Easter Term
[2016] UKSC 16
On appeal from: [2013] EWCA Civ 1608

JUDGMENT

R (on the application of Nouazli) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

20 April 2016

Heard on 23 and 24 November 2015

Appellant	*Respondent*
Pushpinder Saini QC Professor Takis Tridimas Laura Dubinsky (Instructed by Lawrence Lupin Solicitors)	Tim Ward QC Jonathan Auburn (Instructed by The Government Legal Department)

LORD CLARKE: (with whom Lord Neuberger, Lady Hale, Lord Carnwath and Lord Toulson agree)

Introduction

1. This appeal concerns the compatibility with EU law of regulations 21 and 24 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("EEA Regulations 2006") and the legality at common law of the appellant's administrative detention from 3 April until 6 June 2012 and of bail restrictions thereafter until 2 January 2013. The regulations were designed to give effect to the Citizens Directive 2004/58/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (hereinafter "the Directive").

2. The appellant appeals, with permission granted by the Supreme Court, against an order of the Court of Appeal (Moore-Bick, Briggs and Christopher Clarke LJJ) of 10 December 2013 [2014] 1 WLR 3313. In a judgment given by Moore-Bick LJ, with whom the other members of the court agreed, the Court of Appeal dismissed the appellant's appeal against the amended order of Eder J made in the Administrative Court on 24 June 2013. In a judgment handed down on 15 March 2013; [2013] EWHC 567 (Admin), Eder J refused part of the appellant's claim for judicial review challenging his administrative detention by the respondent ("SSHD").

3. The SSHD sought to justify the appellant's detention under regulations 19 and 24 of the EEA Regulations 2006 (as amended), which provide, so far as material, as follows:

> "19. Exclusion and removal from the United Kingdom
>
> (3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if -
>
> (a) that person does not have or ceases to have a right to reside under these Regulations; or

> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21.
>
> 24. Person subject to removal
>
> (1) If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 19(3)(b), that person may be detained under the authority of an immigration officer pending a decision whether or not to remove the person under that regulation, ...
>
> (3) Where a decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act (liability to deportation) applied and section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly."

Regulation 21, which is designed to give effect to articles 27 and 28 of the Directive, is referred to in paras 34 and 35 below.

Issues in this appeal

4. In the agreed statement of facts and issues the parties agreed that the appeal raises the following issues. (1) Does the detention power under regulation 24(1) of the EEA Regulations 2006 discriminate without lawful justification against EEA nationals and their family members? (2) Is the power in regulation 24(1) to detain before the making of a decision to deport disproportionate? (3) In particular, does the absence of a time limit render such detention unlawful under EU law? (4) Does regulation 24(1) unlawfully restrict the rights of EEA nationals and their family members by contrast to those enjoyed before the coming into force of the Citizens Directive which the EEA Regulations 2006 purport to implement? (5) Do regulations 21 and 24 of the EEA Regulations 2006 fail accurately to transpose the safeguards of articles 27 and/or 28 of the Citizens Directive? (6) Were the appellant's administrative detention from 3 April until 6 June 2012 and the bail restrictions imposed upon him until 2 January 2013 unlawful by reason of the matters raised in questions (1) to (5) above?

The facts

5. The facts are not in dispute and can largely be taken from the agreed statement of facts and issues. The appellant is an Algerian national born on 21 August 1968 who arrived in the United Kingdom in March 1996, gaining entry using a false French identity card. On 4 March 1996 he applied for asylum, which was refused. He appealed. On 25 February 1997 he married a French national who was a worker in the UK and on 5 February 1998 he was granted a five year residence permit as the family member of an EEA national. The permit was renewed until 14 April 2004. The appellant and his wife had two children who were born on 30 June 1997 and 23 October 1998 respectively. He withdrew his asylum appeal on 9 February 1999. In or about 2001, the appellant's wife became depressed with psychotic symptoms and became involuntarily unemployed. The appellant, who worked as a barber, began abusing alcohol, heroin and crack cocaine. The two children were taken into care. The couple became estranged before the birth of their third child in July 2004. The appellant's wife returned to France with the youngest child in late 2005. The two older children were transferred to care in France by an order of the Family Court dated 31 January 2006.

6. The appellant acquired a right of permanent residence in the UK under EU law. Article 16(2) of the Directive establishes a right of permanent residence for family members legally residing with an EEA national in a host member state for a continuous period of five years. That entitlement was transposed in regulation 15(1)(b) of the EEA Regulations 2006. The appellant had fulfilled that condition by 5 February 2003.

7. By the end of January 2012, the appellant had been subject to 28 criminal convictions for 48 offences. His longest custodial sentence was imposed in 2008 when he was sentenced to 23 months' imprisonment for three offences of theft, possession of controlled drugs and affray and possession of a bladed article. His other custodial sentences have been imposed for acquisitive offences (theft and handling stolen goods) and offences of personal drug possession, namely possession of a class A drug (crack cocaine) and possession of a Class B drug (cannabis resin). He also received non-custodial sentences for motor vehicle offences, failure to surrender to bail, failure to comply with community punishments, being drunk and disorderly and further acquisitive and drug possession offences. A full list of the appellant's convictions until and including the index offence (which gave rise to the period of detention under challenge) was agreed between the parties as an addendum to the agreed facts and issues. The list is attached to this judgment.

8. It can be seen that the appellant was guilty of a series of offences. The First-tier Tribunal, Immigration and Asylum Chamber ("the FtT-IAC") subsequently described his offending in this way:

> "16. We have studied the record of the appellant's offences with care. Whatever the future may hold, no one can gainsay the appellant's past propensity to re-offend. However, the appellant's convictions are, almost without exception, for petty opportunistic thefts or possession of drugs. None discloses any violence, nor is it suggested that the appellant has ever dealt in drugs. When sentencing the appellant to 8 months' imprisonment on 20 November 2006, the Recorder described the appellant as 'a pest, a nuisance'. He went on to note that the offences were petty thefts and that the appellant to his credit had not sought to use violence or hide anything. The Recorder's characterisation of the appellant as a 'pest' was endorsed in the AIT's November 2008 determination.
>
> 17. We have looked with particular care at the apparently most serious convictions on 15 December 2008, when the offences included affray and possession of a blade in a public place. The appellant was sentenced to 23 months' imprisonment, the longest term by a considerable margin. As to the affray, the appellant states that he was drunk at the time of the incident and got into an argument. The sharp object was a razor blade that he carried with him because at the time he was self-harming. We note that the psychiatric reports of Professor Kantona to which we return below contain some confirmation of the appellant's self-harming claim. There remains no evidence that the appellant has ever used violence in the course of his offences, or that he was carrying the blade with any intention of using it on a third party.
>
> 18. We do not consider that the offences for which the appellant was convicted on 15 December 2008 or any other of the offences set out in the record are of a gravity such as to alter the overall character of the appellant's record of offences as a petty criminal committing mainly theft offences to fund his drug use."

9. On 8 January 2007 the SSHD made the decision to deport the appellant in the light of his convictions to date. He appealed against that decision. On 23 July 2007, the Asylum and Immigration Tribunal ("AIT") found that the appellant had established a right of permanent residence in the UK under EU law and allowed the appellant's appeal on EU law grounds but applied the incorrect legal test. The matter was remitted and on 3 November 2008 the AIT again found that the appellant had acquired a right of permanent residence in the United Kingdom and again allowed his appeal. It held that the "serious grounds of public policy or public security"

threshold for expulsion of permanent residents in article 28(2) of the Directive and regulation 21(3) of the EEA Regulations 2006 was not met. The SSHD was granted permission by the AIT to appeal to the Court of Appeal but withdrew her appeal by a consent order sealed on 11 April 2012.

10. As the addendum shows, the appellant continued to offend after the AIT allowed his appeal on 3 November 2008. On 25 January 2012, the appellant was convicted of theft for which he was sentenced to a further term of 20 weeks' imprisonment, with a release date of 3 April 2012. This conviction gave rise to further deportation proceedings against the appellant and to the administrative detention under challenge in this appeal. While the appellant was serving his custodial sentence, on 27 March 2012 the SSHD issued internally a notice purporting to authorise the appellant's detention under Schedule 3 of the Immigration Act 1971. The detention authority stated (it is agreed erroneously) that the SSHD had decided to make a deportation order against the appellant under section 5(1) of the Immigration Act 1971.

