Case No: C1/2002/1758

Neutral Citation No. [2003] EWCA Civ 475.
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE CRANE

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 3rd April 2003

Before :

LORD JUSTICE KENNEDY

LORD JUSTICE CHADWICK

and

LORD JUSTICE MANCE

- -

Between :

Secretary of State for the Home Department	Appellant
- v -	
The Queen of the application of Khadir	Respondent

- -

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

- -

Ms Carss-Frisk QC, R. Tam & Miss K. Gallafent (instructed by Treasury Solicitor) for the Appellant
N. Blake QC & M. Henderson (instructed by Hackney Law Centre) for the Respondent

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Judgment
As Approved by the Court

Lord Justice Kennedy :

1. This is an appeal by the Secretary of State from a decision of Crane J, sitting in the Administrative Court, who on 29th June 2002 ordered that -

> (1) The decision of the Secretary of State of 3rd May 2002 refusing to grant the respondent exceptional leave to remain be quashed, and –
>
> (2) the Secretary of State give further consideration forthwith to the respondent's application for exceptional leave to remain for some period.

The judge also made orders in relation to costs, and granted limited permission to appeal. In response to an application made to us by Ms Carss-Frisk QC for the Secretary of State we have extended the scope of the permission granted by the trial judge. Whilst supporting the decision of the judge the respondent seeks additional relief, to which I will turn later in this judgment.

Background

2. Before the judge there were two claimants seeking relief, the present respondent and Majid Rashid Hwez. Hwez was not successful, and we are not concerned with his case.

3. The respondent, likewise, is an Iraqi national of Kurdish ethnic origin, who comes from an area of northern Iraq, known as the Kurdish Autonomous Area (KAA) where the writ of the Iraq government does not run. It is not, as the judge pointed out, a single unified area. Different parts are controlled by different parties, the principal parties being the Patriotic Union of Kurdistan and the Kurdistan Democratic Party.

4. On 19th October 2000, in a letter to the Refugee Law Centre, the Immigration and Nationality Directorate of the Home Office made it clear that the Secretary of State regarded the KAA as safe for Iraqi Kurds. The letter continued -

> "In practice the removal of failed asylum seekers to northern Iraq has in the past been hampered by a lack of commercial flights to that country. A few Iraqis have departed voluntarily, travelling via Jordan and some, with the assistance of IOM, have returned via Turkey. If any Iraqi failed asylum seeker were to reach the removal stage the Immigration Service will investigate any viable option. We are actively exploring options for enforced removal along such routes."

On 27th November 2000 the respondent arrived in the United Kingdom, hidden in the back of a lorry. He was not intercepted at the port of entry and applied for asylum on that day. He was interviewed on 12th January 2001, and was advised on 29th January 2001 that his application for asylum had been refused.

5. On 5th February 2001 the respondent was given written notice in standard form of the decision of the Secretary of State. Under the heading "Decision to issue removal directions to an illegal entrant" the notice told the respondent that he was an illegal entrant who had been refused asylum, and it continued -

> "Directions have now been given for your removal from the United Kingdom by scheduled airline to Iraq at a time and date to be notified."

The notice then told him of his right to appeal against the directions.

6. The respondent appealed against the decision to refuse asylum, and against the decision to issue removal directions. That appeal was heard by an adjudicator on 20th June 2001, and for reasons set out in the determination of 7th August 2001 the appeal was dismissed. The adjudicator heard evidence of the respondent's troubles at home, but there was no cogent evidence that he had been persecuted for his actual or political views, and thus he was found not to have established a well-founded fear of persecution for a Convention reason were he to return to Iraq at the present time.

7. On 7th September 2001 the Secretary of State wrote to the respondent informing him that asylum having been refused he no longer qualified for support under section 95 of the Immigration and Asylum Act 1999. He was also told that he must now leave the United Kingdom, and that he should contact the Immigration Service Office dealing with his application, which would make arrangements for his removal.

8. The respondent then consulted the Hackney Community Law Centre which, on 23rd November 2001, wrote to the Secretary of State seeking exceptional leave to remain on the basis that there was no immediate prospect for removal. It was said that a concession made by counsel for the Secretary of State in Hwez, and the operational guidance issued by the Immigration and Nationality Directorate in September 2001 in relation to Somalia both supported that course.

9. There was no response from the Secretary of State, so on 14th December 2001 the respondent commenced proceedings for judicial review, seeking a mandatory order that the Secretary of State make a decision in response to his application, and meanwhile provide financial support.

10. On 3rd January 2002 the Secretary of State in his summary Grounds of Defence said that he was willing to provide assistance to prevent destitution, but that the demand for a decision in relation to the application for exceptional leave to remain was premature. The respondent would have to wait his turn. The situation in relation to Hwez was said to be relevant. Arrangements were then made for the respondent to obtain Hard Cases Support.

11. On 8th February 2002 the Secretary of State wrote to the solicitors acting for Hwez rejecting his application for exceptional leave to remain. That letter contains this paragraph -

> "It remains our intention, subject to the outcome of his appeal, to remove him to northern Iraq. As you are aware, we have been exploring a number of options for returning Iraqi Kurds to northern Iraq through various neighbouring countries. As part of that process we have entered into negotiations with officials from those countries, and there have been a number of meetings and discussions, most recently in November last year. Further meetings are scheduled to take place in the coming weeks. Whilst it is the case that matters are taking longer to conclude than we would ideally like, progress is being made, and our work continues. However these negotiations are sensitive, and to reveal more of their detail would risk jeopardising their outcome."

The letter then sought to distinguish the policies operated in relation to Somalia and Sierra Leone and said that if leave were to be granted for 12 months it could not be cancelled if circumstances changed. The letter states -

> "None of the limited circumstances set out in paragraph 323 of HC395 under which curtailment of limited leave is permitted would apply to his case and there would be no power to enforce removal before the expiry of the 12 month period. In fact there is every reason to believe that removal would not be possible for considerably longer. At the end of the period of exceptional leave Mr Hwez would be very likely to have a second right of appeal under the Immigration and Asylum Act 1999, which would take a considerable period of time to be finally disposed of even if it had no merit."

On 3rd May 2002 the Secretary of State replied to the respondent's application for exceptional leave to remain. It was a brief letter and contained this sentence-

> "As you are aware, the Secretary of State is currently investigating a safe route for Iraqi Kurds to return to northern Iraq, and in those circumstances a grant of exceptional leave is not appropriate."

On or about 7th May 2002 the respondent amended his existing application for judicial review to challenge the decision of 3rd May contending that he had a right to exceptional leave to remain once it became apparent that he could not be removed to the KAA within a reasonable period of time. He had been in the United Kingdom for 18 months, having entered illegally, and had been in practice irremovable since the disposal of his appeal in August 2001. He was in the circumstances not liable to be detained pending the implementation of removal directions, and it was said "the grant of temporary admission alone is no longer a lawful response to his situation." Thus the matter came before Crane J in July 2002, together with the case of Hwez, whose position was different because his appeal against the decision to refuse him asylum had yet to be heard.

Statutory framework

12. The statutory framework as it was at the time of the hearing before Crane J is set out in his judgment at paragraphs 17 to 24. It can be summarised thus -

(a) The person who is not a British Subject requires leave to enter or remain.

(b) Limited leave to enter or remain may be given subject to conditions as to employment, maintenance and registration with the police - section 3(1)(c). In addition, by section 3(3)(a) -

> 'a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions ……..'

(c) The practice followed by the Secretary of State in the administration of the Act is set out in rules laid before Parliament.

(d) The provisions of schedule 2 of the Act have effect with respect to -

> '(c) The exercise by Immigration Officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and
>
> (d) The detention of persons pending examination or pending removal from the United Kingdom.'

(e) Turning to schedule 2, where a person is refused leave to enter paragraph 8(1)(c) enables an Immigration Officer within a limited time to give to the captain or owners or agents of the ship or aircraft in which that person arrived directions requiring them to make arrangements for his removal to -

> '(i) a country of which he is a national or citizen; or
>
> (ii) a country or territory in which he has obtained a passport or other documents of identity; or
>
> (iii) a country or territory in which he embarked for the United Kingdom; or
>
> (iv) a country or territory to which there is reason to believe that he will be admitted.'

(f) Paragraph 9 enables similar directions to be given in the case of an illegal entrant not given leave to enter or remain.

(g) Paragraph 10, so far as material, provides -

> '(1) Where it appears to the Secretary of State either -
>
> > (a) that directions might be given in respect of a person under paragraph 8 or 9 above, but that it is not practicable for them to be given or that, if given, they would be ineffective; or

(b) ..'

then the Secretary of State may give to the owners or agents of any ship or aircraft any such directions in respect of that person as authorised by paragraph 8(1)(c).

