA Civ 168, per Sullivan LJ at §17): *“It is for the Secretary of State to demonstrate by evidence that the principles have been adhered to”*



## ***HARDIAL SINGH (I)***

- SSHD must intend to deport the person and can only use the power to detain for that purpose.
  - e.g. in *R (AA (Nigeria)) v SSHD* [2010] EWHC 2265, Cranston J held that AA could not be detained “for his own protection”.

# ***HARDIAL SINGH (IV)***

## Reasonable diligence and expedition

- Relevant to (ii) and (iii) in what is reasonable
- Freestanding ground upon which detention will be unlawful, if sufficiently serious: *Krasniqi v SSHD* [2011] EWCA Civ 1549, Carnwath LJ at §12
  - e.g. administrative inactivity of 12 months: *JS (Sudan) v SSHD* [2013] EWCA Civ 1378 at §60.

PART 2

# What is reasonable?

Agata Patyna

## ***HARDIAL SINGH (II) AND (III) – WHAT IS REASONABLE?***

- *Hardial Singh* (ii) principles and (iii) are 'conceptually different', per Lord Dyson in *R (on the application of I) v Secretary of State for the Home Department* [2003] I.N.L.R. 196 [2002] EWCA Civ 888 (cited at §280 of *Lumba and Mighty*):

*'(..) 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.'*

# ***HARDIAL SINGH (II) AND (III) – WHAT IS REASONABLE?***

- The assessment must be case- and fact- specific
- There are no ‘tariff’ periods and so it is inappropriate to cite past cases in support of particular periods which are lawful or unlawful: *Fardous v SSHD* [2015] EWCA Civ 931 at [38] and [40]:

*[38] There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.*

*[40] As much as lawyers and others might like to derive tariffs or guideline periods to be derived from the cases, there are none. Continued attempts to do so are not helpful. They result in the excessive and wholly unnecessary citation of authorities; they waste court time and resources. I hope that there will be no further attempts to do this before the courts or elsewhere.’*

## ***HARDIAL SINGH (II) AND (III) – WHAT IS REASONABLE?***

- There must be a "sufficient prospect" of removal to warrant continued detention, what is sufficient is a question of balance in each case: Toulson LJ in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804
- However, the SSHD need not demonstrate a finite timeframe; *'there can be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all'*: *MM v SSHD* [2012] EWCA Civ 1270, §38.

# ***HARDIAL SINGH (II) AND (III) – WHAT IS REASONABLE? - RELEVANT FACTORS***

Per Dyson LJ in *R (I)* [48], approved in *Lumba* [104]

- Length of detention
- Nature of obstacles to removal (and degree of certainty / uncertainty)
  - Litigation / challenges
  - Cooperation of detainee
  - Emergency travel documents
- Diligence, speed and effectiveness of attempts to surmount obstacles

# ***HARDIAL SINGH (II) AND (III) – WHAT IS REASONABLE? - RELEVANT FACTORS***

Per Dyson LJ in *R (I)* [48], approved in *Lumba* [104]

- Conditions in which the detainee is being kept
- Impact on detainee and family
- Risk of absconding
  - *“paramount”* consideration – *Lumba* [121] but not a trump card) *‘the acid test is always whether there is a realistic prospect of effecting a return’*: *Babbage* [2016] EWHC 148, at [90].
- Risk of offending
  - *“paramount”* consideration but not a trump card) – this takes into account *‘both the likelihood of it occurring and the potential gravity of the consequences’*: *R (A)*



# ***HARDIAL SINGH (II) AND (III) - WHAT IS REASONABLE? - RELEVANT FACTORS***

- List from *R (I)* is not exhaustive, there may be other factors which will be relevant
- E.g. the fact a detainee is mentally ill is a relevant factor (see, e.g., *R(M) v SSHD* [2008] EWCA Civ 307 and *Lumba*)
  - Dyson LJ at [39]: *"I accept that, if it is shown that a person's detention has caused or contributed to his suffering mental illness, this is a factor which in principle should be taken into account in assessing the reasonableness of the length of the detention. But 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."*
  - Lady Hale at [218]: *"When considering what was a reasonable period for which to detain Mr Lumba in accordance with the Hardial Singh principles, however, I would stress that his psychiatric condition must be among the factors to be taken into account."*

