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Detention 2

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The March 2010 “Detention” information sheet provides information about the use of detention by the UK Border Agency. This information sheet provides further information about detention following the decisions, given in March and May 2011, of the Supreme Court in *Walumba Lumba & Kadian Mighty v Secretary of State for the Home Department* [2011] UKSC 12 and *Shepherd Masimba Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23.

The *Hardial Singh* principles

In December 1983, Mr Justice Woolf (who later became the Lord Chief Justice) set out important principles concerning the use of powers to detain someone for immigration purposes. He did so in a case called *R(Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB). It is this case that first established what have become known as the *Hardial Singh* principles.

In March 2011, the Supreme Court endorsed and explained these principles in *Walumba Lumba*. Eight of the nine Supreme Court judges agreed with the following four *Hardial Singh* principles:

- The Secretary of State must intend to deport the person and can only use the power to detain for that purpose
- The deportee may only be detained for a period that is reasonable in all the circumstances
- 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
- The Secretary of State should act with all diligence and expedition to effect removal

These principles apply to the UK Border Agency; and apply where the UK Border Agency is seeking to remove a person (whether or not the person is to be deported). However, as is set out in the March 2010 “Detention” information sheet, there are other detention powers in respect of which the *Hardial Singh* principles will not be directly relevant. These include where an immigration officer detains someone at a port of entry to the UK to investigate whether the person is permitted to enter the UK and where an asylum-seeker’s claim is being dealt with in the Detained Fast Track (see the March 2010 “Detained Fast Track” information sheet). If, after these processes, the UK Border Agency decides to remove the person, the *Hardial Singh* principles will then become relevant.

Relevance of a risk of re-offending

The Supreme Court considered that, in the case of someone who is facing deportation having been convicted of a criminal offence in the UK, the risk of re-offending is a relevant factor to consider in relation to the use of immigration detention.

It would be necessary to consider the likelihood of re-offending and the seriousness of any re-offending (i.e. both what are the chances of the person committing another criminal offence, and what sort of offence). Thus, in assessing what period (or length) of detention is reasonable in all the circumstances, the Supreme Court has confirmed that it is appropriate to consider that a risk of re-offending may be a factor indicating that a longer period is reasonable.

Relevance of legal challenges

The Supreme Court considered that, in the case of someone facing deportation (and this would apply similarly to someone detained for the purpose of his or her removal in a non-deportation case), outstanding legal challenges are relevant factors to consider in relation to the use of immigration detention. A legal challenge would include an attempt to show that the deportation or removal should not be carried out by making representations to the UK Border Agency, an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) or an application for judicial review to the Administrative Court.

It would be necessary to consider the prospects of any legal challenge succeeding. Thus, in assessing what period (or length) of detention is reasonable in all the circumstances, the Supreme Court has confirmed that an outstanding legal challenge, particularly where there is some prospect of success, may be a factor indicating that a shorter period is reasonable.

Relevance of refusal to make a voluntary departure

The Supreme Court considered that, in the case of someone facing deportation (and this would apply similarly to someone detained for the purpose of his or her removal in a non-deportation case), a refusal to make a voluntary departure may have little or no relevance to the use of immigration detention.

It will not be relevant if removal to the person's country of origin is not possible. In any case, of itself, a refusal to make a voluntary departure is not relevant unless it can properly be said that it indicates a risk or increased risk that the person, if released, will abscond. The Supreme Court confirmed that the UK Border Agency must not use a refusal to make a voluntary departure as a 'trump card' so as to justify any period of detention. However, the Supreme Court also confirmed that where there is a risk that the person will abscond if released, this may be a factor indicating that a longer period of detention is reasonable.

Relevance of a failure to follow published policy

The Supreme Court also considered the circumstances in which a failure by the UK Border Agency to follow its published policy may make someone's detention unlawful.

Firstly, the Supreme Court made clear that policies on the use of immigration detention should be published. In the *Walumba Lumba* case, the UK Border Agency had followed a secret policy. That was unlawful.

Secondly, the Supreme Court decided that a failure, without good reason, by the UK Border Agency to follow its published policy was capable of making someone's detention unlawful. As to what sort of failure would make detention unlawful, the Supreme Court said that this would be the case where the failure was relevant to the decision to detain. In the *Stephen Masimba Kambadzi* case, the Supreme Court decided that failures by the UK Border Agency to conduct regular reviews of detention, as required by its published policy, made the detention unlawful. This was so even though there had been no breach of the *Hardial Singh* principles (see above).