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Case No: CO/4343/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 1st February 2016

Before:

MR JUSTICE GARNHAM
Between:

The Queen on the application of Babbage	**Claimant**
and	
Secretary of State for the Home Department	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

M. Henderson (instructed by **Bhatt Murphy**) for the **Claimant**
S. Skinner (instructed by **GLD**) for the **Defendant**

Hearing dates: 9th – 15th December 2015

Judgment
As Approved by the Court

Mr Justice Garnham:

Introduction

1. The Claimant is a Zimbabwean national, with no right to remain in the UK, who has committed serious offences in this country and whose home country will only accept returning nationals if they have a passport or wish to return. For reasons I explain below, it is my judgment that the Claimant would be likely, if released, to abscond and to commit further offences. The question which arises here is whether the Home Secretary can justify the Claimant's continued detention when he has made it clear he will not agree to his return home.

2. As is explained below, my answer to that question is "no". That being so, on 15 December 2015, I ordered the Defendant to release the Claimant from detention by 4pm on 16 December. My primary reason for doing so was that there have been no reasonable prospects of returning the Claimant to Zimbabwe since, at least, August 2015. I now set out, in full, my reasons for reaching that conclusion.

The Claim

3. The Claimant, Andre Babbage, has been administratively detained by the Defendant, the Secretary of State for the Home Department, since 7 October 2013. The case was listed on an expedited basis to determine whether the Claimant was unlawfully detained and whether he should therefore be released. The legality of his past detention is not a matter that I have to determine in the present proceedings. There is no claim for damages here. The Secretary of State resists Mr Babbage's claim. She says that the time will come when continued detention would be unlawful. But, she says, that time has not been reached yet.

4. Before I turn to consider the facts of this case it is necessary to say a word about the state of the evidence and about the Secretary of State's response to this claim.

The Secretary of State's Evidence and Disclosure

5. In their pre-action protocol letter dated 23 June 2015, the Claimant's solicitors sought disclosure of all documents relevant to the Secretary of State's decision to detain the Claimant. In particular they sought "*all detention decision making documents, including all detention reviews, monthly progress reports and any other file minutes in which consideration of the decision to detain is recorded*". They asked for the documents in unredacted form. The Secretary of State replied by letter dated 1 July 2015. The relevant part of the letter read: "*Your request for documents and information… should be directed to the Subject Access Request Unit as a subject access request*…". The Claimant's solicitors responded by letter dated 6 July 2015 in which they referred to the requirements of the pre-action protocol for judicial review and to the duty of candour which applies to public bodies in judicial review proceedings. The Claimant received no reply to that letter.

6. On 10 September 2015 Collins J made an order that "*all relevant documents not already disclosed must be disclosed together with the acknowledgment of service*". The only documents that the Secretary of State disclosed with the acknowledgment of service were detention reviews for June and July 2015. In the summary grounds of

defence, which accompanied the acknowledgment of service, the Secretary of State said the following:

> "*21. Dealing first with the issue of disclosure, the Defendant notes that the Claimant has submitted a large amount of documentation in support of his claim which has originated from the Defendant. Indeed, not withstanding that the Claimant is represented by experienced immigration specialist legal representatives, he has failed to identify any specific documents or even class of documents that it is alleged the Defendant has failed to disclose.*"

7. That was not accurate. The Claimant's solicitors had identified relevant documents in their pre-action protocol letter. In particular they had sought "*all detention reviews*" and related material.

8. Permission to apply for judicial review was granted by Picken J on 15 October 2015. He directed that the hearing be expedited. He further directed that:

> "*By 4pm on 13th November 2015, the Defendant shall (i) file and serve detailed grounds for contesting the claim and any written evidence, and (ii) disclose all documents relevant to the reasons for the Claimant's detention (in particular, but not limited to, all reviews of the Claimant's detention and all documents relevant to the prospects of removing him to Zimbabwe) or file and serve an explanation in respect of any such documents which cannot be disclosed.*"

9. In what seemed to me, when this case was opened, to have been clear disobedience to the order of Picken J, the Secretary of State neither disclosed "*all documents relevant to the reasons for the Claimant's detention*" nor served an explanation as to why such documents could not be disclosed. Remarkably, the Secretary of State's detailed grounds of resistance make no reference whatsoever to disclosure.

10. The Claimant's solicitors had made a subject access request of the Home Office to obtain the documents they thought likely relevant to this claim and those documents were supplied. It is those documents that made up the bulk of the bundle prepared for the hearing. Those documents, however, are heavily redacted. Often the redaction was made to parts of the documents that appeared to be relevant to the issues this Court had to decide. No explanation was provided as to why those redactions had been made or as to the character of the information removed by the redaction.

