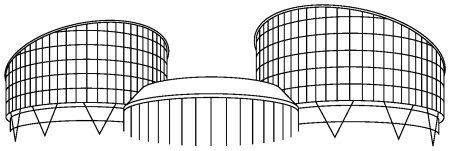

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF J.N. v. THE UNITED KINGDOM

(Application no. 37289/12)

JUDGMENT

STRASBOURG

19 May 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of J.N. v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mirjana Lazarova Trajkovska, *President,*
Kristina Pardalos,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 26 April 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37289/12) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iranian national, Mr J.N. ("the applicant"), on 25 May 2012. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Ms S. Willman of Deighton Pierce Glynn Solicitors, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms M. MacMillan of the Foreign and Commonwealth Office.

3. On 12 February 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

4. The applicant was born in 1971 and lives in Barking.

5. The applicant arrived in the United Kingdom on 7 January 2003. He claimed asylum on 15 January 2003 but his claim was refused by the

Secretary of State for the Home Department on 15 March 2003 and his appeal against that decision was refused on 1 October 2003.

6. On 13 February 2004 the applicant was convicted of indecent assault in relation to an incident involving two fifteen-year old girls and was sentenced to twelve months' imprisonment. He was released on licence on 7 September 2004 but his licence was revoked on 24 September that year because he failed to comply with the terms of the licence.

7. The applicant was re-arrested on 16 January 2005.

B. The first period of immigration detention

8. On 31 March 2005 the applicant was served with the decision to make a deportation order. On the same day he was detained pursuant to the Secretary of State's powers under paragraph 2(3) of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The deportation order was signed on 4 August 2005 and served on him on 12 August 2005.

9. On 5 September 2005 the applicant indicated that he wished to return to Iran. One month later an application was submitted to the Iranian authorities for an emergency travel document to enable him to travel there. However, the application was rejected by the Iranian authorities on 22 November 2005.

10. The applicant was subsequently interviewed at the Iranian Embassy on 15 September 2006. However, two days later the Embassy informed his solicitors that they could not issue a travel document as no formal identification of the applicant had been provided. On 17 October 2006 the Home Office was informed that the Iranian Embassy required a birth certificate before any travel documents could be issued. It appears that the Home Office thereafter proposed to submit copy documents. The Iranian Embassy initially agreed to this proposal, but later refused.

11. On 13 September 2007 the applicant commenced judicial review proceedings challenging his continued detention.

12. On 6 November 2007 the Iranian Embassy agreed to issue a travel document provided that the applicant was prepared to sign a "disclaimer" consenting to his return.

13. On 11 December 2007 the Administrative Court ordered the applicant's release from detention subject to a number of conditions, including that he be subject to a curfew; that he remain at a fixed address; that he report on a weekly basis to the nearest Border and Immigration Agency office; and that he take the steps necessary to obtain travel documents.

14. The applicant refused to sign a "disclaimer" on 14 December 2007. Although he was released on 17 December 2007, four days later the matter was brought back to the Administrative Court and a different judge

discharged the previous order on account of his failure to comply with the conditions for release (namely, that he take the steps necessary to obtain travel documents). As a consequence, the applicant was once again liable to detention.

15. On 27 December 2007 Group 4 Securicor reported that they had on two occasions attempted to visit the applicant at his nominated address to install the equipment required for electronic tagging. Both visits took place during the hours of curfew. Very shortly afterwards the applicant reported a different address to the immigration authorities so that they could continue to communicate with him.

C. The second period of immigration detention

16. On 8 January 2008 an authority was issued for the applicant's detention and on 14 January he was detained while reporting to the immigration authorities.

17. By February 2008 the authorities had been alerted to the fact that the applicant was showing some signs of psychological disturbance, had been diagnosed with "reactive depression" and was receiving medication for his psychological symptoms.

18. On 26 February 2008 the claim for judicial review launched on 13 September 2007 was dismissed.

19. The applicant attended at the Iranian Embassy on 7 April 2008 but no travel document was issued. On 4 June 2008 he again refused to sign a disclaimer.

20. On 25 July 2008 the applicant was alleged to have displayed "inappropriate behaviour" to a female member of immigration staff at a detention centre. His behaviour was also alleged to have been disruptive.

21. In or around September 2008 the immigration authorities discussed the possibility of prosecuting the applicant under section 35 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 for failing without reasonable excuse to comply with the Secretary of State's requirement to take specified action to enable a travel document to be obtained. However, no prosecution was ever mounted.

22. On 13 October 2008 the applicant wrote to the United Kingdom Border Agency, indicating that he would be willing to return to Iran if he were to be compensated for the periods of detention which he had undergone. However, the Border and Immigration Agency refused to agree to any such request.

23. On 6 January 2009, 6 February 2009, March 2009, May 2009, June 2009 and September 2009 the authorities made further attempts to engage the applicant in a voluntary return. However, on each occasion he indicated that he was not willing to co-operate or sign a disclaimer.

24. On 17 March 2009, 9 June 2009 and 7 October 2009 the applicant made three applications for bail to the Asylum and Immigration Tribunal. On each occasion the application was dismissed. The reasons given for the dismissal of the applications included the fact that the applicant could end his own detention by signing the disclaimer.

D. Judicial review proceedings

25. The applicant's solicitors wrote a letter before action on 21 October 2009 and proceedings were issued on 6 November. On 4 December 2009 the High Court granted the applicant permission to apply for judicial review and the Home Office was ordered to release him on bail within forty-eight hours.

26. At the hearing counsel for the applicant argued that both periods of the applicant's detention could properly be looked at as being unlawful, although he focused his attention on the second period. Counsel for the Secretary of State for the Home Department argued – and the court appears to have accepted – that the first period could not be in question legally, since the applicant had been released for one month pursuant to a court order and the order enforcing release had been discharged. However, he conceded that when considering the lawfulness of the second period of detention, the first period of detention would have to be taken into account.

