Neutral Citation Number: [2018] EWHC 800 (Admin)

Case No: CO/3665/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13 April 2018

Before :

MICHAEL KENT QC

(sitting as a Deputy Judge of the High Court)

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Between :

THE QUEEN

on the application of **Cla**

WANDY SANNEH

- and -

SECRETARY OF STATE

Defe

FOR THE HOME DEPARTMENT

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Becket Bedford and Tiki Emezie instructed by **Dylan Conrad Kreolle** for the **Claimant**

Emily Wilsdon instructed by **the Government Legal Department** for the **Defendant**

Hearing date **27 February 2018**

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Judgment Approved

Michael Kent QC :

1.
The Claimant, a national of Gambia, began these proceedings for judicial review on 9 August 2017 challenging the refusal of the Secretary of State, who had made a deportation order against him as a foreign criminal, to grant bail or give him temporary admission and seeking damages for unlawful detention. Permission to proceed with this judicial review was granted by Justine Thornton QC sitting as a Deputy Judge of the High Court but on limited grounds only, namely whether the Claimant was lawfully detained by the defendant under immigration powers and if so whether he is entitled to substantial damages for false imprisonment. She refused permission on other grounds and directed

the Claimant to re-draft his grounds relating to the allegation of unlawful detention which he has done.

2.
The deportation order was made as long ago as December 2014 but the Claimant remains in this country. He is now aged 58 and came to the UK in 2001 on a six months visitor's visa. Before its expiry he applied for leave to remain as the spouse of a British citizen. This was initially refused, it seems on technical grounds, but on re-submission he was granted leave to remain until 27 June 2003. Before that leave had expired he was granted indefinite leave to remain on 20 June2003. That marriage did not last but the Claimant then resumed a relationship with a woman who is also a citizen of Gambia with whom he already had two children. He then married her as his second wife. Another child was born in 2004. She and these children have themselves been given leave to remain in the UK and are all settled here.

3.
On 21 June 2014 the Claimant was convicted of an offence of wounding his wife contrary to section 20 of the Offences Against the Person Act 1861 and given a 24-month suspended sentence. In addition a restraining order was made prohibiting him from contacting his wife and their youngest child who was the only one of his children then still under the age of 18. This was to last for three years.

4.
However he quickly breached this restraining order by attempting to have contact with his wife and he was brought back to the Crown Court where the suspended sentence was activated (but only in respect of 18 months imprisonment). He was also sentenced to two months imprisonment for breaching the restraining order, to run concurrently.

5.
On 29 August 2014 while he was serving this prison sentence the Claimant was given notice that he was liable for deportation. In response, on 30 August, he completed a form indicating that he objected to deportation as being contrary to Article 8 of the European Convention on Human Rights by reference to the presence of his wife and children in the UK.

6.
This objection was, by letter dated 14 December 2014, rejected by the Defendant who in addition certified his human rights claim under section 94B of the Nationality Immigration and Asylum Act 2002 ("NIAA"). The effect of the certificate was that he would not be allowed to proceed with an appeal against deportation unless and until he left the country. On 15 December 2014 the Defendant signed a deportation order.

7.
On 15 March 2015 he was released from his prison sentence and was detained under immigration powers. The Claimant made a bail application which was refused on 20 March 2015. He declined to cooperate in an emergency travel document interview. It appears that no attempt was made to give effect to the deportation order and some 10 months later, on 13 January 2016, he was released on bail by a judge of the First Tier Tribunal (Immigration and Asylum Chamber) ("the FTT") on the grounds that "Removal is not imminent or even foreseeable at this stage.". Bail was made subject to a surety and conditions that required him to live and sleep at an address in Nottingham and to report twice weekly.

8.

Subsequently the Gambian High Commission agreed to issue an emergency travel document and removal directions were set for 18 September 2016. As a result, when he reported on 19 August 2016, he was detained and served with the removal directions. He then applied for temporary admission but this was refused on 5 September.

9.
On 14 September 2016 he for the first time claimed asylum. He also resisted removal on the basis that he was due to undergo surgery and removal would be contrary to Article 3 of the European Convention. The removal directions were then cancelled.

10.
On 9 November 2016 his asylum claim was refused and certified as clearly unfounded pursuant to section 94 of the NIAA.

11.
On 16 November 2016 he made a fresh asylum and human rights claim and on the next day he commenced judicial review proceedings in the Upper Tribunal seeking a stay on his removal. This was refused on the same day.

12.
Also on 17 November the fresh asylum claim was refused by the Secretary of State who stated that it did not amount to a fresh claim pursuant to paragraph 353 of the Immigration Rules. Removal directions however had been cancelled due to the unavailability of staff and on 25 November 2016, through his current solicitors, he made further representations challenging the refusal and certification of his asylum claim. On 17 January 2017 the Defendant indicated that the asylum refusal would stand as would the certification under section 94B.

13.
The Claimant renewed an application to the Upper Tribunal for permission to proceed with a judicial review (refused on the papers on 17 November) but on 1 March 2017, after a hearing at which he was represented, permission was again refused, Upper Tribunal Judge Plimmer concluding that the Defendant was entitled to certify under section 94NIAA both the asylum claim and the human rights claim based on Article 8 as clearly unfounded. She also refused the Claimant permission to appeal to the Court of Appeal. On 20March 2017 he applied to the Court of Appeal for permission.

14.
In the meantime removal directions had again been given for 25 January 2017 but they were again cancelled this time due to cancellation of a flight. They were then reset for 5 April 2017.

15.
The Claimant then submitted yet further representations on 31 March which were considered on 5 April and refused. Removal did not however take place because the Claimant had been prescribed medication and it was thought that a doctor might have to accompany him—no such arrangements could be made in time.

16.
The removal directions were again set for 6 May but once again removal did not take place apparently due to lack of resources and they were reset for 19 June.

17.

On 5 May the Claimant had started further proceedings in the Upper Tribunal seeking a judicial review of the refusal of 5 April.

18.
There was then a potentially significant development in that on 14 June 2017 the Supreme Court handed down its judgments in the joined appeals of R (Kiarie) v Secretary of State for the Home Department and R (Byndloss) v Secretary of State for the Home Department[2017] UKSC 42; [2017] 1 W.L.R. 2380 ("Kiarie v SSHD"). On the same day the Claimant's solicitors requested that he should not be removed in light of this decision. This resulted in the removal being cancelled yet again.

19.
On 25 July the Defendant issued a fresh decision in the Claimant's case refusing his protection and human rights claims and maintaining the decision to deport. However the section 94B certification was withdrawn in light of Kiarie v SSHD and there was no statement that the Claimant's human rights claim was regarded as clearly unfounded (section 94NIAA).

20.
The issuing of a fresh determination and withdrawal of the section 94B certificate meant that the Claimant's proposed appeal to the Court of Appeal from the refusal of the Upper Tribunal to grant him interim relief became academic and on 7 August the parties lodged a consent order under which his application for permission to appeal was withdrawn but the Secretary of State agreed to pay his reasonable costs.