11. The result of these developments was that, by the time this case came on for hearing, almost the only contemporaneous material was that disclosed pursuant to the subject access request, with its redactions. When it became apparent that the redacted material was potentially relevant, I asked Mr Skinner, who appeared for the Secretary of State, why the Court had not been provided with unredacted copies. It is material to note that Mr Skinner appeared on the instructions of Ms Sarah Kelly, a lawyer in Section B2 (Home Office Immigration Litigation) of the Government Legal Department ("the GLD") and Ms Kelly attended throughout the hearing. Mr Skinner was unable to provide me with a response.

12. During the course of the hearing, when it became apparent that two detention reviews were missing from the papers in the bundles, those instructing Mr Skinner were able to obtain them and provide them to the Court and the Claimant. Those two documents were in unredacted form.

13. I confess to having been extremely concerned about the attitude of the Secretary of State, or alternatively her advisers, towards the supply of documents necessary for the resolution of this case. The Secretary of State, through her officials or advisers, was under a duty to disclose this material of their own volition. They did not do so. They were prompted to supply it by the solicitors for the Claimant. They did not provide them. They were ordered to provide it by Collins J. They failed properly to comply with that order. They were then ordered to provide specific, identified material, or an explanation of why they could not do so, by Picken J. They failed to comply with that order too.

14. The deficiency in the response to this claim was compounded by the fact that the Secretary of State served no evidence whatsoever in support of her resistance of the claim. The failure of the Secretary of State to provide evidence has been a subject of comment by the Courts on a number of previous occasions, notably R (I) v SSHD [2007] EWCA Civ 727 and R (Das) v SSHD [2014] EWCA Civ 45. In the latter case, the Court of Appeal noted "*the absence of any evidence on behalf of the Secretary of State before the Court below or before this Court to explain her decision-making in this case*" (paragraph 79) and rejected D's plea that it was hard to serve evidence. The Court went on:

> *80. ... [The SSHD] ... urged the court not to punish the Secretary of State for not filing evidence, and referred to the scarcity of resources, the heavy litigation burden on the Secretary of State, and the need to prioritise resources on those currently detained. The latter submission may reflect the position in which this part of the public services finds itself, but it was not and could not have been an invitation to the court to give the Secretary of State a privileged position in litigation. There is equally no question of the court punishing the Secretary of State or treating her less favourably than other litigants. The judge stated the correct position clearly. He observed (at [21]) that:*
>
> > *'Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk'. In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party ... The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a*

> *public authority facing a challenge to its decision, [in the words of Lord Walker of Gestingthrope in Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment [2004] UKPC 6 at [86]] 'to co-operate and to make candid disclosure by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings…'.* "

15. The position is even more serious in this case. The Home Office, or those who advise that department, are not just in breach of their duty of candour. They have not just opted to provide no witness evidence. They have failed repeatedly to comply with the orders of this Court to produce relevant material. They have required the Claimant to rely on such material as was disclosed in response to a subject access request. They have, in effect, required this Court to conduct this hearing on the basis of material which has been redacted, as they see fit, by the Secretary of State's officials.

16. When this state of affairs became clear to me in the course of the hearing, I invited submissions as to the appropriate way in which I should deal with the matter. At the end of the hearing, in the light of those submissions, I directed the Secretary of State to file a witness statement, from an appropriately senior official, by 4pm on 10 December 2015 explaining the position.

17. On 10 December 2015 a statement was filed by the GLD from a Mr David Hervey, a Grade 7 Civil Servant working in the Immigration Enforcement team in the Home Office. In a short statement Mr Hervey made it clear that relevant documents (CID notes and detention reviews) were provided in unredacted form to the GLD between 23 September and 1 October 2015 in response to the order of Collins J, and updating disclosure (in the form of detention reviews) was provided to the GLD between 5 and 20 November 2015. Entirely reasonably, Mr Hervey said he believed that by providing this material to GLD, the Secretary of State would ensure her compliance with her duty of disclosure. Had that material been provided to the Court and the Defendant, that would also have constituted compliance with the orders of Collins J and Picken J. It follows that there can be no criticism of the Home Office or the Secretary of State.

18. However, it emerged from a letter from Ms Kelly, under cover of which the statement was provided to the Court, that the GLD had decided it was not necessary to disclose any of this material to the Claimant or the Court. Faced with that information, I required Ms Kelly to attend and provide an explanation. She did so. Essentially, she said that she had taken the view that it was for her, as the Defendant's legal adviser, to decide whether any of the additional material provided to her by the Home Office was relevant and disclosable, and she had decided it was not. On questioning she accepted, having had the chance to reflect on the matter, that she was wrong in that view.

19. She was indeed wrong. It is wholly unacceptable for those acting for the Secretary of State to ignore or disregard the orders of the Court. Furthermore, once a Judge of this Court has identified specific documents which are required to be disclosed, there is no

basis for the exercise of any discretion by the Secretary of State's advisers. If the document falls within the class covered by the Order, it must be disclosed.

