**Follow Up – UK Case law: Hardial Singh Principles – UK detention policy**

Judgment, Shepherd Masimba Kambadzi (previously referred to as SK (Zimbabwe) (FC) Appellant v Secretary of State for the Home Department,

25 May 2011

**I. Facts**

The appellant arrived in the UK on 30 October 2002 as a visitor with six months to leave to enter. On 9 May 2003 he applied for leave to remain for two years as a student. He was granted leave for one year until 30 April 2004. After that date he remained in the UK without leave. On 09 October 2005 he was convicted on two counts if common assault and one count of sexual assault on a female. He was sentenced to 12 months' imprisonment and ordered to be registered as a sex offender for five years. The judge did not recommend deportation. On 07 March 2006, the day he was due to be released from prison after serving six months of his sentence, including time spent on remand, the Secretary of State decided to make a deportation order against him. He was detained under par. 2 (2) of Schedule 3 of the 1971 Immigration Act in custody at HMP Woodhill.

In 2006 the appellant claimed asylum. On 11 April 2006 the applicant asked the Secretary of State to move him from the prison to a detention center, but his request was ignored. On 21 September 2006, the Asylum and Immigration Appeals Tribunal heard his appeals against the decision to deport, the refusal of asylum and a refusal to grant him relief on human rights grounds. The tribunal refused bail, having noted that he had previously committed an offence under the Bail Act 1976.

On 4 October 2006 the Tribunal issued its decision dismissing all three appeals. It stated that the appellant, believing that he had a poor case in resisting deportation, had sought to bolster his prospects of success by inventing a false claim and that the Secretary of State was right to conclude that his deportation was necessary as the offences which he had committed were serious and he had been assessed as presenting a medium risk of sexual or violent offending upon his release. On 24 August 2007 a deportation order was made and served on the appellant. As the appellant is a national of Zimbabwe, it is to Zimbabwe that the Secretary of State proposes to deport him. Two years prior on 4 August 2005, Collins J order by consent that removal of 30 Zimbabweans be suspended pending resolution of the issue in a test case, and the enforced return of failed Zimbabwean asylum seekers was suspended by the Secretary of State. Since that date, no enforced returns of Zimbabwean failed asylum seekers had taken place until the date of the hearing of the appeal of Kambadzi.

By the date of the hearing in the first instance, the appellant had been entitled to 22 monthly reviews of the lawfulness of his detention in addition to the initial five reviews in the first month. In the event he had only 10 reviews up to the date of the hearing. Of these only six were conducted by officials of the required seniority. Of these, two were disavowed by the Secretary of State as flawed by material errors of fact.

**II. The Hardial Singh Principles**

The Hardial Singh principles were first laid out per Lord Woolf J, in **R v Governor of Durham Prison, ex parte Hardial Singh** [1984] 1 WLR 704, 706:

According to the ruling, limitations to detain individuals follow the following principles (as affirmed by Dyson LJ in **A v Home Secretary, UKHL 56** [2004]):

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

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

(3) 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 exercise the power of detention

(4) The Secretary of State should act with reasonable diligence and expedition to effect removal

**Further legal framework:**

The Secretary of State's policy for governing detention can be found in a document issued by the Home Office called the Operations Enforcement Manual. Chapter 38 of the manual entitled "Detention and Temporary Release". It is here that the published policies regulating the exercise of the Secretary of State's discretion, in accordance with Hardial Singh principles. The principles laid out are

1. There is a presumption in favor of temporary admission or temporary release.

2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

3. All reasonable alternatives to detention must be considered before detention is authorized.

4. Once detention has been authorized it must be kept under close review to ensure that it continues to be justified.

5. Each case must be considered on its individual merits.

**III. Secretary of State's policy 2006-2007**

From April 2006 to September 2008 the Home Office applied an unpublished detention policy to all foreign national prisoners following the completion of their prison sentences pending their deportation.

On 25 April 2006 it was revealed, that between 1999 and 2006 over 1,000 prisoners had been released from prison or deported. When Home Secretary Charles Clarke was removed from his post and replaced on 4 May 2006, Dr. John Reid instituted a new practice of "blanket detention" that precluded consideration of the merits of any individual case and was wholly at odds with the presumption in the published policy in favor of temporary admission or temporary release.

It remained in place until November 2007 when it was replaced by another unpublished policy which permitted release only in exceptional circumstances. It was not until 9 September 2008 that a revised detention policy was published.

[This course of events may explain the Secretary of State's failure to carry out reviews at the required frequency and by the appropriate persons in the appellant's case].

The court concluded that the original detention of the appellant had been lawful, as it was with a view to the making of a deportation order.

**IV. Reasoning**

The court decided that "It was common ground that the appellant was lawfully detained at the outset, as his detention was with view a view to the making of a deportation order. There was a serious breakdown thereafter in the system of reviews mandated by the manual. It is also common ground, as the judge found, that the Hardial Singh principles were complied with throughout the entire period. The focus of attention was on the authority to detain. **Is the review essential to the legality of the continued detention? Or is it a sufficient answer to the claim for damages for the Secretary of State to say that, unless and until he directed otherwise, the authority to detain is there throughout in terms of the statute. I have not found this an easy question to answer**."

The court held that it was not a question of statutory construction before them, but the case concerned public law duties which were not set out in the statute.

Quoting Lord Phillips of Worth Matravers MR in Saadi v Secretary of State for the Home Department, the court held that "**lawful exercise of statutory powers can be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such policy gives rise."**

In D v Home Office it was decided that the law requires that the policies for administrative detention are published and that immigration officers do not stray outside the four corners of those policies when taking decisions in individual cases.

According to Wade and Forsyth, Administrative Law 10th ed, (2009), pp 315-316, the "principle that policy must be consistently applied is not in doubt and that the courts now expect government departments to honor their statements of policy." Policy was not law, so it may be departed from if a good reason can be shown. But it has not been suggested that there was a good reason can be shown. But it has not been suggested that there was a good reason for the failure of officials of the required seniority to review the detention in this case and to do so in accordance with the prescribed timetable.

The court held that the principles and the instruction in the manual go hand in hand. The reviews were fundamental to the propriety of continued detention. The instructions are the means by which, in accordance with his published policy, the Secretary of State gives effect to the principles. They were not commendable; they were necessary. The relationship of the review to the exercise of the authority was very close. They too would go hand in hand. If the system worked as it should, authorization for continued detention was to be found in the decision taken at each review.

Lord Hope held that if limitations set out in paragraph 38.8. were breached without good reason, continued detention was unlawful. In principle, it must follow that tortious remedies will be available, including the remedy of damages. He also established that there was causation between the missing reviews and the claim of false imprisonment. Even though the reviews were not required by statute, there was a public law duty to give effect to the provisions about reviews in the manual. If the reviews had not been carried out, – unless for good reasons, which was not suggested in the case before the court – continued detention was not authorized by the initial decision to detain. It was held not to be a defense for the Secretary of State to say that there were good grounds for detaining the appellant anyway. Unless the authority to detain was renewed under the powers conferred by the statute he was entitled to his liberty. The decision in *Lumba* [R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12, 2011 2 WLR 671, 11 March 2011] inevitably would lead to this conclusion.

Therefore, by majority opinion restored the declaration of the court of first instance that the appellant's detention by the Secretary of State was unlawful for the periods stated by him, except for a period of one month beginning on 6 December 2007 when the only defect in the decision to continue was that the review was carried out by an official of the wrong grade. Lord Hope decided to restore the first instance judges' orders as to the assessment, if the parties disagreed, on the quantum of damages.