21.
On 26 July the Upper Tribunal refused permission to proceed with his further application for judicial review which he had made in May 2017 but the Claimant was now able to proceed with an in-country appeal to the FTT which he initiated on 14 August 2017. That had the effect of suspending any removal.

22.
This appeal, reopening the merits of his claim to be permitted to remain on human rights grounds under Article 8 and his claim for asylum, related to the 25 July redetermination served on him on 7 August. He remained in detention and on 9 August he started this Claim for Judicial Review and applied for interim relief in the form of bail. This was refused on the papers by Nicola Davies J and again, after an oral hearing on 7 September, by Fraser J who also refused permission to appeal.

23.
His appeal to the FTT was heard on 30 October 2017 and a decision dismissing it promulgated on 15 November. However on 24 November the FTT granted permission to appeal to the Upper Tribunal on a single ground of procedural irregularity. That appeal was heard on 29 January 2018 but, by a judgment promulgated on 15 February, was dismissed.

24.
In the meantime on 12 October the Claimant had applied to the FTT to be released on bail but on 24 November that application was refused.

25.
On 4 December 2017 the Claimant then made a further application to this Court for bail but this was refused on the papers by Julian Knowles J on 6 December. This application was renewed before Moulder J who, on 5 January after a hearing, again refused the relief sought. However Moulder J did

state in her ruling that in view of the appeal to the Upper Tribunal then still pending it could not be said that there was sufficient prospect of removal to warrant continued detention. She nevertheless refused bail on the basis that she could not be satisfied that there was a suitable address to which the Claimant could be bailed. In particular the judge was not satisfied that, as had been asserted on the Claimant's behalf, his wife had agreed to his returning home on the basis that they had become reconciled.

26.
Following that ruling the Defendant invited the Claimant to offer an alternative bail address and, on 8 January, he gave the address of a family friend. Enquiries on behalf of the Defendant were made and this person was spoken to on 23 January. This resulted in the officer dealing with the case drafting a release referral which was sent to a Senior Executive Officer on the same day. In the event this release referral was not acted upon until 20 February and on the next day the Claimant was released to the address given subject to an electronic tag and reporting conditions.

The Issues before the Court

27.
At the commencement of the hearing before me on 27 February Ms Wilsdon on behalf of the Secretary of State formally conceded that the delay in arranging for the Claimant's release from detention on bail between 24 January (the day after contact was made with the person living at the bail address) and 21 February was unjustified rendering the detention during that period unlawful. She also conceded that, in respect of that period of unlawful detention, the Claimant would be entitled to substantial and not merely nominal damages.

28.
The Defendant however continues to resist the contention that the detention was unlawful at any time before 24 January 2018. The parties are agreed that the assessment of damages due for the period of admitted unlawful detention and the assessment of any substantial damages in respect of any earlier period of detention, insofar as I should find that it was unlawful and that the Claimant was entitled to recover more than nominal damages, should be carried out by a judge in the County Court to which the Claim can be transferred in the event that the parties cannot agree a sum.

29.
My task therefore is to decide whether, at any earlier time before 24 January 2018, the detention became unlawful (the burden of proving that it did not being on the Defendant) and, if so, whether it is shown (again the burden being on the Defendant) that, had such error of law as rendered it unlawful not occurred, the Claimant would probably still have been detained so as to preclude any claim for substantial damages.

30.
The primary argument put by Mr Bedford on the Claimant's behalf is that, going right back to the initial detention on 19 August 2016, there were no lawful grounds for detaining his client because that detention was always with a view to the Claimant's removal based on the section 94B certificate which had been given in December 2014. Though that predated the decision of the Supreme Court in Kyarie v SSHD reversing the lower courts' conclusions, that decision, declaring as it did what the law had always been since the coming into force of section 94B, meant that the certificate could not lawfully have been given on that earlier date or indeed at any time thereafter. Though section 94B is not concerned with detention but only with the right to an in-country appeal, this error of public law is said to be material to the Claimant's detention because, applying the words of Lord Dyson JSC in R

(Lumba) v SSHD [2011] UKSC 12; [2012] 1 A.C. 245 at [68], it was one which must "bear on and be relevant to the decision to detain" and was therefore an error which in itself rendered the detention unlawful. Mr Bedford says that the Secretary of State cannot say that, as the Claimant was not in the end prevented from bringing an appeal from within the UK, this was merely a technical error having no impact. He submits that the existence of the section 94B certificate must have been central to the assessment whether the Claimant could be removed from the United Kingdom within a reasonable period. In other words, because the Secretary of State was relying on her own certificate, which it can now be said was unlawfully given, she was proceeding on the mistaken assumption that no statutory appeal could be pursued within the jurisdiction. Without such a certificate any appeal would suspend removal: section 78 of the NIAA. Therefore the second and third Hardial Singh principles (R v Gov of Durham prison, ex parte Hardial Singh[1984] 1 WLR 704 subsequently approved the highest level most recently in R (Lumba) v SSHD at [22])were not satisfied. These require that "(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 a reasonable period, he should not seek to exercise the power of detention."

31.
If these requirements were not met the Claimant was entitled to immediate release regardless of any other considerations such as the risk of absconding or of harm to others such as his wife.

32.
That is his primary case but he advances in the alternative other dates for the detention becoming unlawful as follows:

a.
17 November 2016 when the Claimant began his judicial review in the Upper Tribunal challenging the certification under section 94B

b.
31 March 2017 when he made a fresh claim;

c.
14 June 2017 when the Supreme Court handed down judgment in Kiarie v SSHD;

d.
7 August 2017 when the Defendant conceded an in-country right of appeal to the Claimant.

33.
Mr Bedford additionally argues that the decision to continue detention was at various alternative dates flawed because of the inadequacy of the reasoning given in various detention reviews which he submits indicate a failure to take account of material matters including the Claimant's wife's changed attitude to his returning to live with her and other matters to which I will return.

34.
Finally and by way of further alternative Mr Bedford contends that the concession made by the Secretary of State based upon delay in finding a suitable bail address does not go far enough because the enquiries which the officer commenced only after the decision of Moulder J should have been put in hand much earlier and would have resulted in the Claimant's release not later than the end of December 2017.

The effect of the section 94B certificate

35.
The Claimant's case is that his second period of detention from 19 August 2016 to 24 February 2018 was unlawful because of a wrongly issued section 94B certificate. However as the section 94B certificate was withdrawn on 25 July 2017 the argument that its existence in itself rendered the detention unlawful cannot relate to any later period.

36.
During the hearing I asked whether the Secretary of State accepted the premise of Mr Bedford's primary submission, namely that the section 94B certificate was unlawfully given on 14 December 2014 and, if so, that that was an error of public law which bore on and was relevant to the Claimant's detention on his release from his prison sentence on 15 March 2015—although as stated the claim is confined to the second period of immigration detention from August 2016. I invited further submissions in writing on these two questions.

37.
Section 94BNIAA provides:

(1)
This section applies where a human rights claim has been made by a person ("P").

(2)
The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, refusing P entry to, removing P from or requiring P to leave the United Kingdom, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(3)
The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if refused entry to, removed from or required to leave the United Kingdom.