11. On 3 April 2012, the appellant completed his criminal custodial term but (as stated above) was administratively detained. On the same date, he was served with three documents from the UK Border Agency. The first document, dated 29 March 2012, was a letter which invited the appellant to make representations as to why he should not be deported and stated that he had 20 working days to respond. The second, dated 3 April 2012, was a notice of "Decision to make a Deportation Order" under the EEA Regulations 2006. The decision was said to be made on grounds that he would pose "a genuine, present and sufficiently serious threat to the interests of public policy" if he were allowed to remain in the United Kingdom but gave no other reasons. The third document was a letter dated 29 March 2012 which informed the appellant that he was being detained under Schedule 3 of the Immigration Act 1971 pending his removal. The reasons for detention letter made no reference to the Directive or the EEA Regulations 2006.

12. On 12 April 2012 the appellant's solicitors sent a pre-action protocol letter stating that the decision to deport was procedurally unfair since it had been made before the appellant had time to make representations and was in breach of the mandatory safeguards contained in regulation 21(6) of the EEA Regulations, which required the SSHD to take specific considerations into account before making a "relevant decision". The letter also drew the SSHD's attention to the earlier findings of the AIT that the appellant's deportation would be in breach of EU law. A reply on behalf of the SSHD dated 13 April 2012 said that the SSHD considered that the appellant posed a risk of harm to the general public and that his deportation was proportionate and justified. On 20 April 2012, the SSHD provided reasons for deportation which acknowledged that the appellant had acquired a right of permanent residence in the UK and could only be deported on serious grounds of public policy or public security but asserted that this threshold was met. The letter

set out an account of the appellant's offending and an assessment of the threat posed by him.

13. On 11 May 2012, in her acknowledgment of service in these proceedings the SSHD withdrew her decision to deport the appellant dated 3 April 2012 and stated that she would "notify the [appellant] of any decision to deport following consideration of any representations received". The letter further said that "the [appellant]'s extensive criminal convictions give the SSHD reasonable grounds for believing that he may be someone who may be removed from the United Kingdom under regulation 19(3)" so that in her view the appellant's detention remained lawful.

14. There have been two relevant periods when the appellant was on bail. The appellant was first granted bail on 31 May 2012 by the FtT-IAC subject to a reporting restriction and an electronic curfew and was released from detention on 6 June 2012. It was subsequently conceded by the SSHD in these proceedings that the appellant's detention from 3 April 2012 until 6 September 2012 was to be regarded as pursuant to regulation 24(1) of the EEA Regulations 2006, since there had been no valid decision to deport him in that period. As to the second period of bail, on 7 September 2012 the SSHD issued a further decision to deport him under the EEA Regulations 2006. That decision was accompanied by reasons and referred to the factors listed in regulation 21(6) of the EEA Regulations 2006 (quoted below). The SSHD again acknowledged that the appellant had acquired a right of permanent residence in the UK. The appellant's appeal against the decision of 7 September 2012 was allowed by the IAT in a determination promulgated on 2 January 2013 on the ground that, as a permanent resident, his deportation would breach EU law since the threshold for the expulsion of a permanent resident was not met. The SSHD did not seek to challenge that decision.

These proceedings

15. On 27 April 2012 the appellant issued the claim for judicial review which gives rise to this appeal. On 16 May 2012, the appellant was granted limited permission on the papers to apply for judicial review by James Dingemans QC, sitting as a Deputy High Court Judge. The appellant sought permission to enlarge his grounds and the matter was dealt with at a rolled-up hearing before Eder J ("the judge") on 6 and 7 March 2013. He recorded two concessions made on behalf of the SSHD. The first was that the decision to deport the appellant dated 3 April 2012 was to be regarded as null and void ab initio at least so far as it constituted a decision or notice to remove or deport. It followed that it was common ground that the appellant was in effect to be regarded as having been detained from 3 April 2012, not pursuant to regulation 24(3) of the EEA Regulations 2006 but rather pursuant to regulation 24(1). The second related to the second period of bail after the second decision to

deport, which was on 7 September 2012. The judge said at para 15 of his judgment that, at least until 2 January 2013, the appellant was to be regarded as "detained on bail" under regulation 24(3). I note in passing that it is not accepted on behalf of the SSHD that the expression "detained on bail" was used on her behalf.

16. It was also accepted by the appellant's then counsel that he could not, and did not, challenge the detention decisions on grounds of *Wednesbury* unreasonableness or irrationality: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. Nor did the appellant's counsel below seek to argue that the Secretary of State had acted contrary to the principle of proportionality. Moreover, it was agreed at the hearing before the judge that questions concerning the lawfulness of any remaining restrictions on the appellant's liberty after 2 January 2013 should be adjourned with liberty to apply. For present purposes the issues are accordingly limited to the detention of the appellant for about two months from 3 April to 6 June 2012 and the restraint upon his liberty while on bail for just under seven months until 2 January 2013.

17. As stated above, the application for judicial review failed before the judge and the Court of Appeal dismissed his appeal. One of the ironies of this appeal is that the Court of Appeal dismissed some of the appellant's submissions on the basis that they had not been raised at first instance, whereas the appellant, who has the benefit of fresh counsel, now raises a number of issues which were not before the Court of Appeal. However, he does so without objection on behalf of the SSHD. The court will accordingly consider the particular questions raised by the parties and set out in para 4 above. Before doing so, it is appropriate to set out the relevant legal framework.

18. A striking feature of the appellant's case is that it does not for the most part focus on his particular circumstances. It is put at the highest level of abstraction. The appellant contends that the impugned legislation is invalid and must be disapplied in each and every case and in all circumstances. The critical provisions are regulation 24(1) and (3) of the EEA Regulations 2006, which must of course be construed in their context.

The legal framework

19. The legal framework is not in dispute. There are UK immigration controls relating to (a) entry, (b) restrictions on removal and (c) detention, although this appeal is directly concerned only with detention. At each point there are important differences between the rules which apply to those exercising rights of free movement derived from laws applying to the European Economic Area, which I will

call EU law rights, namely EEA nationals and their family members, and those who are not exercising such rights.

20. As to controls on entry, for a non-British citizen not exercising EU law rights, the regime which confers leave to enter and remain in the United Kingdom is governed by the Immigration Act 1971. By section 3(1) of that Act, people who are not British citizens and do not fall within defined exceptions are not permitted to enter the UK other than with specific permission, or leave, to do so. Leave to remain may be granted for either indefinite or limited periods and may be subject to conditions, such as (amongst other things) restrictions on employment. These rules are subject to specific exceptions, although the general position is that a form of permission is required to enter and remain in the UK. Those who require leave to enter or remain in the UK are "subject to immigration control". The process of the granting of leave to enter or remain to those subject to immigration control involves consideration of whether the presence of the individual in question would be conducive to the public good. Those with previous criminal convictions, or in relation to whom there are other grounds to conclude that their presence will not be conducive to the public good, may be subject to immigration controls preventing their entry.

21. By contrast, those exercising EU law rights are not subject to the above regime. They enjoy extensive additional rights, no doubt as a means of promoting the internal market, including the market for labour, as given effect in UK law. By section 7(1) of the Immigration Act 1988, people with directly effective EU rights to enter or remain in the UK, or who enjoy such rights by virtue of any provision made under section 2(2) of the European Communities Act 1972, do not require leave to enter or remain.

22. Critical to the construction of the EEA Regulations 2006, including of course regulation 24(1), is the true meaning and effect of the Directive, which consolidates and extends the rights granted by pre-existing secondary legislation and reflects established CJEU case-law. Further, it applies to all of the countries in the EEA.

23. It appears to me that the recitals are of some assistance. Moore-Bick LJ drew attention (at para 6) to the following recitals:

> "Whereas
>
> (1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the member states ...