(2) Where the Secretary of State may give directions for a person's removal in accordance with sub-paragraph (1) above, he may instead give directions for his removal in accordance with arrangements to be made by the Secretary of State to any country or territory to which he could be removed under sub-paragraph (1).

(3) The costs of complying with any directions given under this paragraph shall be defrayed by the Secretary of State.'

(h) Paragraph 16, so far as material, provides -

'(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 or 12 to 14, that person may be detained under the authority of an Immigration Officer pending -

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions.'

(i) Paragraph 21 begins -

'(1) a person liable to detention or detained under paragraph 16 above may, under the written authority of an Immigration Officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.

(2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an Immigration Officer as may from time to time be notified to him in writing by an Immigration Officer'…

Before Crane J

13. Crane J held that at least by February 2002, when it was said in the letter to the solicitors for Mr Hwez that there was every reason to believe that removal would not be possible for considerably longer than 12 months, removal of the present respondent was not still "pending". He could not therefore be detained pursuant to rule 16(2), and consequently he could not be granted temporary admission pursuant to rule 21(1). The judge continued at paragraph 60 of his judgment -

> "Even if I am wrong about that, at least by February 2002 his application, made in November, for exceptional leave to enter should in any event have received proper consideration. Very careful consideration should have been given to granting exceptional leave to enter at least for a short period. No decision was in fact given until 3 May 2002, in a letter containing wholly inadequate reasoning."

It is now common ground that the judge mis-read the letter written in February 2002, where, in referring to a period considerably longer than 12 months, the writer was addressing the effect of the appellate process, not the time likely to elapse before any one can be removed to the KAA.

Appellant's Submissions

14. For the Secretary of State Ms Carss-Frisk submitted to us that where a person has entered the United Kingdom illegally, and his application for asylum has been rejected, the statutory scheme envisages directions for removal and meanwhile either detention or a grant of temporary admission. There is no provision for leave to remain, although it can be granted exceptionally outwith the rules.

15. After a decision is taken to give directions for the removal of a person such as the respondent, there may be a gap before effective directions are actually given, but that is covered by paragraph 16(2)(b) of schedule 2. The power to detain will persist so long as the removal pursuant to directions is pending, and that will remain the position so long as there is a reasonable prospect of removal at some time in the future. The circumstances may be such that it would no longer be reasonable to exercise the power to detain, but so long as that power remains extant the power to grant temporary admission will persist.

16. In Hardial Singh [1984] 1 WLR 704 Woolf J was concerned with an offender who had been recommended for deportation following conviction. He had served his sentence and would normally have been released on parole. He had no passport and no valid travel documents. It was in that context that the judge said at 706D that the power of the Secretary of State given in paragraph 2 of schedule 3 to the 1971 Act is subject to limitations -

> "First of all, it can only authorise detention if the individual is being detained in one case pending the making of the deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."

As Ms Carss-Frisk points out, the case was concerned with detention under schedule 3; it was not concerned with temporary admission.

17. In Secretary of State v Rehmat Khan and others [1995] Imm. A.R.348 the respondents were illegal entrants who had claimed asylum. Before their applications had been determined they were detained pursuant to paragraph 16(2) of schedule 2. It was argued that because they could not be removed until their claims were determined there was no power to detain them. That was rejected. Leggatt LJ said at 353 that nothing in the Act -

> "Prevents any of the respondents being persons in respect of whom directions may be given; what it prevents is the giving of directions for removal while the applications for asylum are outstanding. During the period when asylum is being sought, the power to give directions exists; but the existence of the power does not oblige the Secretary of State to exercise it either at once or at all. The effect of the applications for asylum is merely to protract the period during which, in consequence of the Secretary of State's intention to give directions for their removal, the respondents are liable to be detained."

Ms Carss-Frisk submits that for a different but equally compelling reason the period is protracted in the present case.

18. In Tan te Lam v Superintendent of the Detention Centre [1997] AC 97 the Privy Council considered the position of migrants from Vietnam of Chinese ethnic origin. They had landed in Hong Kong by boat, and been refused refugee status. They were detained for several years under section 13D of the Immigration Ordinance "pending .. removal from Hong Kong". However the Ordinance only permitted detention if the period of detention was "reasonable having regard to all the circumstances". It was submitted that the very long period of detention to date rendered further detention for an indefinite period unreasonable, and therefore unlawful, and that as the Vietnam authorities would not accept repatriation of those they regarded as non-Vietnamese nationals there was no possibility of compulsory removal from Hong Kong, so the detention could not be "pending removal". Lord Browne-Wilkinson giving the judgment of the Privy Council adopted the principle set out in Hardial Singh, saying at 111C -

> "In the absence of contrary indications in the statute which confers the powers to detain 'pending removal' their Lordships agree with the principle stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

19. In R (on the application of I) v Secretary of State 28th June 2002 this Court considered an appeal by an Afghani who arrived in England in 1998. His application for asylum was refused, and in 1999 he was convicted of indecent assault and sentenced to imprisonment for three years with a recommendation for deportation and a requirement to register as a sex

offender. Early in 2001, when he was almost due for release on licence, the Secretary of State signed the relevant deportation order but in May 2002 he was still in detention. The Secretary of State was not removing nationals to Afghanistan, and the resumption of removals did not appear to be imminent. Simon Brown LJ reviewed the authorities, and concluded that on the facts of that case the Secretary of State had supplied a valid justification of the detention to date, and of the need to continue it for a longer period. At paragraph 44 he said -

> "The stage has not yet been reached when it can be said that the negotiations will probably fall through and that there is no real prospect or possibility of the Secretary of State being able to operate the machinery for removing the appellant within a reasonable period. The detention of the appellant continues to be with a view to his deportation under an order remaining in force. It has not been suggested that he is being detained for some other purpose. It has not become unreasonable to enforce the deportation order."

Ms Carss-Frisk submits that making allowance for the fact that he enjoys temporary admission a similar approach could and should have been adopted by Crane J in relation to the respondent in the present case.

20. So the first submission made by Ms Carss-Frisk was that the power to detain persists, and with it the power to grant temporary admission. The evidence showed that the Secretary of State was negotiating to try to achieve a means of sending Iraqi Kurds to the KAA, and the judge was right to accept, as he did, that in those negotiations "progress is being made". Thus, for the purposes of paragraph 16(2) it could still be said that removal pursuant to directions was pending.

21. The directions given were, Ms Carss-Frisk submits, valid. They were given under paragraphs 10(1) and 10(2) of schedule 2 to the 1971 Act, and did not have to specify the aircraft or ship. They could be amended when the Secretary of State was in a position to identify a means of transport to the KAA, and by exercising his right of appeal the respondent acknowledged the validity of the directions.

22. Given that there was a power to grant temporary admission, the Secretary of State was entitled to exercise that power, and until the respondent could be removed there was provision to avoid destitution. Had the respondent been granted exceptional leave to remain the judge was wrong to find that leave given for a finite period outwith the rules could be curtailed as soon as a means of getting the respondent to the KAA was identified. Once the respondent was given leave to remain he would have the protection of rule 323 of the Immigration Rules (HC 395) and the right of appeal, although it might be possible to grant exceptional leave to remain until the Secretary of State advised the respondent of the way in which it was proposed that he be sent to the KAA. In R v Secretary of State for the Home Department ex parte Quaquah September 2000 Elias J said at paragraph 38 of his judgment that the Secretary of State must consider an application for exceptional leave to enter on its merits, and continued -

> "He may consider it unsatisfactory that there are delays in the appeal procedure which mean, if he grants leave, then an individual may, in practice, end up remaining in the country longer than he originally

intended. But in my view it is quite wrong to have regard to that fact when determining whether or not it is appropriate to grant leave."

Ms Carss-Frisk submits that in saying what he did Elias J failed to recognise the true status of exceptional leave to enter and exceptional leave to remain. They can be granted by the Secretary of State in the exercise of powers outside the rules, and in deciding, as a matter of discretion, whether or not to exercise his powers he is entitled, she submits, in an appropriate case to consider what the effect will be if the power is exercised, in terms of the length of time for which the applicant is likely in reality to remain in the United Kingdom.

Immigration and Asylum Act 2002

23. Following the decision of Crane J in this case Parliament enacted the Nationality Immigration and Asylum Act 2002, section 67 of which reads –

"(1) This section applies to the construction of a provision which –

(a) does not confer power to detain a person, but

(b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.

(2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that –

(a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,

(b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or

(c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.

(3) This section shall be treated as always having had effect."

