HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 39

on appeal from: [2003] EWCA Civ 475

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
Secretary of State for the Home Department (Respondent)
***ex parte* Khadir (FC) (Appellant)**

Appellate Committee:

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel:

Appellants:
Nicholas Blake QC
Mark Henderson
(instructed by Refugee Legal Centre)

Respondents:
Monica Carrs-Frisk QC
Robin Tam
(instructed by Treasury Solicitor)
Hearing dates:
11–12 May 2005

ON
THURSDAY 16 JUNE 2005

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Regina *v.* Secretary of State for the Home Department (Respondent) *ex parte* Khadir (FC) (Appellant)

[2005] UKHL 39

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the opportunity to read in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in complete agreement with it and would, for the reasons which he gives, dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. For the reasons he gives, with which I agree, I would dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

3. I have had the advantage of reading the speech which my noble and learned friend, Lord Brown of Eaton-under-Heywood, is to deliver. I am in agreement with it and, for the reasons he gives, I too would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

4. I agree that this appeal should be dismissed for the reasons given by my noble and learned friend, Lord Brown of Eaton-under-Heywood. A person is 'liable to be detained' within the meaning of Schedule 2 to the Immigration Act 1971 where there is power to detain him even if it would not be a proper exercise of that power actually to do so. There is some parallel here with the expression 'liable to be detained' in, for example, sections 17 and 20 of the Mental Health Act 1983. A person who is liable to be detained in a hospital by virtue of an application or order under that Act may either be actually detained or given leave of absence. While on leave of absence it may well be that the patient's disorder is not such that he needs to be detained in hospital. But he remains liable to be detained, and may be recalled to hospital, unless and until the application or order authorising his detention lapses or he is discharged: see *B v Barking etc Healthcare NHS Trust* [1999] 1 FLR 106, CA. Under Schedule 2 to the Immigration Act 1971, there is power to detain 'pending removal'. 'Pending' in this context means no more than 'until'. There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would irrational to deny him the status which would enable him to make a proper contribution to the community here, but that is another question. It certainly did not arise on the facts of this case.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

5. The appellant is a 31 year old Iraqi Kurd who on 27 November 2000 arrived clandestinely in this country in the back of a lorry and immediately claimed asylum. His claim was refused by the Secretary of State on 29 January 2001 and his appeal against refusal was dismissed by the adjudicator on 9 August 2001: the appellant came from the Kurdish Autonomous Area ("KAA") of northern Iraq and in that area would have no well-founded fear of persecution. Whilst, however, he would be safe in the KAA, the Secretary of State has yet to find a safe means of enforcing his return there and this it is which gives rise to the

present proceedings. In a word the appellant says that he must be granted leave to enter.

6. On arrival in November 2000 the appellant was temporarily admitted to the UK pursuant to paragraph 21 of Schedule 2 to the Immigration Act 1971 ("the 1971 Act"). By section 11 of that Act someone temporarily admitted under Schedule 2 is deemed not to have entered the UK. On 5 February 2001, following the refusal of asylum, the appellant was given notice of the Secretary of State's decision to issue removal directions under paragraphs 9 and 10 of Schedule 2, to return him to Iraq as an illegal entrant. It was that notice which triggered the appellant's right of appeal to an adjudicator. Following the adjudicator's dismissal of his appeal, the appellant through solicitors pointed to the long-term failure to find a safe means of return to the KAA and urged the Secretary of State to grant him exceptional leave to enter ("ELE"). That application was finally refused by the Secretary of State on 3 May 2002. Instead, the appellant's temporary admission has been periodically extended.

7. The status of ELE has very considerable advantages over that of temporary admission. The benefit regime is altogether more favourable: those on temporary admission obtain only benefits in kind, never cash. Those with leave will ordinarily be permitted to work; those temporarily admitted will not. Those with leave can live where they want; those temporarily admitted only where they are directed to live. There are other important differences too. Because of these disadvantages the appellant sought to challenge the Secretary of State's refusal of ELE. He did so on two grounds. First and principally he contended that because of the continuing inability to find a safe route for his return to the KAA, there was no longer power to authorise his temporary admission under Schedule 2 so that the Secretary of State had no alternative but to grant him ELE. Alternatively he contended that, even assuming that the Secretary of State had a discretion in the matter, he had not exercised it lawfully.