20. In particular, it is not open to the Secretary of State, or her advisers, to decide that some of the documents falling within the category made subject to the Order ought to be redacted to protect some interest of the Home Office or because they do not appear, to the Secretary of State, to be relevant to the issues in the case. The Order of the Court determines relevance and disclosability.

21. If it is thought that there are grounds on which material covered by the Court Order should be redacted before it is disclosed to the other party (or, conceivably, even to the Court) then a proper application should be made for the Order to be varied to accommodate that concern. What must never happen is that those acting for the Secretary of State (or any other party) decide, off their own bat, not to disclose material subject to an order of the court because they judge it irrelevant.

22. This case concerned allegations of unlawful detention. In such cases, an especially careful approach is necessary, by those acting for the Secretary of State, to issues of disclosure. It is plain there was no such approach here.

23. It strikes me as astonishing that more than 20 years after the decision of the House of Lords in M v The Home Office [1994] 1 A.C. 377, it should be necessary to set out what are, in truth, elementary principles of constitutional law. But it seems it is. I set out a short extract from the speech of Lord Templeman:

> "*My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War. For the reasons given by my noble and learned friend, Lord Woolf, and on principle, I am satisfied that injunctions and contempt proceedings may be brought against the minister in his official capacity and that in the present case the Home Office for which the Secretary of State was responsible was in contempt.*"

24. The same applies to any order of the Court. These fundamental principles should be at the forefront of the mind of those advising the Secretary of State.

25. Since the hearing in this case, I have received a letter from the head of the division of GLD responsible for this case, providing a fulsome apology to the Court, confirming that training in duties of disclosure was provided to those responsible for cases such as this, and indicating that "*a review of disclosure in all claims where detention within [the relevant] team which challenge use of the power of detentio*n" had been initiated.

26. As Mr Skinner accepted, faced with conduct of this sort on behalf of the Secretary of State, the proper course for me to adopt in considering this case, consistent with the principle identified in R (Das) v SSHD, is to draw inferences of fact in the Claimant's favour where the evidence is unclear. That is the approach I adopt below.

The Facts

27. The Claimant was born in Zimbabwe in 1986. He came to the UK as a minor in April 2003 with his mother. Leave to remain was granted to the family in June 2003 for the period until June 2007. In September 2007 the Claimant was granted leave to remain here in his own right.

28. In September 2008 the Claimant was convicted of his first criminal offence, namely the supply of cocaine. In June 2009 he was convicted of aggravated vehicle taking, damage to property, and using a vehicle while uninsured and having consumed excess alcohol. In October 2009 he was convicted of failing to comply with the requirements of a community order. In June 2010 he was again convicted of failing to comply with the requirements of a community order and sentenced to six weeks imprisonment. In August 2010 he was convicted of harassment. In September 2010 he was again convicted of harassment. In December 2010 he was convicted of criminal damage. In February 2011 he was convicted of theft and assault. In a little over two years he had built up a serious criminal record.

29. Then, on the 27 May 2011 at Woolwich Crown Court, the Claimant was convicted of robbery and sentenced to two and a half years imprisonment. The sentencing judge was His Honour Judge Dawson. His sentencing remarks included the following:

> "*It was an unpleasant robbery of a person using a personal connection… The aggravating features, of course, are that this was the home of the Complainant. There is… an element of planning and background here. Going to somebody's home, then threatening them and letting in a boyfriend, in my view is an element of planning. There was a weapon waved about, albeit it not one that was actually brought to the premises. There was violence. There was more than one person. All aggravating features…*
>
> *As far as Mr Babbage is concerned, he is in a worse position because he was on an order at the time for a similar kind of dishonest behaviour: snatching of a necklace… He was on a community order at the time when this offence was committed, making it more serious…*
>
> *I have considered the question of dangerousness but I do not think that arises. I agree with the Probation Service that it does not arise in this case. In the round, a nasty robbery against a person who was in his own home and who had very little opportunity to escape from the attack and the action of these two confident defendants.*"

30. The Probation Service assessed that the risk of harm posed by the Claimant in the community was "medium".

31. On 14 July 2011 the Claimant was notified of his liability to deportation. On 29 May 2012 the Secretary of State decided to detain the Claimant when he fell to be released on licence. On 8 June 2012 he became eligible for conditional release from the

sentence imposed by the Crown Court but was detained by the Secretary of State under immigration powers.

32. On 14 June 2012 the Claimant was granted bail. Four days later he was released to his mother's address subject to tagging and reporting restrictions. He breached those conditions because he went to his former partner's address rather than his mother's address and failed to report to his offender manager. On 29 June 2012 he was recalled to prison to serve the remainder of his licence.