Sub-section (3) is highly unusual, but it is not unique. Ms Carss-Frisk and her juniors have been able to demonstrate that the same form of words has been used in primary legislation on at least three occasions, and section 15(4) of the Immigration and Asylum Act 1999 provided that the section "is to be treated as having come into force on 26th July, 1993".

24. Initially Ms Carss-Frisk was not seeking to rely on section 67 of the 2002 Act for the purposes of this appeal, but ultimately she did recognise that as the 2002 Act had been brought into effect before we began to hear the appeal we cannot disregard it, and must give effect to it so far as it is relevant to do so.

25. It is common ground that unless a contrary intention appears an enactment is presumed not to be intended to have retrospective effect, but, Ms Carss-Frisk submits, section 67(3) is clearly worded and from it the contrary intention does appear.

26. The next question is whether section 67 applies to an appeal from a decision taken before the 2002 Act was passed. As to that Ms Carss-Frisk invites our attention to page 269 of the 2002 edition of Bennion on Statutory Interpretation, which states that –

> "Where an amending enactment is intended to be retrospective it will apply to pending actions, including appeals from decisions taken before the passing of the amending Act."

In support of that proposition our attention was also invited to the decision of the Privy Council in Hashim v Government of Malaysia [1980] AC 734, and to the decision of this court in Hewitt v Lewis [1986] 1 WLR 444.

27. Turning then to section 67(1) and (2), Ms Carss-Frisk submits that paragraph 21(1) of Schedule 2 to the 1971 Act was and is a provision within the ambit of section 67(1) of the 2002 Act. Accordingly the reference in that provision to "a person liable to detention" must be taken to include the respondent if the only reason why he cannot be detained is the reason spelt out in section 67(2)(b). So if the respondent cannot lawfully be detained because for the purposes of paragraph 16(2) of schedule 2 to the 1971 Act he is not to be regarded as pending removal, then, as Ms Carss-Frisk submits, section 67(2) "fills the gap" and it does not matter whether the inability to detain the respondent arises from an absence of any power to detain or from a situation in which it would be unreasonable to use a power which does exist.

Respondent's submissions

28. For the respondent Mr Blake QC submits that the judge was right for the reasons he gave, as the law stood at the time when judgment was delivered. For 12 years Iraqi Kurds had not been sent back to Iraq, then in October 2000 the Immigration and Nationality Department notified the Refugee Legal Centre of "a change of practice rather than policy" in relation to asylum seekers from the KAA, but that was not accompanied by any identified means of sending asylum seekers without travel documents back to the KAA.

29. In practice where an asylum seeker cannot be returned to his country of origin the Secretary of State has been prepared to consider granting exceptional leave to enter or to remain for a short time, as can be seen from the Immigration and Nationality Directorate's published instructions of December 2000, and the Directorate's Operational Guidance in relation to Somalia published in September 2001. In R (on the application of I) there was at least the possibility of voluntary return to Afghanistan, but with no travel documents that possibility does not exist for the respondent in the present case. If an applicant for asylum cannot be removed pursuant to directions within a reasonable time then he cannot be detained pursuant to paragraph 16 of schedule 2 because his removal is no longer "pending", and thus he cannot be temporarily admitted pursuant to paragraph 21. Mr Blake does not accept that the authorities are concerned only with the exercise of the power to detain, as opposed to the continued existence of that power, and he points to the language used by Woolf J in Hardial

Singh and by Lord Browne-Wilkinson in Tan te Lam (see paragraphs 16 and 18 above). Mr Blake submits that it would be wrong for this court to hold that the power persists so long as the Secretary of State subjectively intends to remove the asylum-seeker, however unlikely it may be that removal will be possible in the foreseeable future.

30. Mr Blake goes on to submit that even if the Secretary of State did have power to grant temporary admission that power was not lawfully exercised because of the restrictions which such admission involves. Those who have temporary admission cannot work, and have no money. That may be acceptable for a short period whilst arrangements are being made to send someone home, but it is not acceptable for an indefinite period, and it is unnecessary. If leave to enter or remain is granted outside the Rules it can be brought to an end when the reason for granting it no longer applies, and, as Elias J indicated in Quaquah, the Secretary of State should not be deterred from granting exceptional leave to remain because he wants to keep control of the asylum-seeker and not put him in a position to take advantage of an appellate process.

31. Mr Blake submits that in the respondent's case Crane J should not have simply quashed the decision of 2nd May 2002 and ordered the Secretary of State to give consideration forthwith to the grant of exceptional leave to enter or remain. He should have made it clear by declaration that the removal of the respondent from the United Kingdom pursuant to schedule 2 of the 1971 Act was no longer pending, that in consequence he could not be detained or granted temporary admission, and accordingly it was the duty of the Secretary of State to grant exceptional leave to enter or remain.

32. Turning to the 2002 Act, Mr Blake submits that section 67(3) should be construed in such a way as not to impact upon this appeal. He recognises that the statutory wording is clear, and would now apply to any decision at first instance, but he relies on CPR 52.11(1) to show that at least initially our function is "limited to a review of the decision of the lower court", although we can conduct a re-hearing if we consider that in the circumstances of this individual appeal it would be in the interests of justice to do so. Mr Blake points out that in Hashim and in Hewitt the appeals were by way of re-hearing, and thus the determination of the respective rights of the parties was pending, and was capable of being adversely affected by a change in the law. Mr Blake submits that it would not be in the interests of justice for us to proceed by way of re-hearing in a case where the applicability of section 67 was raised by the court rather than by the Secretary of State. The decision of the judge, it is said, cannot be flawed by reason of a law that did not exist at the time when the decision was made, and the Secretary of State should not be permitted to improve his prospects on appeal by relying on a law he has promoted since the decision of the court below. Such reliance, Mr Blake submits, would be contrary to contemporary constitutional norms and would constitute for the purposes of Article 6 of the European Convention on Human Rights an interference with the respondent's right of access to a court (see the Greek Refineries Case [1994] 19 EHRR 293 and Anderson v Scottish Ministers [2002] 8 BHRC 290 and 3 WLR 1460).

33. Mr Blake, both in oral argument and in his written submissions, has invited us to have regard to the statements of ministers promoting the 2002 legislation. In an attempt to overcome the difficulties he faces in the light of Pepper v Hart [1993] AC 593 Mr Blake has drawn our attention to what was said by Lord Steyn in R v A (No 2) [2002] 1 AC 45 and in R (Westminster City Council) v National Asylum Support Service [2002] 1 WLR 2956, but

on both occasions Lord Steyn was concerned with context and here, as it seems to me, the context is clear. The Parliamentary history of the Bill is no concern of ours, save that there is no reason to think that the relevant clause was inserted to assist the Secretary of State in relation to this particular appeal. Furthermore, a perusal of the Parliamentary material placed before us seems to me to be of little assistance to the respondent, because nowhere is it suggested that section 67(3) should be read in such a way as to exclude a pending appeal.

34. Mr Blake then submits that if section 67 applies it does not assist the Secretary of State in this case because this decision is about the grant of exceptional leave to remain and not about the validity of temporary admission before such a grant is made. That seems to me to be, with respect, unrealistic having regard to the structure of the 1971 Act. As a further alternative Mr Blake submits that section 67(2) does not authorise the grant of temporary admission by reference to a deemed power to detain where there is a mere hope of future arrangements being made for removal. I disagree. In my judgment the words of the subsection are plainly intended to cover that situation, and it would be astonishing were it otherwise.

35. Finally Mr Blake submits that we should have regard to schedule 3 of the 2002 Act which came into effect on 8th January 2003, but, as is pointed out on behalf of the Secretary of State, that schedule has no retrospective effect, and so, in my judgment, it can have no bearing on this appeal.

Final submissions of Secretary of State

36. In the final written submissions made on behalf of the Secretary of State it is asserted, and I would accept, that it is of no significance whether we are now conducting a review or a re-hearing. Either way we must apply the law as it is now deemed always to have been.

37. Ms Carss-Frisk goes on to point out that if the appeal of the Secretary of State were to be dismissed on the basis that section 67 of the 2002 Act does not apply, the quashing order made by the judge would remain in place. The Secretary of State would have to re-consider the respondent's application for exceptional leave to remain and there would then be, as she puts it, "a substantial risk of the Secretary of State coming to the same conclusion as he did in May 2002".

38. Ms Carss-Frisk recognises that the retrospective legislation may affect the decision of this court, but she submits that the legislation cannot therefore be regarded as an unlawful or disproportionate interference with the right of access to a court under the European Convention. Article 6 does not apply because a decision concerning an alien's immigration status is not a determination of his civil rights or obligations, nor does it involve the determination of any criminal charge (see Maaouia v France [2000] 33 EHRR 42). Ms Carss-Frisk further submits that even if Article 6 were applicable the retrospective legislation is proportionate and justified. The Greek Refineries case was very different. There the legislature intervened directly to deprive the litigants of the fruits of litigation. In Anderson the interference was less marked, and the effect of the statutory amendment to substantive law on existing proceedings through its retrospectivity was found by the Privy Council to be justified. Here we are concerned only with a statutory expansion of interpretation.