8. On 29 July 2002, Crane J concluded, first, that, as at 3 May 2002, "temporary admission was no longer lawful", and secondly that, even if he was wrong about that, the refusal letter of 3 May 2002 contained "wholly inadequate reasoning." He ordered "further consideration forthwith" of the application for ELE albeit he then stayed the order pending determination of the Secretary of State's appeal.

9. Following Crane J's decision, Parliament enacted the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") which by section 67 (a section which came into force on 7 November 2002 but was to be "treated as always having had effect") put beyond doubt that, whatever might previously have been the true ambit of the paragraph 21 power to grant temporary admission, it was now to be construed as extending to any case like the appellant's.

10. The Secretary of State's appeal (and Mr Khadir's cross appeal, contending that the judge, having found that temporary admission was no longer lawful, should have ordered the Secretary of State to grant, rather than merely reconsider the grant of, ELE) was heard by the Court of Appeal (Kennedy, Chadwick and Mance LJJ) on 15 January 2003. Although initially section 67 of the 2002 Act formed no part of the Secretary of State's argument, the Court of Appeal of its own motion invited submissions upon its application and in the event found it decisive. On 3 April 2003, the Secretary of State's appeal was allowed and Mr Khadir's cross appeal dismissed. Each member of the court concluded that Crane J had been right to hold, on the basis of the legislation then in force, that by 3 May 2002 there was no longer power to continue the appellant's temporary admission. But each then decided that section 67 of the 2002 Act operated retrospectively to deem there to have been such power and accordingly to deny the appellant the benefit of the first instance judgment in his favour.

11. The appellant now appeals to this House against the Court of Appeal's decision that section 67 was properly to be construed and applied as depriving him of the benefit of the judgment he had already obtained. The Secretary of State for his part contends that Crane J's decision was in any event wrong (as too were the judgments of the Court of Appeal finding it to have been correct on the law as it then stood) so that section 67 was, in fact, unnecessary. That section merely made explicit what had always been (and, indeed, until this very case had always been understood to be) the true effect of the pre-existing legislation, namely that temporary admission could properly be continued on a long-term basis in cases like the present.

12. Logically, of course, the correctness or otherwise of Crane J's decision falls for consideration first. If the Secretary of State is right on that point he does not need to pray in aid section 67 of the 2002 Act and it becomes unnecessary to decide whether the Court of Appeal was right to hold that it applies in this particular case. I shall therefore consider first the effect of the legislation as it stood before Crane J. I shall,

however, set out in addition the terms of section 67 which conveniently highlight the central point at issue. Section 67 also underlines an unusual feature of the appeal, that your Lordships' decision on the first point can affect one person and one person only: this appellant. Even if he were right on the first point (and right too in contending that the Court of Appeal erred in applying section 67 retrospectively to his case), such a decision would affect no one else. The position with regard to all others similarly placed is now plain beyond argument: they can all be granted temporary admission on a long-term basis.

13. With those few introductory paragraphs let me turn next to the statutory framework as it was at the time of the hearing before Crane J. In this I am assisted by the summary contained in paragraph 12 of Kennedy LJ's judgment below although my summary will be shorter still.

14. A person who is not a British subject requires leave to enter or remain. But leave may be given for a limited period and may be made subject to conditions. Section 4(2) of the 1971 Act provides that the provisions of Schedule 2 shall have effect with regard to "(c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and (d) the detention of persons pending examination or pending removal from the United Kingdom; and for other [supplementary] purposes". Where a person is refused leave to enter, paragraph 8(1)(c) of the Schedule enables an immigration officer within a limited time to give those who were responsible for carrying the person to the UK directions requiring them to make arrangements for his removal. Paragraph 9(1) provides:

> "Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 are authorised by paragraph 8(1)."

15. Paragraph 10 provides that where it appears to the Secretary of State "(a) that directions might be given in respect of a person under paragraph 8 or 9 above, but that it is not practicable for them to be given . . . then the Secretary of State may give to the owners or agents of any ship or aircraft any such directions in respect of that person as are authorised by paragraph 8(1)(c) … [or] he may instead give directions

for his removal in accordance with arrangements to be made by the Secretary of State … ".