27. In considering the lawfulness of the second period of detention, the Administrative Court judge recalled that the authorities should be free to make strenuous efforts to obtain the assent of a person they proposed to deport. If they were unsuccessful, they could and should seek any way around his consent, for example by persuading the country of origin to issue a travel document without a disclaimer. However, the judge noted that the law did not permit the indefinite detention of someone who was never going to consent to deportation.

28. Bearing that in mind, the judge considered the history of the applicant's second period of detention. He observed that during this period there had been no change in approach to the applicant, no prosecution had been brought under section 35 of the 2004 Act, and there had been no further approach to the Iranian authorities to see if they would change their position.

29. The judge then had regard to the relevant principles of domestic law set out in *R v. The Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 and in the guidance given by the Court of Appeal in both *R (A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 and *WL (Congo) v. Secretary of State for the Home Department* [2010] EWCA Civ 111 (see paragraphs 35-36 below). Applying those principles and the relevant guidance, the judge noted that the most important factor justifying detention was the applicant's refusal to sign the relevant

disclaimer. He further noted that lengthy detention could be justified by the applicant's offending, by the realistic fear that he would further offend and by the genuine and reasonable concern that he might abscond. However, even given those factors, the judge found that there had to come a time when such a sterile tactic as merely sitting and waiting while repeatedly urging the applicant to change his mind, in full expectation that he would not, ceased to be detention genuinely for the purpose of deportation. The judge therefore concluded that "the woeful lack of energy and impetus" applied to this case from at least the middle of 2008 meant that it could not possibly be said that the Secretary of State on this occasion had complied with the obligation in *Hardial Singh* to act with "reasonable diligence and expedition". He therefore held that the applicant's detention had been unlawful from 14 September 2009.

30. With regard to the question of whether there should be guidance on how long it might be appropriate to detain an individual, the judge made the following observations:

> "It cannot be right for the Secretary of State to be led to believe, by looking at a digest of the range of decisions that have been taken, that it is safe to detain for X months or X years.
>
> Equally, it cannot be right for those who are in the positon of being detained for considerable periods, stubbornly refusing to comply with the authority's requests to facilitate voluntary repatriation, to be put in a position of saying, 'If I hold on another year, or two years, or three years, then I am all right'. A tariff is repugnant and wrong, and it seems to me that it would be wise for those preparing legally for such cases to abandon the attempt to ask the courts to set such a tariff by a review of the different periods established in different cases."

31. In a decision dated 13 May 2011 the applicant was awarded GBP 6,150 in damages.

32. The applicant sought permission to appeal. On 31 October 2011 permission to appeal was refused. However, on 7 November 2012 the applicant renewed his application for permission to appeal and on 10 February 2012 he was granted permission to appeal only in respect of the quantum of damages awarded. The outcome of that appeal is unknown.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Hardial Singh principles

33. Limitations on the power to detain an individual in respect of whom a deportation order is in force have been established by the domestic courts. Four distinct principles emerge from the guidance given in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] WLR 704:

> "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 to effect removal."

B. R (A) v. Secretary of State for the Home Department [2007] EWCA Civ 804

34. In *R(A)* Lord Justice Toulson, giving the lead judgment of the Court of Appeal, ruled as follows:

"I accept the submission on behalf of the Home Secretary that 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. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.

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. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. 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."

C. Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department [2011] UKSC 12

35. In the case of *Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department* [2011] UKSC 12 the Supreme Court briefly considered the *Hardial Singh* principles. In his leading judgment, which was accepted by the majority of the court, Lord Dyson found that in assessing the reasonableness of the length of the period of detention, the risk of re-offending would be a relevant factor. In this regard, he noted that if a person re-offended, there was a risk that he would abscond either to evade

arrest or, if he was arrested and prosecuted, that he would receive a custodial sentence. Either way, his re-offending would impede his deportation. He also considered that the pursuit of legal challenges by the foreign national prisoner could be relevant. However, he considered the weight to be given to the time spent on appeals to be fact-sensitive. In this regard, he noted that much more weight should be given to detention during a period when the detained person was pursuing a meritorious appeal than to detention during a period when he was pursuing a hopeless one.

36. Lord Dyson further noted that while it was common ground that the refusal to return voluntarily was relevant to the assessment of the reasonableness of the period of detention because a risk of absconding could be inferred from the refusal, he warned against the danger of drawing such an inference in every case. On the contrary, he considered it necessary to distinguish between cases where the return to the country of origin was possible and cases where it was not. Where return was not possible for reasons extraneous to the person detained, the fact that he was not willing to return voluntarily could not be held against him since his refusal had no causal effect. If return was possible, but the detained person was not willing to go, it would be necessary to consider whether or not he had issued proceedings challenging his deportation. If he had done so, it would be entirely reasonable that he should remain in the United Kingdom pending the determination of those proceedings, unless they were an abuse of process, and his refusal to return voluntarily would be irrelevant. If there were no outstanding legal challenges, the refusal to return voluntarily should not be seen as a trump card which enabled the Secretary of State to continue to detain until deportation could be effected, otherwise the refusal would justify as reasonable any period of detention, however long.

D. R (Muqtaar) v. the Secretary of State for the Home Department [2013] 1 WLR 649

37. In *R (Muqtaar)* the Court of Appeal held that

> "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 with occur at all".

E. R (on the application of Nouazli) v. Secretary of State for the Home Department [2016] UKSC 16

38. In this recent judgment the Supreme Court considered, *inter alia*, whether the absence of a time-limit rendered the applicant's detention unlawful under EU law. The applicant had argued that the absence of time-limits was inconsistent both with the general EU law provisions of

legal certainty and proportionality, and with this Court's case-law under Article 5 § 1 (f) of the Convention.

