

You are here: [Home](#) / [Detention](#) / What is a “reasonable period” for immigration detention?

What is a “reasonable period” for immigration detention?

10 APRIL 2015 BY JAMES PACKER

LEAVE A COMMENT



In a short but powerful judgment the Court of Appeal has clarified the approach to continued detention on the basis that removal can be effected within a reasonable time. The decision is also important for the analysis of case law concerning detention where the prospects of effecting return depend upon changing circumstances in the proposed destination country.

The seemingly open-ended powers of the immigration authorities to detain migrants with a view to their removal are subject to the qualification of the *Hardial Singh* principles, as encapsulated in paragraph 22 of *Lumba*:

- “
- (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 a reasonable period, he should not seek to exercise the power of detention;
 - (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

The Court of Appeal has given further guidance on the application of those principles in the new case of *ZA (Iraq)* [\[2015\] EWCA Civ 168](#).

In that case one of the points of contention between the parties was whether, when assessing at a given moment the question of whether continued detention can be justified on the basis that there is a reasonable prospect of removing the detainee in the future within 'a reasonable period', the length of time that the detainee has already spent in immigration detention is a relevant factor. The Home Office argued that the sole criteria was whether, looking forward, removal could take place within a reasonable time, and that past detention was only relevant to the question of whether the overall length of detention would be excessive.

Given the importance of this issue, and the fact that in the very nature of this type of case this question will arise in nearly every instance, it is perhaps surprising that there was no clear authority on this point before this judgment. That has now been remedied:

“ What is a “reasonable period” for effecting return in any particular case will depend on all the circumstances, but one of the factors which will be highly relevant will be the length of time that the detainee has already spent in detention. A belief that it may be possible to effect removal within a reasonable time of someone who has just been detained may be justified even if it is based on little more than a hope that the security situation in the receiving country may improve (as appears to have been the basis for the Secretary of State’s view in *Mahmoud*), but it does not follow that the position will be the same if the person whose removal must be effected within a “reasonable time” has already been in detention for a long time... [21]

Reliance upon earlier decisions regarding the destination country

The Home Office repeated their argument that had persuaded Mr. Ockelton (sitting as a Deputy High Court Judge) in the Administrative Court, that

“ ...a number of decisions of the Administrative Court dealing with the prospects of removal to Iraq ... demonstrated that throughout the period of six and a half years from March 2005 – September 2011 it had not been possible to show that the prospect of removal to Iraq was so remote that detention for that purpose was unlawful. [6]

The Court of Appeal dismissed this approach as “...to put it charitably, over simplistic” [12].

Applying the principle above, the fact that the detention of one claimant on that basis had been found to be lawful up to a certain date did not mean that all claimants detained on the same basis would be in the same position, noting for example that:

The Court of Appeal dismissed this approach as “...to put it charitably, over simplistic”...

“ ... Mahmoud is of no assistance to the Respondent [because] the Respondent’s submissions overlook the fact that Mr. Mahmoud’s detention began in May 2008. Initially, two mistaken beliefs were held by the Secretary of State: that Mr. Mahmoud could be returned to the KRG and that he could return voluntarily (paragraph 52). The fact that, in due course, both of these beliefs were shown to be mistaken (paragraphs 55 and 56) would not mean that the early months of Mr. Mahmoud’s detention after May 2008 were unlawful.” [21]

The judgment also includes a helpful analysis of previous caselaw concerning detention on the basis that an enforced return to Iraq may have become possible [12]-[23].

Inconsistent submissions

The Court was also clearly concerned that having throughout the period that the claimant was detained (he was released following the grant of permission for judicial review in the High Court) justified the detention on the basis that the claimant was an absconson risk because he was refusing to return voluntarily to Iraq, the defendant then switched tack and argued that detention had been justified

because the claimant may have decided to return voluntarily [8]-[11]

“ We asked Mr. Staker to explain why it had apparently been submitted to the Deputy Judge that the Respondent had at all relevant times been entitled to take the view that the Appellant might co-operate in the removal process, when it was the Respondent’s own case in both her Summary and Detailed Grounds that throughout the relevant period the Appellant was refusing repeated requests to depart on a voluntary basis under the FRS. After a short adjournment to enable him to take instructions, Mr. Staker replied that it was the Respondent’s position that the fact that a deportee had declined to return on a voluntary basis at an earlier stage in the process did not mean that they would necessarily maintain that attitude for the future. As a general proposition that is true, but it does not explain why the Respondent advanced a submission which was contrary to her own Summary and Detailed Grounds in this case. [11]

Finally, the Home Office apparently needed reminding that the burden of proving that detention is lawful lies upon them:

“ In an attempt to overcome the lack of any evidence to support the Respondent’s case ... Mr. Staker submitted that the correct test was not whether the Secretary of State had any reason to believe that removal could be effected within a reasonable time, but whether the Secretary of State had any reason to believe that removal could not be effected within a reasonable time, and there was no evidence of any such reason in the present case. This submission is flawed ... [a]s a matter of principle, the onus is on the Secretary of State to justify the lawfulness of continued detention. [23]

While the decision in this case is to be welcomed, it underlines that the concerns expressed in [The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom](#) (a joint inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration) about the use of immigration detention are well founded:

“ The United Kingdom is an outlier in not having a time limit, both within the EU and further afield, on the length of time an individual can be detained for immigration purposes. The evidence received from the Immigration Minister and the Home Office’s guidance on detention show that the Government’s stated policy is that detention should be used sparingly and for the shortest possible time. However, in practice this guidance is not being adhered to. As a result, detainees are held indefinitely, which creates a stressful and anxious environment. This has significant mental health costs for detainees. Additionally, long-term detention is not correlated with an increase in the likelihood that the Government will be able to effect removal – indeed the opposite is true.