38.
On this question Ms Wilsdon in her further written submissions dated 5March submits that certification of the protection and human rights claim was not unlawful and "in any event it did not retrospectively render unlawful the making of the Deportation Order or the underlying decision to deport Mr Sanneh". She then cites authority to the effect that decisions to deport and other decisions taken by the Secretary of State on the basis of facts which may turn out later to be incorrect are not thereby retrospectively invalidated. With respect this does not address the issue which I raised: firstly the question is not whether the deportation or the decision to proceed with the deportation have been rendered unlawful; the question was simply whether the section 94B certificate itself was unlawfully given; secondly the line of authority to the effect that decisions are not retrospectively invalidated by, for example, tribunals upholding appeals has nothing to do with the question whether action taken by the Secretary of State was unlawful not because of the facts or her perception of the facts (including—as in R (Manrique) v SSHD[2016] EWCA Civ 159 which perhaps comes closest to the issue in this case—where the mistake is of her own making) but because of a misapprehension (and thus a misdirection in law) as to the scope of the Secretary of State's legal powers. In my view it is clear that what the Supreme Court said in Kiarie v SSHD must always have been the correct analysis of the limits of the Secretary of State's powers under that section from the time it was first enacted and, unless there is a material point of distinction on the facts (as they were reasonably understood by the Secretary of

State at the time), the inevitable consequence of that judgment is that the section 94B certificate was not correctly given—as appears to have been recognised following the Supreme Court's judgment because it was then withdrawn.

39.
The Supreme Court could not of course strike down section 94B because it was part of primary legislation. Nor did they purport to declare it incompatible with the European Convention under section 4 of the Human Rights Act. The Court held that in order to justify use of the section 94B power the Secretary of State must first consider how in the particular case the removal of that person might interfere with his ability to sustain his Article 8 claim and to conduct an effective appeal. Lord Wilson JSC considered that in the cases before him there was potential interference with both the substantive and procedural aspects of the rights guaranteed by Article 8 which must be justified by the Secretary of State before exercising the power to give a certificate under that section.

40.
As for the substantive aspect of Article 8 emphasis was placed by Lord Wilson on the fact that in the two cases before the Court the Defendant had not purported to certify the claim as clearly unfounded under section 94NIAA. The intended appeals to the tribunal were therefore regarded as arguable. It was in that context that in para 58 Lord Wilson said:

"It is one thing further to weaken an appeal which can already be seen to be clearly unfounded. It is quite another significantly to weaken an arguable appeal: such is a step which calls for considerable justification. The Home Secretary argues that, by definition, the foreign criminal will have been in prison, perhaps also later in immigration detention, in the United Kingdom and so he will already have suffered both a loosening of his integration, if any, in United Kingdom society and, irrespective of any prison visits, an interruption of his relationship with family members. I agree; but in my view the effect of his immediate removal from the United Kingdom on these two likely aspects of his case would probably be significantly more damaging than that of his prior incarceration here."

41.
However in paragraph 59 Lord Wilson made it clear that his decision in the particular appeals did not turn on this question.

42.
As for the procedural aspects of Article 8 Lord Wilson noted that it is very difficult for an Appellant overseas to give proper instructions to solicitors or to participate effectively in a hearing though he accepted that, with effective facilities such as video links, that might be possible.

43.
It seems to me that the ratio of Kiarie v SSHDS is seen in para 78 the judgment of Lord Wilson speaking for the majority where he says:

"The claimants undoubtedly establish that the certificates represent a potential interference with their rights under article 8. Deportation pursuant to them would interfere with their rights to respect for their private or family lives established in the United Kingdom and, in particular, with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective. The burden then falls on the Home Secretary to establish that the interference is justified and, in particular, that it is proportionate: specifically, that deportation in advance of an appeal has a sufficiently important objective; that it is rationally connected to that objective; that nothing less intrusive than deportation at that stage could accomplish it; and that such deportation strikes a fair

balance between the rights of the appellants and the interests of the community: see R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)[2012] 1 AC 621, para 45."

44.
As the Secretary of State had not at the time or in response to the claims for judicial review sought to demonstrate that an appeal from abroad might have been made effective in the cases of those appellants the Court was unable to hold that a fair balance had been struck.

45.
The issue is whether the Secretary of State could properly say that the person subject to deportation would not potentially suffer irreversible harm by having to pursue an appeal out of the jurisdiction. The facts of the two cases before the Supreme Court were very different from the facts of this case: Kiarie himself was aged 23 and had lived in the United Kingdom with his parents and siblings since 1997, when he was aged three. He had been granted indefinite leave to remain in the United Kingdom. Byndloss was aged 36 and had lived in the United Kingdom since the age of 21. He had been granted indefinite leave to remain and his wife and their four children were living here; he had three or four other children also living here.

46.
There was clearly no question but that the removal from the UK in each case would amount to an interference with Article 8 rights. The obligation to justify that removal in advance of an appeal was thus engaged.

47.
In this case the facts are slightly unusual because the Claimant has, following his arrest for the section 20 offence, effectively been kept apart from his wife and children for nearly 4 years. Unlike the usual case of a foreign criminal facing deportation this was not just because the period spent in prison necessarily separated him from his family but because his wife was the victim of his crime and he was subject to a restraining order keeping him away from her and his youngest child for another two years after he was released from prison. Therefore the argument that requiring him to go abroad to pursue his appeal would weaken his Article 8 claim because of the additional interruption of contact with his family has very limited application here and would have had no application until at the earliest the date the restraining order had expired (in March 2017). Even after expiry of the restraining order, given the fact that for several years no contact had been had with his family, it seems clear that there would not be irreversible harm in that respect by the Claimant's removal before his appeal could be pursued.

48.
It might be said therefore that the Claimant does not demonstrate even a prima facie interference with his Article 8 rights by giving effect to the deportation order. If so there is nothing for the Secretary of State to justify.

49.
Mr Bedford meets that argument by saying that the human rights claim was not certified as clearly unfounded under section 94. That, as the Supreme Court said in Kiarie, is an indication that any appeal would be arguable. Indeed this was clearly central to the question whether the procedural as well as the substantive aspects of Article 8 might be unjustifiably interfered with by removal pending an appeal: see Lord Wilson at [54] and [76].

50.

It seems to me however that there is a real question as to whether the Claimant ever had an arguable appeal against the deportation order in his case. Tribunal Judge Keith in his reasons for dismissing the Claimant's statutory appeal dated 15 November 2017 stated in paragraph 8: "On 16 December 2014, the Respondent certified his claim as clearly unfounded, under Section 94 of the 2002 Act and provided an out-of-country appeal, together with a deportation order dated 15th December." He makes no reference to section 94B.

51.
The chronology I have been given, summarised above, states that the Claimant sought judicial review of the refusal of his claim for asylum in a letter dated 9 November 2016. That is said to have contained a certificate under section 94NIAA. Because Gambia is a State referred to in section 94 (4) (in relation to men) the case would have fallen under sub-section (3) which provides: "If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded."