# ***HARDIAL SINGH (II) AND (III) - WHAT IS REASONABLE? - RELEVANT FACTORS***

- Adults at risk: Adults at Risk in Immigration Detention statutory guidance
- Victims of torture
- Victims of trafficking: Adults at risk: Detention of potential or confirmed victims of modern slavery
  - See also *EOG & Anor v Secretary of State for the Home Department* [2022] EWCA Civ 307, § 91 on delays in the NRM process
- Detention within removal centre vs prison estate

# ***HARDIAL SINGH (II) AND (III) – LEGAL PROCEEDINGS DELAYING REMOVAL***

- *Lumba* ( § § 111-121) rejected ‘exclusionary rule’ argument that the time taken to resolve legal challenges brought by an individual against deportation should generally be left out of account in considering whether a reasonable period of detention has elapsed
- Courts are able to assess if a challenge is hopeless or abusive or prima facie merits of appeal
  - certification under section 94(2) or 96 of the Nationality, Immigration and Asylum Act 2002
  - previous determinations assessing the person to lack credibility
  - orders for reconsideration, grants of permission by higher courts
  - (fresh claims)

# ***HARDIAL SINGH (II) AND (III) – LEGAL PROCEEDINGS DELAYING REMOVAL***

- *“If a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his detention during the challenge should be given minimal weight in assessing what is a reasonable period of detention in all the circumstances. On the other hand, the fact that a meritorious appeal is being pursued does not mean that the period of detention during the appeal should necessarily be taken into account in its entirety for the benefit of the detained person. (...) The risks of absconding and re-offending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one.’ [121]*

# ***HARDIAL SINGH (II) AND (III) – THE DETAINEE’S CONDUCT***

- ‘Difference between refusal to return voluntarily and non-cooperation / obstruction cases

- Refusal to return voluntarily - if it has any relevance it must be limited (*Lumba*)

*‘the fact that the detained person has refused voluntary return should not be regarded as a ‘trump card’ which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be. That is because otherwise, as I said at para 51 of my judgment in R(I), ‘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.’ If the refusal of voluntary return has any relevance in such cases even if a risk of absconding cannot be inferred from the refusal, it must be limited.’*

(...)

## ***HARDIAL SINGH (II) AND (III) – THE DETAINEE’S CONDUCT***

- ‘However, non-cooperation / obstruction can be a factor which significantly lengthens the reasonable period
- Note wide range of conduct from non-cooperation with ETD to elaborate deception
- *Sino v SSHD* [2011] EWHC 2249 (Admin) [56]:  
*‘(..) it is likely, other things being equal, that a reasonable period for the detention of an individual who does not co-operate in obtaining a travel document may be well be longer than it will be in the case of individual who co-operates. Similarly it is likely, other things being equal, that a reasonable period may be still longer in the case of an individual who seeks to frustrate efforts to obtain one by supplying false or misleading information (leading to false hopes of obtaining, and unsuccessful attempts to obtain, a travel document).’*

# ***HARDIAL SINGH (II) AND (III) – THE DETAINEE’S CONDUCT***

- However, *‘Even in such cases (...) detention cannot continue for a period that is unreasonable in all the circumstances.’*
- SSHD’s response to non-cooperation is also relevant: *NAB v SSHD* [2010] EWHC 3137 at [41]-[42]:

*[42] What the law does not permit, it seems to me, is an indefinite detention of someone who is never going to consent to deportation, without taking all other steps that might be open, but merely sitting back without at least a plan to obtain the end of deportation.*

# **HARDIAL SINGH (II) AND (III) – SECTION 35 PROSECUTION**

- Section 35 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004)
- Not lawful to detain for purpose of s.35 prosecution
- But if threat / pursuit of s.35 prosecution impacts on likelihood of removal, some indirect relevance?
- *JM (Zimbabwe) v SSHD* [2017] 1 WLR 268 at [132]-[133]:

*[132] There may be cases where, (...) it would or could appear to the Secretary of State (...) that the threat of a section 35 prosecution might secure a practical result. The detainee might have said something to immigration officers which indicates a potential weakening in resolve. In my view, such cases will fall in the minority.*