39. Having found nothing in this Court's case-law to support the contention that mandatory time-limits were a necessary component of the "quality of law" for the purposes of Article 5 § 1(f) or otherwise a general requirement of that provision, Lord Clarke (with whom the other members of the Supreme Court agreed) held that:

> "The courts have recognised that there are sound policy reasons for a flexible and fact-sensitive approach. I find nothing in the judgments of the ECtHR which undermines the *Hardial Singh* approach to the duration of detention. In this regard our attention was drawn to *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, para 94, where Lord Kerr observed that *Hardial Singh* principles are 'more favourable to detainees than Strasbourg requires.'
>
> ...
>
> This is not to say that the absence of time limits is not a relevant factor in deciding in a particular case. This is shown in a number of cases to which we were referred. See, for example six cases against Turkey, namely *Abdolkhani and Karimnia v Turkey* (Application No 30471/08) (unreported) given 22 September 2009, para 135, applied in *ZNS v Turkey* (Application No 21896/08) (unreported) given 19 January 2010, para 56; *Tehrani v Turkey* (Application Nos 32940/08, 41626/08 and 43616/08) (unreported) given 13 April 2010, para 70; *Charahili v Turkey* (Application No 46605/07) (unreported) given 13 April 2010, para 66; *Alipour and Hosseinzadgan v Turkey* (Application Nos 6909/08, 12792/08 and 28960/08) (unreported) given 13 July 2010, para 57; and *Dbouba v Turkey* (Application No 15916/09) (unreported) given 13 July 2010, para 50 ...
>
> See also *Mathloom v Greece* (Application No 48883/07) (unreported) given 24 April 2012 and *Massoud v Malta* (Application No 24340/08) (unreported) given 27 July 2010 to much the same effect. Again, the absence of a time limit was treated as a relevant factor but no more. In each case the ECtHR focused on the importance of having a procedure capable of avoiding the risk of arbitrary detention.
>
> In my judgment in the instant case there is in place a clear statutory framework which involves appropriate judicial scrutiny and the consideration of the guidelines referred to above. In short, each case depends upon its particular facts."

III. RELEVANT COUNCIL OF EUROPE INSTRUMENTS

A. Twenty Guidelines on Forced Return

40. On 4 May 2005 the Committee of Ministers of the Council of Europe adopted twenty guidelines on forced return. Chapter III of this instrument concerns detention pending removal. The relevant guidelines are as follows:

"**Guideline 6. Conditions under which detention may be ordered**

1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host State have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.

2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.

Guideline 7. Obligation to release where the removal arrangements are halted

Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible.

Guideline 8. Length of detention

1. Any detention pending removal shall be for as short a period as possible.

2. In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.

Guideline 9. Judicial remedy against detention

1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful.

2. This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation."

B. Parliamentary Assembly Resolution 1707 on the detention of asylum seekers and irregular migrants in Europe

41. Paragraph 9 of this Resolution, which was adopted by the Assembly on 28 January 2010, provides as follows:

"... the Assembly calls on Member States of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

9.1. follow 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible. These principles aim to ensure that:

9.1.1. detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative;

...

9.1.3. detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review;

9.1.4. detention shall be ordered only for the specific purpose of preventing unauthorised entry into a state's territory or with a view to deportation or extradition;

9.1.5. detention shall not be arbitrary;

9.1.6. detention shall only be used when necessary;

9.1.7. detention shall be proportionate to the objective to be achieved;

...

9.1.10. detention must be for the shortest time possible;

9.2. put into law and practice 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers to ensure that:

...

9.2.3. all detainees must be informed promptly, in simple, non-technical language that they can understand, of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention; during detention, detainees must be provided with the opportunity to make a claim for asylum or complementary/subsidiary protection, and effective access to a fair and satisfactory asylum process with full procedural safeguards;

...

9.2.9. detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge;

9.2.10. detainees must be able periodically to effectively challenge their detention before a court and decisions regarding detention should be reviewed automatically at regular intervals;

..."

IV. RELEVANT EU LAW

A. The Returns Directive

42. Article 15 of Chapter IV of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals ("the Returns Directive") concerns detention for the purposes of removal:

"1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings. The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries."

43. The United Kingdom has "opted out" of the Returns Directive, so that it is not bound by the specific requirements, including time-limits, of the system imposed by the Directive.

B. Case-law of the Court of Justice of the European Union

1. Saïd Shamilovich Kadzoev, *Case C-357/09 PPU*

44. Following a preliminary reference, the Court of Justice of the European Union (Grand Chamber), in its judgment of 30 November 2009 considered the meaning of a "reasonable prospect of removal" under Article 15 of the Returns Directive:

"63 As regards Questions 3(a) and (b), it should be pointed out that, under Article 15(4) of Directive 2008/115, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.

64 As is apparent from Article 15(1) and (5) of Directive 2008/115, the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal.

65 It must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive.

66 Thus a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

67 Consequently, the answer to Questions 3(a) and (b) is that Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods."

2. J. N. v. Staatssecretaris voor Veiligheid en Justitie, Case C‑601/15 PPU

45. Following a preliminary reference concerning the interpretation of Article 8(3) of Directive 2013/33/EU ("the Receptions Directive"), the Court of Justice of the European Union (Grand Chamber), in its judgment of 16 February 2016, made the following comments in respect of the detention of persons who have made applications for international protection:

"Similarly, Article 9(1) of Directive 2013/13 provides that an applicant is to be detained only for as short a period as possible and may be kept in detention only for as long as the grounds set out in Article 8(3) of that directive are applicable. Moreover, when a decision is taken to detain an applicant, significant procedural and legal safeguards must be observed. Thus, under paragraphs 2 and 4 of Article 9 of Directive 2013/13, the decision must state, in writing, the reasons in fact and in law on which it is based and certain information must be provided to the applicant in a language he understands or is reasonably supposed to understand. Paragraphs 3 and 5 of Article 9 set out the procedures which the Member States must establish for review by a judicial authority of the legality of the detention."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

46. The applicant complained under Article 5 § 1 of the Convention that the system of immigration detention in the United Kingdom fell short of the requirements of Article 5 § 1(f) (in particular, on account of the absence of fixed time-limits and automatic judicial review) and that the length of his detention exceeded that reasonably required for its purpose. Article 5 of the Convention provides, insofar as is relevant to the present complaint:

> "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 to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

47. The Government contested that argument.

A. Admissibility

1. Non-exhaustion of domestic remedies

48. The Government submitted that insofar as the applicant complained about the first period of immigration detention (from 31 March 2005 to 17 December 2007) his complaints should be declared inadmissible for failure to exhaust domestic remedies. On 13 September 2007 he had issued a judicial review application to challenge his ongoing detention. However, in the course of those proceedings he had been released on bail. Consequently, he had not pursued this legal challenge and the judicial review application was dismissed on 26 February 2008 without a substantive hearing. In his second judicial review application (issued on 6 November 2009) the applicant focused his complaints on the second period of detention.

