

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2006-404-7620

BETWEEN

HOSSEIN YADEGARY
Plaintiff

AND

**MANAGER, CUSTODIAL SERVICES,
AUCKLAND CENTRAL REMAND
PRISON**
First Defendant

AND

**CHIEF EXECUTIVE, DEPARTMENT OF
LABOUR**
Second Defendant

Hearing: 18 December 2006

Appearances: D J Ryken and I M Charao for Plaintiff
B Keith and A Longdill for Defendants

Judgment: 4 April 2007

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 4 April 2007 at 5:00 pm
pursuant to r 540(4) of the High Court Rules.

Registrar / Deputy Registrar
Date.....

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Introduction

[1] This case raises the very difficult question of how long a person who deliberately obstructs his removal under the Immigration Act 1987 can lawfully be detained under s 60 of that Act.

[2] Mr Yadegary is an Iranian national who is subject to a removal order. He has been detained since November 2004 under a warrant of commitment issued pursuant to s 60. He cannot be removed because he has destroyed his passport and refuses to apply for a new one. There are no arrangements in place with the Iranian government for involuntary repatriation.

[3] When Immigration New Zealand (INZ) applied in November 2006 to have the warrant of commitment extended Mr Yadegary filed a cross-application seeking conditional release pursuant to s 60(5), which was refused. He now applies for judicial review of that decision.

[4] Judicial review of decisions by the District Court can be undertaken as part of the supervisory function of this Court. However, the power is exercised sparingly. It is appropriate where, by reason of the nature of the error of jurisdictional law in the District Court, the intervention of this Court is necessary: *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 at 133-136.

[5] Mr Yadegary asserts several errors by the Judge; however, they can be viewed as two general complaints. First, that the Judge did not consider whether ongoing detention would be lawful. Secondly, that the Judge misdirected himself as to the meaning of the phrase “exceptional circumstances” in s 60(6).

Statutory scheme

[6] Sections 59 and 60 make provision for the arrest and detention of persons who are subject to removal orders. The two sections are complementary. Section 59 permits the arrest without warrant and detention for up to 72 hours of any person

on whom a removal order has been served. The purpose of detention under s 59 is specified in s 59(2):

(2) the purpose of arrest and detention under this section is to execute the removal order by placing the person on a craft that is leaving New Zealand.

[7] Section 60 applies when it becomes apparent that the detainee is unable to leave New Zealand within 72 hours. Section 60(2) authorises a District Court Judge to issue a warrant of commitment for up to seven days “to enable the execution of the removal order”. The circumstances in which a warrant of commitment may be issued are very wide, including, at s 60(1)(d), if “for some other reason the person is unable to leave New Zealand within the 72 hour period”.

[8] Section 60 recognises that there will be cases where the removal order cannot be executed within the seven day period provided by s 60(2) and allows for the warrant of commitment to be extended, although s 60(7) limits detention to three months. Where several extensions are likely to be required s 60(5) gives the Judge the option of releasing the detainee on conditions. The only prerequisite is that the Judge must be satisfied that the person is unlikely to abscond otherwise than by leaving New Zealand:

(5) If a person is brought before a Judge under subsection (4) for a second or subsequent time the Judge may, where it seems likely that the detention may need to be extended a number of times, and where satisfied that the person is unlikely to abscond otherwise than by leaving New Zealand, instead of extending the warrant of commitment for a further period of up to 7 days, order that the person be released subject to—

- (a) Such conditions as to the person's place of residence or as to reporting at specified intervals to an office of the Department of Labour or a Police station as the Judge thinks fit; and
- (b) Such other conditions as the Judge may think fit to impose for the purpose of ensuring compliance with the residence and reporting conditions.

[9] However, under s 60(6), there are two categories of persons whose detention is not limited by s 60(7) and whose eligibility for conditional release under s 60(5) is restricted. Mr Yadegary is a person to whom s 60(6) applies.

[10] Sections 60(6), (6A) and (7) provide:

(6) Unless the Judge considers that there are exceptional circumstances that justify the person's release, a Judge may not order the release of a person under subsection (5) if -

- (a) The person is currently a refugee status claimant who claimed refugee status only after the removal order was served; or
- (b) A direct or indirect reason for the person being unable to leave New Zealand is or was some action or inaction by the person occurring after the removal order was served.