Conclusion.

39. In my judgment the decision of Crane J was correct at the time when his judgment was delivered. Despite the shortcomings of the Notice it seems clear to me that in February 2001 the Secretary of State did decide to issue removal directions, but thereafter, with the passage of time, and having regard to the continuing inability of the Secretary of State to remove anyone to the KAA, it became increasingly unrealistic to assert that the respondent was a person who might be detained pending his removal in pursuance of removal directions. Thus the Secretary of State was deprived of his right to grant temporary admission pursuant to paragraph 21 of schedule 2 to the 1971 Act.

40. But that situation was changed by the 2002 Act. The wording of section 67(3) makes it clear beyond argument that the whole section must be "treated as always having had effect". Section 67(1) applies to paragraph 21 and section 67(2) applies to the respondent because the only reason why he cannot be detained under paragraph 16 is that there are practical difficulties of the kind envisaged in section 67(2)(b). He is therefore a person who may be granted temporary admission, and the Secretary of State has no obligation to give any further consideration to the respondent's application for exceptional leave to remain. In the circumstances the inadequacy of the reasoning in the letter of 3rd May 2002 is no longer of any moment. It has been overtaken by events. I would therefore allow the appeal and dismiss the cross-appeal.

Lord Justice Chadwick:

41. Provision for the control of immigration is made by the Immigration Act 1971, as from time to time amended. The underlying principle is found in section 3(1) of that Act:

> "Except as otherwise provided by or under this Act, where a person is not a British citizen –
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) . . . "

42. The power under the Act to give or refuse leave to enter the United Kingdom is exercised by immigration officers – section 4(1) of the 1971 Act. The exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering and remaining unlawfully, is regulated by the provisions in schedule 2 (Administrative Provisions as to Control on Entry etc).

43. Paragraphs 8 and 9 of schedule 2 to the Act confer powers on immigration officers to give directions for the removal of persons who are refused leave to enter the United Kingdom (paragraph 8) and persons who (having entered unlawfully) are not given leave to enter or

remain (paragraph 9). Paragraph 10 confers similar powers on the Secretary of State. Paragraph 16(2) confers power to detain a person if there are reasonable grounds for suspecting that he is someone in respect of whom directions may be given under any of paragraphs 8 to 10 of schedule 2. A person may be detained under paragraph 16(2) under the authority of an immigration officer pending "(a) a decision whether or not to give such directions, or (b) his removal in pursuance of such directions".

44. Paragraph 21(1) of schedule 2 to the Act is in these terms:

> "A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; . . ."

A person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by schedule 2 to the Act (in particular, under the powers conferred by paragraphs 16 and 21 of that schedule) – section 11(1) of the Act.

45. The claimant (respondent to this appeal) is an illegal entrant; that is to say, he is a person who has entered unlawfully in breach of the immigration laws – section 33(1) of the Act. He was not given leave to enter or remain in the United Kingdom. Accordingly, he was a person in respect of whom directions for removal could be given by an immigration officer under paragraph 9(1) of schedule 2 to the Act, or by the Secretary of State under paragraph 10(1)(a) or (2) of that schedule. Directions for his removal were given by notice dated 5 February 2001.

46. The directions given by the notice of 5 February 2001 specified removal from the United Kingdom "by scheduled airline to Iraq at a time and date to be notified." In the circumstances that it must have been apparent to the immigration officer who signed that notice that the claimant – who is an Iraqi national of Kurdish ethnicity – could not, in the interests of his own safety, be returned to any part of Iraq to which there were scheduled flights, I find it difficult to see how directions in those terms could have been thought appropriate; or to be an effective exercise, at that time, of any power conferred by paragraphs 9 or 10(1) of schedule 2 to the 1971 Act. The true position was that the only part of Iraq to which the claimant could safely be returned was the area, known as the Kurdish Autonomous Area (KAA), in the north of the country; and return to the KAA by a scheduled flight to Iraq was never in contemplation. This was recognised in the letter dated 8 February 2002 to which Lord Justice Kennedy has referred. It was recognised, also, in the letter dated 3 May 2002 in which the decision which is the subject of the amended judicial review claim is to be found. As it was put in the letter of 3 May 2002:

> "As you are aware, the Secretary of State is currently investigating a safe route for Iraqi Kurds to return to Northern Iraq . . . Mr Khadir is entitled to apply for support . . . whilst awaiting a safe route to Northern Iraq to be identified."

Be that as it may, there has been no challenge in these proceedings to the directions given by the notice of 5 February 2001. The proceedings have been conducted on the basis that the

Secretary of State has given, or intends to give, directions for removal under paragraph 10(2) of schedule 2 to the 1971 Act.

47. Paragraph 10 of schedule 2 is in these terms, so far as material:

> "(1) Where it appears to the Secretary of State either
>
> (a) that directions might be given in respect of a person under paragraph . . . 9 above, but that it is not practicable for them to be given or that, if given, they would be ineffective; or
>
> (b) . . .
>
> then the Secretary of State may give to the owners or agents of any ship or aircraft such directions in respect of that person as are authorised by paragraph 8(1)(c).
>
> (2) Where the Secretary of State may give directions for a person's removal in accordance with sub-paragraph (1) above, he may instead give directions for his removal in accordance with arrangements to be made by the Secretary of State to any country or territory to which he could be removed under sub-paragraph (1)."

The countries or territories to which a person "could be removed under sub-paragraph (1)" are those specified in paragraph 8(1)(c). They include a country of which the person is a national.

48. The letter of 3 May 2002 was in response to a request, made in a letter dated 23 November 2001 from the Hackney Community Law Centre, that the claimant be given exceptional leave to remain. The nature of exceptional leave to enter or remain is described in the Immigration Directorate's Instructions, chapter 11, section 2:

> "Exceptional leave to enter or remain in this context [Settlement and Family Reunion] is that given to people who have sought asylum in this country, who have not been granted refugee status, but who have been allowed to remain *outside the normal provisions of the Immigration Rules.* . . .
>
> Exceptional leave may be granted on the basis of:
>
> * evidence of difficulties in the country of origin that are insufficient to justify refugee status;
>
> * general compassionate circumstances; or
>
> * likely difficulty in enforcing departure from the United Kingdom"
>
> [emphasis added]

It may be noted that *exceptional* leave to enter or remain is leave granted outside the provisions of immigration control as enacted.

49. Exceptional leave to remain was sought, in the present case, on the basis that "the Secretary of State cannot, at present, forcibly remove Iraqi Kurdish people to Northern Iraq". It was refused (in the letter of 3 May 2002) on the basis that "the Secretary of State is currently investigating a safe route for Iraqi Kurds to return to Northern Iraq". As developed in argument, refusal was based on the proposition that *exceptional* leave to remain is not appropriate in circumstances where the claimant falls within the normal provisions of immigration control. In a case where the claimant's case falls within the provisions as enacted, it should be dealt with under those provisions. There is no reason to go outside those provisions.

50. The Secretary of State contends that exceptional leave to remain is not appropriate in this case because the claimant can be the subject of temporary admission to the United Kingdom under the power conferred by paragraph 21(1) of schedule 2 to the 1971 Act. An important distinction between a person who has been given leave to enter or remain (albeit for a limited period and until arrangements can be made for his removal from the United Kingdom) and a person who has been temporarily admitted under paragraph 21(1) of schedule 2 is that the former has statutory rights of appeal against a refusal to extend the period of limited leave – sections 61 and 69(3) of the Immigration and Asylum Act 1999. The latter does not have rights of appeal under the Act.

51. The premise which underlies the Secretary of State's contention that the claimant can be the subject of temporary admission under paragraph 21(1) of schedule 2 to the 1971 Act is that he is a person "liable to detention" under paragraph 16(2) of that schedule. The judge held that that premise had not been established. At paragraph 36 of his judgment he directed himself that: "the power to detain [under paragraph 16(2)] lasts only while one of the two events set out in paragraph 16(2)(a) or (b) is "pending". If such an event is not "pending", he is not liable to detention. And he would not then be "liable to detention" under paragraph 21(1)". The judge reached the conclusion, at paragraph 60 of his judgment, that: "at least by February 2002, when the view was expressed . . . that there was every reason to believe that removal would not be possible for considerably longer than 12 months, removal was not still 'pending'". So, as he held, detention would no longer have been lawful and hence temporary admission was no longer valid.

