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Case No: C4/2014/1287/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEENS BENCH & ADMINISTRATION DIVISION
Andrew Grubb
CO/10123/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2016

Before:

LORD JUSTICE DAVIS
LORD JUSTICE SALES
and
MRS JUSTICE THEIS DBE

- -

Between:

The Queen on the Application of AA (Somalia)	**Appellant**
- and -	
The Secretary of State for The Home Department	**Respondent**

- -
- -

Mr Peter Jorro (instructed by **Wilson Solicitors LLP**) for the **Appellant**
Ms Julie Anderson (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date: 25th February 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE THEIS DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis:

Introduction

1. The appellant, AA, appeals to this court against the dismissal of his claim for judicial review on 29 January 2014 by Mr Andrew Grubb, sitting as a Deputy High Court Judge. His claim sought a declaration and damages in the tort of false imprisonment and for breach of Article 5 of the European Convention of Human Rights ('ECHR') on the basis that he was unlawfully detained by the Secretary of State for the Home Department ('Secretary of State'). He was granted permission to appeal by Arden LJ on 9 October 2014.

2. The appellant is a Somali national. On 22 November 2011 he was detained at port on entering the UK under powers contained in paragraph 16 (2) to Schedule 2 of the Immigration Act 1971 ('the 1971 Act'). As a result of the appellant's earlier conviction in the UK for an offence, for which he was sentenced to 3 years imprisonment, he was subject to the automatic deportation provisions under the UK Borders Act 2007 ('the 2007 Act'). From 19 January 2012 until his release on 24 September 2012 the appellant was detained pursuant to the powers in s 36 (1) of the 2007 Act. The appellant was detained in order to determine whether he should be deported under the 2007 Act or that he could not because one of the exceptions in s 33 applied. The focus of the appellant's claim is not upon detention in principle, but upon the length of time that his detention lasted which the appellant submits went beyond what was 'reasonable' and therefore must be unlawful.

3. The appellant's grounds of appeal are

   (i) that the learned Deputy Judge's finding that such detention was reasonable under the provisions of s 36 (1) (a) whilst considering 'in the light of the up-to-date material on Somalia whether the Claimant could now be returned', is unsustainable on the evidence disclosed by the respondent; and/or

   (ii) the Deputy Judge's finding that it was reasonable in all the circumstances for the respondent to have detained the appellant for 10 months whilst considering whether or not he could be safely removed, on deportation, to Somalia (in order to decide whether the human rights exception to 'automatic deportation' applies) is irrational or at least was one that was not sensibly open to him on the facts.

Relevant Background

4. This factual background is set out with admirable clarity in the Deputy Judge's judgment [2014] EWHC 929 (Admin).

5. The background, in so far as it is relevant to this appeal, can be stated quite shortly.

6. The appellant entered the UK unlawfully in 2003, he claimed asylum which was refused. A decision was made to remove him in late 2003. By early 2004 he was recorded as an absconder.

7. In 2006 the appellant lodged an appeal out of time, which was dismissed on asylum and humanitarian protection grounds, but allowed under Article 8 ECHR.

8. Both sides successfully applied for reconsideration of the decision in 2007. On 31 October 2007 Judge Hart dismissed the Appellant's appeal on asylum grounds based on the Refugee Convention and under Article 8, but allowed the appeal on the basis that he was entitled to humanitarian protection and that his return to Somalia would breach Articles 2 and 3 of the ECHR.

9. On 19 March 2008 the Appellant was granted leave to remain as a refugee until 18 March 2013. This was a mistake: Judge Hart had dismissed the appellant's claim on this basis.

10. On 1 June 2009 the appellant was convicted on 6 counts of supplying Class A drugs and 1 count of possessing with intent to supply a Class A drug. He was sentenced to a term of 3 years imprisonment for each offence, to run concurrently.

11. On 24 June 2009 the appellant was notified of his liability to be deported and invited to give reasons why he should not be deported, the appellant responded indicating that he believed his removal would breach his human rights under the Refugee Convention. On 15 July 2009 the appellant's continued detention after his custodial sentence was due to be completed was approved under immigration powers.

12. On 15 June 2010 the appellant was notified of his liability to be deported under the automatic deportation provisions in the 2007 Act. On 13 July 2010 he declined to complete the forms, but indicated orally that he considered an exception to the automatic deportation provisions applied to him.

13. On 24 July 2010 the appellant completed his custodial sentence and was detained under the 1971 Act.

14. The appellant was refused bail on 1 September 2010.

15. The Secretary of State wrote to the appellant notifying him of the intention to cancel his refugee status. It was served on the appellant on 14 October 2010.