(6A) Where a Judge determines not to order the release of a person to whom subsection (6) applies, the Judge may—

- (a) extend the warrant of commitment for a further period of up to 30 days, in which case—
 - (i) the warrant authorises the detention of the person named in it for the period specified in the extension of the warrant; and
 - (ii) subsections (3) to (6) and this subsection apply at the expiry of the extension of the warrant; and
- (b) make any orders and give any directions that the Judge thinks fit.

(7) No person may be detained under 1 or more warrants of commitment under this Part for a consecutive period of more than 3 months, unless the person is a person to whom subsection (6) applies.

[11] Sections 60(6), (6A) and (7) in their current form were introduced through the Immigration Amendment Act (No 2) 2003 in response to the decision in *Mohebbi v Minister of Immigration* [2003] NZAR 685 in which a detainee who refused to sign a passport application was released because the three month limitation under s 60(7) had expired. The record of parliamentary debate at the time shows that such behaviour had not been contemplated when s 60 was introduced in 1999 and that Parliament regarded it as unacceptable that a person should secure release through deliberately obstructing the removal process.

Limits on detention under s 60

[12] Mr Ryken submitted that the power to detain under s 60 is subject to certain implied limitations, including, particularly, that:

- a) Detention must be necessary for the purpose for which it is authorised; and

- b) The period of detention cannot exceed what is reasonable in the circumstances, even where the person is one to whom s 60(6) applies.

Purpose of detention

[13] The Crown does not dispute that, to be lawful, Mr Yadegary's detention must be for the purpose authorised by s 60. There is, however, dispute between the parties as to what the purpose of detention under s 60 actually is. Mr Ryken submitted that the purpose was the same as under s 59 i.e. to execute the removal order by placing the person on a craft that is leaving New Zealand. I do not accept that argument; it is apparent from the circumstances in which detention may be authorised under s 60 that it serves a much wider purpose than detention under s 59.

[14] In comparison, the Crown asserts a wider purpose than that specified under s 60(2). Mr Keith submitted that, by virtue of s 60(6)(b), detention serves the following broader purposes:

- applies a more stringent standard to those who obstruct removal;
- provides an incentive to the detainee to co-operate with removal measures and a sanction for not doing so; and
- prevents persons who obstructs removal from obtaining the benefit of de facto residence.

[15] Sanctioning obstructive conduct and giving an incentive for co-operation are obvious reasons for denying conditional release under s 60(5). But I do not accept that they represent the purpose for which detention is authorised. The statutory purpose appears clearly from s 60(2), namely to enable a removal order to be executed. Further, the warrant of commitment itself specifies execution of the removal order as the purpose of detention. It would be a surprising result if this clearly stated purpose was enlarged by implication, with a wider purpose being inferred solely from the provisions that circumscribe conditional release.

[16] While the practical effect of the purpose stated in s 60(2) and the objectives identified by Mr Keith may well be the same (continued detention) I consider that the lawfulness of the continued detention requires fulfilment only of the purpose identified in s 60(2). Put shortly, if ongoing detention no longer serves the purpose of enabling the removal order to be executed, then the purposes asserted by the Crown could not, in themselves, justify continued detention.

Length of detention - the Hardial Singh principles

[17] The circumstances in which persons who obstruct the removal process can be detained for prolonged periods have been extensively considered by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 and the High Court of Australia in *Al-Kateb v Godwin* [2004] HCA 37. Mr Ryken relied heavily on the decision in *Tan Te Lam*, which concerned, in part, Vietnamese detainees subject to removal orders under the Hong Kong Immigration Ordinance who could apply for voluntary repatriation but refused to do so. They complained that their ongoing detention was unlawful because the period for which they had been detained was unreasonable.

[18] The Privy Council applied the principles enunciated by Woolfe J in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704:

Although the power which is given to the Secretary of State...to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained...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 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. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.

[19] While affirming those principles, the Privy Council recognised that they could be excluded by express provisions. Delivering the judgment in *Tan Te Lam*, Lord Browne-Wilkinson said at p 111:

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 Woolfe J in the *Hardial Singh* case [1984] 1 WLR 704 are statements of 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 principle stated by Woolfe 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.