33. On 21 June 2013 the Defendant made a deportation order against the Claimant. The Claimant appealed that decision. On 21 August 2013 the Secretary of State wrote to the Zimbabwean Embassy inviting the Embassy to issue a travel document so that the Home Office could arrange the Claimant's removal to Zimbabwe. On 9 September 2013 the Claimant was again released from his custodial sentence but was immediately detained administratively under immigration powers. 11 days later the Claimant made an application for bail. On the 25 September 2013 bail was granted. The Claimant again breached his bail conditions in that he resided at his ex-partner's home rather than his mother's address and failed to report as directed.

34. On 6 October 2013 the Claimant was arrested on suspicion of assault. When he was released from police custody he was detained again under immigration powers. He has been detained under those powers ever since, a period of over two years.

35. On 7 October 2013 the Secretary of State prepared a minute of a decision to detain the Claimant. Under the heading "Likelihood of Removal within a Reasonable Timescale" the Defendant gave the following assessment:

> "*Not possible to give a reasonable timescale for removal. Mr Babbage does not wish to return to Zimbabwe. An emergency travel document was to be applied for at the Zimbabwean High Commission on 21st August 2013 however his passport has expired and for him to have a face to face interview with the Zimbabwean authorities he must first sign a disclaimer.*"

36. The Claimant's detention was reviewed by the Secretary of State's officials regularly thereafter. The reviews were in substantially similar terms.

37. On 23 April 2014 the Claimant's appeal against the decision to deport him was heard by the First Tier Tribunal. The appeal was dismissed. On 21 May 2014 permission to appeal to the Upper Tribunal was refused. In consequence by early June 2014 the Claimant was "appeal rights exhausted".

38. On 5 December 2014 the Claimant's then solicitors wrote to the Secretary of State indicating that the Claimant wished to claim asylum and asking for his release for detention. That request was rejected on 23 December 2014. On 14 January 2015 the Secretary of State arranged an asylum interview. On 20 July 2015 the Secretary of State formally refused the asylum application. On 10 September 2015 these judicial review proceedings were filed.

The Competing Arguments

39. Both Mr Henderson and Mr Skinner provided detailed skeleton arguments which they amplified in oral submissions.

40. There was precious little between the parties on the law. Both parties accepted that the decision of the Supreme Court in R (Lumba) v SSHD [2011] UKSC 12 provided the guiding principles. There was, in particular, no disagreement but that the principles set out in R (I) v SSHD [2002] EWCA Civ 888, as endorsed by Lord Dyson in Lumba, applied. Those principles were as follows:

> "*(i) The Secretary of State must intend to deport the person and can only use the powers to detain for that purpose;*
>
> *(ii) The deportee may only be detained for a period that is reasonable in all 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.*"

41. Both parties agreed that the critical test for me to apply in this case is that set out by Lord Dyson at paragraph 103 of Lumba:

> "*If there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful.*"

42. Mr Henderson's case was essentially very simple, and was well developed by him by reference to a singularly comprehensive chronology. He pointed to the repeated references in the Defendant's detention reviews to the fact that the Zimbabwean authorities will not accept the return of their nationals unless either they hold a current passport or they sign a voluntary disclaimer indicating that they are willing to return to Zimbabwe. The claimant has no current Zimbabwean passport. Mr Henderson's case was that the Claimant had repeatedly made clear that he did not consent to being returned to Zimbabwe. He said that that had long been the position, that there was no prospect of that position changing and that accordingly the Claimant's continued detention was unlawful.

43. Mr Skinner accepted that there have been no enforced removals to Zimbabwe in the period under consideration. He accepted that the time would come when continued detention of the Claimant becomes unlawful. But he said that that stage had not been reached by the time of the hearing. He said that until August 2015 there were other bars in place which prevented removal, that the Claimant's position on whether he was willing to return to Zimbabwe had fluctuated over time and that until December 2014 he was consistently refusing to sign the disclaimer and refusing to attend for interview at the Zimbabwean Embassy.

44. Then, says Mr Skinner, on 24 December 2014 the Claimant was again presented by the Home Office with a request for his cooperation with the re-documentation process. Mr Skinner said he was asked to confirm that he would attend for interview at the Zimbabwean High Commission and that he would sign a voluntary disclaimer. Mr Skinner then pointed to the disclaimer which was signed that day by Mr Babbage. Mr Skinner argued that that disclaimer made it clear that the Claimant was signifying his consent to removal from the UK.

45. Mr Skinner argued that it was not possible for the Home Office to progress voluntary removal at that stage because the Claimant still had an extant asylum claim. When that claim was finally rejected in July 2015, it became possible to arrange an interview at the Zimbabwean High Commission. It was at that stage that the Claimant indicated that, in fact, he was not willing to consent to his removal to Zimbabwe.

46. Mr Skinner argued that thereafter it remained lawful for the Secretary of State to detain the Claimant "*because he might at some later date agree to cooperate*". He relied on the fact that the Claimant had agreed to his removal in the past and therefore might do so again in the future. Mr Skinner argued that the Claimant's history demonstrated that there was a significant chance of his committing further offences if released and a significant chance of his absconding. These, said Mr Skinner, were considerations of "*paramount importance*".