16. Paragraph 16(2) provides:

> "If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
>
> (a) a decision whether or not to give such directions;
> (b) his removal in pursuance of such directions."

17. Paragraph 21 is crucial too:

> "(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

18. The question arising is whether the appellant, as at 3 May 2002, the date of the decision under challenge, could be "temporarily admitted" under paragraph 21. That in turn depends upon whether he was "a person liable to detention … under paragraph 16." There can be no dispute but that he was an illegal entrant who had not been given leave to enter or remain and was accordingly "someone in respect of whom directions may be given under [paragraphs 9 and 10]" within the meaning of paragraph 16 (2). He was, therefore, someone who "may be

detained … pending – (a) a decision whether or not to give such directions; (b) his removal in pursuance of such directions." On the face of it, therefore, the appellant was someone liable to detention under paragraph 16 and so properly able to be authorised to be temporarily admitted under paragraph 21. Not so, however, submits Mr Blake QC on his behalf, thus far with success throughout these proceedings. His argument is that the appellant could not lawfully be detained because of the practical difficulties in making the arrangements for his removal from the UK back to the KAA. He was not, therefore, "liable to detention."

19. I shall come shortly to the precise form of the argument but it is convenient next to set out the terms of section 67 of the 2002 Act:

> "67 Construction of reference to person liable to detention
>
> (1) This section applies to the construction of a provision which—
>
> (a) does not confer power to detain a person, but
>
> (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.
>
> (2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that—
>
> (a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,
>
> (b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or
>
> (c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.
>
> (3) This section shall be treated as always having had effect."

20. It will readily be seen that paragraph (b) of section 67(2) was enacted to deal precisely with the present type of case. Paragraph (a) is directed to those cases where the person concerned, although lacking the necessary leave to enter or remain in the UK, cannot be removed until the final determination of an asylum or Human Rights Act claim to remain. Paragraph (c) applies to a residual (and, one trusts, smaller) category of cases. As section 67(1) makes plain, it does not affect provisions like paragraph 16(2) of Schedule 2 (the detention power), but rather provisions like paragraph 21 which give power to temporarily admit those "liable to detention." In short, the section recognises that it is one thing to detain a person during what may be a long delayed process of removal, quite another to provide for his temporary admission during such delays.

21. It is time to come to a line of cases which have considered the exercise of the power of detention, not in fact in the context of removing those refused leave to enter under Schedule 2 but rather in relation to those whom it is intended to deport under Schedule 3. The first of these cases was *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 where, following a two-year prison sentence for burglary, the applicant was served with a deportation order and detained for five months under paragraph 2(3) of Schedule 3 to the 1971 Act whilst the Home Office attempted to obtain for him a travel document from the Indian High Commission. Paragraph 2(3) provides that "where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom . . .". Woolf J said this, at p 706:

> "Although the power which is given to the Secretary of State in paragraph 2 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 going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it

> seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention. 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."

22. That approach was followed by Laws J in *In re Mahmod (Wasfi Suleman)* [1995] Imm AR 311 and by the Court of Appeal in *R (I) v Secretary of State for the Home Department)* [2003] INLR 196, both similarly concerned with applicants who had been detained for long periods under paragraph 2(3) of Schedule 3. Laws J in *Mahmod* said this:

> "Whilst, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards. In this case I regard it as entirely unacceptable that this man should have been detained for the length of time he has [10 months] while nothing but fruitless negotiations have been carried on."

Laws J expressed himself "entirely satisfied" that whatever would have been "a reasonable period for this man's continued detention . . . has certainly now been exceeded" and ordered his immediate release.

23. In *I,* giving my reasons (as part of the majority of the Court of Appeal) for having released the applicant from detention at the hearing of the appeal the previous month, I said this, at p 206, paras 37-38:

> "Given . . . that the appellant had by then been in administrative detention for nearly 16 months and that the Secretary of State could establish no more than a hope of being able to remove him forcibly by the summer, substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period. . . .) In short, I came to the clear conclusion that . .

> . it was simply not justifiable to detain the appellant a day longer; the legal limits of the power had by then been exhausted."