16. On 5 October 2010 the appellant was granted conditional bail, including reporting and electronic monitoring.

17. By December 2010 the appellant had failed to report to the Probation Service as required and action was taken to recall him to prison. At some point in December the

appellant left the UK having removed his electronic tag and travelled to Amsterdam, where he claimed asylum.

18. In June 2011 the Dutch authorities notified the UKBA that the appellant was in the Netherlands and in November 2011 he was detained there.

19. On 22 November 2011 the appellant was returned to the UK by the Dutch authorities and detained under powers in the 1971 Act. By 29 November 2011 it was considered the appellant should be re-detained under s 36(1) of the 2007 Act. The Criminal Casework Division ('CCD') also indicated that they would consider pursuing the cessation of the appellant's refugee status on the basis that the situation in Somalia had changed since it was granted.

20. On 4 or 5 December 2011 the appellant's case was transferred to the CCD at Croydon which had responsibility for cases involving Foreign National Offenders ('FNOs').

21. On 17 January 2012 consideration was given to the appellant's continued detention, which was considered reasonable and proportionate to reduce the risk of reoffending, absconding and harm to the public.

22. On 19 January 2012 the appellant was detained under the powers in s 36 (1) of the 2007 Act, whilst the Secretary of State considered whether the automatic deportation provisions of the 2007 Act applied.

23. Thereafter there were eight 28 day reviews carried out as detailed in paragraphs 29 and 48 in the judgment below.

24. At the 5th review in early April the background facts were noted, there was reference to the decision in *Sufi & Elmi v UK ([2011] ECHR 1045)*, the appellant's non-compliance with the ETD interview was noted and consideration was given as to whether his refugee status and limited leave to remain could be curtailed. On 11 April 2012 a caseworker passed the appellant's file to the asylum casework team in the CCR for consideration. This was still being considered by the time of the 7th review on 30 May 2012.

25. On 21 June 2012 it was noted the appellant had been granted refugee status in error and he had been informed in 2010 of the intention to cancel this. The caseworker proposed that the appellant's refugee status, granted in error following his appeal on 1 November 2007, should be cancelled. The file was passed to a Senior Case Worker ('SCW') in the asylum team for consideration of that proposal.

26. On 5 July 2012 a SCW in the asylum team concluded the appellant's refugee status could not be cancelled, nor could he be excluded from the Refugee Convention or his status revoked. The SCW noted that the appellant's indefinite leave to remain could be revoked and he could be granted six months discretionary leave. However as his current leave expired on 18 March 2013 it was not practical to revoke his leave and it

was recommended on the expiry of his leave he should be granted the usual leave given to a person who could not be removed immediately due to Articles 2 and 3 ECHR, which was to grant periods of six months' leave at a time. This proposal was submitted to the SCW in the asylum team.

27. On 20 July 2012 the SCW recorded '*As a person with refugee status we have to consider whether to deport him to Somalia would breach his rights under Article 2 and 3 ECHR (in view of the fact that his appeal was allowed on Article 2 and 3 grounds we would do that anyway)*'. Submissions were then sent on to the SEO SCW for further consideration.

28. On 29 July 2012 the appellant's solicitors requested temporary admission and enquired whether a decision had been taken whether to deport the appellant, stating he was not removable being a minority clan member from Mogadishu.

29. The 9th review was completed on 31 July 2012. It noted the appellant's background, his claim to be from a minority clan, the advice of not being able to cancel his status and that a further proposal had been submitted to the SEO SCW. His further detention was confirmed for another 28 days in order for a decision on the submission currently with the SCW in the SEO team not to revoke his status, but to determine whether Articles 2 and 3 would be breached if he were returned to Somalia.

30. The evidence filed on behalf of the Secretary of State set out that any proposal not to pursue deportation of an FNO who fell within the automatic deportation regime was required to be formulated into a referral for consideration by or on behalf of the Chief Executive of the UKBA. Any such referral was required to go through the different levels of the relevant hierarchy of responsibility for consideration, to ensure it was correct before being considered by the Chief Executive.

31. Two applications for bail were made in August by the appellant, but both were withdrawn. On 17 August 2012 the appellant's solicitors pressed for a response to their request for temporary admission and requested a copy of the appellant's file.

32. The review on 22 August 2012 records the position and notes, as it has done in the previous reviews, the risk of the appellant reoffending and absconding.

