Neutral Citation Number: [2018] EWHC 92 (Admin)

Case No: CO/1671/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2018

Before :

Andrew Henshaw QC
(sitting as a Judge of the High Court)

- -

Between :

THE QUEEN **on the Application of** **YH (CHINA)**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Christopher Jacobs (instructed by **Duncan Lewis**) for the **Claimant**
Benjamin Tankel (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 16 November 2017

- -

Judgment Approved

Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. The Claimant applies for judicial review of her detention pursuant to the Defendant's powers under the Immigration Acts between 1 January 2017 and 21 April 2017. The Claimant seeks a declaration and damages for unlawful detention, in respect of either the whole period, the period from 1 March 2017 onwards, or various alternative periods of time.

2. Permission to apply for judicial review was granted by Helen Mountfield QC, sitting as a High Court Judge, on 19 May 2017. The substantive hearing of the Claimant's application took place on 16 November 2017, and the Defendant filed supplemental information on 28 November 2017.

3. The parties have agreed that this judgment should deal only with matters of liability, with any issues of quantum deferred for later disposal if not agreed.

(B) FACTS

4. The Claimant is a citizen of China, born on 19 November 1983. On 21 September 2013 she entered the UK with leave to enter on a Tier 4 student visa valid until 30 January 2015. On 16 January 2015, the Claimant applied for further leave to remain ("***LTR***") as a Tier 4 student, and was granted LTR until 18 February 2016.

5. On 4 November 2015 the Claimant submitted an application for LTR as a Tier 2 migrant. That application was refused on 15 December 2015 with a right of administrative review which the Claimant exercised. By a decision dated 25 January 2016 the Defendant maintained the refusal of the Claimant's LTR application. The Claimant's LTR accordingly expired on 18 February 2016.

6. Following a pre-action protocol letter dated 22 February 2016, the Claimant issued an application in the Upper Tribunal on 8 March 2016 seeking judicial review of the Defendant's refusal of her LTR application.

7. After two initial instances of possible failure to report to immigration authorities (considered later in this judgment), the Defendant's records indicate that the Claimant consistently reported fortnightly from 17 March 2016 until her incarceration on 22 September 2016.

8. On 1 April 2016, the Claimant was arrested on suspicion of fraud. She was bailed. There is no evidence of any failure to comply with bail conditions.

9. The Upper Tribunal refused the Claimant's application for permission to apply for judicial review on 18 April 2016.

10. On 14 June 2016, the Claimant claimed asylum and an asylum screening interview was carried out.

11. On 22 September 2016, the Claimant pleaded guilty at Southwark Crown Court and was sentenced to either 22 weeks' or 30 weeks' imprisonment[1] for six offences of

[1] The documents variously give the sentence as 22 weeks or 30 weeks. On the basis that the Claimant was in prison from 22 September 2016 to 4 January 2017, i.e. period of 15 weeks, it seems likely that the sentence was 30 weeks.

making false representations to make gain for herself or another or to cause loss to another/expose another to risk, and one offence of facilitating the acquisition/acquiring/possessing of criminal property. She was imprisoned at HMP Peterborough.

12. On 6 October 2016 the Claimant was offered a facilitated voluntary return.

13. On 30 December 2016 the Claimant was given notice in form IS.91R of reasons for detention. The notice stated that "*Detention is only used when there is no reasonable alternative available*", but that the Claimant was being detained for the (sole) reason that "*You are likely to abscond if given temporary admission or release*". The box stating *"Your removal from the United Kingdom is imminent"* was not ticked.

14. The form indicated that the decision to detain on the ground of risk of absconsion was based on the factors that the Claimant (i) had previously failed to comply with conditions of her stay, temporary admission or release; (ii) had used or attempted to use deception in a way that led the Defendant to consider that she may continue to deceive; (iii) had not produced satisfactory evidence of her identity, nationality or lawful basis to be in the UK; and (iv) had previously failed or refused to leave the UK when required to do so.

15. Accordingly at the end of the custodial part of her sentence, the Claimant was detained pursuant to the Defendant's powers under the Immigration Acts. She initially remained in detention at HMP Peterborough.