24. There is one other case which applied the *Hardial Singh* principles to which I must briefly refer, the decision of the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. The applicants there were Vietnamese boat people who were refused refugee status and detained in Hong Kong for periods of up to 44 months under the Immigration Ordinance of Hong Kong (c 115). The question arising was whether that detention was lawful pursuant to section 13D of the Ordinance (as inserted by section 7 of the Immigration (Amendment) Ordinance 1982 (No 42 of 1982) which provided for detention "pending his removal from Hong Kong." Giving the judgment of the Board, Lord Browne-Wilkinson said this, at p 113:

> "The issue . . . in the present case is whether the determination of the facts relevant to the question whether the applicants were being detained "pending removal" goes to the jurisdiction of the director to detain or to the exercise of the discretion to detain. In their Lordships' view the facts are prima facie jurisdictional. If removal is not pending, within the meaning of section 13D, the director has no power at all."

He later, at p 116, stated the Board's conclusion as follows:

> "In all the circumstances their Lordships can see no sufficient reason to overturn the finding of the judge that it is the policy of the Vietnamese Government not to accept repatriation of non-Vietnamese nationals. In these circumstances, it is not contended that these applicants are being detained 'pending removal.' Accordingly, the decision of Keith J to order their release was correct."

25. In each of those four cases the court was concerned only with whether the applicant was still lawfully detained. In none of them did the court consider the consequences of their release from detention. Paragraph 2(5) and (6) of Schedule 3 to the 1971 Act deals with a person "liable to be detained" under paragraph 2(3), "while he is not so

detained," by providing that he "shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State." I doubt it crossed the minds of anyone involved in those cases that the applicants on release might not have been properly made subject to such restrictions but instead should have been released unconditionally. Yet that necessarily must be the effect of Mr Blake's argument.

26. That argument can now be summarised I think essentially as follows:

(1) The power to detain under paragraph 16 exists only when removal is "pending".
(2) Removal cannot be said to be "pending" unless it will be possible to effect it within a reasonable time.
(3) That is why the applicants in the above series of cases had to be released (and why it would be unlawful to detain the appellant in the present case): since removal was not "pending", they were not liable to be detained. The limitation was upon the existence and not merely the exercise of the detention power.
(4) By the same token that they were not liable to be detained, so too they were not subject to the restrictions provided for by paragraph 2(5) of Schedule 3 and so too this appellant is not now able to be temporarily admitted under paragraph 21 of Schedule 2.

27. It is interesting to see how this argument was dealt with in the courts below. Crane J concluded, at para 60, that by February 2002, when:

> "there was every reason to believe that removal would not be possible for considerably longer than 12 months, removal was not still 'pending'. Detention would no longer have been lawful and hence temporary admission was no longer lawful."

He had earlier stated, at para 38;

"I am not deciding that temporary admission is not permissible in all circumstances in which it would be a wrong exercise of discretion to detain a person. I am holding that temporary admission is not available when the power to detain no longer exists."

28. In the Court of Appeal, Kennedy LJ said, at para 39:

"With the passage of time, and having regard to the continuing inability of the Secretary of State to remove anyone to the KAA, it became increasingly unrealistic to assert that the respondent was a person who might be detained pending his removal in pursuance of removal directions. Thus the Secretary of State was deprived of his right to grant temporary admission pursuant to paragraph 21."

29. Chadwick LJ, at para 53, decided that here, as in *Tan Te Lam:*

"If removal was not pending there was no jurisdiction to detain. Absent jurisdiction to detain, a person cannot be said to be 'liable to detention.'"

30. Mance LJ's reasoning was rather fuller and as follows:

"74 . . . there is, I consider, a relevant distinction to be drawn between the circumstances in which a person is potentially liable to detention (and can properly be regarded as temporarily admitted) and the circumstances in which the power to detain can in any particular case properly be exercised.