Discussion and Conclusions

The Legal Framework

47. The Claimant had been sentenced to a period of imprisonment of at least 12 months and, under section 32 of the UK Borders Act 2007, the Secretary of State was required to make a deportation order in respect of him. Detention after the period of custody imposed by the Crown Court was authorised under s36(2) and paragraph 2(3) of Schedule 3 to the Immigration Act 1971.

48. The exercise of the powers to detain a person administratively is subject to well established common law limitations. They were set out in R v Governor of Durham Prison Ex Party Hardial Singh [1984] 1 WLR 704. Those principles were authoritatively summarised by Lord Dyson in Lumba v SSHD [2012] 1 AC 245, in the passage summarised at paragraph 40 above. As was pointed out by Leggatt J at paragraph 8 of his judgment in R v Ghnour v SSHD [2015] EWHC 3211 (Admin), Lumba is also authority for three further propositions:

> "*1. 'The risks of absconding and re-offending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place'. (Paragraph 121)*
>
> *2. Whilst periods of detention during which the detainee seeks to exhaust appeals or other legal proceedings against his removal cannot be entirely discounted, 'if a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his deportation during the challenge should be given minimal weight in assessing what is*

a reasonable period of detention in all the circumstances'. (Paragraph 121)

3. A refusal to return voluntarily is relevant to an assessment of what is a reasonable period of detention if a risk of absconding can properly be inferred from the refusal. Other than in relation to the question of whether there is a risk of absconding, a refusal of voluntary return may still be taken into account but must be regarded as having limited relevance (Paragraphs 123 and 128)."

49. As Leggatt J went on to discuss, the case law establishes a fourth proposition, a proposition of central importance to the present case:

> "*In considering whether at any stage there is a reasonable prospect of removal, the relevant question is whether there is a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors, including any risk of absconding and any risk of danger to the public if the detainee were at liberty.*"

50. Against that background, it appears to me that there six relevant questions in this case;

i) During the period since the start of administrative detention, what was the risk of the Claimant absconding if released from detention and what would be that risk now?

ii) During the same period, what was the risk of the Claimant reoffending if released, and what is that risk now?

iii) Were there other bars to removal?

iv) Did the Claimant ever consent to removal?

v) What is the significance of the Claimant's refusal voluntarily to return? and critically;

vi) Is there at present a reasonable prospect of removing the Claimant?

<u>The Risk of Absconding</u>

51. In my judgment there has been a real risk of the Claimant absconding if released from detention throughout the period of his administrative detention. Furthermore that risk remains now.

52. He was granted bail by the Immigration and Asylum Chamber on 14 April 2012 and was released from prison on licence on 18 June 2012. His bail conditions included residence with his mother, reporting to the authorities and wearing an electronic tag. He breached all those conditions. 10 days after his release the Secretary of State revoked the Claimant's licence and he was recalled to prison. He was detained by the police on 29 June 2012. On 20 July 2012 the Claimant's mother indicated she would no longer be willing to act as surety for him.

53. The Claimant was again granted immigration bail on 9 September 2013 and was released on 27 September 2013. There were similar conditions attached to his bail. He again breached those conditions and disappeared. He was arrested on suspicion of assault on 6 October 2013.

54. As Mr Skinner correctly argues, the Claimant has demonstrated little respect for the law. He has failed to surrender, has breached court orders and offended while subject to the court's supervision. He twice disappeared when granted bail. There is a significant risk that, on release, he will disappear again.

Risk of Reoffending

55. I have set out at paragraph 27 above the Claimant's offending history. Mr Henderson sought to describe the pattern of offending prior to the robbery as minor in nature. I do not accept that description. He had pleaded guilty to the supply of Class A drugs, he had admitted aggravated vehicle taking, he had been found guilty of harassment, criminal damage, assault and theft. He had repeatedly breached the terms of court orders.

56. The final and most serious offence was committed whilst still subject to a court order. He was sentenced to two and a half years imprisonment on a guilty plea. As the observations of the trial judge set out at paragraph 28 above make clear, this was a particularly nasty offence.

57. In his skeleton argument, Mr Skinner describes the Claimant's previous convictions in the following way: "*The Claimant's offending spree of crimes escalating in seriousness was only brought to an end by the imposition of this sentence and subsequent immigration detention*". It seems to me an entirely fair summary. It leads me to the firm conclusion that, on release, there is a real risk that the Claimant will continue offending.

58. Mr Henderson points to the fact that the Probation Service regarded the Claimant as posing "moderate" risk to adults in the community. He refers to the fact that the sentencing judge on the robbery charge did not find the Claimant dangerous. I accept that. Nonetheless, it seems to me plain that the Claimant will pose a significant risk to the community once released.