16. The Claimant's substantive asylum interview was held on 4 January 2017.

17. On 5 January 2017 ("***the first 5 January review***") reviewing officer A Rajan filled in a Detention Review form which was not, however, completed by an authorising officer. The form included the following entries:

> **"3. Current barriers to removal (excluding documentation)**
>
> Sub's asylum claim is an outstanding barrier to removal.
>
> …
>
> **5. Assessment of removability.**
>
> High – The subject's screening and AIR interviews have been conducted and an ACD referral will be made imminently. Under a service level agreement, a decision will be made in writing within 14 days. If the subject's claim cannot be certified under section 94 it is likely to be certified under section 96
>
> **6. Previous immigration compliance and non compliance**
>
> Sub was on reporting conditions and they complied with those conditions.
>
> **7. Assessment of risk of harm to the public**
>
> Low – PNC Trace – subject was convicted and sentenced to 30 weeks imprisonment for 6 offences of 'Make false representations to make gain for self or another or cause loss to other/expose other to risk" and 1 offence of Facilitate the

acquisition/acquire/possess criminal property; Harm Assessment: B

8. Known or claimed medical conditions (including mental health and/or self-harm issues and any reference to a Rule 35 report)

The subject has diabetes mellitus type 2, insulin is not required and it is controlled by medication.

…

10. Any other compassionate circumstances (including children issues and ties to the UK)

The subject has no close ties in the United Kingdom.

…

12. Previous applications for bail or temporary release

Sub complied with their previous reporting.

…

14. Recommendation (whether to maintain detention or release, supported by reasons)

This is a CC non criteria case, sub was convicted and sentenced. Sub's asylum claim can be concluded within a reasonable timeframe. Sub's valid passport is available to HO. Detention remains appropriate pending outcome of asylum/removal."

18. A further Detention Review form was completed by Mr R Robinson on 5 January and completed by an authorising officer on 6 January 2017 **("the second 5 January review")**. The form stated inter alia:

> "The subject is an overstayer, she has demonstrated a disregard to the law, and presents a high risk of recidivism and is unlikely to adhere to reporting conditions.
>
> The subject's screening and AIR interviews have been concluded and an ACD referral will be made imminently. Under a service level agreement a decision will be made in writing within 14 days. If the subject's claim cannot be certified under section 94 it is likely to be certified under section 96.
>
> The subject's valid passport is held by the police and arrangements are being made to have it sent to CCNC.
>
> The subject has diabetes mellitus type 2, insulin is not required and it is controlled by medication. The subject does not fall within the protected categories of risk, as defined in 'Adults at Risk' policy. … there is no evidence that the subject is

> vulnerable or that detention is likely to lead to a risk of significant harm or detriment to the individual. …
>
> The subject has no known family or close ties in the UK and there are no compassionate circumstances.
>
> There is no evidence that the subject is an adult at risk and if the subject's asylum claim is refused, removal can be effected within a reasonable period of time. …"

The authorising officer stated:

> "Subject is an overstayer who has claimed asylum. Her asylum claim is actively being progressed as her asylum interviews have been completed and her asylum case is now going to be referred to ACD. Under a service level agreement a decision will be made within 14 days of referral. If the asylum claim is refused and certified her removal can be effected within a reasonable timescale as she has no close ties, she is not deemed an adult at risk and her passport is held by the police and arrangements are currently being made for this to be sent in. She is a deceptive immigration offender who has a high risk of absconding and it is deemed necessary that her detention is maintained whilst her asylum claim is continued to be progressed."

19. The Defendant has in its detailed grounds provided further explanation of the reference to a decision being made within 14 days pursuant to a "service level agreement":

    i) it refers to a decision being made in relation to the asylum element of the claim. That is not necessarily the final element of the decision-making process, since a separate case worker team goes on to consider the position under Article 8 of the Human Rights Convention;

    ii) the 14 days runs from acceptance of the referral by the asylum team and receipt of the Home Office file, upon which the claim can be allocated to a caseworker for decision; and

    iii) it is an internal aspiration reflected in an intra-department service legal agreement: it is not a commitment, still less a published policy.

    It was further explained in oral argument that the "service level agreement" is not a replacement for the former fast track system.

20. On 11 January 2017 the Claimant's then solicitors wrote asking for temporary admission.

21. On 13/15 January 2017 the Claimant's detention was reviewed ("**the 13 January review**"). The form completed by Mr Robinson included the following:

> "The screening and AIR interviews were conducted on 14/06/2016 and 04/01/2017 respectively. IO C Dempsey, who conducted the substantive asylum interview has been asked … to complete the relevant proforma … Once this has been reviewed, an ACD referral will be made and under a service

level agreement a decision will be made in writing within 14 days. If the subject's claim cannot be certified under section 94 it is likely to be certified under section 96.

The subject is an overstayer, she has demonstrated a propensity for deception and is unlikely to adhere to reporting conditions. There is no evidence that the subject presents a risk of harm to the public, however she has shown a disregard to the law, and presents a high risk of recidivism."