Although these restrictions are to be applied 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 a constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the *Hardial Singh* principle. 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. (emphasis added)

[20] In the present case, although the Crown accepts that s 60 does not authorise indefinite detention (which quite apart from anything else would be a breach of the Bill of Rights Act 1990), it does not accept that there should be a limitation of the kind imposed in *Tan Te Lam*. It asserts that s 60(6) shows an intention that there be a different approach to the detention of persons who obstruct the removal process i.e. (although not expressed this way in submissions) that there is a contrary indication of the kind referred to by Lord Browne-Wilkinson in *Tan Te Lam*.

[21] In *Tan Te Lam* the Privy Council held that there was no conflict between the *Hardial Singh* principles and the relevant part of the Ordinance, which required expressly what *Hardial Singh* would otherwise imply. In addition, the Ordinance specified that, in considering whether the detention was reasonable, the fact that the

detainee could put an end to his detention was a factor to take into account in determining the reasonableness of the detention:

Section 13D(1A), which was inserted in 1991, expressly envisages that the exercise of the power of detention conferred by s 13D(1) will be unlawful if the period of detention is unreasonable. It expressly provides that “the detention...” shall not be unlawful by reason of the period of the detention *if that period is reasonable* having regard to...What s 13D(1A) does is to provide expressly that, in deciding whether or not the period is reasonable, regard shall be had to all the circumstances including (in the case of a person detained pending his removal from Hong Kong) “the extent to which it is possible to make arrangements to effect his removal” and “whether or not the person has declined arrangements made or proposed for his removal”. Therefore the sub-section is expressly based on the requirement that detention must be reasonable in all the circumstances (the *Hardial Singh* principle) but imposes specific requirements that in judging such reasonableness those two factors are to be taken into account...

In their Lordships’ view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable.

[22] The application of the *Hardial Singh* principles was considered by the High Court of Australia in *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562, which concerned a stateless person detained under the Migration Act 1958 (Cth), s 196 of which requires that an unlawful non-citizen “must be kept in immigration detention until he or she is.....removed from Australia..... deported..... or granted a visa”. Section 196(3) provides:

To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or detention) unless the non-citizen has been granted a visa.

[23] The majority of that Court rejected the earlier decision by the Federal Court of Australia in *Minister for Immigration & Multi-cultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70 (also dealing with s 196), which had endorsed the *Hardial Singh* principles and held that the language of s 196 was not sufficiently clear and unambiguous as to show a conscious decision to curtail personal liberty for a potentially unlimited period.

[24] However, the *ratio* of the decision in *Al-Kateb* was that s 196 was sufficiently clear to override any implied limitation of the kind implied by the *Hardial Singh*

principles. Implicit in the judgment is the acknowledgement that such principles would apply in the absence of such clear legislative intention. In his dissenting judgment Kirby J, reviewing the decisions in *Zadvydas v Davis* 533 US 678 (2001), *Hardial Singh* and *Tan Te Lam*, said of the approach to construction of relevant legislation:

Likewise, in *Tan Te Lam* the approach to the judicial function of statutory interpretation adopted by the Privy Council in a Hong Kong appeal can only be explained by reference to the same judicial resistance to unlimited executive detention. In different courts the resistance leads to different techniques of decision-making and to different powers and outcomes. But the common thread that runs through all these cases is that judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law. Hence, judges regard such unlimited detention with vigilance and suspicion. They do what they can within their constitutional functions to limit it and to subject it to express or implied restrictions defensive of individual liberty.

[25] Hayne J, while reaching a different conclusion as to the effect of the language used in s 196 expressed the same view as to the construction of legislation conferring a power to detain:

There is a relevant general principle to which effect must be given in construing the provisions now in question: legislation is not to be construed as interfering with fundamental rights and freedoms unless the intention to do so is unmistakably clear. General words will not suffice. Reading the three sections together, however, what is clear is that detention is mandatory and must continue until removal, or deportation, or the grant of a visa. The relevant time limitation introduced to the otherwise temporally unbounded detention is the time limit fixed by s 198- removal as soon as reasonably practicable after certain events. No other more stringent, time limit can be implied into the legislation. (That is why the reasoning in *Hardial Singh* finds no application here.) But more than that, the time limit imposed by the Act cannot be transformed by resort to the general principle identified. The words are, as I have said, intractable.