33. The appellant's solicitors sent a Pre-Action Protocol letter to the UKBA on 28 August 2012, which was responded to on 11 September 2012.

34. The appellant's bail application was refused on 5 September 2012.

35. On 20 September 2012 the caseworker at the CCD was informed by the Office of the Director acting on behalf of the Chief Executive that the proposal not to deport the appellant had been approved. On 21 September 2012 the appellant's solicitors were asked for a release address.

36. The appellant was released unconditionally on 24 September 2012.

The Legal Framework

37. There is no dispute that the Deputy Judge correctly directed himself on the law.

38. It is common ground that the appellant's detention on arrival in the UK on 22 November 2011 was pursuant to the powers contained in the 1971 Act.

39. The 2007 Act contains powers of detention where a person is subject to the automatic deportation provisions of that Act. The 2007 Act applies to a "foreign criminal" (see s.32 (1)) who is a person who is not a British Citizen and has been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months. In respect of such a person, the Secretary of State must make a deportation order unless one of the exceptions in s. 33 applies (see s.32 (5)). For the purposes of this case, the relevant exception is Exception 1 set out in s. 33(2), namely that the foreign criminal's deportation would either breach his rights under the ECHR or under the Refugee Convention.

40. The powers of detention whilst the Secretary of State considers whether an exception applies or, where she thinks it does not, pending the making of a deportation order are set out in s. 36. It provides as follows:

> "36. Detention
>
> (1) A person who has served a period of imprisonment maybe detained under the authority of the Secretary of State –
>
> (a) while the Secretary of State considers whether section 32(5) applies, and
>
> (b) where the Secretary of State thinks that section 32(5) applies pending the making of the deportation order.
>
> (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c.77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.
>
> ....
>
> (4) The provisions of the Immigration Act 1971 which apply to detention under paragraph 2(3) of Schedule 3 to that Act shall apply to detention under sub-section (1) (including provisions about bail)...."

41. It was pursuant to the power in section 36(1) (a) that the Claimant was detained from 19 January 2012 whilst consideration was given to whether he should be deported under the 2007 Act.

42. It is well recognised that there are limitations on the relevant powers to detain set out in the legislation. Those limitations were originally set out by Woolf J (as he then was) in *Hardial Singh*. The four *Hardial Singh* principles were set out by Dyson LJ (as he then was) in *R(I) v SSHD* [2003] INLR 196 at [46] as follows:

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

> *Moreover the determination by the Secretary of State of whether, despite the strong policy and statutory impetus favouring deportation, such an individual should, exceptionally, be given leave to remain is a serious and important matter requiring proper and careful evaluation which, of necessity, will occupy a period of time. Any evaluation of the reasonableness of that period of time must, therefore, reflect the gravity of the decision that is to be taken.'*

48. It is clear this court should not interfere, even if it would have taken a different view of the case (see *Mustafa Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at [43]). There is a significant area of judgment open to the judge in the assessment of what a reasonable period is in all the circumstances, and it is necessary for a claimant to show that the judge's decision was either inconsistent with his findings of fact or that he had misapplied the relevant principles of law or had reached a decision that was outside the ambit of judgment open to him.

The decision of the Deputy Judge

49. The Deputy Judge decided the period of the appellant's detention pursuant to s 36 2007 Act was reasonable in all the circumstances.

50. In reaching his decision he took into account the appellant's history of absconding, the complexity regarding the appellant's status and that the returnability of the appellant was not clear from the outset and there were no periods of substantial inactivity.

51. In relation to his status he rejected the submission on behalf of the appellant that all the relevant facts were known when the appellant returned to the UK in November 2011. Judge Hart in determining the appellant's appeal found the appellant had lied. He dismissed his appeal on asylum grounds. Judge Hart had not accepted the appellant's evidence that he was at risk on return to Mogadishu as a member of the minority Reer Faqi clan. He did not accept the appellant was from Mogadishu, that he had lived in Somalia since the civil war began or that he was a member of the minority clan he claimed to be.

52. As the Deputy Judge observed at [93], *'The position was, therefore, at the time of the Claimant's return that although he had been found to be a Somali national, his claim to be from a minority clan and to have lived in Mogadishu had not been established'.* He noted that by the time of the 4th 28 day review on 13 March 2012 the Secretary of State, despite the judicial finding against the appellant, appears to have accepted the appellant's account. Having referred to the Strasbourg Court's decision in *Sufi and Elmi v UK* the review note recorded that the appellant is *'from Mogadishu in Somalia and is a member of the Reer Faqi clan which is a minority clan'.*

53. The Deputy Judge concluded at [96], *'It is not clear from the documentation why the Defendant changed her position on the Claimant's origin but, at least until that point, the judicial finding was adverse to the Claimant's case that he came from Mogadishu*

(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."