59. The risk of re-offending and of absconding are matters of paramount importance. The question for me is whether there is a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors, including those risks.

Bars to Removal

60. Mr Skinner places some reliance on the fact that during much of the previous two years there have been reasons, other than the Claimant's refusal to consent, why removal has been impossible. He identifies four bars to removal.

61. First, he points to the fact that the Claimant appealed against the decision to deport him on 3 July 2013 and the appeal was not dismissed until 8 May 2014. He observes that the Claimant sought to appeal that decision and that appeal was dismissed on 21 May 2014. He says the Claimant became "*appeal rights exhausted*" on 5 June 2014.

He says that that appeal operated as a bar preventing removal and referred to Section 78 of the Nationality and Immigration Act 2002.

62. In my judgment, that provided a sound basis for concluding that the Claimant could not be removed, and it might well provide a sound basis for continuing detention where deportation could otherwise be anticipated. But it does not, in itself, provide a basis for detaining the Claimant.

63. Second, Mr Skinner points out that the Claimant's Zimbabwean passport had expired and he required an emergency travel document in order to be returned to Zimbabwe. Obtaining an ETD required two things: first the Claimant had to sign a disclaimer indicating the willingness to return to Zimbabwe and second he had to attend an interview at the Zimbabwean High Commission. At one stage it appeared there might be some dispute as to whether or not the Claimant had refused to attend the High Commission; that point was not pursued. But what is plain is that for, at least, most of the time the Claimant was refusing to sign a disclaimer.

64. The monthly progress reports compiled by the Defendant in respect of the Claimant, each contain a section headed "Progress since Last Review". Similar (if not identical) entries are made under that heading on each report. So, for example, in the monthly progress report for 1 November 2013 the text reads:

> "*We are continuing to make arrangements to obtain a travel document for your removal from the United Kingdom. However this is taking longer than we would like because you fail to sign a voluntary disclaimer…*"

65. That refusal to sign continued, says Mr Skinner, until 24 December 2014. On that date the Claimant was sent a "Request for cooperation with the redocumentation process" which indicated he was required to sign the attached voluntary disclaimer. He did so. Mr Skinner submits that that signature meant that the bar to removal created by the failure to sign the disclaimer came to an end.

66. On Mr Skinner's analysis, however, shortly before that time a third bar to removal emerged. On 5 December 2014 the Claimant's solicitors wrote to the Secretary of State indicating that the Claimant wished to claim asylum. A full asylum interview was arranged for 14 January 2015. It was not until 20 July 2015 that the asylum claim was finally rejected. Prior to that date, argues Mr Skinner, the existence of the asylum claim was a bar to the Claimant's removal, and pursuit of the asylum claim justified continued detention.

67. The asylum claim plainly prevented removal. But in my judgment, on the facts of this case, that is not the question that matters. That "bar" only justified continued detention, if it could be said that, once the asylum claim was dealt with, there would be a realistic prospect of removal.

68. On 28 July 2015 the Defendant wrote to the Claimant indicating that arrangements had been made for him to attend the Zimbabwean High Commission for an interview in relation to the obtaining of an ETD. The Claimant describes what happened in his witness statement. He says:

> "*The official asked me if I was 'ready to go back', to which I replied 'no'. He said that there are currently no enforced removals to Zimbabwe, only voluntary returns. At the end of the interview the official said that they would not be providing me with a travel document.*"

69. In the "Progress since Last Review" section of the next monthly review the Defendant wrote:

> "*You attended an ETD interview at the Zimbabwean Embassy on 5 August 2015, however, you were non compliant with the process and an ETD was not issued.*"

70. As regards the Claimant's willingness to return the position has remained as it was in August 2015 ever since.

71. The final bar to removal, as Mr Skinner described it, was the fact that the Defendant was contemplating a prosecution of the Claimant under Section 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 for lack of cooperation. That, he said, was the operative bar at the time of the hearing. Section 35 provides as follows:

> "*(1) The Secretary of State may require a person to take specified action if the Secretary of State thinks that –*
>
> *(a) the action will or may enable a travel document to be obtained by or for the person, and*
>
> *(b) possession of the travel document will facilitate the person's deportation or removal from the United Kingdom.*
>
> *(2) In particular, the Secretary of State may require a person to*
>
> *(a) provide information or documents to the Secretary of State or to any other person;*
>
> *(b) obtain information or documents;*
>
> *[(c) provide biometric information (within the meaning of section 15 of the UK Borders Act 2007), or submit to a process by means of which such information is obtained or recorded;]*
>
> *(d) make, or consent to or cooperate with the making of, an application to a person acting for the government of a State other than the United Kingdom;*
>
> *(e) cooperate with the process designed to enable determination of an application;*
>
> *(f) complete a form accurately and completely;*
>
> *(g) attend an interview and answer questions accurately and completely;*
>
> *(h) make an appointment.*
>
> *(3) A person commits an offence if he fails without reasonable excuse to comply with a requirement of the Secretary of State under subsection (1).*"

72. Mr Skinner was able to point to frequent references in the monthly detention reviews to suggestions that the Claimant was liable to prosecution under Section 35. He said in argument that the decision whether or not to pursue such a prosecution is a difficult and complex one that could take some considerable period. He said that the Secretary

of State will take some time to decide whether or not to put the papers before the Crown Prosecution Service ("CPS") who will then take some months to decide whether or not to prosecute.