52. It is accepted in this Court that the judge was wrong to hold that, in expressing the view in the letter of 8 February 2002 that "there was every reason to believe that removal would not be possible for considerably longer than 12 months" the Immigration and Nationality Directorate were to be taken to have accepted that the safe return of the claimant to the KAA could not be effected within the next twelve months. The judge had mis-read that letter. Nevertheless, by 3 May 2002, some fifteen months had elapsed since the decision to issue removal directions had been notified to the claimant (by the notice of 5 February 2001); and some three months had elapsed since the Directorate had written, in the letter of 8 February 2002, that "Further meetings [with officials from countries neighbouring Iraq] are scheduled to take place in the coming weeks". In that context the statement in the letter of 3 May 2002 that "the Secretary of State is currently investigating a safe route for Iraqi Kurds to return to Northern Iraq" offers no prospect that the safe return of the claimant to the KAA could be effected within the foreseeable future. In my view it was open to the judge, in those

circumstances and in the light of the observations of Mr Justice Woolf in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704, 706, to hold that the power to detain "pending" removal pursuant to the directions given (or to be given) in or pursuant to the notice of 5 February 2001 could no longer be exercised.

53. Further, I think that the judge was right to hold, as the law then stood, that a person in respect of whom the power to detain pending removal could no longer be exercised was not a person "liable to detention" for the purposes of paragraph 21(1) of schedule 2 to the 1971 Act. As Lord Browne-Wilkinson observed, when giving the opinion of the Privy Council in *Tan Te Lam and others v Superintendent of Tai A Chau Detention Centre and another* [1997] AC 97, 111b-c, the principles enunciated by Mr Justice Woolf in *Hardial Singh* are "limitations on the statutory power of detention pending removal . . . if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised". He pointed out (*ibid*, at 113e) that the determination of the facts relevant to the question whether the applicants in that case were being detained "pending removal" went to the jurisdiction to detain; if removal was not pending there was no jurisdiction to detain. Absent jurisdiction to detain, a person cannot be said to be "liable to detention".

54. But the law is not now as it was when the matter was before Mr Justice Crane. Lord Browne-Wilkinson recognised, in *Tan Te Lam* (*ibid*, at 111d-e) that, although the limitations identified in *Hardial Singh* are to be implied where statute confers simply a power to detain "pending removal" without more, "it is plainly possible for the legislature by express provision in the statute to exclude such implied restrictions". That, as it seems to me, is what the legislature has chosen to do (in a limited context) by the enactment of section 67 of the Nationality, Immigration and Asylum Act 2002. That section requires that the reference to "a person liable to detention", in paragraph 21(1) of schedule 2 to the 1971 Act, be given a meaning which (but for section 67) it would not bear. The section requires that, in construing paragraph 21(1), the reference to "a person liable to detention . . . under paragraph 16 above" must be taken to include a person "if the only reason why he cannot be detained [under paragraph 16] is that - . . . (b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom". The effect is that, for the purposes of paragraph 21(1) of schedule 2, the claimant must be taken to be a person liable to detention under paragraph 16; notwithstanding (i) that, under the principles recognised in *Hardial Singh* and *Tan te Lam*, he could not lawfully be detained under that paragraph and (ii) that, section 67 of the 2002 Act does not, itself, permit detention under paragraph 16 – see section 67(1)(a).

55. Is this Court required to hold that the decision under appeal cannot stand, having regard to the change in the law effected subsequently by the enactment of section 67 of the 2002 Act? But for section 67(3) I would have no doubt that that question should be answered in the negative. But section 67(3) of the Act requires that "This section shall be treated as always having had effect". That, as it seems to me, is an unequivocal direction to which this Court must have regard. The direction requires this Court to determine this appeal on the basis that, for the purposes of paragraph 21(1) of schedule 2 to the 1971 Act, the claimant was a person liable to detention under paragraph 16 both at the date of the decision letter of 3 May 2002 and at the date of the decision under appeal. It follows that the judge's decision – in so far as it was based on his conclusion that the claimant was not a person liable to detention under paragraph 16 of schedule 2 - cannot stand. It follows, also, that the cross-appeal – in so far as it seeks declarations that, by February 2002, there was no power to grant the

claimant temporary admission and that, accordingly, there was a duty on the Secretary of State to grant exceptional leave to enter or remain – cannot succeed.

56. The judge expressed his conclusion – that, by February 2002, removal of the claimant was not still pending, detention would no longer have been lawful and hence temporary admission was no longer lawful - at paragraph 60 of his judgment. But he went on to say this:

> "Even if I am wrong about that, at least by February 2002 his application, made in November, for exceptional leave to enter should in any event have received proper consideration. Very careful consideration should have been given to granting exceptional leave to enter at least for a short period. No decision was in fact given until 3 May 2002, in a letter containing wholly inadequate reasoning."

It was on that basis – as well as on the basis that, by February 2002, temporary admission had ceased to be an available option – that the judge quashed the decision in the letter of 3 May 2002 and ordered the Secretary of State to give consideration forthwith to the grant of exceptional leave to enter.

57. The claimant seeks to uphold the order which the judge made on that alternative basis. As it is put, at paragraph 21 of the skeleton argument lodged on his behalf: "Even if there was power to keep [the claimant] on temporary admission, the learned judge was correct to conclude that the power had not been lawfully exercised in this case." We were reminded that a person on temporary admission is deemed not to have entered the United Kingdom – section 11(1) of the 1971 Act – with the important consequences (denial of access to benefits and inability to take employment) which result from that fictional status. Further, a person on temporary admission may be subject to restrictions as to residence – sub-paragraphs (2) and (2A) of paragraph 21, schedule 2. It could never have been contemplated (it is said) that temporary admission under paragraph 21(1) of schedule 2 to the 1971 Act should be other than "temporary" – in the sense of a short term expedient while a person's case for entry is examined, a decision is taken and he is awaiting removal following a decision to remove. To extend a period of temporary admission beyond short term expediency is to expose the would-be immigrant to degrading treatment and to violation of his dignity as a human being.

58. But for the enactment of section 67 of the Nationality, Immigration and Asylum Act 2002 those would be powerful arguments in favour of giving the phrase "pending his removal" in paragraph 16(2) of schedule 2 – and the related expression "a person liable to detention" in paragraph 21(1) – a meaning consistent with the implied limitations identified in *Hardial Singh* and *Tan te Lam.* And, if those arguments led to the conclusion, as a matter of construction, that the power to treat a person as on temporary admission was no longer exercisable once it could be said that his removal was no longer pending, then the question whether, in the particular case, the exercise of that power was irrational or otherwise flawed would not arise. But, in the light of section 67 of the 2002 Act those arguments can no longer be invoked as an aid to construction. Parliament has made clear its intention that temporary admission under paragraph 21(1) of schedule 2 to the 1971 Act should be available while (and for so long as) arrangements for removal, following a decision to remove, are impeded or delayed by practical difficulties – section 67(2)(b) of the 2002 Act.

The point is emphasised by the complementary provision in section 67(2)(a): temporary admission is an available option where a person "cannot *presently* be removed from the United Kingdom because of a legal impediment . . .". The question, now, is whether the decision to exercise a power which, as Parliament plainly intended, is exercisable in circumstances where the making of arrangements for removal is impeded or delayed by practical difficulties - which may continue for some time – can be said to be irrational or otherwise flawed.

59. In my view that question must be answered in the negative. I am not persuaded that the Secretary of State could, now, be criticised for choosing to treat a person in respect of whom he has given directions for removal – but where arrangements for removal are delayed or impeded by practical difficulties – as a person on temporary admission under paragraph 21(1) of schedule 2. Where Parliament - after addressing its mind to the problem posed by the difficulty of holding, consistently with *Hardial Singh* and *Tan te Lam*, that removal is "pending" in a case where it cannot be said that the practical difficulties of effecting removal are short term - has enacted that, in such a case, temporary admission is an available option, I find it impossible to say that it is irrational for the Secretary of State to take that option. Exceptional leave to enter or remain should be confined to cases which cannot adequately be dealt with under the statutory scheme of immigration control. It would, in my view, be difficult to justify the grant of *exceptional* leave in a case for which Parliament has made specific provision.

60. It follows that I would hold that the decision which was made in May 2002 is a decision which the Secretary of State could make, now, if he were required to reconsider the matter. Further, having regard to the retrospective effect which sub-section (3) requires the court to give to section 67 of the 2002 Act, it seems to me impossible to hold that, if the Secretary of State could now make that decision, it can be treated as flawed at the time when he did make it. The fiction to which section 67(3) requires the court to give effect is that the law was, in May 2002, as it now is. I conclude that the order made by the judge on 29 June 2002 cannot stand.