> (2) The free movement of persons constitutes one of the fundamental freedoms of the internal market ...
>
> (5) The right of all Union citizens to move and reside freely within the territory of the member states should, ... be also granted to their family members, irrespective of nationality ...
>
> (20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a member state on the basis of this Directive should enjoy, in that member state, equal treatment with nationals in areas covered by the Treaty ..."

24. Article 1 explains that the Directive lays down the conditions governing the exercise of the right of free movement and residence by Union citizens and their family members, the right of permanent residence and the limits placed on the rights set out above, on grounds of public policy, public security or public health. Article 2 defines "Union citizen" as any person having the nationality of a member state, and defines "family member" to include a spouse. Article 3 makes clear that the beneficiaries of the Directive are "Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members". Accordingly, it does not apply to a "wholly internal situation", which arises where an EU national has not moved between member states.

25. The class of persons who are able to exercise EU law rights extends not only to nationals of EEA member states who exercise rights of free movement, but also to certain "third country" family members who are nationals of non-EEA states. The residence rights conferred by EU law on third country family members are nevertheless personal rights. Article 13 of the Directive makes clear that rights of residence of a spouse may survive divorce in certain circumstances.

26. In short, so far as leave to enter and remain are concerned, those exercising EU rights have much greater rights than those not exercising such rights but are subject to immigration control. The same is true so far as restrictions on removal and deportation are concerned. For example, a person subject to immigration control who has leave to remain may be liable to deportation or removal under a number of statutory provisions, namely sections 3(5)(a), 3(5)(b) and 3(6) of the Immigration Act 1971 and section 32 of the UK Borders Act 2007. There are differences between deportation and removal but it is not necessary to discuss those differences here.

27. A person who is not a British citizen (and not exercising EU law rights) is liable to deportation under the Immigration Act 1971 where (a) the SSHD determines that his or her deportation is conducive to the public good: section 3(5)(a); or (b) another person to whose family he belongs is or has been ordered to be deported: section 3(5)(b); or (c) after attaining the age of 17 he has been convicted of an offence punishable by imprisonment and on his conviction the judge recommended deportation: section 3(6). The power to make deportation orders is contained in section 5 of the 1971 Act.

28. In addition to those powers of deportation, the UK Borders Act 2007 introduced automatic deportation for certain "foreign criminals". Section 32(5) of that Act provides that the Secretary of State "must make a deportation order in respect of a foreign criminal". The regime of automatic deportation is, however, subject to certain exceptions set out in section 33 of the 2007 Act including, *inter alia*, where removal of the foreign criminal would breach that person's rights under EU Treaties (section 33(4)) and where deportation would breach a person's Convention rights or the UK's obligations under the Refugee Convention (section 33(2)).

Detention pending a decision whether or not to deport

29. I turn to detention pending a decision whether or not to deport. In summary, it is a familiar feature of the system of immigration controls that the power of detention can be used in a variety of situations prior to the making of a decision to deport or remove. These include the following: (1) the 1971 Act, Schedule 2, paragraph 16(2), where there are reasonable grounds to suspect a person is someone in respect of whom removal directions may be given, including inter alia under section 10 of the Immigration and Asylum Act 1999; (2) the 1971 Act, Schedule 3, paragraph 2, pending the making of a deportation order following a court recommendation; (3) under the 2007 Act, detention pending a decision as to whether a person is liable to automatic removal; and (4) under regulation 24(1) of the EEA Regulations 2006.

30. It is correctly accepted on behalf of the SSHD that, in contrast to the position described above, those exercising EU rights do not require leave to enter or remain and have the benefit of powerful protections against their expulsion from the UK. The ability of member states to restrict the Treaty rights described above is limited by Chapter VI of the Directive, which is entitled

> "RESTRICTIONS ON THE RIGHT OF ENTRY AND THE RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH"

and comprises articles 27 to 33. For present purposes articles 27 and 28 are of particular significance and provide, so far as relevant, as follows:

"Article 27

General principles

1. Subject to the provisions of this Chapter, member states may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.

Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

…

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of

> health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin.
>
> …"

31. It is clear that EEA residents who fall within the scope of the Directive enjoy powerful rights of residence far beyond those afforded by domestic law. As appears above, the Directive applies three different escalating threshold tests for restriction on rights of free movement as follows. In the case of a person such as the appellant with the right of permanent residence, an expulsion decision must be based on "serious grounds of public policy or public security": article 28(2). Article 24, which is entitled "Equal Treatment", provides so far as relevant:

> "1. … all Union citizens residing on the basis of this Directive in the territory of the host member state shall enjoy equal treatment with the nationals of that member state within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a member state and who have the right of residence or permanent residence."

32. As already noted the Directive has been implemented into domestic law by the EEA Regulations 2006. The Regulations extend to the EEA rather than just the EU because the Directive applies throughout the EEA. They include the following. Regulation 2 contains definitions, including the definition of "EEA decision" as meaning "a decision under these Regulations that concerns - (a) a person's entitlement to be admitted to the United Kingdom … (c) a person's removal from the United Kingdom". Regulation 7(1)(a) provides that a "spouse or his civil partner" shall be treated as a "family member". Regulations 11 to 15B provide for rights of admission and residence which implement the relevant provisions of the Directive.

33. As noted in para 3 above, regulation 19(3)(b) provides for the removal of an EEA national or the family member of an EEA national where

> "the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21."

34. Regulation 21 is designed to give effect to articles 27 and 28 of the Directive. It applies to "relevant decisions", meaning "an EEA decision taken on the grounds of public policy, public security or public health." It provides that such a decision to remove *inter alia* "(2) … may not be taken to serve economic ends", and "(3) … may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security".

35. Regulations 21(5) and (6) provide:

> "(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles -
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

36. In summary, an EEA national who has entered the United Kingdom or the family member of such a national, exercising free movement rights, may be removed if certain limited circumstances apply, and under circumscribed conditions. Broadly, removal may only occur where:

> (1) There are grounds of public policy, public security or public health: article 27(1) of the Directive and regulation 19(3)(b). In the case of a person with a permanent right to reside under regulation 15, there must be serious grounds of public policy or public security: article 28(2) and regulation 21(3). If the EEA national has resided in the United Kingdom for a continuous period of at least ten years there must be imperative grounds of public security: article 28(3)(a) and regulation 21(4)(a). For an EEA national under 18 there must be imperative grounds of public security and expulsion must be necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child: article 28(3)(b) and regulation 21(4)(b).
>
> (2) But a decision to remove taken on public policy or public security grounds must also be a proportionate response and taken exclusively on the basis of the individual's personal conduct, which must itself represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It cannot be based on matters isolated from the case, considerations of general prevention or prior convictions (see, generally, article 27(2) and regulation 21(5)(a-e)).
>
> (3) Decisions on grounds of public policy or public security further require consideration of a set of specific factors, including age, state of health, family and economic situation, length of residence and social and cultural integration in the UK and links to the country of origin: article 28 and regulation 21(6).

37. It is to be noted that, as originally drafted, regulation 24(1) referred to regulation 19(3) without the restriction to paragraph (b) of that provision. The regulation was amended with effect from 16 July 2012 to its present form which refers only to cases in which regulation 19(3)(b) is satisfied. Although that change took place during the period of detention with which the appeal is concerned, it is not suggested that it is material to any of the issues in the appeal.

Discussion of issues

38. The agreed issues are set out at para 4 above. Although there is considerable overlap between some of them, it seems to me to be sensible to consider them separately.

> *(1) Does the detention power under regulation 24(1) discriminate without lawful justification against EEA nationals and their family members?*

39. Before the Court of Appeal it was argued that this question should be answered in the affirmative on the basis that the power under regulation 24(1) to detain is contrary to article 18 of the TFEU, which provides:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

Reliance is placed upon a statement by CWA Timmermans in *Kapteyn-Verloren Van Themaat, The Law of the European Union and European Communities*, Kluwer Law International, 4th ed (2008), para 6.5.1 at p 158, where he described article 18 as "The most fundamental expression of the principle of equality in relation to the functioning of the Common Market."