*[133] (...) there may be circumstances (...) where it would/could appear to the Secretary of State that the use of section 35 might secure a practical result, namely a change of heart or mind, making deportation within a reasonable time a realistic prospect. (...)*



# GRACE PERIODS

- Where circumstances change such that detention is no longer compatible with the *Hardial Singh* principles (principle (iii) in particular) is detention immediately unlawful?
- The authorities suggest not. Rather there is a “*period of grace*” to allow the Secretary of State to respond to the change in circumstances and take steps to effect release.
- There is no fixed limit to how long might be allowed. Examples range from a couple of days to 24 days or more.
- See discussion in *AC (Algeria) v SSHD* [2020] WLR 2893
- See recent decisions, inc. on interim relief: *R (Qarani) v Secretary of State for the Home Department* [2017] EWHC 507 (Admin), *R (Merca) v Secretary of State for the Home Department* [2020] EWHC Admin 1479, *R (on the application of Diriye) v Secretary of State for the Home Department* [2020] EWHC 3033 (Admin)

PART 3

# Evidence and procedural issues

Graham Denholm

# SOURCES OF EVIDENCE

- Earlier sessions looked at factors bearing on reasonableness. This session focusses on the practical issues that arise in building a case that the (prospective) period of detention is unreasonable.
- Does so by reference to the factors identified in *R(I)*
- Presentation assumes that context is a potential judicial review claim challenging detention on *Hardial Singh* (ii)/(iii) grounds
- Most of what follows also relevant to civil claims relying on *Hardial Singh* principles
- **NOT INTENDED TO BE EXHAUSTIVE**

# SOURCES OF EVIDENCE

- Your client
  - What documents do they hold?
  - Evidence (in statement) on factors within their knowledge (impact of detention, conditions, how long in cell per day, impact on family life, etc)
  - Critical on relevant matters that are not apparent from docs or where instructions contradict official record
- Other potential witnesses
  - Those impacted by client's detention or whose evidence may bear on relevant matters (spouse or partner / children / colleagues)

# SOURCES OF EVIDENCE

- HOME OFFICE DPU FILE (ELECTRONIC FILE)
  - GCID – Read them all!
  - CID Calendar Events – should record reporting
  - Detainee Detention History / ASU Call Notes
  - Minute of Decision to Detain (sometimes in electronic file or reproduced in GCID)
  - Detention Reviews (sometimes in electronic file)
  - Decision letters (sometimes in electronic file)
  - Release referrals (can be elusive)

# SOURCES OF EVIDENCE

- HOME OFFICE DPU FILE (PAPER FILE) (May need to be requested separately)
- Potentially relevant documents include (but not limited to):
  - Manuscript minutes (particularly in cases with long history)
  - Correspondence (including representations and accompanying evidence; release requests and responses)
  - Decision letters
  - Decisions & orders of courts / Tribunals
  - Minute of Decision to Detain / Detention Reviews
  - Medical reports / records

# SOURCES OF EVIDENCE

- HOME OFFICE DPU FILE (PAPER FILE) (Continued)
  - Rule 35 reports & response letters
  - Bail applications, bail summaries, bail decisions
  - Release documentation (including bail conditions, etc)
  - IFS documents
  - Bio data documents & documents relating to ETD applications (**not always on file**)
  - OASYS / NOMS1 documents
  - Sentencing comments, pre-sentence reports

# SOURCES OF EVIDENCE

- SAB requests to other public bodies (depending on case)
  - Ministry of Justice
    - OASYS reports, PSR
    - Criminal record
    - Licence conditions
    - Records of conduct in custody
  - Salvation Army (in trafficking cases)



# SOURCES OF EVIDENCE

- SAB requests to other public bodies (continued)
- Social Services
  - May be relevant in family separation cases or other cases in which welfare of children a live issue (impact of detention on wider family is relevant factor)
    - NB: In any case in which conduct of or evidence from family proceedings may be relevant, it is critical to bear in mind restrictions on disclosing documents from family cases without court's permission – see article on Free Movement by Rachel Francis – *Disclosure of documents from family court proceedings*