We can but hope that the many sensible and humane recommendations in the Report are acted upon by the next government.

The author, James Packer, represents ZA

Share this:



Related



The Outer Limit

In "Cases"

Five years of immigration detention ruled unlawful

Five years of immigration detention ruled unlawful

In "Cases"

Detention unlawful when Secretary of State faffs around

In "Cases"

FILED UNDER: DETENTION

TAGGED WITH: CASES, COURT OF APPEAL



About James Packer

'Exceptionally diligent' and 'Exceptional' is what Legal 500 2013 says about James Packer. James has been recognised as a Leading Lawyer in his Field within the Chambers UK 2014 edition and has been highly recommended for his expertise by Legal 500 2013 for both his Public Law and Immigration work.



The Free Movement immigration law blog is written by members of the immigration team at Garden Court Chambers in London, ranked as top tier in both [Chambers and Partners](#) and [The Legal 500](#). The editor is [Colin Yeo](#).

SUBSCRIBE TO EMAIL UPDATES



IN BRIEF

Interesting snippet I just spotted while trawling appeals policies for a major update of the Immigration Act 2014 ebook and course: A ... [\[Read More...\]](#)

Great to see Chelvan's profile on the I Am An Immigrant website. He is an inspirational campaigning lawyer and academic and occasional ... [\[Read More...\]](#)

The Office of the Children's Commissioner is seeking evidence on the impact of the family migration rules on children. You can download the ... [\[Read More...\]](#)

[See older updates](#)

MOST RECENT POSTS

Legal Aid Team to the rescue!

Fun video from Legal Aid Team making a very serious point: I particularly enjoyed Lord Chancellor Graying, his smug civil ... [Read More >>](#)

Home Office confirms that EEA(FM) application form is not mandatory

In a useful policy document explaining internal processes within the UK Visas and Immigration department of the Home Office, it is ... [Read More >>](#)

Court has no "superhero" jurisdiction says Home Office in unlawful detention case

In the case of *Xue v Secretary of State for the Home Department* [2015] EWHC 825 (Admin) the Home Office claimed that the court had ... [Read More >>](#)

February 2015 immigration update podcast

Welcome to the February 2015 edition of the Free Movement immigration update podcast. For February I cover some tribunal, High ... [Read More >>](#)

POSTS BY TOPIC

IN THE FORUMS

-  [Immigration Health Surcharge](#) by [Rizwan Yasin](#)
18 hours, 29 minutes ago
-  [Entry clearance as an adult dependant relative of a British Citizen](#) by [Inderpreet Singh Sachdeva](#)
1 day, 18 hours ago
-  [Consultation on closing the forums](#) by [Colin Yeo](#)
1 day, 18 hours ago
-  [No Curtailment Notice was served – Admin Review?](#) by [Lindoven Magsino](#)
1 day, 19 hours ago
-  [Life in the UK Test: No proof of address](#) by [Lindoven Magsino](#)
1 day, 19 hours ago



HJT TRAINING PROFESSIONALS

HJT'S IMMIGRATION MANUAL (14TH EDITION)

The most up to date and comprehensive guide to UK Immigration law and practice.

Available now. Get your copy.



The Immigration Law Practitioners' Association (ILPA) is a professional membership organisation for those practising in all aspects of immigration, Asylum and Nationality Law. It works to raise standards, disseminate information and to promote a justice and equitable immigration, asylum and nationality law practice.

MEMBERS' FEEDBACK

Feedback from the members-only training courses:



The
su
m
m
er

This
w
as
a
co



Ex
tr
e
m
ely
de

This
co
ur
se
is

A
go
od
an
al
ysi

l
l
i
j
(

Password

Remember Me

LOG IN

[Lost Password?](#)

 Search...

ABOUT

Free Movement was founded by Colin Yeo in 2007 and Colin continues to edit the blog. Other members of the immigration team at Garden Court Chambers and some others also contribute. See [About](#) page for more details.

The blog permits 20 page views per month for free after which you need to sign up for a membership package. These start at £7.99. For more details see the [membership page](#).

DISCLAIMER

The information and commentary on this blog is provided free of charge for information purposes only. The information and commentary does not, and is not intended to, amount to legal advice to any person. For specific legal advice please see the 'Contact' page.

We try to make sure information is accurate at the date it is published. Immigration law changes very rapidly, though. The older the blog post on this site, the more likely it is that there have been legal developments since it was published.

Views expressed in blog posts are those of the author only, not Garden Court Chambers as a whole.

This website uses cookies. We'll assume you're ok with this, but you can opt-out if you wish.

Accept

[Read More](#)