40. Both the judge and the Court of Appeal rejected this submission. The Court of Appeal put it thus in para 28:

> "Equality of treatment among EU nationals is one of the cornerstones of the European Union but [article 18 TFEU] is not concerned with the way in which member states treat nationals of other countries who reside within their territories, provided that they do not undermine the laws of the Union. Consistently with the purpose of the Treaty, which is to establish the fundamental legal architecture of the Union, article 18 TFEU is concerned only with the way in which citizens of the Union are treated in member states other than those of which they are themselves nationals. The argument therefore falls down at the first hurdle."

41. It was correctly conceded on behalf of the appellant that the Court of Appeal was right to hold that article 18 is concerned only with the way in which citizens of the Union are treated in member states other than those of which they are nationals. This can be seen in the decision of the CJEU in *Vatsouras and Koupstantze v Arbeitsgemeinschaft (AGRE) Nürnberg* (Joined Cases C-22/08 and C-23/08) [2009] ECR I-4585, where two Greek nationals complained that they were not permitted access to certain social assistance benefits which were granted to illegal immigrants. The CJEU explained that the referring Court was essentially asking whether article 12 EC [now article 18 TFEU] precluded national rules which excluded nationals of member states from receipt of social assistance benefits in cases where those benefits were granted to nationals of non-member states.

42. The court rejected the complaint in these terms:

> "52. [Article 18 TFEU] concerns situations coming within the scope of Community law in which a national of one member state suffers discriminatory treatment in relation to nationals of another member state solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of member states and nationals of non-member countries.
>
> 53. The answer to the third question, therefore, must be that [article 18 TFEU] does not preclude national rules which exclude nationals of member states of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries."

43. As observed in argument on behalf of the SSHD, in *Vatsouras*, Advocate General Ruiz-Jarabo Colomer formulated the same point at a higher level of abstraction:

> "66. In relation to the third question, Community law does not provide rules for resolving issues of difference in treatment between Community citizens and citizens of non-member countries who are subject to the law of the host member state. [article 18 TFEU] seeks to eliminate discrimination between Community citizens and nationals of the host member state but does not offer guidelines for eliminating the discrimination complained of by the referring court."

In so far as it was suggested that *Vatsouras* can be confined to its own facts and to consideration of articles 12 and 39 EC and article 24 of the Directive, and did not purport to set out general principles of equality under article 18 TFEU, it is my opinion, in agreement with the judge and the Court of Appeal, that *Vatsouras* was indeed setting out general principles.

44. Further, in *Martinez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691, para 62, the CJEU said:

> "Article 8(2) of the Treaty [now article 20(2) TFEU] attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in article 6 of the Treaty [now article 18 TFEU], not to suffer discrimination on grounds of nationality within the scope of application ratione materiae of the Treaty."

Finally, in *Edward and Lane on European Union Law* (2013), para 8.02, Professor Sir David Edward QC, former UK judge at the European Court of Justice, writing extra-judicially, observed:

> "Discrimination against third country nationals is not prohibited. It is presumed, and indeed expected, that they will be treated differently."

45. Such "discrimination" is simply a function of the limited scope of the EU legal order. It is not legitimate to draw a comparison between those exercising EU rights and other third country nationals for the purposes of EU discrimination law. Thus, in *R (Bhavyesh) v Secretary of State for the Home Department* [2012] EWHC 2789 (Admin) Blake J held at para 27 that

> "… members of such a class are the beneficiaries of a special legal regime, in a different position from either aliens or generally, or British citizens who fall altogether outside the scope of EU law. They are thus incapable of being a comparator class, or a group who are analogously situated with the claimants."

46. It is submitted on behalf of the SSHD that this analysis is fatal to the appellant's discrimination case. I agree. It follows to my mind that the other points made on behalf of the appellant under this head do not assist his case. They all fall foul of the principle in *Vatsouras* that those concerned are subject to a different legal

order. It may be noted that the European Court of Human Rights has approached the problem in a similar way. In *Moustaquim v Belgium* (1991) 13 EHRR 802 the claimant was a Moroccan national who had resided in Belgium for most of his life. On committing criminal offences the Belgian government decided to deport him to Morocco. He claimed that he was the victim of discrimination on grounds of nationality (contrary to article 14 taken together with article 8 ECHR) because two categories of persons could not be deported in the same circumstances: those with Belgian nationality and those who were citizens of another member state of the European Community. The ECtHR rejected this challenge. Paragraph 49 included the following:

> "… the court would reiterate that article 14 safeguards individuals placed in similar situations from any discriminatory differences of treatment in the enjoyment of the rights and freedoms recognised in the Convention. … In the instant case the applicant cannot be compared to Belgian juvenile delinquents. The latter have a right of abode in their own country and cannot be expelled from it …
>
> As for the preferential treatment given to nationals of the other member states of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those states, to a special legal order."

47. See also, to the same effect, *Ponomaryov v Bulgaria* (2011) 59 EHRR 20, where the applicants complained they were required to pay school fees as a result of their Kazakh nationality and immigration status. At para 54 the ECtHR said:

> "… [A state] may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member states of the European Union - some of whom were exempted from school fees when Bulgaria acceded to the Union - may be said to be based on an objective and reasonable justification because the Union forms a special legal order, which has, moreover, established its own citizenship."

Here too the ECtHR regarded such differences as objectively justified by the existence of a "special legal order" rather than treating such a comparator as impermissible.

48. It was submitted on behalf of the SSHD that it is artificial to isolate regulation 24(1) and complain as to the lack of precisely analogous powers under the non-EEA regime. That submission was accepted by both the judge and the Court of Appeal. The judge held at para 52 that whilst there was

> "no power to detain pending a decision to remove/deport … this does not necessarily mean that there is any relevant disadvantage to EEA nationals or their family members."

He noted that "EEA nationals and their families benefit from extended rights which non-EEA nationals do not benefit from" and that there is a "lower threshold test" for deportation conducive to the public good which applies to non-EEA nationals. He said at paras 53 and 54:

> "53. … As to the former … a non-British citizen is liable to deportation if the SSHD deems his deportation to be 'conducive to the public good'. In my judgment this is indeed a lower threshold test than that which exists with regard to the power of the SSHD to remove pursuant to regulation 19(3)(b). In particular, the latter is limited to the grounds of public policy, public security or public health in accordance with Regulation 21. Again, [the appellant's] comparison exercise ignores this additional important aspect and for that reason as well is, in my judgment, fundamentally flawed.
>
> 54. Given these differences I do not consider that there is any proper basis for comparing the different circumstances which exist to deport/remove under each applicable regime."

49. As to this part of the appellant's argument, Moore-Bick LJ said at the end of para 28 that article 18 TFEU is not concerned with the way in which member states treat nationals of other countries who reside in their territories. He added at para 29:

> "29. However, the difficulties do not end there. In seeking to compare the position of EEA nationals with that of nationals of other countries [the appellant] sought to focus exclusively on the Secretary of State's power of detention, but that is to view the matter too narrowly. As the judge pointed out, the provision for detention in each case forms part of a wider regime dealing with removal. Unlike nationals of other countries, nationals of the EEA are entitled to reside in this country and enjoy the

> protection from removal afforded by the Treaty and the Directive. They are subject to a different legal regime which cannot be directly compared to that which applies to other foreign nationals, who can be deported if the Secretary of State deems their removal to be conducive to the public good: see section 3(5)(a) of the 1971 Act. For both these reasons I agree with the judge that [the appellant's] argument is fundamentally flawed and that there is no substance in this ground of appeal."

I agree with the reasoning of both the judge and Moore-Bick LJ.

50. In this court Mr Saini QC for the appellant has put his case rather differently. He argues that two forms of discrimination arise which require justification, and to which the *Vatsouras* principle has no application. The first is discrimination between EU nationals or their spouses and third country nationals, on grounds of their status as beneficiaries of the Directive, contrary to article 21(1) of the EU Charter of Fundamental Rights. The second is discrimination on grounds of nationality, contrary to article 18 TFEU, between British nationals and EU nationals, both of whom have third country spouses.

51. The first argument in my view adds nothing to the discussion under TFEU article 18. Article 21 of the Charter cannot be relied on to extend the rights otherwise provided under European law. As the CJEU said in *NS v Secretary of State* (Case C-411/10) at para 119:

> "… the Charter reaffirms the rights, freedoms, and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles."