49. The applicant did not address this issue in his submissions to the Court.

50. The Court has consistently held that, as the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights, it cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. States are therefore dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke

the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, amongst many authorities, *Sher and Others v. the United Kingdom*, no. 5201/11, § 130, ECHR 2015 (extracts); *Akdivar and Others v. Turkey*, 16 September 1996, § 65, Reports of Judgments and Decisions 1996-IV; and *Gough v. the United Kingdom*, no. 49327/11, § 137, 28 October 2014).

51. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that at the relevant time there existed an effective remedy which was available in theory and in practice, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar*, cited above, § 68 and *Gough*, cited above § 139).

52. In the present case the applicant effectively abandoned his first judicial review application after he was released from detention. Although he later referred to the first period of detention in his second judicial review application, he focused his attention on the second period, presumably because the first period could not be in question legally since he had been released for one month pursuant to a court order and the order enforcing release had been discharged (see paragraph 26 above). The applicant has not advanced any reason for failing to pursue the first judicial review application. Moreover, since the Administrative Court, upon consideration of his second judicial review application, found that his detention from 14 September 2009 onwards had been unlawful and awarded him damages, the Court sees no reason to doubt that, had he pursued the first judicial review application, the domestic courts would have fully considered his complaints concerning the first period of detention and awarded him damages if it was found to have become unlawful at any stage.

53. Therefore, in the circumstances it cannot be said that the applicant has exhausted domestic remedies in respect of the first period of detention. Consequently, insofar as his complaint concerns this period (from 31 March 2005 to 17 December 2007), it must be rejected under Article 35 § 1 of the Convention.

2. "Victim" status

54. The Government submitted that, insofar as the applicant's complaint concerned his detention after 14 September 2009, he could no longer be considered a "victim" within the meaning of Article 34 of the Convention since the domestic courts had expressly acknowledged that his detention had become unlawful and had afforded him adequate redress.

55. The applicant did not address this issue in his submissions to the Court.

56. The Court recalls that an individual can no longer claim to be a "victim" of a violation of the Convention when the national authorities have acknowledged, either expressly or in substance, the breach of the Convention and afforded redress (*Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; and, more recently, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 81, ECHR 2012).

57. In the present case, the Administrative Court expressly held that from 14 September 2009 the applicant's detention had become unlawful and he was awarded GBP 6,150 in damages. Although he was granted leave to appeal in respect of the quantum of damages, the outcome of that appeal is unknown. In any case, in his submissions to this Court the applicant has not suggested that he was awarded insufficient redress in respect of the period of unlawful detention. Consequently, insofar as he now seeks to complain about his detention from 14 September 2009 until his release in early December 2009, the Court considers that the applicant cannot claim to be a "victim" of a violation of the Convention within the meaning of Article 34. This aspect of his complaint must therefore be rejected.

3. Manifestly ill-founded

58. The Government argued that the remainder of the applicant's complaint under Article 5 § 1 of the Convention (that is, his complaint in respect of the period from 14 January 2008 to 14 September 2009) was manifestly ill-founded. However, the Court is satisfied that the complaint raises complex issues of fact and law, such that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

59. The applicant argued that the system of domestic law governing immigration detention in the United Kingdom lacked the "quality of law" required by Article 5 § 1 of the Convention because it was not clear and did not produce foreseeable consequences for individuals. In particular, the applicant argued that in the absence of fixed time-limits the approach of the domestic courts in considering a challenge to the lawfulness of immigration detention was inherently subjective and, as a consequence, there existed

very real uncertainty as to the exact point in time when detention would become unlawful.

60. The applicant further contended that the absence of clear time-limits on the maximum period of immigration detention was impossible to justify since many Contracting States have now imposed such time-limits. In particular, he argued that the Returns Directive was indicative of an increasing consensus among European States that indefinite immigration detention was not consistent with basic standards of human rights, and that limitations on maximum periods of detention were not inconsistent with effective border control.

61. In this regard, the applicant did not accept that the addition of a fixed time-limit would increase incentives for detainees to refuse to cooperate with the State's efforts to deport or extradite them. A detainee's cooperation would not necessarily be required to effect a removal. However, even if it were, a time-limit such as that provided for under the Returns Directive (a maximum period of eighteen months) would still permit detention for a lengthy period and would thus provide an obvious reason for detainees to cooperate. Finally, the applicant submitted that release into the community would not necessarily prevent incentives to depart (such as restrictions on access to work and benefits) from being imposed.

62. The applicant also argued that automatic independent judicial scrutiny of the legality of detention was particularly important in the immigration context, since in practice it would be extremely difficult for a lay person with a limited knowledge of the English court system – and possibly a limited grasp of the English language – to develop a sufficient understanding of the relevant legal principles to effectively argue that his detention had become unlawful. Furthermore, immigration detainees would likely find legal representation difficult to obtain as legal aid was not currently available for many immigration matters.

63. In addition to his complaint that the system of immigration detention in the United Kingdom did not satisfy the "quality-of-law" requirement under Article 5 § 1(f), the applicant also submitted that, having regard to the particular circumstances of his case, the length of his detention was both unlawful under domestic law, as there had been no realistic prospect of removal prior to 14 September 2009 (the date at which the domestic courts found his detention had become unlawful), and in breach of Article 5 § 1 of the Convention.