73. An offence is committed under Section 35 if a person fails, without reasonable excuse, to comply with a requirement to take action that the Secretary of State thinks may enable a travel document to be obtained for him. The specified actions which Mr Skinner says have been required of the Claimant are to complete the disclaimer form accurately and completely and to attend an interview at the Zimbabwean High Commission.

74. I cannot see how it can conceivably be said that pursuit of the possibility of prosecution under Section 35 can justify the Claimant's detention. The first principle set out by Lord Dyson in Lumba was that the Secretary of State can only use the power to detain for the purpose of deporting the person concerned. If the true purpose for detaining him was to prosecute him under Section 35, that was not a lawful exercise of the power.

75. In any event, I have the gravest doubt whether a breach of Section 35 could be made out against the Claimant. The Claimant was being asked to sign a document indicating that he intended to leave the United Kingdom. If, in truth, he did not intend to leave the United Kingdom he could not properly be required to sign the voluntary disclaimer; or to put it another way, he would have a reasonable excuse for not doing so.

Did the Claimant Ever Consent to Removal?

76. It is a matter of dispute between the parties whether the Claimant did indicate his consent to removal on 24 December 2014.

77. Mr Skinner points to the signing of the document accompanying the "Request for cooperation with the redocumentation process" as evidence of the Claimant's consent to removal. The accompanying document is a proforma, which, in my view, is poorly drafted.

78. The first part of the form reads as follows: "*To the Criminal casework Directorate: I,* (and then Mr Babbage's name is written in) *intend to leave the United Kingdom for* (and then the word Zimbabwe is written in)". There follows three assertions printed alongside boxes which can be ticked if applicable. None are ticked in the present case. Then there is a new paragraph which reads "*This form has been read to me in* (and the word 'English' is written in) *and has been understood"*. Below that is a line for a signature, below which the words "*Andre Charles Babbage*" has been typed. The Claimant signed on that line.

79. In my judgment that form, so completed, is at the very least equivocal. It is not clear whether the Claimant was signing to indicate his consent to the proposition that the form had been read to him in English or to the proposition that he intended to leave the UK.

80. The form was attached to the Request which purports to be served under s35 of the 2004 Act. The Request reads: "*You are required to take the following specified actions… attend for interview at the Zimbabwean High Commission… (and)… Sign*

the attached voluntary disclaimer" (my emphasis). The Request goes on to indicate that, absent reasonable excuse, "*a failure to comply with the requirements above… is a criminal offence punishable by up to 2 years imprisonment*".

81. That makes this form worse than equivocal. It suggests to a detainee that he is obliged to sign the "voluntary" disclaimer or face the possibility of criminal proceedings, thereby rendering it far from voluntary. Mr Skinner suggested that the Claimant could have advanced a reasonable excuse, namely that he was not consenting to the removal. The detainee would need to be a lawyer as sophisticated as Mr Skinner to appreciate that. In my judgment signing this form as the Claimant did cannot be taken as constituting consent to removal.

82. There is some evidence that a casework officer at the Home Office believed that this document indicated consent. I have seen an email dated 2 January 2015 which reads:

> "*We have had a request from the caseowner to proceed with the asylum interview, although Mr Babbage… has stated that he wants to return home. However, he has refused to sign the IS 101PA to withdraw his asylum claim until he has spoken to his solicitor, therefore an interview cannot be arranged at the ZWE High Commission*"

83. However, there is much other evidence to suggest that others responsible for the Claimant's case in the months that followed understood he was not willing to return to Zimbabwe. There are a number of references in the detention Reviews to that being the position, the first of which was dated 14 January 2015. That includes the assessment "*Mr Babbage does not wish to return to Zimbabwe."*

84. In my judgment the claimant never gave his agreement to his return to Zimbabwe and the Home Office appreciated that from no later than 14 January 2015.