Furthermore, as has been seen above, article 24(1) contains a specific application of the principle of non-discrimination on grounds of nationality contained in article 18 TFEU. It makes clear that the relevant comparators for the purposes of the Directive are the nationals of the host member state but does not include and is not concerned with discrimination as regards third country nationals who fall entirely outside the scope of EU law.

52. The second argument appears to be new. The following comparison is relied on:

i) A French woman exercising Treaty rights in the UK is married to an Algerian man. Her husband is sentenced to less than 12 months imprisonment

for a criminal offence. Her husband is liable to be detained under regulation 24(1).

ii) A British woman resident in the UK is married to an Algerian man. Her husband is sentenced to less than 12 months imprisonment for a criminal offence. Her husband is not liable to be detained before a decision to deport.

53. At first sight this comparison does not appear to assist an argument that the appellant has been discriminated against in the enjoyment of his EEA law rights. In each limb of the comparator the situation of the third country national is the same. The argument is that the spouse of the third country national has been the subject of discrimination. But here the appellant's wife has not brought a claim and is not before the court. As stated in para 5 above, she returned to France in late 2005 with her third child and the two older children joined her in 2006. So the couple have been separated for ten years. There is nothing to suggest that she has suffered any discrimination because of the appellant's detention.

54. However, Mr Saini submits that, contrary to the requirement to treat an EU national equally to a British national, the French wife exercising Treaty rights has been adversely affected. Her husband was liable to be detained, whereas the British wife's husband was not. When considering whether regulation 24(1) is discriminatory, it is legitimate to consider the EU spouse, regardless of whether she has brought a claim herself. This is because any adverse effects on third country spouses interfere with the EU national's own free movement rights.

55. Mr Saini supports his argument by reference to the decision of the CJEU in *R v Immigration Appeal Tribunal, Ex p Secretary of State for the Home Department* (Case C-370/90) [1992] 3 All ER 798. Mr Singh was the Indian husband of a British woman. They had married in the UK in 1982, and lived in Germany from 1983-1985 where they were employed. They returned to the UK to open a business in 1985. A decree nisi of divorce was pronounced in 1987. Mr Singh remained in the UK without leave from 1988. A deportation order was made against Mr Singh, which he appealed, asserting a Community law right to reside in the UK. The decree absolute was pronounced in 1989.

56. The court held that the fact that the marriage was dissolved by the decree absolute was irrelevant to the issue raised by the question before the court which concerned the basis of his right of residence in the period before the decree (para 12). Mr Saini relies in particular on the following passage of the judgment, at para 19:

> "A national of a member state might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another member state if, on returning to the member state of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another member state."

The court rejected the submission that her rights turned on domestic law. The case was concerned with free movement under Community law. As the court said, at para 23:

> "These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse."

57. Thus, submits Mr Saini, Mr Singh was able to rely on the fact that the free-movement rights of his EEA spouse might be affected *hypothetically* by restrictions placed on his own movements, and to continue to do so even after any connection had ceased.

58. It is unfortunate that this authority, described by Mr Saini as "seminal", was not referred to in the courts below or even in his own 50 page case for this appeal. It seems to have emerged for the first time in a note accompanying a set of supplementary authorities submitted shortly before the hearing. For this reason, no doubt, it was not addressed in the respondent's case, or in any detail in oral argument. Had it been necessary to reach a conclusion on the scope and implications of that decision, the court might have required further submissions including submissions on the possibility of a reference.

59. However, I am satisfied that the decision has no direct bearing on this case. In the first place, the court made clear that its reasoning was addressed to Mr Singh's position before the divorce was finalised. It seems doubtful that it was intended to apply to a case where, as here, any practical link between the spouses came to an end eight years before the relevant actions of the Secretary of State. Any effect on the rights of Mr Nouazli's spouse would surely be truly hypothetical because she was unlikely ever to exercise her rights and thus unlikely ever to be deterred from exercising them. It is important in any event to bear in mind that we are concerned not with the removal of the appellant, but merely with his temporary detention or

subjection to bail conditions for a few months, first pending a decision by the Secretary of State, and then pending his successful appeal. Whether in other circumstances any relevant discrimination might arise as a result of mere detention pending a decision to remove will also be a fact sensitive matter. It cannot be a reason for holding, as Mr Saini would submit, that regulation 24(1) is invalid in "each and every case". At most, such a claim could justify the disapplication of the offending measure in a particular case.

60. On the facts of the present case I can see no conceivable basis for holding that any actual or hypothetical rights of the appellant's former spouse have been affected by the appellant's detention for a few months in 2012, still less by the imposition of bail conditions.

61. In the light of these conclusions it is not necessary to consider whether regulation 24(1) can be objectively justified. I would answer the question raised by issue (1) in para 4 above, by holding that regulation 24(1) does not discriminate without lawful justification against EEA nationals and their family members.

(2) Is the power in regulation 24(1) before making a decision to deport disproportionate?

62. So far as I am aware it is not in dispute that regulation 24(1) must be applied proportionately. In these circumstances, so long as it is so applied, I do not see how it can be said that the regulation is itself disproportionate. It is not said in this appeal that it was applied disproportionately on the facts. This question must therefore be answered in the negative, subject to the answer to question (3).

(3) In particular, does the absence of a time limit render such detention unlawful under EU law?

63. It is submitted on behalf of the appellant that this question should be answered in the affirmative. In particular it is submitted that it is inconsistent with the general EU law provisions of legal certainty and proportionality to permit executive detention of those exercising free movement rights when such incarceration is subject neither to specified time limits nor to initial or further mandatory judicial oversight. It is submitted that the ECtHR has found mandatory detention time limits to be a necessary component of the quality of "law" for the purposes of justifying deprivation of liberty under article 5(1)(f) ECHR, which provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> > (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

64. The SSHD relies upon the well-known principles originally propounded by Woolf J in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704. In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, Dyson LJ noted at para 46 that the principles were approved by Lord Browne-Wilkinson in the House of Lords in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111A-D. Dyson LJ identified the following four principles as emerging from *Hardial Singh*:

> "(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal."

In *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245, para 171, those principles were was endorsed by Lord Hope of Craighead, for the majority.

65. Those principles have been applied by the courts on many occasions. I would accept the submission made on behalf of the SSHD that they were intended to

impose limitations on the powers of immigration detention: *R (Francis) v Secretary of State for the Home Department* [2015] 1 WLR 567, para 45. The principles have been applied to the following: mandatory detention pending deportation: *Francis;* detention pending administrative removal: *R (FM) v Secretary of State for the Home Department* [2011] EWCA Civ 807, para 25; detention pending examination of immigration status: *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131, para 26; and detention pending a decision on whether one of the exceptions to automatic deportation applies: *R (Rashid Hussein) v Secretary of State for the Home Department* [2009] EWHC 2492 (Admin), para 44 and *R (Saleh (Sudan)) v Secretary of State for the Home Department* [2013] EWCA Civ 1378, para 16.

66. It is clear that the approach taken in *Hardial Singh* requires both the SSHD and the courts to take a fact sensitive approach to the length of detention. Thus in *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931, paras 37-41, Lord Thomas CJ deprecated the use of "tariffs or yardsticks". He said between paras 37 and 41:

> "37. The Secretary of State acting through his officials has to determine whether the period of detention is reasonable when deciding whether or not to continue the detention, subject to the right of any detainee to apply for bail. It is a judgment which has to be made on the evidence and in the circumstances as appear to the officials in each case.
>
> 38. There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.
>
> 39. McFarlane LJ said in *R (JS) Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 1378 at 50 -51 that fixing a temporal yardstick might cause the courts to accept periods of detention that could not be justified on the facts of a particular cases. In *R (NAB) v Secretary of State for the Home Department* [2010] EWHC 3137 (Admin) Irwin J made clear at paras 77-80 that a tariff would be repugnant and wrong …
>
> 41. Each deprivation of liberty pending deportation requires proper scrutiny of all the facts by the Secretary of State in accordance with the *Hardial Singh* principles. Those principles are the sole guidelines."