The authorising officer stated:

"14 day detention review.

Chinese National sentenced to 30 weeks imprisonment for 6 offences of "Make false representations to make gain for self or another or cause loss to other/expose other to risk" and 1 offence of facilitate the acquisition/acquire/possess criminal property

Served overstayer.

Subject claimed asylum on 14/06/2016 based on her diabetes and sexuality.

The subject has diabetes mellitus type 2, insulin is not required and it is controlled by medication. Does not fall under AAR policy.

AIR has been completed.

The subject's valid passport is held by the police and arrangements are being made to have it sent to CCNC.

Asylum claim is to be determined by NW asylum team under the SLA 14 day turnaround following allocation. It is not therefore considered that the subject will remain in detention for a prolonged period.

Maintain detention for asylum decision."

22. On 18 January 2017 the Claimant had a health screening at Yarl's Wood Immigration Removal Centre. It was noted that the Claimant took medication for diabetes and a body rash, and further that the Claimant said that she had been physically and mentally tortured by family members in China.

23. A medical report dated 19 January 2017 stated that the Claimant: "*has medication for T2DM but cannot remember doses and these have not been recorded, asked Pharmacy and prescribed according to label on box. Has some panic attacks, worse at night as was abused in past by her family. Booked for R35 as reverted back to old rules for definition of torture so will come under punishment/signposted to wellbeing to support anxiety, advised of HC and to come here if concerns*."

24. The medical notes record that the Claimant also attended clinic on 20 January 2017, and state:

"Patient wasn't sure why she had been asked to come here.

When prompted if she wanted to apply for the R35, she wasn't sure what this meant.

I then went further to ask her about abuse with her family, and she said it was when she was a child and it was a very long time ago.

She reports she does suffer with anxiety and depression, from time to time, but has been referred to the Wellbeing team for support.

She didn't given enough details to be able to complete the form, as wasn't very keen in the first instance.

Diagnosis: Anxiety disorder; Insomnia

Plan: commence on PRN dose of propranolol for anxiety symptoms

Promethezine for sleep

Ensure to engage with the Wellbeing team to help support her mental health."

25. On 23 January 2017 the Claimant's asylum claim was referred to the asylum casework directorate ("***ACD***"). The referral was accepted on 1 February 2017 and the Home Office file was received on 5 February 2017. On that basis, the 14-day period referred to under the "service level agreement" would appear to have commenced on 5 February and expired on 19 February 2017.

26. On 27/30 January 2017 the Claimant's detention was reviewed ("**the 27 January review**"). Mr Robinson stated in the form that an ACD referral was made on 23 January. The Detention Review form also stated:

"**5. Assessment of removability.**

Under a service level agreement, a written decision on the subject's asylum claim will be made within 14 days. If the subject's is refused removal can be effected within a reasonable period of time.

6. Previous immigration compliance and non compliance

The subject has failed to leave the UK after her application to vary her leave was refused on 05/12/2015 and her leave subsequently expired on 18/02/2016. Her administrative review, PaP and Judicial review were all refused and she then claimed asylum. The timing of which places doubt on her credibility and suggests that it is an attempt to frustrate removal. She has also demonstrated a propensity for deception and is unlikely to adhere to reporting conditions.

7. Assessment of risk of harm to the public

There is no evidence that the subject presents a risk of harm to the public, however she has shown a disregard of the law, and presents a high risk of recidivism. CID Harm assessment: B

…

10. Any other compassionate circumstances (including children issues and ties to the UK)

There are no known compassionate circumstances.

…

12. Previous applications for bail or temporary release

A request for TA was received on 13/01/2017 and a response will be sent along with the subject's monthly report.

…

14. Recommendation (whether to maintain detention or release, supported by reasons)

There is no evidence to suggest that the subject is vulnerable as defined under the 'Adults at Risk' policy or tha[t] continued detention is likely to lead to a risk of significant harm or detriment to the individual. She has demonstrated a disregard to immigration rules and a propensity for deception and she is unlikely to adhere to reporting conditions

An ACD referral has been made to consider the subject's asylum claim and under a service level agreement a written decision will be made within 14 days. If her claim is refused removal can be effected within a reasonable period of time, therefore I recommend that detention is maintained."

The authorising officer stated:

"Subject is non EEA national offender who overstayed her leave and who was sentenced to 30 weeks for false representations. She had leave as a Tier 4 (General) student until 18/2/16. An in time application to vary leave as Tier 2 (General Student) was refused on 15/12/15 with a right of administrative review. She submitted a false Certificate of Sponsorship in relation to the application for LTR, Administrative review rejected, PAP rejected and JR permission refused on papers on 18/4/16.