43. In *R(I) (ibid)*,at [48] Dyson LJ set out an non-exhaustive list of factors relevant to determining whether a period of detention was "reasonable" as follows:

the length of the period of detention;

the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation;

the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles;

the conditions in which the detained person is kept;

the effect of the detention on him and his family;

the risk that if he is released from detention he will abscond; and

the danger that, if released, he will commit other criminal offences.

44. Those principles and the relevance of these factors were approved by the Supreme Court in *R (Lumba) v SSHD* [2011] UKSC 12 at [22] and [105].

45. In the court below the appellant relied upon the second and fourth *Hardial Singh* principles. In this court the only relevant one is the second.

46. There is no maximum period after which detention becomes unlawful and cases are '*highly dependent on their own facts'* (see *R (Belkasim) v SSHD* [2012] EWHC 3109 (Admin) at [105]-[106], *per* Haddon-Cave J).

47. In *R(JS)* [2013] EWCA Civ 1378 this court was concerned with the application of the fourth *Hardial Singh* principle, namely the duty to use reasonable diligence, in the context of a person detained under s.36 of the 2007 Act. However, the court emphasised the importance and significance of the decision to be made by the Secretary of State whether a statutory exception applied preventing deportation. At [52], McFarlane LJ stated:

> *'52. The focus of this case is upon the period of detention and the administrative activity, or inactivity that took place during that time. It is, however, necessary to stress that the assessment of what is a "reasonable" time needs to reflect the overall context. That context is of a foreign national, who has no right to remain in this jurisdiction, who has been convicted of serious criminal offences, in relation to whom the criminal court has made a recommendation for deportation and in respect of whom, as a matter of law, the Secretary of State is required to implement deportation unless the individual is seen to fall within one of the narrow statutory exceptions.*

and was a member of a minority clan. I do not, therefore, accept Ms Short's submission that all the relevant facts about the Claimant were known when he returned to the UK on 22 November 2011. Given the rejection of the Claimant's evidence and account of his background by the Immigration Judge, there was, at least, a partial 'evidential vacuum' which required investigation and resolution in order to determine the returnability of the Claimant to Somalia.'

54. In rejecting the submission that the appellant's returnability was clear from the outset, that he could not return to Somalia in the light of the decisions in *Sufi and Elmi* and *AMM and Others* the Deputy Judge, having referred to the relevant passages in those cases, said:

'[100] In my judgment, however, these passages do not establish that every returnee to Mogadishu is necessarily at risk of Article 15(c) ill-treatment arising from indiscriminate violence or, as the Upper Tribunal put it, "regardless of circumstances" there is a real risk of Article 3 harm. Even for an individual from Mogadishu, that individual's circumstances would need to be assessed in order to determine whether they were in fact at real risk of Article 15(c) or serious ill-treatment contrary to Article 3.

[101] As I have said, Judge Hart's findings resulted in there being a partial "evidential vacuum" in respect of the Claimant's circumstances. Was he from Mogadishu and, if not, where was his home area? What was his clan status and what would be his personal circumstances if returned to Mogadishu? On these, at least until the detention review on 13 March 2012, the position was adverse to the Claimant as a result of Judge Hart's findings in the Claimant's appeal or at least unresolved.

[102] It is far from clear that the detention decision resolved the matter for the asylum team within the UKBA who were required to make the decision on status and returnability to Somalia. As AMM illustrates, the situation in Somalia, and its implications for the returnability of any individual, was fluctuating and fluid. The mere fact that Judge Hart had in October 2007 concluded that the Claimant could not be returned to Somalia because that would breach Article 15(c) of the Qualification Directive and Article 3 of the ECHR, did not resolve the Claimant's position on return after 22 November 2011 – 4 years after Judge Hart's decision. It was entirely proper, and indeed essential, for the Secretary of State to consider in the light of the up-to-date material on Somalia whether the Claimant could now be returned.'