(b) The Government

64. The Government submitted that the domestic legal system governing immigration detention was based on the *Hardial Singh* principles, which was a comparable test to that required by Article 5 § 1(f) of the Convention. Furthermore, the application of those principles was foreseeable and produced predictable outcomes based on the relevant circumstances of a

case. Therefore, although domestic law contained no fixed time-limit on the duration of administrative detention, limits were still set by the common law. The fact that the limit was different for different cases according to their individual circumstances did not make the test arbitrary. Rather, it protected detainees from arbitrariness by taking into consideration the circumstances individual to each case.

65. The Government drew the Court's attention to the fact that in practice the overwhelming majority of immigration detentions in the United Kingdom were brief as the individuals concerned were either removed shortly after being detained, or they were released on bail. However, they argued that the adoption of a fixed time-limit would be likely to increase the length of immigration detention as it would provide an incentive for detainees to not cooperate with the authorities' attempts to remove them.

66. The Government further submitted that if the Court were to require a system which only allowed a time-limited period of permissible detention it would effectively be imposing, by the "back door", a system modelled on the Returns Directive, which would subvert the democratic process by which the United Kingdom had lawfully and properly "opted out" of that Directive. It would also impose the system provided for by that Directive on those Council of Europe States that were not members of the European Union or the European Economic Area.

67. In addition, the Government contended that Article 5 of the Convention did not require automatic judicial oversight of detention. On the contrary, Article 5 § 4 required nothing more than that an individual be entitled to take proceedings by which the lawfulness of his detention should be determined "speedily" by a Court. The system in place in the United Kingdom complied with that requirement, as longer periods of detention were almost always subject to repeated judicial scrutiny through bail applications and by way of judicial review. Systems were in place to inform individuals of their right of challenge, and those rights were well-used in practice.

68. With regard to the circumstances of the case at hand – in particular the seriousness of the applicant's offending and his refusal to cooperate with his removal – the Government submitted that the High Court's assessment that a "reasonable period" had not yet expired prior to 14 September 2009 was not wrong and did not disclosed any violation, either of the *Hardial Singh* principles or of the requirements of Article 5 § 1(f).

(c) The third party intervener

69. Bail for Immigration Detainees ("BID") submitted that without hard-edged legal rules concerning maximum time-limits, or automatic judicial supervision to guard against excessively protracted or otherwise disproportionate detention, domestic law was insufficiently clear, precise

and foreseeable in its application to have the "quality of law" required by Article 5 of the Convention.

70. In this regard, BID submitted that it was common ground amongst the majority of Contracting States of the Council of Europe that administrative detention of foreign nationals for the purposes of expulsion should be subject to maximum time-limits. The United Kingdom was alone among the Member States of the European Union in placing no time-limit on the detention of foreign nationals, as all other Member States were bound by the Returns Directive, which imposed an outer time-limit of eighteen months on the detention of third-country nationals with no entitlement to remain in the European Union. In fact, fifteen Member States imposed more stringent time-limits under domestic law.

71. The absence of a time-limit had been subject to criticism by independent experts and human rights monitoring bodies, including the United Nations Committee Against Torture, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the United Nations High Commissioner for Refugees, and the Commissioner for Human Rights of the Council of Europe. Only recently, the United Nations Human Rights Committee recommended the adoption of statutory time-limits for the detention of immigrants in its seventieth periodic report on the United Kingdom (21 July 2015); and Her Majesty's Chief Inspector of Prisons, the domestic body with oversight of detention in prisons and immigration removal centres, also recommended the adoption of a time-limit for the detention of immigrants in the United Kingdom (12 August 2015).

72. BID further submitted that immigration detainees faced significant impediments in accessing the domestic courts, including reduced access to representation on account of deep cuts to legal aid, barriers of literacy and language, and difficulties in obtaining timely and accurate information regarding their cases.

73. In practice, therefore, the absence of time-limits, together with the absence of automatic judicial oversight of detention, had resulted in increasingly long periods of immigration detention. Indeed, some immigrants had been administratively detained for as long as nine years, purportedly for the purpose of expulsion, even where there was no risk to national security. There existed no separate regime for the vulnerable: among those detained were victims of torture and persons suffering from mental illness.

2. The Court's assessment

(a) General principles

(i) Detention

74. Article 5 of the Convention enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Subparagraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in the immigration context (see, as recent authorities, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162‑63, 19 February 2009).

75. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), be "lawful". In other words, it must conform to the substantive and procedural rules of national law (*Amuur v. France*, 25 June 1996, § 50, Reports 1996−III, and *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 130, 22 September 2009).

76. In assessing the "lawfulness" of detention, the Court may have to ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied.

77. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the "quality of the law". "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007; *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005−... (extracts); *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Amuur*, cited above). Factors relevant to this assessment of the "quality of law" – which are referred to in some cases as "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention (*Abdolkhani and Karimnia*, cited above, § 135 and

Garayev v. Azerbaijan, no. 53688/08, § 99, 10 June 2010); and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention (*Louled Massoud v. Malta*, no. 24340/08, § 71, 27 July 2010).

78. In addition to the requirement of "lawfulness", Article 5 § 1 also requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Saadi v. the United Kingdom*, cited above, § 6; and *Chahal v. the United Kingdom*, 15 November 1996, § 118, *Reports of Judgments and Decisions* 1996-V). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

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

80. One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, *Bozano v. France*, 18 December 1986, Series A no. 111, and *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I). Furthermore, the condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Aerts v. Belgium*, 30 July 1998, § 46, Reports 1998-V; and *Enhorn v. Sweden*, no. 56529/00, § 42, ECHR 2005-I).

81. Where a person has been detained under Article 5 § 1(f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained "with a view to deportation", that is, as long as "action [was] being taken with a view to deportation", Article 5 § 1(f) did not demand that detention be reasonably considered necessary, for example, to prevent the individual from committing an offence or fleeing. It was therefore immaterial whether the underlying decision to expel could be justified under national or Convention law (see *Chahal*, cited above, § 112; *Slivenko v. Latvia* [GC], no. 48321/99, § 146, ECHR 2003 X; *Sadaykov*

v. Bulgaria, no. 75157/01, § 21, 22 May 2008; and *Raza v. Bulgaria*, no. 31465/08, § 72, 11 February 2010).