52.
It does seem clear that there was in fact no statement that the Defendant regarded the claim as clearly unfounded in the original decision of 16 December 2014—which I have not been shown. Nor would that have been appropriate: the only certificate that could be given preventing an in-country appeal—other than one under section 94B—was one under section 94 (3) stating that the claimant was entitled to reside in a State listed in subsection (4). In the absence of such a certificate the Secretary of State must have been satisfied that the claim was not clearly unfounded. I must assume that Tribunal Judge Keith referred in error to section 94 rather than section 94B.

53.
Though I have not been shown it, it would appear however that in the letter of 9 November 2016 the Secretary of State did certify under section 94 (3) both the asylum claim and the human rights claim and therefore cannot have been satisfied that the asylum and human rights claims were not clearly unfounded. That seems to be the only explanation for the ruling of Upper Tribunal Judge Plimmer dated 1 March 2017 on a renewed application for permission to apply for judicial review of that decision in which, having correctly directed herself that it was a matter for her taking into account all the evidence before the Secretary of State at the time of the refusal under challenge (that of 9 November 2016), she said that she was satisfied that not only the asylum claim but the human rights claim based upon Article 8—not simply the claim under Article 3 (relating to his need for medical treatment) which according to the chronology I have been given was the human rights claim then being made—were bound to fail before a tribunal. She made it clear that this was not simply because any private and family life of the claimant in the UK was significantly outweighed by the public interest in deporting him but also because:

"There was little to corroborate the claimed relationship before the Respondent but I have considered supporting evidence that was available in the form of letters from friends and family members. They do not live together and the Applicant is prevented by a restraining order from having direct contact with his 11-year-old daughter. The relationship between the Applicant and his minor child is very weak indeed. The relationship between the Applicant and his adult children does not have any compelling features and there is no element of dependency beyond normal emotional ties. There is very little evidence regarding the Applicant's wife. In any event they do not live together."

54.

That comes very close to saying that Article 8 was not engaged in the first place. The reason why Mr Bedford nevertheless says that this was not a section 94 case is that, when the decision was made afresh in the light of the Kiarie v SSHD in the Supreme Court, not only was the section 94B certificate withdrawn but there was no certificate under section 94 (3) which means that, at that date (as in December 2014) the Secretary of State was satisfied that the Article 8 claim was not clearly unfounded. It is unclear why that change was made as it is not obvious that there was any significant change of circumstances since November 2016. It may be that the restraining order having by then lapsed the Claimant's reliance upon an alleged reconciliation with his wife was regarded as sufficient to preclude a further certification under section 94.

55.
While this appears to be a case where the Defendant would have been justified, in December 2014, in certifying the Article 8 objection to deportation as clearly unfounded so as to require a certificate under section 94 (3), in my judgment it would be inappropriate for me to take that possibility into account when no such certificate was in fact given as the Secretary of State's own guidance required officials to refrain from certifying under section 94B if the claim could be certified under section 94 as appears from Kiarie v SSHD where Lord Wilson said at [35]:

"In published guidance to her case-workers the Home Secretary has made clear that there is no need to consider certification of a claim under section 94B if it can be certified under section 94, as to which see para 14 above. So, as exemplified in the cases of Mr Kiarie and Mr Byndloss, a certificate under section 94B is of a human rights claim which is not clearly unfounded, which in other words is arguable. In my view therefore, the public interest in a foreign criminal's removal in advance of an arguable appeal is outweighed unless it can be said that, if brought from abroad, the appeal would remain effective…"

56.
Therefore while there may be no reason to treat the Article 8 claim as presented to the Secretary of State in December 2014 as any stronger than the claim subsequently considered by UT Judge Plimmer at the beginning of 2017, the fact remains that the Claimant had a right of appeal which, however unpromising its prospects, he was entitled to be able to put forward effectively. Notwithstanding the absence of any current enjoyment of family or private life on which the Claimant could rely in December 2014, as long as he claimed, as he has and does, that he has or would become reconciled with his wife such that family life as he may have enjoyed in this country had not effectively and permanently come to an end, the impact of his removal before the appeal could be heard had to be considered.

57.
As to whether such removal was justified in this case the Secretary of State did not apparently investigate the question how the Claimant's ability to pursue an appeal might be affected if he was required to do so from Gambia and she has not put before me any material about it. It seems to me therefore that, notwithstanding the considerable factual differences between this case and the cases of Kiarie and Byndloss, if the Secretary of State had had in mind the guidance later given by Lord Wilson she would not have given the certificate without making further enquiries about how that might prejudice the Claimant's right to pursue an effective appeal and I do not feel able to make any assumptions favourable to the Defendant as to what those enquiries might have revealed.

58.

In my view this case is not distinguishable from the facts of the cases of the two appellants in Kiarie v SSHD and I conclude therefore that the Secretary of State cannot argue, in light of the clarification given by the Supreme Court in that case, that the section 94B certificate in the Claimant's case was lawfully given in December 2014. It does not follow that that remained the position after 9 November 2016 when it seems clear that the case was certified under section 94 (3). In my view, from then on this was a case where the ingredient of an arguable appeal was lacking and in the circumstances the certificate under section 94B remaining in place was not unlawful (save that it appears to have been inappropriate in light of the Secretary of State's guidance but that would have been an immaterial error as the Claimant would have been precluded from pursuing an in-country appeal by the certificate under section 94 in any event). It may be that the proper analysis is that the section 94 certificate then given impliedly cancelled the December 2014 certificate under section 94B. Either way the Claimant was then liable to be removed from the UK before his statutory appeal was instituted and the rejection of the challenge to its lawfulness by the Upper Tribunal on the ground that the Defendant was entitled to treat the Article 8 claim as clearly unfounded means that the restrictions on the exercise of the power to grant a certificate under section 94B identified in Kiarie v SSHD were not in play. The most that the Claimant is entitled to is a finding that between 19 August and 9 November 2016 there was in place a certificate purportedly given under section 94B that should not have been given.

Was the section 94B certificate material to the claimant's detention?

59.
On this point Ms Wilsdon relies on the fact that Claimant's detention was maintained after withdrawal of the certificate on 25 July 2017 as supporting the proposition that it had no bearing on the decision to maintain detention in this case. However Lumba is authority for the proposition that the question whether public law error renders detention unlawful does not depend on a consideration whether it in fact made any difference: that will be relevant to the question whether the claimant can recover substantial as opposed to nominal damages but not whether the detention is lawful. This is made clear by Lord Dyson in Lumba when he said at [88]:

"To summarise, therefore, in cases such as these, all that the claimant has to do is to prove that he was detained. The Secretary of State must prove that the detention was justified in law. She cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made."

60.
That still leaves the question whether the erroneous issue of a section 94B certificate is material error rendering the detention unlawful.In Lumba Lord Dyson said at [68]:

"It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain a person under conditions different from those described in the policy. Errors of this kind do not bear on the decision to detain. They are not capable of affecting the decision to detain or not to detain."

61.
In that case the error was the application of an unpublished policy of blanket detention for all foreign national prisoners on completion of their sentences of imprisonment which was inconsistent with

published policy. It is not difficult to see why a claimant detained under that blanket policy was able to complain that the error bore on and was relevant to his detention.