55. Turning to the question of whether overall the period of the appellant's 10 month detention was unreasonable the Deputy Judge, after reminding himself of the factors set out by Dyson LJ at [48] in *R (I),* stated

'[122] First, the length of the period of detention was relatively short, namely 10 months. Secondly, there were complex issues of the Claimant's personal circumstances and, whether in the light of the country evidence and case law he could be returned to Mogadishu. There was also the legal issue of whether his refugee status could be revoked as it had been granted in error. Thirdly, I have already concluded that the UKBA acted with reasonable diligence in detaining the Claimant

and then re-detaining him under s.36(1) of the 2007 Act and in reaching its decision on or around 20 September 2012 that he would not be deported pursuant to the automatic deportation provisions under the 2007 Act. Fourthly, no matters were put before me in relation to the conditions in which the Claimant was detained. Fifthly, no material was put before me on the effect of the detention upon the Claimant or any of his family. Sixthly, given the Claimant's history there was a clear risk that he would abscond if not detained. Finally, there was a risk that if released he might commit further criminal offences of the type for which he was convicted on 1 June 2009 involving the supply of Class A drugs. Such offences are serious and pose a significant risk to the public.

[123] In addition, the appellant's non-cooperation in the ETD process only enhanced the risk of his absconding given his lack of willingness to provide information to assist in the deportation process.'

The submissions

56. Firstly, Mr Jorro submits, on behalf of the appellant, the conclusion by the Deputy Judge at [102] of his judgment that *'It was entirely proper, and indeed essential, for the Secretary of State to consider in the light of the up-to-date material on Somalia whether the Claimant could now be returned'* is not supported by the evidence in the material disclosed by the Secretary of State. He submits the strong indication from the disclosed evidence is that the Secretary of State was considering whether or not to revoke the appellant's refugee status during much of the period of his detention and this is not a reasonable basis for detaining him under the provisions of the 2007 Act, in particular s 36 (1)(a), which provides a power to detain a person whilst considering whether to deport and not what kind of status the person should have whilst remaining in the UK.

57. He supports that submission with a detailed analysis in his written skeleton argument of the review recordings, which he submits disclose no evidence to support any consideration by the Secretary of State of up to date material on Somalia to underpin the conclusion reached.

58. Secondly, Mr Jorro submits the conclusion that it was reasonable to detain the appellant for 10 months whilst considering whether or not the appellant could be safely removed, on deportation, to Somalia is irrational. He refers to the material referred to by the Deputy Judge in relation to *Sufi and Elmi* and *AMM*. He relies on the circumstances in *R (MM) v Secretary of State for the Home Department [2012] EWCA Civ 1270* where the court considered the Secretary of State had not been unreasonable in taking two weeks to consider the claimant's own personal position in the light of the judgments in *Sufi and Elmi*. He submits in June 2011, just prior to the appellant being detained, the decision of the ECtHR in *Sufi & Elmi* that the situation in Somalia had deteriorated to the extent that very few Somalis could be safely returned to Mogadishu and that those that could would have to be exceptionally well-connected to *'powerful actors' Sufi & Elmi [250]*. There was no basis for considering the appellant had such connections and it was clear in the light of these decisions it was not reasonable to detain the appellant for 10 months.

59. In his oral submissions he summarized his position as follows. There had been an Article 3 finding regarding the appellant returning to Somalia in 2007. In the light of the decision in *Sufi & Elmi* in the ECtHR and *AMM* in 2011 the position was clear that the exception to automatic deportation applied to the appellant. He submits this must have been known at an early stage in the appellant's detention, and in those circumstances the appellant's detention until September 2012 was unreasonable. He also submitted that it was not reasonable to wait to check on the Appellant's refugee status since it was clear that under Article 33(2) of the Refugee Convention that the Appellant's offending was so serious as to deprive him of protection under that Convention.

60. Ms Anderson in her written skeleton argument emphasised the context of the statutory power to detain under s 36 (1) of the 2007 Act, namely the automatic deportation regime for foreign criminals like the appellant who must be deported unless they come within the exceptions in s 33. She submitted given the statutory purpose the second *Hardial Singh* principle is modified to place Parliament's outer limit of reasonableness at the end of the period to establish definitively whether an exclusion to the automatic deportation regime is made out on the facts of the individual case.

61. She emphasised the seriousness of the decision to exclude a foreign national from automatic deportation, which would otherwise be mandated by Parliament and to justify the necessary facts to justify exclusion rather than pursuing deportation would be expected to take time (per McFarlane LJ in *R (JS)* at [52]). This was, she submits, a complex case that required proper investigation by the Secretary of State which the Deputy Judge correctly recorded and carefully evaluated, then having addressed the applicable legal principles (which there is no challenge to) he reached a conclusion that was well within the ambit of judgment open to him.