# SOURCES OF EVIDENCE

- Medical records
  - GP records (in the community / prison / IRC)
  - If relevant, hospital records
- Expert medical reports
  - Where mental and/or physical illness a factor bearing on detention
  - Forensic psychologist or psychiatrist re offend risk
  - ISW and/or child psychiatrist / psychologist in family cases
  - See Adults at risk in immigration detention v7.0, section on External medical reports

# SOURCES OF EVIDENCE

- Other expert evidence?
  - Removability is often the critical issue in a *Hardial Singh* challenge
  - Can raise complex questions re admissibility to country of origin
  - Can be bound up with allegations that client claimed false nationality
  - There may be cases where instructing a country expert might assist

# SOURCES OF EVIDENCE

- Reported cases
  - If you have to deal with e.g. removability to a particular country or ETD process for a particular country there may be reported cases which deal with this
    - Example re Eritrea - *SW v SSHD* [2020] EWHC 2118 (Admin)
  - Country guidance cases or other reported UT immigration cases may also assist re documentation, removability, etc

# SOURCES OF EVIDENCE

- Previous advisors files
  - Immigration solicitors / advisors
  - Criminal solicitors?
  - Family solicitors? (Again, note restrictions re disclosure of evidence from family cases)

# SOURCES OF EVIDENCE

- At the outset:
  - You may not have much.
  - Obtain as much as you can from client
  - Bail summaries / IFS - can be useful in the absence of other materials as they should include a detailed chronology (do not assume accuracy!)
  - Judgement to be made about how long to spend gathering evidence before you begin proceedings
  - Utmost care needed not to mislead court where you hold limited documentation
  - Be clear about what you have and what you do not have and the sources of your information

# SOURCES OF EVIDENCE

- SEEKING DISCLOSURE
  - In pre-action letter and/or in proceedings
  - Can be quicker than DPU application
  - Where you have DPU file(s) and/or disclosure you may have grounds to suspect incomplete. Options:
    - Raise in correspondence
    - Part 18 (information)
    - Application for specific disclosure (documents)
      - » Internal emails, release referrals, correspondence with embassies re ETDs, internal ETD guidance can all be missing
  - Example (in context of civil claim): *AZT v The Home Office* [2019] EWHC 4 (QB)

# SOURCES OF EVIDENCE

- BARRIERS TO REMOVAL

- Country Returns Guide (<https://www.gov.uk/government/publications/country-returns-guide>)
- Old versions on National Archives site (<https://www.nationalarchives.gov.uk/webarchive/>)
- CRG can be vague.
- Home Office (Returns Logistics) maintain more detailed internal guidance in relation to some countries and sometimes publish Operational Updates where situation is changing. Worth requesting this.



# LENGTH OF DETENTION / OBSTACLES

- How long has your client been detained? (not always clear)
- Prospective length of detention often critical. The longer the period to removal the harder detention is to justify
  - What are barriers to removal?
  - How long will they take to resolve?

# LENGTH OF DETENTION / OBSTACLES

- LEGAL BARRIERS
  - Asylum or HR claim
  - Further reps
  - Ongoing refugee status revocation procedure
  - Appeal / JR / other domestic proceedings / Strasbourg proceedings
    - Consider merits? (less weight if clearly unmeritorious)
    - What stage? Likely timescale to (potential) resolution? Evidence?
    - Have Home Office done (or failed to do) anything to expedite?
    - If proceedings delayed (e.g. adjournments) – whose fault?

# LENGTH OF DETENTION / OBSTACLES

- PRACTICAL BARRIERS
  - Issues with ETD process (delays or no process at all?)
  - Certain countries permit only voluntary return (e.g. Zimbabwe?, Russia)
  - Certain countries very slow issuing ETDs and/or have criteria that not all potential returnees can satisfy
  - Lack of viable route of return
  - Obstruction by client?
    - Distinction between refusal of voluntary return and non-cooperation with or obstruction of enforced return is significant
    - In non-cooperation cases it is important to have clear instructions on client's position