75 The 'reasonable period' within which the machinery for removal must be capable of being operated (Woolf J's third principle) has, as I see it, quite different and potentially much wider parameters, when compared with the reasonable period within which any power of detention may be exercised (Woolf J's second principle). Potential *liability* to detention exists throughout the former period, but the *exercise* of the power to detain will be strictly

> controlled and confined in time and other respects in the interests of individual liberty . . .
>
> 76 Whether someone can be regarded as temporarily admitted depends on whether there is a realistic possibility of operating the machinery for removal within what I would prefer, for clarity, to describe as a tolerable, rather than a reasonable period. That period must depend on the particular circumstances, including in my view whether the person is or is not in detention, but also taking into account as a factor that temporary admission is itself an unprivileged status . . . .
>
> 81 In the light of the long history of the problem, the burden of proof on the Secretary of State, the evidence that I have recounted and the significance for the respondent of the status of temporary admission, I would, not without doubt, agree that by 3 May 2002 the time had indeed passed when the respondent could still be treated as liable to be detained or temporarily admitted 'pending' removal."

31. For my part I have no doubt that Mance LJ was right to recognise a distinction between the circumstances in which a person is potentially liable to detention (and can properly be temporarily admitted) and the circumstances in which the power to detain can in any particular case properly be exercised. It surely goes without saying that the longer the delay in effecting someone's removal the more difficult will it be to justify his continued detention meanwhile. But that is by no means to say that he does not remain "liable to detention". What I cannot see is how the fact that someone has been temporarily admitted rather than detained can be said to lengthen the period properly to be regarded as "pending … his removal".

32. The true position in my judgment is this. "Pending" in paragraph 16 means no more than "until". The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be "pending", still less that it must be "*im*pending". So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (ie throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains "liable to detention" and the ameliorating possibility of his temporary admission in lieu of detention arises under para 21.

33. To my mind the *Hardial Singh* line of cases says everything about the *exercise* of the power to detain (when properly it can be exercised and when it cannot); nothing about its *existence*. True it is that in *Tan Te Lam* the Privy Council concluded that the power itself had ceased to exist. But that was because there was simply no possibility of the Vietnamese Government accepting the applicants' repatriation; it was effectively conceded that removal in that case was no longer achievable. Once that prospect had gone, detention could no longer be said to be "pending removal". I acknowledge that in the first passage of his judgment set out in paragraph 24 above, Lord Browne-Wilkinson, having correctly posed the question whether detention was "pending removal," then used the expression "if removal is not pending." That, however, can only have been a slip. He was clearly following *Hardial Singh* and no such error appears in Woolf J's approach.

34. None of this, of course, is to say that the regime governing temporary admission as presently administered is other than harsh. But that harshness has been sanctioned by Parliament and cannot affect the true construction and application of paragraphs 16(2) and 21 of Schedule 2. Its only possible relevance would be to the exercise of the Secretary of State's undoubted discretion, irrespective of the legal position under Schedule 2, at any time to grant ELE.

35. This brings me to a discrete second argument which Mr Blake advances in the appeal, that the Court of Appeal did not deal adequately with the alternative basis of Crane J's decision, namely that the Secretary of State had in any event failed to give proper reasons for rejecting the appellant's application for ELE. All three members of the court appear to have regarded that argument, no less than the appellant's principal argument that there remained no power to grant him temporary admission, as effectively destroyed by the retrospective effect of section 67 of the 2002 Act. I too would reject the challenge to the Secretary of State's exercise of his power to grant ELE but I would do so less by reference to section 67 than because it must require an altogether stronger case on the facts than this to impugn a refusal of ELE in circumstances where Parliament has expressly provided for temporary admission as the alternative to detention. ELE means what it says: it is exceptional. The Secretary of State's discretion is a very wide one and it is hardly surprising that he found nothing exceptional about this case when he refused to grant ELE a mere 18 months after the appellant's unlawful entry into this country. Nor should the fact that the appellant has now been here for a further five years occasion any particular optimism for the future: by section 67 Parliament has manifested its

clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime.

36. From all this it follows that in my opinion section 67 was an unnecessary enactment: what it provided for had in any event always been the law. It therefore becomes unnecessary to decide whether or not the Court of Appeal was right to regard section 67 as effective to deprive the appellant of the benefit of his victory at first instance. Since, moreover, such an exercise, besides being wholly academic, would be quite unreal because based on a false premise, I would propose that your Lordships say no more about it than that this House is not to be taken to have endorsed the Court of Appeal's views upon any of the many issues underlying their decision on retrospectivity.

37. In conclusion, I would dismiss this appeal with the result that Crane J's order remains set aside, although, as will have become clear, for reasons quite other than those given by the Court of Appeal.