Application of Hardial Singh principles in New Zealand

[26] There have been cases in this Court in which the *Hardial Singh* principles have been accepted as applying, though without the point having been specifically argued e.g. *Abu v Superintendent Mt Eden Womens' Prison* [2000] NZAR 260; *Oparah v The Chief Executive of the Department of Labour* HC AK CIV 2006-404-002348 4 May 2006 Venning J. In particular, the question whether s 60(6) ousts the

Hardial Singh limitations in relation to persons to whom s 60(6) applies appears never to have been argued.

[27] For the reasons expressed by Lord Browne-Wilkinson in *Tan Te Lam* and Hayne and Kirby JJ in *Al-Kateb*, it must be the case that, absent clear legislative intent, the *Hardial Singh* principles apply in New Zealand to the power to detain under s 60. Section 60(5) clearly intends that, unless it is inappropriate because of the risk of offending or absconding, persons should not be detained longer than necessary. Aside from s 60(6) there is nothing that could possibly be viewed as a clear intention to permit prolonged and possibly indefinite detention.

[28] However, the Crown contends that s 60(6), coupled with the removal of the limitation in s 60(7), should be interpreted as a clear intention to permit potentially prolonged detention. One might view the removal of the limitation in s 60(7) in respect of those to whom s 60(6) applies as disclosing an intention that there be no such limitation, express or implied, in respect of such persons. This is especially so having regard to the concerns recorded in the parliamentary debate that preceded this change. On the other hand, there is nothing in the wording to indicate that this change was specifically intended to permit prolonged detention. The removal of the three month limitation period might simply reflect the fact that, in respect of those to whom s 60(6) applies, three months is unlikely to be sufficient to enable execution of the detention order. I do not consider that the change to s 60(7) conveys a sufficiently clear intention that the limitation as to reasonableness implied into other detentions under s 60 should be excluded in these particular cases.

[29] This leaves the question whether, either alone or coupled with the change to s 60(7), the wording of s 60(6) is sufficiently clear to oust the implied requirement for detention to be reasonable in the circumstances. Clearly, s 60(6) was intended to alter the way in which specified categories of persons are dealt with by refusing them the benefit of conditional release under s 60(5). Section 60(6) takes away the power of conditional release in respect of them unless exceptional circumstances exist. But for the opening words “Unless the Judge considers that there are exceptional circumstances that justify the person’s release”, s 60(6) would be couched in

absolute terms that would leave no room for doubt that Parliament intended to preclude absolutely the release of the specified categories of persons.

[30] So the question comes down to whether the opening words of s 60(6) detract from that meaning sufficiently to conclude that, even in relation to those specified in s 60(6), detention must still be limited to what is reasonable in the circumstances. The construction of these words must be undertaken against the obvious intention that the categories of persons specified in s 60(6) are to be treated less favourably than others to whom s 60 applies. However, the decision to add the opening words to s 60(6) when, without them, the intention to allow prolonged detention would have been clear, can only have been intended to limit the effect that s 60(6) would otherwise have had.

[31] The opening words of s 60(6) specifically envisage that there will be people to whom s 60(6) applies who should nevertheless be entitled to conditional release. In adding these words Parliament has drawn back from the kind of unmistakable language used by the Australian legislature. I find that the opening words must have been intended by Parliament to ensure that there was a safety net that would prevent the literal effect of s 60(6) being implemented. The result is that the *Hardial Singh* principles apply to those detained under s 60(6) as to any other person detained under s 60.

[32] Mr Ryken submitted that the length of the detention should be regarded as an exceptional circumstance. There is no express restriction on what is encompassed in the expression “exceptional circumstances”. The phrase was considered by the UK Court of Appeal in *R v Kelly* [1999] 2 All ER 13 in the context of whether exceptional circumstances existed justifying not imposing a life sentence under the Crime (Sentences) Act 1997. Lord Bingham said that:

We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly or routinely, or normally encountered.