67. The courts have recognised that there are sound policy reasons for a flexible and fact-sensitive approach. I find nothing in the judgments of the ECtHR which undermines the *Hardial Singh* approach to the duration of detention. In this regard our attention was drawn to *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, para 94, where Lord Kerr observed that *Hardial Singh* principles are "more favourable to detainees than Strasbourg requires."

68. We were also referred to the leading case of *Chahal v United Kingdom* (1996) 23 EHRR 413, where the Grand Chamber considered a lengthy period of detention prior to deportation. The court said at para 113:

> "any deprivation of liberty under article 5 para (1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with reasonable diligence, the detention will cease to be permissible under article 5 para (1)(f)."

As counsel observed on behalf of the SSHD, that is evidently a fact-sensitive question, just as it is in English law.

69. The court in *Chahal* held that article 5(1)(f) was satisfied on the facts. It did not suggest that the lack of a specified time limit rendered the detention unlawful. The Grand Chamber revisited *Chahal* in *Saadi v United Kingdom* (2008) 47 EHRR 17 and made an explicit link between the notion of arbitrariness and the duration of detention (para 74):

> "To avoid being branded as arbitrary … the length of the detention should not exceed that reasonably required for the purpose pursued."

In *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, para 76, Baroness Hale described this as an endorsement of *Hardial Singh* principles, and noted that the ECtHR had not yet imposed a requirement for regular reviews. There is no suggestion in the Strasbourg judgment that a firm time limit is required.

70. I would accept the submission that the principles set out in *Chahal* and *Saadi* contain a specific application of the relevant rules in the context of the legality of detention. Nothing in the broad dicta in the CJEU cases referred to on behalf of the appellant demonstrates a narrower approach in EU law.

71. *Hardial Singh* was considered by the ECtHR in *Tabassum v United Kingdom* (Application No 2134/10) decision on admissibility, 24 January 2012), where the applicant complained of unlawful detention pending deportation. The ECtHR expressly considered the formulation of the *Hardial Singh* principles in *R (WL (Congo))* and concluded at para 23 that the applicant's period of detention "did not exceed what was reasonable in all the circumstances of the case and was not arbitrary". None of the cases cited on behalf of the appellant in his case to support his contention that mandatory time limits are a "necessary" component of the "quality of law". They all turn on very different facts. See, for example *Ismoilov v Russia* (2008) 49 EHRR 42 and *Muminov v Russia* (2008) 52 EHRR 23. In *Ismoilov* the ECtHR criticised the Russian system under review and concluded at para 140 that:

> "in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to extradition and setting up time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness."

There is nothing to suggest time limits are a general requirement of article 5(1)(f).

72. This is not to say that the absence of time limits is not a relevant factor in deciding in a particular case. This is shown in a number of cases to which we were referred. See, for example six cases against Turkey, namely *Abdolkhani and Karimnia v Turkey* (Application No 30471/08) (unreported) given 22 September 2009, para 135, applied in *ZNS v Turkey* (Application No 21896/08) (unreported) given 19 January 2010, para 56; *Tehrani v Turkey* (Application Nos 32940/08, 41626/08 and 43616/08) (unreported) given 13 April 2010, para 70; *Charahili v Turkey* (Application No 46605/07) (unreported) given 13 April 2010, para 66; *Alipour and Hosseinzadgan v Turkey* (Application Nos 6909/08, 12792/08 and 28960/08) (unreported) given 13 July 2010, para 57; and *Dbouba v Turkey* (Application No 15916/09) (unreported) given 13 July 2010, para 50. In those cases the ECtHR treated the absence of a time limit as a relevant factor in reaching the same conclusion as in *Ismoilov* quoted in para 71 above, in almost identical terms. In *Abdolkhani*, at para 135, the ECtHR said, in the context of detention pending deportation concluded:

> "In sum, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected

> was not circumscribed by adequate safeguards against arbitrariness."

73. See also *Mathloom v Greece* (Application No 48883/07) (unreported) given 24 April 2012 and *Massoud v Malta* (Application No 24340/08) (unreported) given 27 July 2010 to much the same effect. Again, the absence of a time limit was treated as a relevant factor but no more. In each case the ECtHR focused on the importance of having a procedure capable of avoiding the risk of arbitrary detention.

74. In my judgment in the instant case there is in place a clear statutory framework which involves appropriate judicial scrutiny and the consideration of the guidelines referred to above. In short, each case depends upon its particular facts. I would endorse the approach identified by Lord Thomas CJ and quoted in para 66 above:

> "Each deprivation of liberty pending deportation requires proper scrutiny of all the facts by the SSHD in accordance with the *Hardial Singh* principles. Those principles are the sole guidelines."

75. Nor can I accept the five reasons given on behalf of the appellant as to why the *Hardial Singh* approach is unlawful. They are these. First, it is said that this approach "fails to address the fundamental legality" test of reasonable foreseeability. For my part, I would reject the argument based on reasonable foreseeability. As explained above, the principles in *Chahal* are an application of the legality principle in the context of the legality of detention. Secondly, it is said that *Hardial Singh* is not satisfied because detention under regulation 24(1) does not comply with the requirement that detention "must be for the purpose of facilitating the deportation". As I see it, facilitating the deportation is precisely the purpose of regulation 24(1) detention, even if no final decision has been made. Thirdly, it is said that the principles in *Hardial Singh* only apply *ex post facto*. In my view that is wrong. What is required is proper scrutiny of all the facts: see paras 64 and 70 above. The court is able to ensure that *Hardial Singh* is adhered to, but the primary responsibility to comply lies with the SSHD. The courts provide supervision of the application of these criteria and in practice, challenges are brought to secure release, not just damages after the event.

76. Fourthly, it is said that a lack of legal certainty may amount to a restriction on free movement. The authority cited for this proposition is a tax case, namely *Safir v Skattemyndigheten i Dalarnas Län* (Case C-118/96) [1999] QB 451, which was not concerned with detention. I would accept the submission made on behalf of the

SSHD that it gives no reason to suppose that EU law requires more in this particular context than the ECHR.

77. Fifthly, the appellant argues that it is no answer to lack of legal certainty that the national courts interpret the measures compatibly with EU law. That is not the case for the SSHD, which is that the *Hardial Singh* limitations form part of what has been accepted by European courts as meeting the requirements imposed by law.

78. For all these reasons I would reject the case for the appellant and in answer to the question posed by issue (3), would hold that the absence of a time limit does not, as a matter of principle, render such detention unlawful under EU law.

> *(4) Does regulation 24(1) unlawfully restrict the rights of EEA nationals and their family by contrast to those enjoyed before the coming into force of the Directive which the EEA Regulations purport to implement?*

79. I would answer this question in the negative, essentially for the reasons given in the answer proposed to issue (1).

> *(5) Do regulations 21 and 24 of the EEA Regulations 2006 fail accurately to transpose the safeguards of articles 27 and/or 28 of the Directive?*

80. The essential point made on behalf of the appellant is that the Directive has not been properly transposed into the EEA Regulations 2006 because regulation 24 fails to transpose the safeguards contained in articles 27 and 28 of the Directive. It is said that decisions taken under regulation 24(1) are not "EEA decisions" for the purposes of regulation 2 of the Regulations, which is the definition section. It provides:

> "'EEA decision' means a decision under these Regulations that concerns -
>
> (a) …
>
> (b) …
>
> (c) a person's removal from the United Kingdom;

(d) ….”

The argument is that a decision to detain a person in the position of the appellant, who is detained under regulation 24(1) pending a decision whether or not to remove him, is not a decision which “concerns … a person’s removal” within the meaning of sub-paragraph (c).