61. I, too, would allow the appeal and dismiss the cross-appeal.

Lord Justice Mance:

62. I have had the benefit of reading in draft the judgments given by Kennedy and Chadwick LJJ, and I gratefully adopt their statements of the facts. The respondent, having passed through immigration controls unnoticed in the back of a lorry, is treated as someone who has entered the United Kingdom (so that s.11(1) of the Immigration Act 1971 does not apply to him), but is an illegal entrant for the purposes of paragraph 9(1) of Schedule 2 to the Act. The Secretary of State has purported to give directions in relation to him under paragraph 10(2), and maintains that he has been at all material times "temporarily admitted" under paragraph 21(1). As such he has been placed under legal and practical restrictions. The Secretary of State refused on 3rd May 2002 to grant him exceptional leave to remain, and it was that decision that the respondent sought primarily to challenge in these proceedings.

63. Crane J quashed the Secretary of State's decision of 3rd May 2002 refusing to grant the respondent exceptional leave to remain, and ordered the Secretary of State to give further

consideration forthwith to the respondent's application for such leave. The Secretary of State appealed on the basis that Crane J. erred in the light of the law as it stood at the time of his decision. The Secretary of State continued to pursue his appeal on that basis despite the subsequent enactment of s.67 of the Immigration and Asylum Act 2002, and only changed course following discussion during the hearing of this appeal. The respondent cross-appealed by respondent's notice, on the basis that the judge ought positively to have ordered the Secretary of State to grant emergency leave to remain for a period. As to s.67, the respondent submits that this section has no relevant retrospective effect on the present appeal.

64. Crane J. expressed the view that the removal directions given by the Secretary of State on 5th February 2001 were invalid, but pointed out that it was open to the Secretary of State to issue substitute removal directions, and recorded that both sides had before him accepted that any invalidity of the directions given was not crucial in this case. He decided the case in favour of the respondent on the basis that:

> "at least by February 2002, when the view was expressed ….. that there was every reason to believe that removal would not be possible for considerably longer than 12 months, "removal was not still 'pending'."

That was a reference to the language of paragraph 16(2) of Schedule 2 to the Immigration Act 1971. The judge's reasoning proceeds on the basis that a person cannot be detained pending his removal if it can be seen that "removal would not be possible for considerably longer than 12 months". Earlier in his judgment, in paragraph 36, he made clear his view that there could be no question of a person being detained pending removal or of "temporary admission", for a "permanent or even indefinite" period, although he rejected a submission that "admission cannot be temporary unless its end can be seen on the horizon". As a matter of fact, as Kennedy LJ has pointed out in paragraph 13, the judge misread the Secretary of State's letter of 8th February 2002. That being so, it seems to me that the judge's conclusion that detention was not pending removal must on any view require review.

65. First, it is necessary to consider the legal framework. I start with the law as it stood prior to the enactment of s.67 of the 2002 Act. I observe that paragraph 16(2) of Schedule 2 to the 1971 Act provides that, if there are reasonable grounds for suspecting that a person is someone in respect of whom relevant directions may be given, "that person may be detained ….. pending ….. his removal". To speak of detention "pending" removal is not to imply that removal is impending or about to happen in the immediate future. At one point in her skeleton and oral submissions, Miss Carss-Frisk QC for the Secretary of State suggested that removal was pending as long as it remained the Secretary of State's intention to remove and that considerations of feasibility did not enter into the picture. That cannot be right either. During oral submissions, she accepted that removal must be a realistic possibility, in order for it to be said that a person was liable to detention "pending removal".

66. Miss Carss-Frisk's submissions also accept that, when paragraph 21(1) of Schedule 2 to the 1971 Act refers to "A person liable to detention …. under paragraph 16 above", it incorporates a requirement that such detention should be "pending" the giving of or removal pursuant to directions under any of paragraphs 8 to 10 or 12 to 14; and that, unless this

remained so on a continuing basis, a person could not continue to be treated as "temporarily admitted" under paragraph 21(1). She did not suggest that, if a person liable to detention was granted the status of temporary admission, that status could continue if the person had ceased to be liable to detention because removal was no longer pending. Any such suggestion would anyway have faced the difficulty that the concept of "temporary" admission itself implies some end point, presumably the giving of directions or removal pursuant to such directions.

67. Miss Carss-Frisk also accepted that the only alternatives contemplated by the legislation in relation to the respondent as an illegal entrant were detention and temporary admission. S.4(2) provides that Schedule 2 "shall have effect with respect to ….. the detention of persons pending examination or pending removal from the United Kingdom; and for other purposes supplementary to the foregoing provisions of this Act". Paragraph 16(2) says merely that persons within its scope "may be detained". But it was not suggested that there was some "limbo" status in which an illegal entrant could be left, without being either detained or temporarily admitted or given some form of leave to remain.

68. The main argument before us related to the time-frame within which removal must be foreseeable for it to be said that a person is "liable to detention …. pending …. removal". We were referred to the cases of *R. v. Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704, *Tan Te Lam v. Superintendent of Tai a Chau Detention Centre* [1997] AC 97 and *R (on the application of I) v. Secretary of State for the Home Department* [2002] EWCA Civ 888. In *ex p Hardial Singh* Woolf J (as he was) identified three limitations on a power to detain "pending …. removal or departure from the United Kingdom" under Schedule 3 to the 1971 Act. First, is must be "pending" removal or departure, and for no other purpose. Second, he regarded "the power of detention as impliedly limited to a period which is reasonably necessary for that purpose". Third, he said that in a situation where it was apparent to the Secretary of State that he was not going to be able to operate the machinery for removing persons intended to be deported within a reasonable period, it would be wrong for him to seek to exercise his power of detention. Miss Carss-Frisk and Mr Blake QC for the respondents were at issue as to whether Woolf J's second and third implied limitations qualify the circumstances in which removal may be said to be pending. Miss Carss-Frisk submits that they merely qualify the circumstances in which it will be proper to *exercise* the power to detain. Mr Blake accepts that there may be circumstances in which the power to detain may exist under paragraph 16, but that its exercise could be challenged, and he cites the example of irrationality. However he submits that Woolf J's second and third limitations go to the existence of the power.

69. In all the three cases cited in the previous paragraph, the question was whether the persons detained were lawfully detained, so that the resolution of the issue whether Woolf J's limitations go to the power or its exercise might be thought to have been unnecessary. However its resolution could be important in the present case, in view of the accepted link between the concept of a person "liable to detention" under paragraph 16(a) and the power to treat or continue to treat a person as temporarily admitted under paragraph 21(1) of Schedule 2.

70. Read by itself, Woolf J's formulation of the limitations may be said to be at least consistent with the Secretary of State's analysis, and I note that at first instance in *R v. Secretary of State for the Home Department ex p. Gedaini* (CO/3694/97; 10/10/97), a case under

paragraph 16(2) of Schedule 2, Kay J had no doubt that the second and third limitations went to the exercise, not the existence, of any power to detain. Miss Carss-Frisk also sought indirect support for a similar approach in this court's decision in *Secretary of State for the Home Department v. Khan* [1995] Imm AR 348. However, that case turned on the meaning of the words "someone in respect of whom directions may be given" for his removal from the United Kingdom, a concept which was held to have an element of futurity so as to include someone with an outstanding asylum application, pending the determination of which s.6 of the Asylum and Immigration Act 1993 precluded any removal.

71. However, in *Tan Te Lam*, the Privy Council applied Woolf J's principles to a power to detain "pending …. removal from Hong Kong", and said this at p.111b-e:

> "Section 13D(1) confers a power to detain a Vietnamese migrant "pending his removal from Hong Kong." Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J. in the *Hardial Singh* case [1984] 1 W.L.R. 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain "pending removal" their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure removal within a reasonable time.
>
> Although these restrictions are to be implied where a statute confers simply a power to detain "pending removal" without more, it is plainly possible for the legislature by express provision in the statute to exclude such implied restrictions. Subject to any constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the *Hardial Singh* principles. But in their Lordships' view the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances."

Later, at pp.112-113, the Privy Council addressed an argument that the Hong Kong authorities' decision to detain involved an exercise of discretion that could only be reviewed on *Wednesbury* grounds, and that it was "not for the court to reach findings as to the underlying facts, viz, whether or not the period of detention was unreasonable or whether Vietnam would accept repatriation of non-Vietnam nationals" (p.112e). The Privy Council said this at p.113e-d:

> "The issue therefore in the present case is whether the determination of the facts relevant to the question whether the applicants were being

> detained "pending removal" goes to the jurisdiction of the director to detain or to the exercise of the discretion to detain. In their Lordships' view the facts are prima facie jurisdictional. If removal is not pending within the meaning of section 13D, the director has no power at all."