[33] In *Patel v Removal Review Authority and Department of Labour* [2000] NZAR 200 the Court of Appeal considered the phrase “exceptional circumstances of a humanitarian nature” in the context of s 63B Immigration Act 1987, observing that in its natural usage “exceptional circumstances” sets a high threshold necessarily involving questions of fact and degree.

[34] Clearly, the words “exceptional circumstances” require circumstances that are special and not usually encountered. But because the phrase is not qualified so as to be limited to humanitarian factors whereas it is so qualified elsewhere in the Act, I do not consider that it needs to be strictly limited to humanitarian factors in the sense of physical or mental well-being. I infer that a broader meaning was intended. Given my conclusion that the *Hardial Singh* principles are to be implied into s 60(6) I find that “exceptional circumstances” must include detention that would be regarded as unreasonable within those principles. Only in this way can the *Hardial Singh* principles be given effect to.

[35] However, what is reasonable depends on the particular circumstances of the case. The factors that will usually be relevant were canvassed by Dyson LJ in *R v Secretary of State for the Home Department, ex parte I* [2002] EWCA Civ 888 (CA):

It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the condition in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger, if released, he will commit criminal offences...

[36] In *Tan Te Lam*, the Privy Council observed that the conduct of the detainee was of fundamental importance. However, the relevant legislation specifically required the Court to have regard to whether a detainee had declined arrangements for removal, thereby giving a clear signal that the detainee’s conduct was to be given significant weight.

[37] In comparison, in *Ex parte I Dyson* LJ viewed the detainee's refusal to leave voluntarily as relevant, though of limited significance, observing that:

...the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention that would otherwise be unreasonable. If Mr Robb were right, the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect deportation.

[38] There is some force in this statement. If the detainee's conduct alone could determine the reasonableness of the detention then the situation would become an unseemly test as to whether the detainee could endure detention long enough for the Court to declare the period unreasonable. However, it is impossible to ignore the obvious intention behind s 60(6) that those who obstruct the removal process are to be treated less favourably than those who do not. I consider that this can only be achieved by according the detainee's conduct substantial weight in determining whether ongoing detention would be unreasonable.

[39] I therefore conclude that detention of those to whom s 60(6) applies is subject to the *Hardial Singh* principles. If detention would be unreasonable in terms of those principles then exceptional circumstances will exist for the purposes of s 60(6). In determining whether detention would be unreasonable, the detainee's conduct is to be accorded significant weight.

The present case

Background

[40] Mr Yadegary arrived in New Zealand in 1993. He made three unsuccessful applications for refugee status. By September 2004 he had exhausted all avenues of appeal and judicial review and had failed to persuade the Minister of Immigration to intervene. He was detained pursuant to s 59 for the purpose of removing him to his country of origin, Iran.

[41] However, having destroyed his passport, Mr Yadegary could not be removed within the 72-hour period provided for in s 59(3). INZ obtained a warrant of

commitment under s 60, authorising his detention for seven days to enable the removal order to be executed. The purpose of this extended period was to arrange travel documentation. This proved impossible because Mr Yadegary refused (and continues to refuse) to sign an application for a passport and the Iranian government requires applications for Iranian passports to be signed by the applicant.

[42] There have been ongoing diplomatic efforts over the last two years or so to secure arrangements with the Iranian authorities for the involuntary repatriation of persons in Mr Yadegary's position. Throughout this period INZ has regularly obtained extensions to the warrant of commitment. Prior to applying for such extensions it offers Mr Yadegary the opportunity to change his position and apply voluntarily for an Iranian passport. He invariably declines the invitation.

The District Court decision

[43] In November 2006 the Judge was confronted with INZ's application to extend the warrant and Mr Yadegary's cross-application for conditional release. It is clear from the decision that the Judge did not give separate consideration to the application to extend the warrant. Instead he appears to have assumed that grounds existed on which to allow that application and moved immediately to consider the cross-application for conditional release.

[44] After reviewing the background to the applications and observing the provisions in s 60(6) the Judge dealt with the question of whether exceptional circumstances existed that would justify releasing Mr Yadegary. The Judge considered the facts that Mr Yadegary had not committed any criminal offence, was not a flight risk and may yet be able to apply again for refugee status. He also noted the delay before his situation could be resolved. He then reached his conclusion that there were no exceptional circumstances that would justify release:

[15] However, to come directly to the point, has the respondent satisfied me that there are exceptional circumstances here that would justify his release?