81. In my view there is a short answer to this point. The power to detain under regulation 24 is not free-standing, but is purely ancillary to the powers of removal in the circumstances permitted by regulation 21, which properly transposes articles 27 and 28. Where the Secretary of State has reason to believe that there is a case for removal under those provisions, it is clearly appropriate that she should have power to detain while the matter is being considered, and thereafter pending deportation, if otherwise there might be a risk of the subject absconding. The creation of such a power is well within the margin of appreciation given to the national authorities under the Directive, provided it is suitable and proportionate to its purpose and reasonably exercised (see for example *R (Lumsdon) v Legal Services Board* [2015] 3 WLR 121, para 55). It is not necessary to show that a decision under regulation 24 is itself an “EEA decision” within the meaning of article 2. It is enough that it is directly linked to regulation 19(3)(b) which in turn is made expressly subject to regulation, and hence to requirements equivalent to those in the Directive. Moreover, I can see no basis for concluding the regulations themselves are disproportionate and it is not said that the impugned decisions were arbitrary or disproportionate on the facts.

82. Both the judge and the Court of Appeal rejected the submission, albeit on somewhat different grounds. The submission advanced on behalf of the SSHD is shortly this. Regulation 24(1) provides:

> “If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 19(3)(b), that person may be detained ….”

Thus, regulation 24(1) makes express reference back to regulation 19(3)(b). Regulation 19(3)(b) permits the removal of an EEA national on grounds that: “the Secretary of State has decided that the person’s removal is justified on grounds of public policy, public security or public health in accordance with regulation 21”. So regulation 19(3)(b) in turn makes express reference back to the requirements of regulation 21 and is in any event itself an “EEA decision” and a “relevant decision”. See paras 34 to 35 above.

83. In these circumstances, I would accept the submission made on behalf of the SSHD that regulation 21 implements the requirements of articles 27 and 28 of the Citizens Directive. It appears to me to follow from the above that regulation 24(1) gives an express power to detain a person who may be removed under regulation 19(3)(b), which contains essentially the same criteria as articles 27 and 28 of the Directive. It seems to me therefore that a person who is so detained can fairly be said to be detained pursuant to a decision which "concerns … a person's removal" within the meaning of sub-paragraph 2(c) of the EEA Regulation 2006 in the definition of an "EEA decision".

84. For these reasons I would answer the question posed by issue 5 in the negative. Regulations 21 and 24 of the EEA Regulations 2006 do not fail accurately to transpose the safeguards of articles 27 and/or 28 of the Directive.

> *(6) Were the appellant's administrative detention from 3 April until 6 June 2012 and the bail restrictions imposed upon him until 2 January 2013 unlawful by reason of the matters raised in questions (1) to (5) above?*

85. It follows from the above that the answer must be no. The appellant's detention was not unlawful for the reasons suggested.

86. The remaining question is whether the court should refer any of the questions discussed above to the CJEU for a preliminary reference. I am not persuaded that the Supreme Court should do. In so far as the questions raise issues of EU law, the principles adopted seem to me to be *acte clair*.

Conclusion

87. For the reasons given above I would dismiss the appeal.

Postscript

88. After preparing a draft judgment in the form set out above (as agreed by the other members of the court) we received a detailed note containing submissions on behalf of the appellant relying upon a decision of the Grand Chamber of the CJEU in *JN v Staatssecretaris van Veiligheid en Justitie* (Case C-601/15 PPU), in which judgment was handed down on 15 February 2016.

89. It was submitted that, where in the implementation of EU law, a member state authorises administrative detention prior to expulsion and seeks to justify it on public order grounds, first, the member state must previously have formed a concluded view as to the threat posed to public order by the individual and must have balanced that against the interference with liberty:

> "Such a provision cannot form the basis for measures ordering detention without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail." (see para 69)

Second, administrative detention for the purpose of expulsion (including, in that instance of third country nationals exercising no free movement rights) in the implementation of EU law must be necessary.

90. Reliance was placed on the right to liberty in article 6 of the EU Charter of Fundamental Rights and upon article 52 of the Charter, which provides that "limitations may be made only if they are necessary". See paras 49-50 in *JN*. It is submitted that article 52(3) of the Charter and article 5(1)(f) of the ECHR do not preclude article 6 of the Charter from proposing a necessity test in detention for expulsion for the reasons given in paras 47 and 48. Thus, it is submitted, a legislative measure authorising administrative detention must be "necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued": see para 54. It is stressed that, in view of the importance of the right to liberty, limitations on the exercise of the right must apply only in so far as they are strictly necessary. See para 56, where reliance is also placed upon para 52 of the judgment in the *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (Joined cases C-293/12 and C-594/12).

91. Reliance is further placed upon article 8(3) of Directive 2013/33/EU, which lays down standards for the reception of applicants for international protection. It is said that article 8(3)(e) is the analogue, in the asylum context, of article 27 of the Citizens Directive. Indeed, it is submitted that the Citizens Directive is *a fortiori* to Directive 2013/33/EU. In all the circumstances it is submitted that the EEA Regulations incorrectly transposed the safeguards of article 27 of the Citizens Directive and that the test is one of necessity. In all the circumstances it is said that, on this new ground, the appeal should be allowed and that, in any event, an appropriate question should be referred to the CJEU.

92. It is properly accepted on behalf of the appellant that Directive 2013/33/EU now relied upon is not binding on the United Kingdom. It is not therefore in issue in these proceedings. Where it does apply, it sets out an express legislative code which governs the circumstances in which an applicant for international protection may be detained. Article 8(1) provides that the member states to which it applies "shall not hold a person in detention for the sole reason that he or she is an applicant" for international protection: see para 15 of the *JN* judgment. Article 8(2) then provides that "when it proves necessary and on the basis of an individual assessment of each case, member states may detain an applicant, if other less coercive alternative measures cannot be applied effectively". Article 8(3) then provides that an applicant for international protection "may be detained" only on certain exhaustive grounds.

93. By contrast, as is correctly submitted on behalf of the SSHD, the Citizens Directive contains no legislative provisions which refer expressly to detention. Articles 27 and 28 are concerned respectively with restrictions on freedom of movement and residence and removal. The substantive issue in *JN* was whether the freestanding power contained in article 8(3)(e) was compatible with fundamental rights. A question referred by the Dutch court was whether such a power could be compatible with article 5 of the ECHR "if such detention was not imposed with a view to removal". The CJEU held (in para 82) that the provision was valid.

94. There is no similar freestanding power in EU law applicable in the United Kingdom. Moreover, the *JN* case was not concerned with the central issue in the *Nouazli* case, namely whether detention may be permitted in circumstances prior to the making of a decision to effect the removal of the family member of an EEA national. By contrast, Directive 2013/33/EU contains a "pre-decision" power to detain in order to decide on an applicant's right to enter (article 8(3)(c)) and in order to secure the transfer of a claimant for international protection to the responsible member state (article 8(3)(f)). Those powers were not in issue in *Nouazli*.

95. I have set out in detail above the basis upon which in my opinion the appeal of the appellant should be dismissed. By contrast, the CJEU in *JN* was considering a different legislative provision and did not purport to address the issue before the court in this appeal. I would accept the submission made on behalf of the SSHD that the CJEU did not lay down minimum criteria that must be satisfied in all cases within the scope of EU law. It was instead addressing the requirements that must be satisfied before the exercise of a specific statutory power of unusually broad scope.

96. For these reasons I would not accept that this new point affords any supportable basis for allowing the appeal or indeed for making a reference to the CJEU. I would therefore dismiss the appeal for the reasons I gave earlier.