72. The Privy Council's actual decision turned not on the length of detention (an issue on which the judge had decided against the applicants), but on the absence of any possibility that the Vietnamese authorities would accept back any of the applicants. On that ground, their removal could not be said to be pending. The contrary was not even contended: see p.116c. However, the reasoning at pp.112d-113a suggests that the Privy Council saw at least the first two, and probably all, of Woolf J's principles as involving issues of "precedent or jurisdictional fact" which "had to be proved before any power to detain was exercisable at all".

73. The Privy Council's reasoning must however be seen in the context in which it was used, that is to assert the courts' power and duty to re-examine the legitimacy of long term detention of Vietnamese migrants being held in Hong Kong. Here, we are concerned with an illegal entrant who has not been detained, but granted temporary admission. Statistically, it appears that only a very small percentage of persons liable to detention under immigration powers is detained (some 1.5% as at July 1998) and that Home Office policy has been to use detention only as a last resort: see paragraph 12 of the Home Office White Paper, Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum; Cmnd. 4018 of July 1998 and *R. v. Secretary of State ex p. Brzezinski* (CO/4251/95 and CO/4237/95) (Kay J; 19th July 1996).

74. Woolf J's second principle was that the power of detention was "impliedly limited to a period which is reasonably necessary for that purpose [that is for the giving of directions or removal pursuant thereto]". His third principle was that, if there was a situation where the Secretary of State was not going to be able to operate the machinery for removal provided in the Act within a reasonable period, it would be wrong for the Secretary of State to seek to exercise his power of detention. However, it is clear that there are very many cases where no detention at all is reasonably necessary for the purpose of giving directions or removal, and there is, I consider, a relevant distinction to be drawn between the circumstances in which a person is potentially liable to detention (and can properly be regarded as temporarily admitted) and the circumstances in which the power to detain can in any particular case properly be exercised.

75. The "reasonable period" within which the machinery for removal must be capable of being operated (Woolf J's third principle) has, as I see it, quite different and potentially much wider parameters, when compared with the reasonable period within which any power of detention may be exercised (Woolf J's second principle). Potential *liability* to detention exists throughout the former period, but the *exercise* of the power to detain will be strictly controlled and confined in time and other respects in the interests of individual liberty. That is also consistent with the last 14 words of paragraph 21(1), which cater for situations where the power to detain has not been exercised, but circumstances change so as to make it desirable to exercise it. A corollary of this conclusion is that the mere fact that a person has been detained longer than necessary does not of itself mean that he or she can no longer be treated as a person who "may be detained …. pending …. removal" within paragraph 16(2)

or a person *"*liable to detention under paragraph 16*"* for the purposes of being regarded as "temporarily admitted" under paragraph 21(1).

76. Whether someone can be regarded as temporarily admitted depends on whether there is a realistic possibility of operating the machinery for removal within what I would prefer, for clarity, to describe as a tolerable, rather than a reasonable period. That period must depend on the particular circumstances, including in my view whether the person is or is not in detention, but also taking into account as a factor that temporary admission is itself an unprivileged status. That this status (which the respondent has had since 27th November 2000) may be consistent with human rights, as Miss Carss-Frisk submitted, is not the issue. Its limitations are a relevant factor when considering the period for which a person could be expected to continue in it pending removal.

77. The judge considered that removal could not be said to be "pending". On the facts, since he expressly accepted that admission could be temporary even though its end could not be seen on the horizon, he appears to have concluded that, as at February 2002, Mr Khadir was likely to be here for an effectively "permanent or even indefinite" period. He also said that, even if he was wrong in concluding that "removal was not still 'pending'", he would still have concluded that by February 2002 Mr Khadir's application made in November 2001 for exceptional leave to remain should have received proper consideration.

78. In reaching his decision, the judge took into account that removals to the Kurdish Autonomous Area had been impracticable for years prior to 2000, and that the Secretary of State had by then already been investigating routes for removal. Before us, Mr Blake again directed attention to the terms of the directions given by the Secretary of State on 5th February 2001, which were "for your removal from the United Kingdom by scheduled airline to Iraq at a time and a date to be notified". He submitted first that these were invalid since it was common ground that the only safe place in Iraq to which the respondent could be returned was the Kurdish Autonomous Area ("the KAA"), to which no scheduled airline has flown at any relevant time; and that second the Secretary of State could not give valid directions under paragraph 10(2) of Schedule 2 unless he could identify arrangements that were at least capable of being made, even though they had not yet been "tied down". These submissions do not appear in the respondent's notice of appeal, and the respondent has in the past accepted the validity of the directions given in the context of his (unsuccessful) appeal to a Special Adjudicator under s.69(5) of the Immigration and Asylum Act 1999. Further, I would not accept that paragraph 10(2) is to be limited in the way that Mr Blake suggests. Accordingly, like the judge, I consider that the issue is whether there was on 3rd May 2002 any realistic prospect of removal to the KAA pursuant to the removal instructions given, or any substitute removal instructions which could have been given.

79. The error which the judge made regarding the significance of the Secretary of State's letter dated 8th February 2002 (relating to the case of Mr Hwez) was, as I read it, central to his reasoning. Miss Carss-Frisk submits that he also erred in rejecting two other points made in that letter, one to the effect that, if exceptional leave to remain was given for 12 months, there would be no power under paragraph 323 of the Immigration Rules (HC 395) to curtail it within the 12 months, the other that a second right of appeal would arise that could take a considerable time to dispose of, even if without merit. I see some force in Miss Carss-Frisk's submission on the first point, but there seems to be no reason why leave could not have been given for less than 12 months or on conditions, relating to the feasibility of return

to the KAA. Neither point seems to me however to be central to the question whether the respondent could still properly be regarded as temporarily admitted pending removal.

80. Returning to that central question, we have in view of the judge's error to consider for ourselves whether, on the evidence, the decision which he reached was still the right one. The onus was on the Secretary of State to prove that the respondent could still be treated as temporarily admitted "pending" removal. The evidence was, as the judge said, sparse. One reason, given by the Home Office in its letter dated 8th February 2002, was the sensitivity of the negotiations, by which options were being explored for the return of Iraqi Kurds to northern Iraq. The Home Office's letter dated 3rd May 2002 merely repeated that the Secretary of State was "currently investigating a safe route for Iraq Kurds to return to Northern Iraq". Evidence filed by the respondent's solicitor, Ms Ghelani, dated 7th May 2002 throws some further light on what had been happening. She spoke to the International Organisation for Migration ("IOM") which (she said) she was aware "is co-ordinating negotiations between various member States of the European Union (including the United Kingdom) and the Turkish government regarding the return of Iraqi Kurdish asylum seekers to Northern Iraq via Turkey"; and he was informed that "negotiations had not progressed as the Turkish government's current position is that it will not allow Kurdish people from Northern Iraq to transit in Turkey" and that "at present the IOM cannot assist any Kurdish person from Northern Iraq to voluntarily return to that area". The IOM could not give any time scale as to when the IOM might be in a position to facilitate voluntary returns.

81. In the light of the long history of the problem, the burden of proof on the Secretary of State, the evidence that I have recounted and the significance for the respondent of the status of temporary admission, I would, not without doubt, agree that by 3rd May 2002 the time had indeed passed when the respondent could still be treated as liable to be detained or temporarily admitted "pending" removal. I would add that the position remained, so far as we were told, unchanged at the time when this appeal was heard, although hindsight is not the test. In these circumstances, it was incumbent on the Secretary of State at least to consider granting him exceptional leave to remain. Further, in the absence of any valid reasons to the contrary (and none were shown), it would appear that there was no basis to refuse to give Mr Khadir the exceptional leave to remain, for at least some period, which it had previously and normally been the Secretary of State's policy to give in such circumstances.

82. I turn to the second aspect of the appeal, which is the effect of s.67 of the Immigration and Asylum Act 2002. I have had misgivings about the Secretary of State's eventual case that the enactment and coming into force of this section provides a retrospective answer to this appeal. That this is a legal possibility is not in doubt. But the general principle is that if a new Act affects substantive rights, as distinct from procedure, it will not apply to proceedings which have already commenced, unless a clear intention is manifested: see *Colonial Sugar Refining Co. Ltd. v. Irving* [1905] AC 369 and *A-G v. Vernazza* [1960] AC 965.