[16] An exceptional circumstance is a circumstance truly out of the ordinary. It might include matters such as severe problems with the physical

and mental health of the respondent or there may be extreme humanitarian grounds on which the Court could act. At the moment what I have is an extensive support network; we have a significant delay that seems likely not to persist indefinitely; we have the fact that Mr Yadegary has been in custody for two years without having committed any crimes; there is some psychological effect on him to date - and I can well understand that.

[17] However, I regret to say that these are not exceptional circumstances. They are circumstances which would be common, I expect, in many cases, to people who come before the Court and who have managed to attract, deservedly, the concern of the community.

Grounds for judicial review

[45] Mr Yadegary says that the judge erred in:

- a) Failing to consider the lawfulness of ongoing detention. He maintains that his ongoing detention no longer serves the purpose for which detention is authorised under s 60 and is therefore unlawful;
- b) Failing to consider whether the length of detention to date would make further detention unreasonable and therefore unlawful;
- c) Misinterpreting the meaning of “exceptional circumstances” in s 60(6) by limiting it to humanitarian issues and not taking into account the length of detention;
- d) Wrongly finding that the prospect of a meeting in February between INZ and Iranian authorities gave definition to the length of detention; and
- e) Refusing leave to cross-examine the Crown’s deponent, Mr Baker in relation to the state of negotiations with the Iranian authorities.

[46] I deal with the first, fourth and fifth grounds together as all being part of the enquiry into whether the detention is still necessary for the purpose authorised by s 60. I consider the second and third grounds together as they both depend on an assessment of the reasonableness of ongoing detention.

Purpose of detention

[47] Mr Ryken submitted that Mr Yadegary's detention, although initially lawful, had become unlawful because its original purpose had been overtaken by the inconclusive attempts to reach agreement with the Iranian authorities for involuntary repatriation. Somewhat inconsistently, he accepted that if repatriation was imminent then Mr Yadegary could not maintain that he was being unlawfully detained. So I took the general tenor of the argument to be that progress towards arrangements for involuntary repatriation has become so slow and inconclusive that *further* detention could not be said to be for the statutory purpose of removing Mr Yadegary, rather than that his detention until now had been unlawful.

[48] If Mr Ryken's submission were correct, it would follow that further detention would be unlawful. If so, there would have been no basis on which to extend the warrant. It was incumbent on the Judge in this case to consider whether ongoing detention would be lawful so as to support a further extension to the warrant. His failure to do so was undoubtedly an error. However, for the reasons I am about to come to, it is an error that would not have affected the decision.

[49] The Crown says that meaningful diplomatic contact is continuing with Iranian authorities and that there is reason to hope that progress will be made this year to effect suitable arrangements for involuntary repatriation.

[50] The District Court Judge had before him an affidavit 16 November 2006 by the National Manager, Border Security and Compliance Operations of Immigration New Zealand, Mr Baker. That affidavit very briefly outlined the diplomatic contact and negotiations between New Zealand and Iran. Mr Baker said that INZ, the Ministry of Foreign Affairs and the Iranian Government were working towards an agreement that complies with the Convention on International Civil Aviation as well as the respective domestic legislation of both countries. He expressed the view that conclusion of arrangements may be reached to coincide with a planned meeting of the respective authorities in early 2007.

[51] The Judge refused Mr Yadegary leave to cross-examine Mr Baker on the ground that "...all he [Mr Baker] could say was that he had these discussions and that was the result".

[52] Mr Baker gave a further affidavit 12 December 2006 for the purposes of Mr Yadegary's application for *habeas corpus* in which he gave more detail about the ongoing negotiations between New Zealand and Iran regarding both the provision of passports for those who are co-operative and involuntary repatriation for those who are not. It is reasonable to assume that if Mr Baker had been cross-examined it is this further detail that would have emerged.

[53] I am satisfied from Mr Baker's evidence that INZ has been actively addressing the issue of involuntary repatriation and that progress is being made. It cannot be said that negotiations have broken down or reached a stalemate such that a concluded arrangement is unlikely to be agreed upon some time in the future. However, nor is there any certainty as to when the negotiations might actually produce an agreement that can be implemented. Mr Baker did not give any objective basis for thinking that the meeting scheduled to take place in February 2007 would result in a firm agreement being reached.