62.
In R (Kambadzi) v SSHD [2011] UKSC 23; [2011] 1 W.L.R. 1299 detention which was initially lawful was held to have become unlawful as a result of a failure to comply with a published policy which laid down a requirement for regular detention reviews. In EO and others v SSHD[2013] EWHC 1236 (Admin) detention was held to be unlawful for a failure to follow policy requiring a medical examination of the detainee. Without such an examination taking place the opportunity for the medical practitioner to make a report under rule 35 of the Detention Centre Rules was reduced and, because the Secretary of State's policy was "redolent with references to the rule 35 report being the trigger which leads to consideration whether a defendant should be released", the failure to follow policy was material to continued detention.

63.
A conclusion that the erroneous giving of a section 94B certificate was material to the detention is less obvious. The Claimant was detained for the purpose of removing him in accordance with a deportation order. The fact that he could not appeal against that order before he left the country does not directly bear on the decision to detain or indeed to maintain detention. The Defendant had made her decision not to revoke the deportation order and was therefore entitled to proceed on the basis that unless and until it was set aside by an appeal the Claimant was liable to be deported. What however is said is that the certificate was indirectly material to the Claimant's detention because of the Hardial Singh principles which require the use of detention to be confined to cases where there is a prospect of removal within a reasonable time. It is said that the decision to detain must have involved an erroneous view as to the prospects of removal within a reasonable time because it was based upon the assumption that the section 94B certificate was correctly issued and there would therefore not be any delay while a right of appeal was pursued before he could be removed. The argument is that it would not be an answer that, if no section 94B certificate had been issued, the Secretary of State would have been justified in maintaining detention (as she did after it was withdrawn) even though removal would have to await the outcome of an appeals process because it must still have been a highly relevant consideration to the decision to detain and maintain detention whether the Claimant was going to be able to pursue an appeal before he could be removed. Even if, ultimately, the decision to detain would still have been maintained and fully justified in the circumstances, it was nevertheless material because the Secretary of State disabled herself from assessing those circumstances on which the exercise of the discretion to detain was based on a correct understanding of them.

64.
The dividing line between acts or omissions which bear on and relevant to detention those which do not is not well defined in the authorities. However in my judgment what the cases where that test is satisfied have in common is that the courts were able to identify a qualification placed on the statutory power to detain. In Kambadzi it was explained that what is required was something in the statutory power itself or in the Defendant's own policy which expressly or impliedly restricted the exercise of that power. This was explained by Lady Hale JSC at [71]-[73]:

"71 In short, there are some procedural requirements, failure to comply with which renders the detention unlawful irrespective of whether or not the substantive grounds for detention exist, and some procedural requirements, failure to follow which does not have this effect. If the requirement is laid down in legislation, it will be a matter of statutory construction into which category it falls. A

clear distinction can be drawn between a requirement which goes to whether or not a person is detained and a requirement which goes to the conditions under which a person is detained. If the grounds exist for detaining a person in a mental hospital, for example, and the procedures have been properly followed, it is not unlawful to detain him in conditions of greater security than are in fact required by the nature and degree of his mental disorder.

72 The same analysis applies to requirements which are imposed, not by statute, but by the common law. There are some procedural requirements which go to the legality of the detention itself and some which do not. The common law imposed a requirement that an arrested person be told, at the time, the real reason why he was being arrested. It did so for the very good reason that the arrested person had to know whether or not he was entitled to resist arrest. Mr Leachinsky was told that he was being arrested under the Liverpool Corporation Act 1921, but this Act gave the police officers no power to arrest him without a warrant. They did have power to arrest him on reasonable suspicion of having committed a felony. But, as they had not told him this, his detention was unlawful and he was entitled to damages for false imprisonment: see Christie v Leachinsky[1947] AC 573. As Lord Simonds put it, at p 592, 'if a man is to be deprived of his freedom he is entitled to know the reason why'.

73 It is not statute, but the common law, indeed the rule of law itself, which imposes upon the Secretary of State the duty to comply with his own stated policy, unless he has a good reason to depart from it in the particular case at the particular time. Some parts of the policy in question are not directly concerned with the justification and procedure for the detention and have more to do with its quality or conditions. But the whole point of the regular reviews is to ensure that the detention is lawful. That is not surprising. It was held in Tan Te Lam[1997] AC 97 that the substantive limits on the power to detain were jurisdictional facts, so the Secretary of State has to be in a position to prove these if need be. He will not be able to do so unless he has kept the case under review. He himself has decided how often this needs to be done. Unless and until he changes his mind, the detainees are entitled to hold him to that. Just as Mr Leachinsky's detention was unlawful even though there were in fact good grounds for arresting him, the detainees' detention is unlawful during the periods when it has not been reviewed in accordance with the policy, irrespective of whether or not the review would have led to their release. In my view, Munby J was right to hold that the reviews were 'fundamental to the propriety of the continuing detention' and 'a necessary prerequisite to the continuing legality of the detention': see [2008] EWHC 98 (Admin) at [68]."

65.
In applying that analysis to the wrongful issue of a section 94B certificate it seems to me that the conclusion must be that there is nothing about that section or in the Defendant's own policy or guidance to which my attention has been drawn in relation to the making of a decision by her officials whether to issue such a certificate which can be construed as in any way qualifying the power to detain purportedly exercised here (under para 2 (3) of Schedule 3 to the Immigration Act 1971). In my judgment therefore the wrongful issue of a certificate whether under section 94B or section 94 provides no basis for a contention that the detention or continuing detention of the person in respect of whom such a certificate is issued becomes unlawful. In contrast in Lumba the published policy to detain foreign criminals at the expiry of their prison sentences only when that was justified in their particular cases, in Kambadzi the policy requiring regular detention reviews and, in EO v SSHD, the requirement of a medical examination within 24 hours of initial detention were each capable of being construed as qualifying the discretion to detain or maintain detention. There is nothing of that character in statute or policy here.

66.

That is not to say that, in respect of the period in detention during which as I have held the section 94B certificate should not have been issued, that error is irrelevant to the assessment whether the detention became unlawful. It does mean that the error does not by itself and automatically render the detention during that period unlawful. In addressing the question whether the third Hardial Singh principle continued to justify detention the Secretary of State should not be allowed to rely upon her own erroneous section 94B certificate to bolster a contention that she would be able to effect deportation of the Claimant within a reasonable period.

Other grounds for saying the detention was unlawful

The overall period of detention

67.
The Claimant has been detained for a period of some 27 months in all which is by any standard a long time. However this includes the ten months of earlier immigration detention between 15 March 2015 and 13 January 2016. That is not the subject of complaint in these proceedings. While the period of any earlier detention may be indirectly relevant to the consideration of the second Hardial Singh principle (the deportee may only be detained for a period that is reasonable in all the circumstances) I do not accept that the two periods should simply be aggregated. That would mean that, for example, if a person had been released previously because the second Hardial Singh principle required it he could never be detained again for however short a period even though all barriers to removal had by then disappeared.