83. In the former case an Act removing the right of appeal to the Privy Council did not affect an appeal in litigation pending when the Act was passed and decided after its passing, on the ground that "To deprive a suitor in pending litigation of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure". In the latter case, during the pendency of an appeal against an order restraining a vexatious litigant

from commencing proceedings, an Act was passed adding to the court's power to restrain vexatious litigants from commencing proceedings a power to restrain them from pursuing existing proceedings. The Act was held to be procedural, on the basis that it did not deprive the litigant of a right to bring proper proceedings, and even if it had been regarded as substantive Lord Denning said that it was retrospective (p.977). The effect of a contrary decision would simply have been to require the Attorney-General to bring fresh proceedings. That was also the position in *Hewitt v. Lewis* [1986] 1 WLR 444, where Parliament legislated to reverse the effect of a recent decision (in *Pocock v. Steel* [1985] 1 WLR 229) that a landlord could not recover possession when he required the property for his own residence, unless he had resided there immediately before he let it to the statutory tenant, that decision being perceived as contrary to the previous prevailing understanding. The Act specifically applied to tenancies granted and notices given before as well as after its commencement. It was held to apply to the pending appeal in *Hewitt v. Lewis*, one reason being that it would only cause expense and inconvenience if it did not, since it would be open to the landlords to commence a fresh claim for possession on its basis.

84. In *Zainal Bin Hashim v. Government of Malaysia* [1980] AC 734, the Government lost a police-officer's action for wrongful dismissal on the ground that the dismissal had been authorised by a delegate, rather than the proper person under the relevant statute. The Government then promoted amending legislation, adding to the statute a qualifying proviso that extended the class of persons entitled to dismiss to include the delegate and which deemed the proviso "to have been an integral part of this clause" since Malaysian independence. An appeal succeeded on the ground that this amendment undermined the basis of the pending action and the judgment obtained in it, and the Privy Council dismissed the further appeal. The Privy Council held that no distinction could be drawn in this connection between an action commenced after the amendment, an action commenced before the amendment and an action which had led to a successful judgment before the amendment.

85. In an appropriate context, any United Kingdom legislation similar to that under scrutiny in this last case would have now to be viewed in the light of article 6(1) of the European Convention on Human Rights, s.3 of the Human Rights Act 1998 and the jurisprudence of the European Court of Human Rights. The European Court said in *Stran Greek Refineries v. Greece* (1994) 19 EHRR 293 that:

> "The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute"

In *Pressos Co. Nav. SA v. Belgium* (1995) EHRR 301 the Commission held objectionable retrospective legislation removing the legal foundation for the claimant's ongoing claim (based on a recent Cour de Cassation decision) to hold the Belgian state liable for pilot's negligence:

> "The Commission considers that the retroactive effect of that Act did not respect a reasonable relationship of proportionality between the means employed by the contested statute and the objectives which it sought to achieve".

The Court found for the claimant on another basis and did not need to consider the position under article 6.

86. That a powerful argument could in an appropriate context be made based on these and other authorities is confirmed by the judgment of Lord Rodger of Earlferry LP in *Anderson v. Scottish Ministers* (2000) 8 BHRC 590. However, the present is not an appropriate context. The European Court has (by a majority of 15 to 2) confirmed in *Maaouia v. France* (2000) 33 EHRR 42 that litigation concerning immigration control does not concern the determination of a civil right within the meaning of article 6(1), despite acknowledging the major repercussions on an applicant's private and family life or on his prospects of employment that such litigation may have. The European Convention on Human Rights can, it seems to me, be put on one side.

87. It is nevertheless submitted that the words of retrospection in s.67 should not be treated as covering the present litigation, on the basis of a number of specific bases, as well as the general presumption that I have mentioned. First, it is pointed out that under the Civil Procedure Rules an appeal to this court is now described as a review, unless the court decides to hold a re-hearing. It is submitted that we should therefore confine ourselves to the legal position as it was at the time of the hearing before the judge, whatever the construction of s.67 might be on a re-hearing. But, as has recently been held, this change in nomenclature makes effectively no difference to the court's approach: see *Assicurazioni Generali SpA v. Arab Insurance Group* [2002] EWCA 1642; [2003] 1 WLR 577. There is in my view nothing in this submission.

88. Turning to the construction of s.67, it is submitted that s.67 does not impact on situations where removal is no longer "pending" and "temporary" admission is impossible. Mr Blake submits that the reference in s.67 to "practical difficulties …. impeding or delaying the making of arrangements for his removal" is insufficient to cover such situations. At the same time, he invites us to look at the context in which the section was passed, which was, admittedly, to resolve general problems relating to the status of persons hitherto treated as "temporarily admitted" which were perceived as arising from Crane J's decision in the present case. If Mr Blake were right in this submission, Parliament would not have achieved its aim, even for the future, and it is difficult to see that the section could have much impact at all.

89. Mr Blake's further submissions are to the effect that s.67 should be read as inapplicable to the present appeal. He submits that the element of retrospectivity should be restricted as far as possible, and he seeks to support this with reference to the proceedings in Parliament, in two ways. First, he invokes *Pepper v. Hart* [1993] AC 593. Second, he relies on Lord Steyn's speeches in *R v. A* [2001] UKHL 25; 2 WLR 1546 and *R (Westminster C.C.) v. National Asylum Support Service* [2002] UKHL 38; 1 WLR 2956, referring also to his extrajudicial lecture on *Pepper v. Hart: A Re-examination* (2001) 21 Oxford Journal of Legal Studies 59.

90. Lord Steyn in *R v. A* underlined the need to identify the context before construing any statute – to put it in "its objective setting or contextual scene and to have regard to the mischief at which it is aimed". But in the present case there is no doubt about the context. S.67 was introduced because of Crane J's decision in the present case and because that decision was regarded as having serious general implications. No-one can or does suggest

that the section was specifically aimed at the present appeal, or at other outstanding litigation (of which there is so far as we are aware none).

91. As to *Pepper v. Hart*, I do not consider that the threshold conditions to consideration of ministerial statements in Parliament are satisfied. The language of the statute is not ambiguous or obscure. Nor do I think that it can be said that it would lead to absurdity, even if its effect was to reverse Crane J's decision in every respect. It should be possible to give it a definite meaning, applying usual principles of construction, including the general presumption against retrospective legislation affecting pending litigation. Further, on examination of the statements on which reliance is placed, I doubt whether the material contains any sufficiently clear statement about the effect of the new section on the present litigation. The most that can be said is that Lord Filkin, the minister moving the amendment that became s.67, said that the government did "not believe" that it was interfering with litigation currently before the courts, and later that "We shall wait to see what the appeal brings forth" and "We do not necessarily take the view that we shall have an unfavourable result on appeal ….". It is true that, if he had believed that s.67 was itself envisaged as affecting the outcome of the appeal, he could hardly have said this. But I think that something more specific than indications of belief is required before *Pepper v. Hart* is capable of being invoked.

92. Where s.67 applies, a person who would not otherwise be regarded as "liable to be detained" is to be taken to be so liable, and by s.67(3) this is to be treated as always having been the legal position. It is clear that, if the Secretary of State were now to be required to take any decision regarding Mr Khadir, he would, in the absence of contrary order, be entitled to proceed on the basis that Mr Khadir was temporarily admitted under paragraph 21, even though removal could not be said to be pending under paragraph 16, so as to authorise detention. Mr Blake seeks to avoid this for the future, under the respondent's notice, which seeks an order that the Secretary of State do grant Mr Khadir exceptional leave to remain, leaving only the period at the Secretary of State's discretion. But the court cannot, as it seems to me, make such an order now in circumstances where Mr Khadir falls currently to be treated as someone who is temporarily admitted. The primary basis for the respondent's notice was that Mr Khadir could not be allowed to fall into a limbo or no man's land, with no status. That is no longer a risk.

93. I am more concerned about the effect of s.67 on the first head of relief sought by Mr Khadir and granted by the judge, namely the order quashing the Secretary of State's decision of 3rd May 2002 refusing Mr Khadir exceptional leave to remain. But, if Mr Khadir is to be treated as someone who was all along capable of being temporarily admitted, that corresponds with the way in which the Secretary of State has regarded and treated him. The effect of s.67 is, as it seems to me, to undermine the primary basis on which Crane J gave judgment in Mr Khadir's favour.

94. Crane J also considered that, even if he was wrong in concluding that Mr Khadir could no longer be regarded as temporarily admitted, the Secretary of State's decision ought still to be quashed, and he ought still to be ordered to reconsider his decision to refuse exceptional leave to remain. I find it difficult to see any basis for that decision, if the respondent could as at 3rd May 2002 still properly be regarded as temporarily admitted "pending his removal" for the purposes of paragraphs 16(2) and 21(1). Parliament's clearly expressed current intention that persons should be so regarded despite "practical difficulties … impeding or delaying the

making of arrangements for …. removal from the United Kingdom" makes it even less easy to support the judge's decision on this point. I would therefore also allow this appeal.

Order: Appeal allowed, cross-appeal dismissed. No order for costs. Application for permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)