[54] I was left with the strong impression from Mr Baker's evidence that workable arrangements are unlikely to be achieved until some time later this year, at the earliest. Indeed, as the time for the planned meeting has now passed with no advice from INZ of a firm agreement being reached, this impression would seem to be correct.

[55] Even on the Crown's evidence, it seems quite possible that Mr Yadegary could be detained for at least three years and quite possibly longer. In these circumstances, can it be said that continued detention is still necessary for the purpose of enabling the removal order to be executed? The diplomatic negotiations are unquestionably slow. They may, in the end, be unsuccessful. But it seems quite clear that they are being undertaken specifically to find a means by which Mr Yadegary and others in his situation can be removed from New Zealand. It is the purpose that is in issue at this stage of the enquiry, not the certainty of the outcome.

I consider that the statutory purpose required by s 60(2) is still being served by ongoing detention.

Would ongoing detention be unreasonable under the Hardial Singh principles?

[56] Mr Ryken's second main point was that the length of Mr Yadegary's detention to date coupled with the likely length of future detention made ongoing detention unreasonable or alternatively constituted an exceptional circumstance for the purposes of s 60(6). As I have already concluded, if detention of a person to whom s 60(6) applies would be unreasonable then exceptional circumstances will exist for the purposes of s 60(6).

[57] While the Judge specifically considered whether Mr Yadegary's circumstances were "exceptional" within the meaning of s 60(6), he failed to realise that determining whether exceptional circumstances existed in this case required determination of whether ongoing detention would be reasonable. Although the Judge did not expressly limit the circumstances that might be regarded as exceptional for the purposes of s 60(6), those that he identified as relevant fell solely within the realms of general humanitarian issues. He did not consider the reasonableness of ongoing detention within the *Hardial Singh* principles. As a result he effectively limited the facts that should have been taken into account in deciding whether exceptional circumstances existed and wrongly failed to take into account the length of detention to date, the likely length of future detention and Mr Yadegary's conduct in obstructing the removal process.

[58] I therefore turn to consider whether further detention would be unreasonable. Mr Yadegary has now been in detention for more than two years. He has no criminal convictions. Apart from immigration issues he led a law-abiding existence in New Zealand before being detained. He has considerable support from reputable members of the community. There is substantial evidence as to his good character. He has offers of support, including accommodation.

[59] Although it would be unrealistic to exclude the risk of a person in Mr Yadegary's position absconding, in Mr Yadegary's case the risk does seem to be

low. There seems little risk of him offending. If these risks were high then one would regard a longer detention as tolerable but the Crown does not suggest that there is a significant risk in this case.

[60] I regard the unchallenged evidence of Mr Yadegary's good character as significant. He appears to present little risk to the community and, to the contrary, has something to contribute. I am mindful of the fact that the concern sparked by the *Mohebbi* case seemed to arise as much from the fact that Mr Mohebbi had convictions for violence as from the fact that he was obstructing the removal process.

[61] Mr Yadegary is being held at the Auckland Central Remand Prison. A psychiatric report obtained in June 2005 describes a number of physical and psychological symptoms which suggest that ongoing detention will be detrimental to his mental health. Psychiatrist Dr Colin Goodwin commented:

He presents with a mixture of both anxiety and depressive symptoms in direct response to both his incarceration and his ongoing uncertainty about the possible length of that incarceration. In my opinion Mr Yadegary currently qualifies for the diagnosis of *adjustment disorder with depressed mood and anxiety* as per the Diagnostic and Statistical Manual 4TR (DSM-IV TR)) of the American Psychiatric Association.

I am also of the opinion that Mr Yadegary's symptoms appear to be worsening while incarcerated. It appears likely that his symptoms will continue to develop to the point where he develops a Major Depressive Episode in the future unless there is significant alteration to his current circumstances. Continued incarceration without a release date will result in deterioration of Mr Yadegary's mental state.