The Significance of the Claimant's Refusal Voluntarily to Return

85. The relevance of the fact that a detainee could return to his home country voluntarily was considered by Dyson LJ (as he then was) in R (I) v SSHD [2002] EWCA Civ 888. He said:

> "*50. … I too consider that [refusal of voluntary repatriation] is a relevant circumstance, but in my judgment it is of little weight. (Counsel for the Secretary of State) submits that a refusal to leave voluntarily is relevant for two reasons. First, the detained person has control over the fact of his detention: if he decided to leave voluntarily, he would not be detained. Secondly, the refusal indicates that he would abscond if released from detention.*
>
> *51. I cannot accept that the first of (the Secretary of State's) reasons is relevant. Of course, if the appellant were to leave voluntarily, he would cease to be detained. But in my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable. If*

> *(the Secretary of State) were right, the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect the deportation.*
>
> *52. I turn to [the Secretary of State's] second reason. I accept that if it is right to infer from the refusal of an offer of voluntary repatriation that a detained person is likely to abscond when released from detention, then the refusal of voluntary repatriation is relevant to the reasonableness of the duration of a detention. In that event, the refusal of voluntary repatriation is no more than evidence of a relevant circumstance namely the likelihood that the detained person will abscond if released.*
>
> *53. But there are two important points to be made. First, the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake.*
>
> *54. Secondly, it is for the Secretary of State to satisfy the court that it is right to infer from the refusal by a detained person of an offer of voluntary repatriation that, if released, he will abscond. There will no doubt be many cases where the court will be persuaded to draw such an inference. I am not, however, satisfied that this is such a case… In my judgment, the most that can be said [of the appellant I] is that there is a risk that if he is released the appellant will abscond. But that can be said of most cases…*"

86. Lord Dyson set out this passage at paragraph 123 of his judgment in Lumba. Then, at paragraph 128, he set out his conclusions as to the position in circumstances where enforcing return was not possible, where the detained person had no outstanding legal challenges, and where he was not willing to consent to removal. In other words, precisely the position in the present case. Lord Dyson said:

> "*128. … The fact that the detained person has refused voluntary return should not be regarded as a trump card which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be. That is because otherwise, as I said at paragraph 51 of my judgment in I's case, 'The refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided the Secretary of State was doing its best to effect the deportation'.*"

87. Here the risk of absconding is a very real one without resort to the inference that flows from the refusal of voluntary return; that refusal serves to increase the risk. But

it still does not provide a trump card for the Secretary of State when faced with a refusal to consent to removal.

A Reasonable Prospect of Removing the Claimant?

88. The risk of re-offending and the risk of absconding, amplified as it is by the refusal to return voluntarily, are of paramount importance when the court considers the justification for continued detention.

89. In R (A) v Secretary of State for the Home Office [2007] EWCA Civ 804, Toulson LJ said at paragraph 54:

> "*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…*"

90. However, in the light of the Supreme Court's decision in Lumba (and in particular the passages in the judgment of Lord Dyson set out at paragraphs 82 and 83 above), it cannot be said that the risks of reoffending and absconding are bound to be decisive, and I do not understand that to be what Toulson LJ was suggesting. Those risks go to, and may have a very significant effect upon, what is to be regarded as a reasonable period of detention prior to the proposed removal. But the acid test is always whether there is a realistic prospect of effecting a return.

91. For much of the time up until August 2015 there were additional reasons why the Claimant could not be returned and these might justify continued detention if there was some prospect of the Claimant being returned once those bars ceased to apply. Throughout the period of the Claimant's detention, it has been clear that the Zimbabwean authorities do not accept non-voluntary returns. For the reasons set out above, there has never been a time when the Claimant gave proper consent to his return.

92. If and when it becomes necessary to determine the lawfulness of the Claimant's past detention, the Court will need to consider whether in fact there was any realistic prospect of returning the Claimant at the relevant juncture, even if these bars did not exist.

93. Given that my function here is only to determine the legality of the present detention, it is not necessary for me to reach a concluded opinion as to the lawfulness of the Claimant's detention at earlier stages, or the effect of each of the suggested bars to removal. I simply observe that, at best for the Secretary of State, the suggested bars appear each to constitute only one of two potentially operative bars; throughout the period of detention there was also a bar created by the Zimbabwean authorities' refusal to accept a returnee like the Claimant unless he consented to return to Zimbabwe.

94. Mr Skinner argued that because the Claimant had indicated consent to removal in December 2014, he might do so again in the future and that justified continued detention. I have found that there was no such consent and so this point goes nowhere. In any event, I have grave doubts whether some vague hope of a change of mind on the part of the Claimant at some unidentified time of the future would be sufficient to justify continued detention.

95. The Zimbabwean authorities' position has been made clear over a prolonged period; they will not accept the return of those who do not hold a current passport other than from those willing to go back. There is nothing to suggest that stance is likely to change in the foreseeable future. In my judgment, in all the circumstances, it cannot be said that there is any realistic, foreseeable prospects of returning the Claimant to Zimbabwe.

Conclusion

96. In those circumstances the answer to the question I posed at the beginning of this judgment was "no" and this application had to succeed. At the time of the hearing on 15 December 2015 there was no prospect of the Claimant being deported to Zimbabwe and his continued detention could not be justified. It was in those circumstances that I ordered his release.

97. I will hear counsel on the terms of the order that is now required.