# DILIGENCE, SPEED AND EFFECTIVENESS

- Look to internal records, e.g.
  - GCID
  - Detention Reviews
  - Procedural history of appeals / JRs
  - How promptly were ETD applications made? Were they diligently pursued?
  - Appointments / calls / hearings missed due to Home Office error?
- Approach evidence of progress with a critical eye – repeated internal discussions or interviews with client may give appearance of diligence but, on proper examination, not be progressive of case

# CONDITIONS

- Unlikely to be apparent from paper records – instructions required
- Issues to consider (amongst others):
  - Disability or medical condition relevant to impact?
  - Distance from family? Visits possible?
  - How long confined to cell each day?
  - Access to recreational / educational pursuits?
  - Allegations of harassment or bullying (staff or other detainees / inmates)?
  - Drug use in facility
  - Dietary issues?
  - Medical treatment (or lack of)
- Anything to corroborate account?

# IMPACT OF DETENTION ON DETAINEE & FAMILY

- Instructions
  - From detainee and, where relevant, family members
- Statements
- Helpful material in medical records or reports prepared for purpose of asylum/human rights claim?
- Need for psychiatric or other expert evidence on impact?
- ISW report?

# ABSCOND RISK

- Risk factors (meet with evidence so far as possible)
  - Past absconding / breach of bail conditions [GCID / CID Calendar]
  - Criminal record (serious offending, dishonesty, documentation offences, breach of orders) [PNC / OASYS / GCID]
  - Lack of ties
  - Illegal entry / overstaying / illegal working (days / weeks / months / years?)
  - Use of aliases?
  - Adverse judicial findings (bail refusals, appeal decisions, previous JRs, etc)
  - Deception / obstruction of process through deception or physical disruption
  - End of the road (no outstanding reps, appeals)
  - Imminent removal

# ABSCOND RISK

- Protective factors
  - Past compliance with conditions / court orders / etc
    - *Particularly significant where at risk of detention / removal*
  - Ties in community (spouse/partner, children, parents, siblings, social network, etc)
  - Absence of past criminality / low level criminality / one off conviction?
  - Evidence of cooperation with removals process
  - Outstanding reps / JR / appeal (unless demonstrably unmeritorious)
  - ? Medical issues (need to stay in touch with doctors)
  - Settled accommodation



# RISK OF OFFENDING AND PUBLIC HARM

- Unlikely to be an issue in non-deportation cases
- Consider client's history and criminal record
- Look to OASYS reports / NOMS1 assessments if available
- Judicial findings? E.g. section 72 in immigration appeal; bail refusals
- **If evidence suggests risk consider how it might be countered:**
  - Evidence of rehabilitation
  - Protective factors (family, children, probation supervision, etc)
  - Report from forensic psychiatrist / psychologist?
  - Victim of trafficking for forced criminality?
- Note that Home Office / judicial conception of "harm" may differ from that used by Probation - *SSH D v Jobe* [2016] EWCA Civ 1035

# TACTICAL & PROCEDURAL ISSUES

- Judicial review or bail?
  - Bail application unlikely to prejudice JR (IMO!)
- In judicial review cases consider relevant parts of *Administrative Court judicial review guide*
- Interim relief
  - Consider whether viable – no point taking up time with application if not
  - Critical to bear in mind recent authorities on approach to urgent applications:
    - *DVP v SSHD* [2021] 4 W.L.R. 75 – Claimant’s duty of candour; abuse of urgent applications procedure
    - RE: AN APPLICATION FOR JUDICIAL REVIEW [2021] WLR 6121 – Use of urgent procedure to seek non-urgent directions deprecated

# TACTICAL & PROCEDURAL ISSUES

- Need to make realistic judgment about expedition
  - Pushing for greater expedition than can be justified may backfire
  - In almost all cases Court is likely to want considered response from Home Office and will allow sufficient time for this (but will not tolerate repeated delays in this being provided)
- Public law nature of challenges
  - Remember these are public law challenges. In *Hardial Singh* cases the court stands in the shoes of the decision maker, but makes judgement by reference to what was before SSHD.
  - If relying on new evidence it may well be appropriate to serve on SSHD first and seek urgent review of detention before issuing claim.

CONCLUSION

QUESTIONS