68.
The second principle requires an assessment by this Court on what "is reasonable in all the circumstances". Though, as confirmed in Lumba, there is no "exclusionary rule" which requires any delay caused by the detainee pursuing unsuccessful appeals or judicial reviews to be ignored, that does not require the Court to attribute to periods of delay during which unsuccessful steps are taken by the detainee to avoid removal to be given the same weight as other periods of delay: see Lord Dyson at [121].

69.
Though there were many occasions when removal directions were cancelled for reasons that had nothing to do with steps taken by the Claimant these delays in themselves would have been relatively brief. In contrast long periods of delay can be attributed to unsuccessful steps taken by the Claimant to avoid removal (and in the earlier period of detention in part to non-cooperation with the obtaining of an emergency travel document). In my judgment in all those circumstances the overall delay was not so great as to support a conclusion that at any time before 24 January 2018 it had continued for longer than was reasonable.

Hardial Singh third principle

70.
Should it have become apparent to the Secretary of State at some point between 19 August 2016 and 24 January 2018 that she would not be able to effect deportation within a reasonable period? This is a question for me to decide based on the material available to the Defendant from time to time during that period.

71.

Mr Bedford relies on the erroneously given section 94B certificate which the Claimant was bound to attempt to have removed as he did in his judicial review launched in November 2016. This, though unsuccessful, he would have taken to the Court of Appeal had not Kiarie v SSHD intervened to make it academic. Stripping out the error he submits that it can be seen that the Secretary of State ought to have concluded that there would be lengthy delay while a statutory appeal was pursued making it impossible to say that the Claimant's removal was imminent or achievable within a reasonable period.

72.
In developing these submissions Mr Bedford understandably relied upon the finding of the judge of the FTT on 13 January 2016 that removal was neither imminent nor foreseeable, the withdrawal of the section 94B certificate in July 2017 following Kiarie v SSHD in the Supreme Court and the conclusion of Moulder J that the Defendant could no longer justify detention. He argues that the situation had not in any material respect changed over the period of detention other than in respects favourable to the Claimant's release such as his wife's changed attitude and the expiry of the validity of the restraining order. He therefore says that the conclusions of the FTT judge in January 2016 and of Moulder J in 2018 in truth reflect what was always the position.

73.
He also refers to a reference in a Home Office "Monthly Progress Report Detainees" document dated 14February this year which informed the Claimant that, amongst other things, since the last review "An interim review was held on 5 January 2018 where it was concluded that release to be considered on the basis that removal is not imminent." Again Mr Bedford says that that statement does not appear to be based upon any recent change in circumstances.

74.
On behalf of the Secretary of State Ms Wilsdon argues that at no time prior to 24January 2018 could it be said that there was no longer a reasonable prospect of removing the Claimant from the UK in a reasonable period, that the third Hardial Singh principle does not require the removal to be imminent but only that there was a reasonable prospect that any current barriers to removal (such as the existence of an in-country appeal or a judicial review which had not been finally disposed of) could be expected to be resolved in a reasonable time. She reminds me that the Court of Appeal in Fardous v SSHD [2015] EWCA Civ 931 explained that the third Hardial Singh principle does not require the Secretary of State to be able to point to a definite date in the future when all existing barriers to removal will have disappeared and she urges me to approach the matter on the basis that, though there is no "exclusionary rule" which requires any delay caused by the detainee pursuing unsuccessful appeals or judicial reviews to be ignored, that does not require the Secretary of State to assume, regardless of the merits, that such an appeal or judicial review will be successful or that, if unsuccessful, the detained person will choose to pursue every possible avenue of appeal or further appeal.

75.
In my view the starting point is that for the first two months there was in place, as I have found, a section 94B certificate that should not have been given but which would have been regarded by the Defendant's officials deciding whether detention or its continuation was appropriate as meaning that only a non-suspensive appeal could be started. I should therefore view the question from the point of view of a reasonable official correctly understanding that the Claimant might pursue an appeal which would prevent any removal until it was concluded. However, that is a commonplace situation and it seems to me that in those first two months if no such certificate had been in place there would have been ample grounds to initiate and maintain detention.

76.
From then—and certainly after UT Judge Plimmer's decision of 1 March 2017— until the handing down of the judgments in Kiarie v SSHD on 14 June 2017 the Defendant could properly regard the position as being that there were no further barriers to removal: the Tribunal had held that the asylum and human rights claims were clearly unfounded and the Claimant had been refused permission to appeal to the Court of Appeal. Since the decision of 9 November 2016 the Claimant had submitted further representations but these were rejected and an attempted judicial review of removal directions was refused on the papers. On 5 April the Defendant maintained her earlier decision and the Claimant was refused permission to proceed with a judicial review of this further decision.

77.
Following the judgments in Kiarie v SSHD the Defendant acted quickly to take steps to allow an in-country appeal and from then on it can be said that an appeal to the FTT having the effect of suspending removal was likely.

78.
Ms Wilsdon in my view correctly submits that in carrying out the assessment whether the Defendant should have concluded at any time during this period that removal would not be possible in a reasonable period, I must avoid hindsight and focus on what was known or should have been known by the Secretary of State at the particular time being considered. The Defendant was not required to assume that any particular step taken by the Claimant whether by way of statutory appeal or judicial review would have been successful or involve further stages which might involve renewed applications or for permission to appeal, substantive appeals, re-hearings, fresh applications for judicial review and so on potentially ad infinitum. If there was an obligation to make that assumption any detainee who indicated an intention to start any sort of legal process to resist removal would immediately have strong grounds for alleging that his continued detention became unlawful because the prospect of removal then will be so uncertain and delayed that the Secretary of State could not reasonably conclude that it could be achieved in a reasonable period. In my judgment what is required is only that the Secretary of State looks at the effect of the current stage of any proceedings (or proceedings which can be expected to ensue within any relevant time limits): for example if a judicial review or a statutory appeal has been initiated it is inevitable that, short of its being abandoned or disposed of summarily, no removal can be effected within whatever is the typical interval between the start of such proceedings and the decision at first instance. If, following failure at first instance, there is an attempt at a further step such as an appeal then at that point the Secretary of State would need to consider how much additional delay that might build in. It may be that Secretary of State should have a longer horizon than simply the end of the current stage of any legal proceedings in a case where it is clear that it is likely to proceed to an appeal (as for example where a difficult point of law of general importance is involved). In this respect I consider that the Secretary of State is entitled, even in a case which she cannot be satisfied that a claim is clearly unfounded, to take a view as to the merits of a potential appeal or judicial review and therefore indirectly as to the prospects of any permission to appeal being given, in assessing the significance for the prospects of removal caused by the delay that might follow the initiation of such proceedings.

79.
In my judgment the horizon from the point of view of the Secretary of State in a case such as this is set by the expected date of the disposal of those proceedings at first instance. If the appeal is successful then the question of removal becomes academic and it might be said that will show that the

detention in the meantime has been unnecessary but the matter must be looked at prospectively at a time when the Secretary of State has rejected the claim. If on receipt of grounds of appeal to the tribunal or a judicial review Claim Form it can be seen that her rejection was erroneous then the decision ought to be corrected and release will follow. But in the vast majority of cases the Secretary of State will maintain a refusal notwithstanding grounds of appeal or review. An appeal may be arguable but the Secretary of State can reasonably take the view that it will probably fail even if it cannot be regarded as clearly unfounded. It seems to me that in those circumstances she is entitled to take the view that, even though removal must be suspended until the appeal is heard, if the appeal fails removal will still be possible within a reasonable time.