[62] The next factor to consider must be the probable length of detention in view of the ongoing diplomatic negotiations. I accept that INZ has been conscious of the need to advance the issue of involuntary repatriation and has taken reasonable steps to do so. Those steps have progressed slowly but this seems likely to be the nature of negotiating with a foreign government. As I have found, there is still the prospect of removal being achieved, albeit not soon. It seems very likely that Mr Yadegary could be detained for at least a further year until there are arrangements for his removal in place. Given the time that he has already spent in custody, this is a very long time by anyone's standards. It exceeds the time regarded as unreasonable in *R v Secretary of State for the Home Department, ex parte I*.

[63] The circumstances of the detention and Mr Yadegary's psychological response to them are hardly unusual. Regrettably, many people find themselves in the Auckland Central Remand Prison and find the conditions difficult to bear. However, not many spend more than two years there with the prospect of ongoing detention for an unknown period (possibly years) without having committed or even being accused of any crime. Against the background of his good character and the likely effect of ongoing detention on his mental condition, in the absence of any other factor, I consider that ongoing detention would be unreasonable.

[64] Against those factors, however, is Mr Yadegary's obstructiveness. He could secure his removal from New Zealand at any time. He has a genuine belief that he will be in danger if he does that. However, it was beyond the scope of either the District Court considering the application for extension of the warrant or of this Court in reviewing the District Court's decision to enquire into the foundation for that belief. While accepting that the belief is genuine, I must proceed on the basis that Mr Yadegary's status has been properly determined and that he could, if he wished, effect his removal from this country within a very short time by applying for a passport.

[65] Given my earlier conclusion as to the intention behind s 60(6) that a person in Mr Yadegary's position be treated less favourably, I accord this factor significant weight. However, it cannot have the status of a trump card. There is a point at which the unreasonableness of ongoing detention outweighs the need to sanction obstructive conduct. This does, of course, give rise to the unpalatable possibility that a detainee may be able to secure release simply by enduring detention long enough for a Court to declare further detention unreasonable. However, had Parliament intended the sanctioning of obstructive conduct to prevail over other factors it could have stated its intention in unmistakable terms. It has not done so.

[66] I find that, even taking into account Mr Yadegary's obstructiveness, the circumstances of his detention are such as to make further detention unreasonable. Exceptional circumstances therefore exist for the purposes of s 60(6) and Mr Yadegary is entitled to conditional release under s 60(5).

Summary of conclusions and relief

[67] I have found that:

- a) The purpose of detention under s 60 is to enable the execution of removal orders. The Judge should have considered whether ongoing detention would serve this purpose. However, I am satisfied that it would and, therefore, this error would not have altered the outcome of the decision;
- b) The principles enunciated in *Hardial Singh* apply generally to detention under s 60, namely that:
 - i) Detention can only be for the purpose authorised by s 60;
 - ii) The length of detention must be limited to the period reasonably necessary for the statutory purpose;
 - iii) What is a reasonable period depends on the circumstances of the particular case;
 - iv) The State must take the steps necessary to achieve removal within a reasonable time;
 - v) If it becomes apparent that removal cannot be achieved within a reasonable period the detainee must be released;
- c) There is nothing in the language of s 60(6) that could operate to exclude the *Hardial Singh* principles. Accordingly, the phrase “exceptional circumstances” in the opening words of s 60(6) is to be construed so as to include detention that would be unreasonable under those principles. However, in determining what a reasonable period is the detainee’s own conduct in obstructing the removal process is to be given significant;

- d) The Judge erred in not considering the reasonableness of ongoing detention in light of all the relevant circumstances and in limiting the meaning of “exceptional circumstances” to purely humanitarian issues. Proper consideration of all the relevant factors would have shown that on-going detention would be unreasonable and therefore exceptional circumstances existed, with the result that Mr Yadegary was eligible for conditional release.

[68] It is open to this Court to quash a decision of the District Court where it has been reached on the basis of an error and substitute its own decision: *Fiordland Venison v Minister of Agriculture & Fisheries*[1978] 2 NZLR 341. I consider that to be the appropriate course in this case. I therefore grant the application for judicial review, quash the decision of the District Court and order that Mr Yadegary be released on conditions. However, since I was not addressed on appropriate conditions I remit the matter to the District Court for conditions to be set, with that to be addressed as a matter of urgency.

P Courtney J