82. Consequently, the Grand Chamber held in *Chahal* that the principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held that "any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible" (*Chahal*, § 113; see also *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, ECHR 2007-II). Indeed, the Court of Justice of the European Union has made similar points in respect of Article 15 of Directive 2008/115/EC (in the 2009 case of *Kadzoev*) and in respect of Article 9(1) of Directive 2013/13 (in the 2016 case of *J.N.*) (see paragraphs 42 and 44 above).

(ii) Time-limits

83. The Court has unequivocally held that Article 5 § 1(f) of the Convention does not lay down maximum time-limits for detention pending deportation; on the contrary, it has stated that the question whether the length of deportation proceedings could affect the lawfulness of detention under this provision will depend solely on the particular circumstances of each case (see *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10, § 190, 21 July 2015; *Amie and Others v. Bulgaria*, no. 58149/08, § 72, 12 February 2013; *Auad v. Bulgaria*, no. 46390/10, § 128, 11 October 2011; and *Bordovskiy v. Russia*, cited above, § 50, 8 February 2005). Consequently, even where domestic law does lay down time-limits, compliance with those time-limits cannot be regarded as automatically bringing the applicant's detention into line with Article 5 § 1(f) of the Convention (*Gallardo Sanchez v. Italy*, no. 11620/07, § 39, ECHR 2015; *Auad*, cited above, § 131).

84. In a series of Russian cases the Court has considered the existence - or absence – of time-limits on detention pending extradition to be relevant to the assessment of the "quality of law" (see, for example, *Azimov v. Russia*, no. 67474/11, § 171, 18 April 2013; *Ismoilov and Others v. Russia*, no. 2947/06, §§ 139-140, 24 April 2008; *Ryabikin v. Russia*, no. 8320/04, § 129, 19 June 2008; *Muminov v. Russia*, no. 42502/06, § 121, 11 December 2008; and *Nasrulloyev v. Russia*, no. 656/06, §§ 73-74, 11 October 2007). In these cases the Court was addressing a recurring problem of uncertainty over whether a provision of domestic law laying down the procedure and specific time-limits for reviewing detention applied to detention pending extradition. In light of this uncertainty, in a number of those cases the Court held that the domestic law was not sufficiently precise or foreseeable to meet the "quality of law" standard. In other words, the deprivation of liberty to which the applicants were subjected was not

circumscribed by adequate safeguards against arbitrariness (see, for example, *Nasrulloyev*, cited above, § 77).

85. The Court adopted a similar approach in *Louled Massoud*, cited above, § 71, in which it found that the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation. It reaching this conclusion it noted that, in the absence of time-limits, the applicant was subject to an indeterminate period of detention, and the necessity of procedural safeguards (such as an effective remedy by which to contest the lawfulness and length of his detention) therefore became decisive.

86. In *Abdolkhani and Karimnia*, cited above, § 135 and *Garayev*, cited above, § 99 the Court held that in the absence of clear legal provisions establishing the procedure for ordering and extending detention or extradition with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness. Similarly, in *Mathloom v. Greece*, no. 48883/07, § 71, 24 April 2012, although the Court's conclusions refer to the fact that "the relevant provisions of domestic law governing the detention of persons under judicial expulsion do not set the maximum length of such detention", it is clear from the preceding paragraphs that it also viewed as significant the fact that the applicant had been detained for "an unreasonably long period" (more than two years), during which time his expulsion had not been possible. Consequently, the relevant authorities had failed to exercise "due diligence".

(iii) Automatic judicial review

87. Although the Court has made it clear that the existence of an effective remedy by which to contest the lawfulness and length of detention may be a relevant procedural safeguard against arbitrariness (*Louled Massoud*, cited above, § 71), it has not, to date, held that Article 5 § 1(f) requires automatic judicial review of detention pending deportation. In fact, as with time-limits, it has found that the existence of such a remedy will not guarantee that a system of immigration detention complies with the requirements of Article 5 § 1(f) of the Convention; for example, in *Auad*, cited above, § 132 it found that the fact that the applicant's detention was subject to automatic periodic judicial review provided an important safeguard against arbitrariness but could not be regarded as decisive.

88. In the context of Article 5 § 4, the Court has made it clear that that provision's requirement that "everyone who is deprived of his liberty ... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court" does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances (*Louled Massoud*, cited above, § 40). Nevertheless, the Court

has provided some guidance on what might constitute an "effective remedy". First, the remedy must be made available during a person's detention to allow that person to obtain speedy review of its lawfulness. Secondly, that review must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see *Louled Massoud*, cited above, § 40 and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 203, ECHR 2009‑...). Thirdly, the review should also be capable of leading, where appropriate, to release. Finally, it must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see *Muminov*, cited above, § 113, and *Ismoilov*, cited above, § 145, 24 April 2008).

(b) Application of the general principles to the facts of the applicant's case

(i) Does the regime of immigration detention in the United Kingdom comply with the requirements of Article 5 § 1(f) of the Convention?

89. Although the Court has previously considered complaints under Article 5 § 1(f) of the Convention lodged against the United Kingdom (most recently in *Abdi v. the United Kingdom*, no. 27770/08, 9 April 2013 and *Saadi v. the United Kingdom*, cited above), it has not, to date, found that its system of immigration detention in principle failed to comply with the requirements of Article 5 § 1(f). In fact, in *Abdi* the Court had regard to the interpretation of the second *Hardial Singh* principle (the reasonableness of the period of detention) by the Supreme Court in *Lumba and Mighty* (see paragraphs 35 and 36 above) and concluded that its approach was consistent with its own in *Mikolenko v. Estonia*, no. 10664/05, 8 October 2009. However, the applicant submits that the Court's recent case-law should be interpreted so as to read into Article 5 § 1(f) a requirement that detention be subject to a fixed maximum time-limit and/or automatic judicial review.