80.
As to the significance of the statement of the immigration judge in January 2016 that release was not imminent or foreseeable and the conclusion of Moulder J in January this year that there was no reasonable prospect of removal warranting continued detention Ms Wilsdon makes the following points. What happened in January 2016 is past history. The Claimant does not allege that his earlier detention which came to an end with that immigration judge's bail decision, was at any time unlawful. It may well be that the problem then was the practical one of obtaining an emergency travel document, something which the Claimant himself declined to cooperate in. The Secretary of State, in considering the question of detention in August 2016 and in reviewing the Claimant's continued detention from then onwards, would be looking forward prospectively to the prospects for removal and whether that could be achieved in a reasonable period. As for the observation of Moulder J, while the Secretary of State loyally acted upon it to give effect to the judge's ruling, as a finding made in an interlocutory application it is not binding upon me as the judge deciding the substantive question at the final hearing where the matter has been examined in more detail. It was in any event an observation made at the time when the Upper Tribunal had still to give its judgment on whether, because of procedural error, the Claimant should be permitted to reopen his appeal to the FTT. Nor could it be treated as a finding that the Claimant was required to be released under the Hardial Singh principles because if that were the case it would be irrelevant whether a suitable bail address could be found for him as detention could not then be lawfully maintained.

81.
As for the statement in the February 2018 monthly progress report, because that report also contains a statement that the Claimant's continued detention remains justified, there is an apparent internal contradiction. This can be resolved if the reference to an interim review held on 5 January is treated as simply a reference to the ruling of Moulder J on that date and a review carried out immediately after it to give effect to her conclusion that detention could no longer be justified. This report is signed by Mr Neil White who has made a witness statement explaining that he was asked to consider whether the Claimant could be released to another address following the decision at this interim relief hearing. Ms Wilsdon therefore says that the statement about the imminence of the Claimant's removal should not therefore be regarded as having any significance in relation to the view as to the prospects for removing him in a reasonable time that the Secretary of State had or should have had at any earlier time.

82.
As to the merits of any appeal or judicial review Ms Wilsdon relies on the findings of a number of judges and in particular Upper Tribunal Judge Plimmer's ruling dated 1 March 2017 which I have quoted above and in which she additionally said:

“Even when all the material submitted is considered at its highest, no reasonable Judge would find that the Article 8 submissions advanced have realistic prospects of success.”

83.
This in itself is a powerful reason for saying that the Defendant was entitled to take the view that it was unlikely—and I would say very unlikely—that any legal process would result in her decision to maintain the deportation order and re-set removal directions being overturned. This was not therefore a case where the arguments were finely balanced or there was a point of law of difficulty that might have to go right up to the Supreme Court and involve further significant delay. On the contrary it was a case where the Claimant was unlikely to get permission to proceed with any further judicial review and any statutory appeal which he pursued would be likely to fail on the merits. That includes the attempted judicial review before the Upper Tribunal because, although Mr Bedford says that this was a challenge to the granting of the section 94B certificate, the ruling of UT Judge Plimmer does not even mention such a certificate. This could not therefore have been seen as a generic challenge to the lawfulness of granting of section 94B certificates in such cases as was the challenge in Kiarie v SSHD.

84.
That was the position in March 2017. The Secretary of State was entitled to pay regard to the views of an independent judge in the Upper Tribunal as strengthening the view that her decision had been correct. Indeed it amounted to a complete vindication of that decision.

85.
Nothing emerged to indicate that this was the wrong decision before the decision of the judge of the FTT considering the merits of the Claimant’s case on his statutory appeal. This judgment in November 2017 was even more emphatic as to the correctness of the Secretary of State’s decision that the deportation order should stand. Mr Bedford contends that this judgment should in effect be disregarded because of the failure on the part of Tribunal Judge Keith to allow an adjournment (in fact a second adjournment) in order to enable the Claimant to call his wife as a witness. The obvious difficulty about that is that, insofar as it is said that Judge Keith’s decision was vitiated by procedural error, that was rejected by the Upper Tribunal in the decision promulgated on 15 February 2018. It does not seem to me that I can or should seek to go behind the Upper Tribunal’s decision on that question. In my judgment the decision of Judge Keith provided further support for a conclusion that any appeals or other legal process would not get beyond the first stage and would probably fail.

86.
Ms Wilsdon points out that it took some six months between the initiation of the statutory appeal to the FTT on 14 August 2017 and the dismissal of the appeal by the Upper Tribunal communicated on 15 February 2018 and that was following an adjournment of the initial first instance hearing and a permission hearing before a separate FTT judge following the dismissal of the first instance decision. Mr Bedford has not suggested that represents an unusually speedy disposal.

87.
As the chronology which I have set out shows the Defendant repeatedly set dates for the Claimant’s removal. On several occasions these arrangements were abandoned for reasons which had nothing to do with any actions on the part of the Claimant. It may be that some were out of the control of the Defendant. It is also the case that on many occasions the initiation of proceedings led to the cancellation of removal directions. But it is apparent that the Defendant was constantly, in so far as it was open to her lawfully to do so, seeking to give effect to the deportation order and remove the Claimant. I am satisfied that at no time did the Secretary of State abandon her intention to remove the

Claimant from the United Kingdom; that at no time before 24 January this year had the position been arrived at where objectively speaking there was no reasonable prospect of removal in a reasonable time or that at any such time the Claimant's detention had continued for more than was a reasonable period for the purpose of effecting removal.

Other grounds for challenging the maintenance of detention

88.
Mr Bedford argues that there was no justification for keeping his client in detention even before an in-country appeal had become available: there was no evidence he was an absconding risk and there was insufficient basis for concluding he might reoffend. Mr Bedford was anxious for me to note that the Claimant's wife has now signed a witness statement saying that she was happy for him to return to live with her. The obvious problem with that is that an assertion that the very person who was the victim of a serious crime at the hands of the Claimant is now happy to have him back would need to be treated with a considerable degree of scepticism. There was no witness statement from the Claimant's wife until 5 February 2018, though there were "to whom it may concern" typed documents made in October 2017 and on 25 January this year apparently signed by her saying that she had forgiven him and wanted him released to her address. It is perhaps significant however that though, I am told, the October 2017 document was put before Moulder J on 5 January this year, that judge refused to grant bail on the ground that a suitable bail address had not been provided, the Claimant's wife's address being regarded as plainly unsuitable. Moulder J had been referred to the findings recorded in the judgment in the FTT about the Claimant's "controlling behaviour in the past" and "the violent and abusive relationship with his wife largely fuelled by alcohol".