62. In her oral submissions she said the approach taken by Mr Jorro in his submissions was over prescriptive. He was considering the case with the benefit of hindsight, rather than considering the facts as they were at the time. The 2007 statute did not require the Secretary of State to take matters in a particular sequence, the requirement was for there to be an investigation in the way described by McFarlane LJ in *R (JS)* bearing in mind the context that determining that a FNO falls outside the automatic deportation provisions is a serious and important matter requiring proper and careful evaluation which, of necessity, will take a period of time. It could not be assumed that the Refugee Convention was not a relevant issue, as submitted by Mr Jorro. The facts of this case were complex, the assessment was being undertaken by the specialist teams concerned with automatic deportation and entitlement to asylum and humanitarian protection.

Discussion

63. Mr Jorro's analysis has a number of flaws. His focus has been on only one aspect of the evaluation of the evidence by the Deputy Judge and he has given that matter undue weight. He has sought to portray the impact of the decisions in *Sufi & Elmi* and

AMM in a generalised way as supporting, in effect, the proposition that unless a person is considered *'well connected to powerful actors'* in Mogadishu they would not be deported on Article 3 grounds.

64. Such an approach is over simplistic for the following reasons.

65. First, the decisions in *Sufi & Elmi* and *AMM* are more nuanced than Mr Jorro suggests. In *Sufi & Elmi* there is reference to the changing dynamic position in Somalia over time - [247], the difference between Mogadishu and other areas in Somalia, with there being the possibility of internal relocation - [294], and the fact that the circumstances described in that case concerned a time period prior to the circumstances in this case. The situation in Somalia is complex and dynamic and the Secretary of State was entitled to take time to consider the position at the relevant time.

66. Second, this issue cannot be considered in isolation of all the other relevant factors that form an integral part of the Secretary of State's evaluation, accepted by the Deputy Judge, and not seriously challenged by the appellant. This includes such matters as investigation in relation to the appellant's status and his background circumstances, particularly bearing in mind the conclusions reached in 2007 that the appellant had lied about his background. Whether the appellant retained his refugee status, or not, had implications regarding the Refugee Convention, which is one of the provisions specified in s 33. Contrary to Mr Jorro's submission, it was not obvious that the effect of Article 33(2) of the Refugee Convention was that the appellant could not enjoy any protection under that Convention.

67. Mr Jorro's focus was on the last sentence in paragraph 102 of the Deputy Judge's judgment, namely the finding that the Secretary of State was right to consider in the light of the up to date material on Somalia whether the claimant could not be returned. His limited focus in his skeleton argument of the detailed recordings failed to factor in other relevant considerations. As the Deputy Judge observed in the preceding sentence in [102] '*The mere fact that Judge Hart had in October 2007 concluded that the Claimant could not be returned to Somalia because that would breach...Article 3 of the ECHR, did not resolve the Claimant's position on return after 22 November 2011 – 4 years after Judge Hart's decision.*'

68. Integral to the Secretary of State's decision, as found by the Deputy Judge, were matters relating to the appellant's status, which was not clarified until July 2012, and the partial 'evidential vacuum' caused by the appellant's repeated lies over a number of years, which required further investigation. In addition, there was detailed evidence before the Deputy Judge that due to the sensitivity of the decisions in these cases any decision regarding an exception to the automatic deportation provisions were required to be taken at the highest level within the UKBA.

69. Mr Jorro's submission, in effect, that there was no need for the Secretary of State to investigate these other matters cannot stand. He has sought to elevate one consideration over the others in a way that is not permissible.

70. I would therefore hold that the appellant's first ground of appeal fails.

71. Turning to his second ground of appeal, it mirrors much of what is said in reliance on the first ground. Mr Jorro submits the Deputy Judge's conclusion that the period of detention was reasonable is irrational or not one that was open to him.

72. This can be taken quite shortly.
73. Each of the conclusions reached by the Deputy Judge in [122] and [123] (as set out in [47] above) that underpin his conclusion that the period of the appellant's detention was reasonable in all the circumstances were material conclusions he was fully entitled to reach on the evidence available to him. As set out above, Mr Jorro's submission that the Secretary of State was not required to consider the appellant's status is wrong, the position regarding his status was relevant as part of the Secretary of State's consideration as to whether the exception under s 33 applied.

74. The Deputy Judge reminded himself in the preceding paragraph [121] of the relevant principles and there is no foundation to the assertion that his conclusion was irrational.

75. I would therefore hold that the appeal on the second ground also fails.

Lord Justice Sales:

76. I agree.

Lord Justice Davis:

77. I also agree.