(α) Time-limits

90. The Court finds nothing in the foregoing case-law to undermine its unequivocal and frequently re-iterated assertion that Article 5 § 1(f) of the Convention does not lay down maximum time-limits for detention pending deportation (see paragraph 83 above). It is clear that the existence or absence of time-limits is one of a number of factors which the Court might take into consideration in its overall assessment of whether domestic law was "sufficiently accessible, precise and foreseeable" (in other words, whether there existed "sufficient procedural safeguards against arbitrariness"). However, in and of themselves they are neither necessary nor sufficient to ensure compliance with the requirements of Article 5 § 1(f) (see, for example, *Gallardo Sanchez*, cited above, § 39, and *Auad*, cited above, § 131, in which the Court made it clear that even if fixed time-limits

were complied with, it would still find an applicant's detention to be in breach of Article 5 § 1(f) if deportation was not pursued with due diligence).

91. It is true that in accordance with the Returns Directive, which is not binding on the United Kingdom (see paragraphs 43 and 66 above), the majority of EU Member States may not detain third-country nationals for the purposes of a returns procedure for more than eighteen months (see paragraph 42 above), and that there has been some criticism of the United Kingdom's decision not to adopt a time-limit for the detention of immigrants (see paragraph 71 above). However, while the Returns Directive may be regarded by such critics as reflecting a preferable approach to the detention of immigrants than that currently available in the United Kingdom, that does not mean that the system set up under the Returns Directive, including in particular its provision of time-limits, is to be taken as being imposed by sub-paragraph (f) of Article 5 § 1 of the Convention or as representing the only system conceivable in Europe as being compatible with sub-paragraph (f). In this connection, it is noteworthy that the creation of fixed time-limits is not specifically recommended by the Council of Europe in either its Twenty Guidelines on Forced Returns or in Parliamentary Assembly Resolution 1707 on the detention of asylum seekers and irregular migrants in Europe (see paragraphs 40 and 41 above).

92. In any case, the existence of otherwise of fixed time-limits cannot be considered in the abstract but should instead be viewed in the context of the immigration detention system taken as a whole. For example, it is possible that some of those States which have fixed time-limits for detention pending expulsion might not offer detainees an effective judicial remedy by which to challenge their detention. The Court has therefore resisted interpreting Article 5 so as to impose a uniform standard on Contracting States (*Louled Massoud*, cited above, § 40); rather, it has preferred to examine the system of immigration detention as a whole, having regard to the particular facts of each individual case.

93. In light of the above, the Court would reject the applicant's submission that the "quality of law" requirement under Article 5 § 1 of the Convention requires Contracting States to establish a maximum period of immigration detention.

(β) Automatic judicial review

94. As with time-limits, it is clear from the foregoing case-law that Article 5 § 1(f) does not require there to be automatic judicial review of immigration detention, although the Court may take the effectiveness of any existing remedy into consideration in its overall assessment of whether domestic law provided sufficient procedural safeguards against arbitrariness (see paragraph 87 above). That no implicit requirement of automatic judicial review is to be read into Article 5 § 1 in regard to the category of deprivation of liberty covered by paragraph (f) is in accord with the specific

safeguard as to judicial protection afforded by Article 5 § 4, which is worded in terms of an "entitlement" for persons deprived of their liberty to take proceedings enabling them to contest the lawfulness of their detention.

95. Furthermore, the Court finds no support in any international instrument for the applicant's assertion that automatic judicial review of immigration detention is necessary. The Returns Directive requires the participating EU Member States either to provide for automatic judicial review of the lawfulness of detention or to grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be decided on. Likewise, Guideline 9 of the Twenty Guidelines on Forced Returns simply requires that a person in immigration detention be entitled to take proceedings by which the lawfulness of detention shall be decided speedily by a court, and according to Parliamentary Assembly Resolution 1707 detainees must be able periodically to effectively challenge their detention before a court.

96. The Court would therefore also reject the applicant's submission that automatic judicial review of immigration detention is an essential requirement of Article 5 § 1 of the Convention.

(γ) Conclusion

97. The Court observes that in the United Kingdom, a person in immigration detention may at any time bring an application for judicial review in order to challenge the "lawfulness" and Article 5 § 1(f) compliance of his detention. In considering any such application, the domestic courts must apply the *Hardial Singh* principles (see paragraph 33 above). These principles require that detention be for the purpose of exercising the power to deport; the period of detention must be reasonable in all the circumstances; a detainee must be released if it becomes apparent that deportation cannot be effected within a reasonable period; and the authorities must act with due diligence and expedition to effect removal. Failing compliance with the requisite conditions, the detention becomes unlawful under domestic law, with the attendant obligation on the authorities to release the individual. The test applied by the United Kingdom courts is therefore almost identical to that applied by this Court under Article 5 § 1(f) of the Convention in determining whether or not detention has become "arbitrary".

98. The Court therefore agrees with the Government that in principle the system in the United Kingdom should not give rise to any increased risk of arbitrariness as it permits the detainee to challenge the lawfulness and Convention compliance of his ongoing detention at any time. In considering any such challenge, the domestic courts are required to consider the reasonableness of each individual period of detention based entirely on the particular circumstances of that case, applying a test similar to – indeed,

modelled on – that required by Article 5 § 1(f) of the Convention in the context of "arbitrariness".

99. In light of the foregoing, it cannot be said that in, the absence of fixed time-limits and automatic review of immigration detention, domestic law was not sufficiently accessible, precise and foreseeable in its application or that there existed inadequate procedural safeguards against arbitrariness.

100. The applicant and the third party intervener have criticised the domestic system on account of both the obstacles to detainees bringing judicial review applications and what they describe as "increasingly long periods of immigration detention" being held to be "lawful" by the domestic courts. However, although it is open to this Court to consider whether the system in the United Kingdom in principle complied with the requirements of Article 5 § 1(f), in considering how it operated in practice it has to confine itself, as far as possible, to an examination of the concrete case before it (see *A.H. and J.K.*, cited above, § 190). Therefore, in deciding whether there has been a violation of Article 5 § 1(f) in the present case, the Court cannot rely on the access to court or the length of detention of persons who have not lodged applications with it and whose individual circumstances are not known to it.