Addendum to the Statement of Facts and Issues

List of appellant's convictions and sentences until and including the conviction giving rise to the detention under challenge in this appeal

Date	Offence	Sentence
06/11/2001	Driving a motor vehicle with excess alcohol	Fine £100 Disqualification from driving 6 months Driving licence endorsed
21/08/2002	Failing to provide a specimen for analysis (driving or attempting to drive)	Fine £150 Disqualification from driving 18 months Driving licence endorsed
12/01/2004	Theft	Imprisonment 28 days
	Possession controlled drug- Class B- Cannabis	Fine £50 Forfeiture and destruction
	Failing to surrender to bail	Fine £100
	Failing to surrender to bail	Fine £150
22/01/2004	Possession controlled drug- class A Drug – Crack cocaine	Fine £100 Forfeiture
28/06/2004	Theft from person	Community rehabilitation order 12 months
30/12/2004	Obtaining property by deception	Community punishment order 140 hours concurrent
	Theft	Community punishment order 140 hours
	Attempt/ obtaining services by deception	Community punishment order 140 hours concurrent
	Failing to surrender to bail	Community punishment order 140 hours concurrent

Date	Offence	Sentence
14/03/2005	Breach of community rehabilitation order	Resulting from original conviction of 28/06/2004, order to continue
27/04/2005	Detainee fail/ refuse to provide sample of fluid for purpose of ascertaining whether class A drug is in body	Fine £50 or 1 day (served)
	Handling stolen goods	Imprisonment 3 months
18/05/2005	Theft from person	Conditional discharge 18 months
04/07/2005	Theft	Imprisonment 4 months
	Theft	Imprisonment 2 months consecutive
	Theft	Imprisonment 2 months concurrent
	Possession controlled drug- Class C- cannabis	Fine £150 or 1 day (served) Forfeiture
	Handling stolen goods (receiving)	Imprisonment 4 months consecutive
24/05/2006	Theft from person	Imprisonment 21 weeks
20/11/2006	Theft- shoplifting	Imprisonment 4 months
	Theft from person	Imprisonment 4 months consecutive
20/05/2008	Possession of a class C drug with intent to supply	Fine £75 Victim surcharge £15 Forfeiture and destruction
	Possession of a class A drug	Fine £75
03/06/2008	Being drunk and disorderly	Fine £60

Date	Offence	Sentence
15/12/2008	Theft from person	Imprisonment 4 months consecutive
	Theft from person	Imprisonment 4 months consecutive
	Possession cannabis resin	Imprisonment 1 week concurrent Forfeiture and destruction
	Affray	Imprisonment 15 months
	Possession knife blade/ sharp pointed article in a public place	Imprisonment 9 months concurrent Forfeiture and destruction of razor
01/07/2010	Possession Cannabis resin	Fine £100 Forfeiture and destruction
28/09/2010	Obstructing powers of search for drugs	Community order, unpaid work requirement 80 hours Subsequently varied on 08/12/2010 to curfew requirement 2 months with electronic tagging
22/10/2010	Possession Cannabis resin	Fine £100 Victim surcharge £15 Forfeiture and destruction
	Failing to surrender to custody at appointed time	Fine £100
08/12/2010	Failing to comply with the requirements of a community order	Resulting from original conviction of 30/09/2010, order revoked
13/12/2010	Theft from person	Imprisonment 5 months
14/01/2011	Theft	Imprisonment 5 months Consecutive

Date	Offence	Sentence
19/01/2011	Possession controlled drugclass A- cocaine	Forfeiture and destruction 1 day's detention
	Possession controlled drugclass B- cannabis resin	Forfeiture and destruction 1 day's detention
04/07/2011	Handling stolen goods	Imprisonment 12 weeks
13/07/2011	Theft from person	Imprisonment 3 months
05/09/2011	Possession controlled drug-class A- crack cocaine	Community order, curfew requirement 3 months, subsequently varied to imprisonment 2 weeks
20/10/2011	Theft- shoplifting	One day's detention
14/11/2011	Possession controlled drugclass A- crack cocaine	Imprisonment 2 weeks consecutive
14/11/2011	Failure to comply with the requirements of a community order	Resulting from original conviction of 05/09/2011, order revoked
25/01/2012	Theft from person	Imprisonment 20 weeks

LORD CARNWATH:

97. I agree that the appeal should be dismissed for the reasons given by Lord Clarke. I add a few words of my own to underline the need to avoid overcomplicating what is in essence a relatively narrow, albeit important, issue.

98. The appellant has an appalling record of thefts and other crimes (described by the tribunal as mainly "petty opportunistic thefts" not involving violence) extending over a decade before the events in question. They had resulted in jail terms amounting cumulatively to at least five years. It is not surprising that the Secretary of State's patience ran out in early 2012 and that she set in motion steps for his removal from this country. There was an administrative muddle in April 2012 over the powers used to detain him, but that is not an issue in the appeal. Nor is it argued

that the detention was in itself unreasonable in the circumstances, assuming there was power to do it.

99. The Secretary of State's problem was that by then he had acquired permanent rights of residence here under European law, and thus could only be removed on "serious grounds of public policy or public security". He was entitled to have that issue determined by the First-tier Tribunal. They decided the point in his favour in on 2 January 2013, and the Secretary of State has properly accepted that decision.

100. We are concerned solely with his detention under regulation 24(1) from 3 April to 6 September 2012 (on bail from 6 June); and thereafter under regulation 24(3) (again on bail) until the tribunal's decision. The period of actual detention therefore lasted little over two months. On one view the case could be seen as an example of the system working as it should. However, he now seeks damages for that short period of detention, on the basis that the powers on which the Secretary of State relied did not comply with European law.

101. Mr Saini QC (who did not appear below) has developed his case in elaborate detail. In terms of written submissions it is to be found in a 55-page statement of case, to which were added shortly before the hearing a 12-page note on supplementary authorities, and an 18-page note concerning "statutory and factual context". They depart in a number of respects from the case as presented below. For the Secretary of State Mr Ward QC has not objected to these changes, but (perhaps understandably) has felt it necessary to respond in kind, with a 73-page statement of case. The bundles of authorities include 184 items, including cases, legislative material and academic commentary.

102. I am however grateful to Mr Saini, in response to my request on the first day of the hearing, for reducing his submissions to a two-page "summary of appellant's challenge". Although the summary contains a note to the effect that "all of the points" in the submitted case "are maintained", I assume that summary can be taken as indicating the substantial points on which he now relies.

103. The summary identifies four matters of challenge. There is some overlap between them but the essential points can be stated briefly:

> (1) *Equality/discrimination - applicable to regulation 24(1) only*. The power to detain an EEA national under regulation 24(1) is discriminatory on the grounds of nationality, contrary to TFEU article 18, because there is no equivalent power in relation to a third country national.

(2) *Proportionality - applicable to regulation 24(1) only*. The power was introduced for the first time in June 2009. The Secretary of State has failed to show a need for a power which had not been required before. Nor had she shown any reason why consideration of deportation could not have taken place during the criminal custodial term.

(3) *Legal certainty, proportionality and time limits - applicable to regulation 24(3) as well as regulation 24(1)*. This is principally a challenge to the *Hardial Singh* principles, which do not require a fixed time limit.

(4) *Further transposition flaws - applicable to both regulation 24(1) and 24(3).* Regulation 24 is not in terms made subject to the principles set out in articles 27 and 28 of the Directive, or in regulation 21 which gives effect to them in domestic law. In particular the test of "reasonable grounds" under regulation 24(1) is well below the threshold required by article 27.

104. On the first point I have nothing to add to what Lord Clarke has said (in agreement with the Court of Appeal). Article 18 is not directed to the comparative treatment of nationals of other countries, who are outside the scope of European law. The alternative formulation based on the case of *R v Immigration Appeal Tribunal, Ex p Secretary of State for the Home Department* (Case C-370/90) [1992] 3 All ER 798 (raised for the first time in the note on supplementary authorities) is equally unsustainable for the reasons given by Lord Clarke.

105. On the second point, the Secretary of State has a wide margin or appreciation as to the powers required to give effect to the Directive. If their exercise were shown to be disproportionate in a particular case (which is not alleged here), it could to that extent be disapplied. It is not a reason for striking down the regulation. On the third point, the *Hardial Singh* principles are well established, and approved by high authority; their legality is not open to serious question for the reasons given by Lord Clarke.

106. The last question raises a possible point on the construction of the definition (in regulation 2(1)) of the expression "decision … that concerns … a person's removal from the United Kingdom". If necessary I would read this as extending to a decision such as in the present case which is part of the process leading to removal. But in any event the powers in article 24 are ancillary to the substantive power of removal under regulation 19(3)(b). That refers in terms to the requirements of regulation 21 (reproducing articles 27 and 28). It follows that the Secretary of State cannot properly exercise her powers under article 24, with a view to action under article 19(3)(b), without taking account of the need as part of that process to satisfy

regulation 21. That seems to me sufficient to ensure that the action is compliant with the Directive.

107. For these reasons, which are no more than a distillation of those given by Lord Clarke, I would dismiss the appeal.