89.
In my view it was right for the Secretary of State at all material times to regard the Claimant's alleged reconciliation with his wife as doubtful. It is said that even so the problem could have been solved with a suitable bail address such as that in Nottingham used by the Claimant in January 2016. The Secretary of State was however entitled to take the view that that would not in itself prevent the possibility of reoffending and could not be said to have been irrational in taking that view.

90.
As for then risk of the Claimant absconding, he was clearly someone who was very anxious to avoid deportation but he had had no success with the various applications he pursued before Tribunals or this Court in relation to his detention and deportation. He had been told that his claim was clearly unfounded by a judge of the Upper Tribunal in March 2017. In November his statutory appeal failed on the merits. I do not see that it could be said to be irrational for the Secretary of State to conclude that he was at all times an absconding risk.

91.
Mr Bedford says that there was a failure on the part of the Secretary of State to disclose an important matter to Moulder J, namely that her officer had been informed on 14 December 2017 by someone in the social services department of the relevant local authority that the Claimant's wife did want to have contact with him and allow him to return to the family home. This only came to the attention of the Claimant and his representatives when it was mentioned in the Defendant's detailed grounds of defence in these proceedings served on 24 January this year. Ms Wilsdon on behalf of the Defendant has accepted that this was a failure which should not have occurred but submits that this would not have had any bearing on the decision of Moulder J. If, she says, the Claimant and his wife have

become reconciled then the best person to confirm that is the wife herself and no such statement had been produced to the Defendant from that source by 5 January.

92.
The Claimant had sought to obtain permission to appeal to the Court of Appeal from the refusal of Moulder J to grant bail but Kitchen LJ on 15 February, without deciding the question of permission, directed the Secretary of State to provide by 22 February a statement giving reasons for the Claimant's continued detention and why permission to appeal should be refused. In the event as stated the Claimant was released on bail on 21 February and no such statement was provided (beyond a response opposing permission and explaining that the Claimant had been released), any appeal becoming academic. Mr Bedford has sought to derive significance from the decision to release the Claimant only after Kitchen LJ's order and before the time for complying with it as a further indication that the Secretary of State never or at an earlier date than is conceded had proper grounds for continuing to detain the claimant. I decline to draw that inference. It seems to me that in view of a High Court judge's indication that he should be released once a suitable address could be found, the Secretary of State was bound to act upon that whether she agreed with it or not.

93.
In his redrafted Grounds I have been invited to look at various detention reviews of the Claimant which are said on his behalf to indicate a failure to take account of material matters or a misapprehension of material facts which vitiate the decisions to continue detention.

94.
Thus in the review on 16 September 2016 it is said there was no basis for the conclusion that the Claimant posed a high risk of absconding or a medium risk of reoffending. The Defendant responds that the breach of the restraining order and the commission of an offence during the period of the suspension of the prison sentence itself indicates propensity both to fail to comply with bail conditions and to reoffend. It is said that this does not make him a danger to the public. It may be that the risk posed was only to his wife but that surely is enough. I agree.

95.
In respect of the review on 14 October 2016 the same point is made. It is also said that this decision is vitiated by an error namely the statement that removal directions were in place for 18 September when in fact they had been cancelled at the time the review was carried out. In so far as it is the same point the same answer can be given. The error as to the date set for removal directions cannot have been material because that date had passed when that review was being carried out and the reviewer cannot have thought that it was correct. It was obviously left in from the wording of the previous review by mistake.

96.
It is said that the review on 11 November 2016 discloses an erroneous approach which treats the risk of reoffending as a trump card. Whether or not that is a correct reading of this review that is not a material error because the risk of reoffending was clearly a highly important consideration.

97.
The error in the review of 8 December 2016 is said to be that the reviewer failed to have regard to the fact that, by then, there was a barrier to removal such that removal would not take place within a reasonable period. This is a reference to the fact that by that date the Claimant was pursuing his application for permission to apply for judicial review before the Upper Tribunal which had been

refused on the papers. I see no reason to regard an attempt to obtain permission at a hearing following refusal on the papers as likely to result in significant further delay and nor did it.

98.
In respect of the review on 29 March 2017 the allegation is a failure to have regard to the pending appeal to the Court of Appeal and its impact on the prospects for removal. Again permission had been refused by the Upper Tribunal and there would be no reason to think that significant delay would ensue before the question of permission was considered by the Court of Appeal.

99.
The complaint in relation to the review on 26 April 2017 is that the risk of reoffending was changed from high to medium but the reviewer then changes his mind and states that the risk of reoffending is high. However the statement “He is therefore considered to pose a medium risk of reoffending at this stage in the deportation process” seems to be a reference to two counts of harassment and breach of the restraining order for which he received a sentence of two months on each count. For some reason there is no reference to the much more serious offence of wounding which is referred to in paragraph 2. The authorising officer treats the risk of reoffending as high and in my view, if there is an error, it was one made by the reviewing officer in paragraph 7.

100.
In relation to the review on 18 July 2017 it is objected that the assessments of risk were subjective and contradictory: on the one hand the reviewer says that the risk of absconding is high and on the other hand the risk is medium. It is also said that there was an erroneous assumption that the Claimant’s appeal would be expedited when there was no reason why it should be and that this affected the possibility of removal within a reasonable timeframe. However in my view such inconsistencies cannot be regarded as material to the continued detention of the Claimant.

101.
It is clear in my view that during the whole of the period I am concerned with the Secretary of State could properly have concluded that there was a significant risk of harm to the Claimant’s wife and possibly his children should he have been released from detention and that his wife was unlikely to have willingly agreed to his returning to live with her.The FTT judgment of 15 November 2017 sets out excerpts from a 2015 OASys report which includes the following:

“Given a knife was used to stab the victim and she (possibly through some coercion and certainly under some pressure) is being encouraged to re-establish the relationship the risk of serious harm is correctly assessed as high”;

“He has given various versions events that all conflict with each other”.

The Claimant’s wife “has some mental health issues which compounds her vulnerability from Wandy Sanneh”

“She has given a statement stating that she will not stand up against her husband in court as she fears for her personal safety as he threatened to kill her”

“She has already received a threatening message from Wandy’s sister.”

“It is my view that the victim is under duress… [and] is unlikely to be making choices of her own free will and will thereby not protect herself or her children”

“I remain concerned about the risks to his wife and children from his abusive behaviour”

“Should he return to the family home there would be a significant concern about risks posed to both his wife and their children”

102.
In paragraph 66 the tribunal judge said that “having assessed the detailed evidence I do not find the appellant has an ongoing subsisting relationship with his wife and children. Evidence to the contrary is of a disturbing violent and abusive relationship which has resulted in the appellant’s family becoming his victims, as well as former partners having been victims in a pattern of behaviour lasting over a decade.”

103.
As for the contention that the Defendant should have taken steps to identify a bail address before the matter came before Moulder J and at any rate by the end of December 2017 I do not see that there is anything in it. Apart from the question whether it would have been appropriate to release the Claimant then, it is not apparent that he was offering any suitable address.

Conclusion

104.
The Claimant’s claim fails save in the respect conceded by the Defendant and referred to in paragraph 27 above. The Claim will be transferred to the County Court for the assessment of damages for that period of unlawful detention between 24 January and 21 February 2018.