101. In view of the above considerations, the Court finds that the system of immigration detention in the United Kingdom did not, in principle, fall short of the requirements of Article 5 § 1(f) of the Convention.

(ii) Did the applicant's detention from 14 January 2008 to 14 September 2009 breach Article 5 § 1(f) of the Convention?

102. It therefore falls to the Court to consider whether, on the particular facts of the applicant's case, his detention from 14 January 2008 (when his second period of immigration detention began – see paragraph 16 above) to 14 September 2009 (the date on which, according to the ruling of the Administrative Court, his detention became unlawful – see paragraph 29 above) was in breach of Article 5 § 1(f) of the Convention.

103. In this regard, it notes that the applicant was re-detained on 14 January 2008 after a judge discharged the order of 19 December 2007 to release him on bail and an authority was issued for his detention (see paragraphs 13-14 and 16 above). His detention on 14 January 2008 therefore had a solid basis in domestic law.

104. With regard to the subsequent attempts to deport him, the Court recalls that the applicant attended at the Iranian Embassy on 7 April 2008 but no travel document was issued and that on 4 June 2008 he again refused to sign a disclaimer consenting to his return (see paragraph 19 above). In or around September 2008 the immigration authorities discussed the possibility of prosecuting him under section 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 for failing without reasonable excuse to comply with the Secretary of State's requirement to

take specified action to enable a travel document to be obtained. However, no prosecution was ever mounted (see paragraph 21 above). On 13 October 2008 the applicant indicated that he would be willing to return to Iran if he were to be compensated for the periods of detention which he had undergone. The Border and Immigration Agency refused to agree to any such request (see paragraph 22 above). Further attempts to engage him in a voluntary return were made on 6 January 2009, 6 February 2009, March 2009, May 2009, June 2009 and September 2009 but on each occasion he indicated that he was not willing to co-operate or sign a disclaimer (see paragraph 23 above).

105. For the reasons set out below, the Court is not convinced that throughout this period it could be said that the attempts to deport the applicant were being pursued with "due diligence". First, it notes that even though it has declared the applicant's complaints relating to the first period of detention (from 31 March 2005 until 17 December 2007 – see paragraphs 8-15 above) to be inadmissible for non-exhaustion (see paragraph 53 above), in considering his complaints concerning the second period of detention (up to 14 September 2009), it may take account of the state of affairs that existed on 14 January 2008: namely, that he had previously spent more than two years and eight months in immigration detention (see *Abdi*, cited above, § 53). Consequently, there was greater impetus on the authorities to pursue his deportation with "due diligence".

106. Secondly, while it is true that the applicant repeatedly refused to cooperate with the authorities' attempts to effect a voluntary removal, the Court does not consider that this can be seen as a "trump card" capable of justifying any period of detention, however long (see the dicta of Lord Dyson in *Lumba and Mighty*, referred to at paragraph 36 above; and *Mikolenko*, cited above, § 65). This was accepted by the Administrative Court in its decision of 9 November 2011. Although the court found that lengthy detention could be justified by the applicant's offending, by the realistic fear that he would further offend, and the genuine and reasonable concern that he might abscond, it held that, even given those factors, there had to come a time when "such a sterile tactic as merely sitting and waiting while repeatedly urging the applicant to change his mind, in full expectation that he would not" ceased to be detention genuinely for the purpose of deportation. The court therefore concluded that "the woeful lack of energy and impetus" applied to the applicant's case from at least the middle of 2008 meant that it could not possibly be said that the Secretary of State had complied with the obligation in *Hardial Singh* to act with "reasonable diligence and expedition" (see paragraph 29 above).

107. However, despite its grave criticism of the authorities' inaction, the Administrative Court held the applicant's detention to have become unlawful only on 14 September 2009, that is to say, one year and seven months after the applicant's second period of immigration detention had

begun. The Court finds it difficult to agree that there was an adequate basis for that conclusion. It would accept that the applicant's previous offending, the risk of his further offending and the fear that he would abscond were all factors which had to weigh in the balance in deciding whether or not his continued detention was "reasonably required" for the purpose of effecting his deportation. Nevertheless, in light of the fact that, with the exception of a period of just under one month, the applicant had been in immigration detention since 21 March 2005, and having particular regard to the clear findings of the Administrative Court concerning the authorities' "woeful lack of energy and impetus" from mid-2008 onwards, the Court considers that it is from this point that it cannot be said that his deportation was being pursued with "due diligence".

108. The foregoing considerations are sufficient to enable the Court to conclude that from mid-2008 to 14 September 2009 the applicant's detention was in breach of Article 5 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

110. The applicant claimed seventy-five thousand pounds (75,000 GBP) in respect of non-pecuniary damage (to reflect his loss of liberty and the resulting deterioration of his mental health) and two thousand two hundred and forty pounds in respect of pecuniary damage (representing phone cards purchased during both periods of detention, property lost upon re-detention, attending medical appointments and telephone calls to his solicitor).

111. The Government argued that the claim for just satisfaction was excessive and unfounded, and the items claimed under the head of pecuniary damage were not recoverable in law or fact.

112. Taking note of the awards made in similar cases, and the fact that during the relevant period the applicant contributed to his continued detention by persistently refusing to cooperate with the authorities in their attempts to effect a voluntary return, the Court awards him EUR 7,500 in respect of non-pecuniary damage. The Court notes that the applicant has not submitted any documents which would corroborate his claims for pecuniary damage; it therefore rejects these claims.

B. Costs and expenses

113. The applicant also claimed GBP 15,615.54 for the costs and expenses incurred before the Court.

114. The Government submit that these costs – and particularly counsel's hourly fee of GBP 400 – were excessive.

115. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000.00 for the proceedings before the Court.

C. Default interest

116. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the period of detention from 14 January 2008 to 14 September 2009 admissible and the remainder of the complaint inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of the period of detention from mid-2008 to 14 September 2009;

3. *Holds,*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 May 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Mirjana Lazarova Trajkovska President