Following JR refusal subject submitted asylum claim which is currently the only barrier to removal.

Since the last DR, asylum claim has been referred to Liverpool team under a locally agreed expedited SLA and accepted by them for allocation. Asylum ownership transferred from London asylum team to Liverpool asylum team on 26/1/17.

Additionally, Subject was inducted by CC Port IO on 25/1/17. No new welfare concerns were identified.

Subject has no family or other ties in UK. She has type 2 diabetes which is controlled by medication. This does not

constitute a serious medical condition within the AAR policy and there is no indication of vulnerability as defined by the AAR policy or that continued detention would lead to a risk of significant harm.

If her asylum claim is refused then removal can be effected within a reasonable period as there is a valid passport."

27. On 15 February 2017, the Claimant attended healthcare complaining of hyperventilation and pins and needles. She said she was upset by the refusal to grant her bail. She was encouraged to engage wellbeing but declined to see the GP for review.

28. By letter dated 22 February 2017 the Claimant's request for temporary admission was refused.

29. On 24/26 February 2017, the Claimant's detention was reviewed ("***the 24 February review***"). The review noted that her asylum claim was under active consideration. The contents of the form completed by Mr Robinson were broadly similar to those in the 27 January review. However, section 5 now read:

> "**5. Assessment of removability.**
>
> Under a service level agreement, a written decision on the subject's asylum claim will be made within 14 days. If the subject's is refused and certified removal can be effected within a reasonable period of time" (my emphasis)

Section 14 now read:

> "**14. Recommendation (whether to maintain detention or release, supported by reasons)**
>
> There is no evidence to suggest that the subject is vulnerable as defined under the 'Adults at Risk' policy or tha[t] continued detention is likely to lead to a risk of significant harm or detriment to the individual. She has demonstrated a disregard to immigration rules and a propensity for deception and she is unlikely to adhere to reporting conditions. There is no evidence that the subject would present a risk of harm to the public, however she would present a risk of recidivism.
>
> A CID note by Liverpool Asylum Tea on 06/02/2017 states that the file has been sent to SCW [senior case worker] for SPOE ['second pair of eyes']. It would be reasonable to expect an asylum decision within the next 2 weeks and therefore removal within a reasonable period of time remains a realistic prospect. I recommend that detention is maintained in order to effect removal."

The authorising officer stated:

> "Chinese national, sentenced to 30 weeks imprisonment for 6 offences of 'make false representation to make gain for self or another or cause loss to other/expose other to risk and 1 offence

> of facilitate the acquisition/acquire/possess criminal property. There are no impending prosecutions or previous convictions.
>
> Served overstayer.
>
> Valid passport held.
>
> PaP and Judicial Review were all refused and she claimed asylum on 14/06/2016 based on her diabetes and sexuality.
>
> Asylum decision now made and Liverpool Asylum Team on 06/02/2017 states that file has been sent to SCW for SPOE.
>
> Maintain detention for the asylum decision to be served and proceed accordingly."

30. On 1 March 2017, a rule 35 report was prepared by Dr Rebecca Ward. Dr Ward noted the account given by the Claimant as follows:

> "In China, she was raised by an abusive father. He would get drunk often and she would be beaten. He would hit her with the washing line stick and wet towels. On one occasion he pushed her down the stairs and she [l]anded hard on her bottom. She has had pain ever since in this area and cannot sit for long. She was also beaten for going to church with her Grandmother. She would often run away and stay with her Aunt.
>
> Also as a child her neighbour started molesting her around 7 years old. He would touch her inappropriately and sometimes hurt her. She told her Mother who advised her not to tell anyone. She resents her mother for not protecting her. She does not like men and now identifies as a lesbian.
>
> She was also beaten by her cousins, who hit her and threw stones at her; they would taunt her that her parents are cousins.
>
> Around 2004 she was very depressed and felt very low but did not feel she could speak to anyone.
>
> She fears that a return to China will see her discriminated against as a lesbian as she will be expected to marry. She also does not have contact with her family and her aunt who she was close to, has since had a stroke."

31. The relevant clinical observations and findings were:

> "See body map
>
> She was due to have counselling prior to detention.
>
> She says she is very anxious and has poor sleep."

32. The assessment stated:

> "There were no scars presented for assessment. Her ongoing pain around the coccyx may be from a previous injury and a possible fracture. An X-ray would be needed to confirm this.

> This could be from a heavy fall onto the bottom, such as being pushed down the stairs as she describes. She was upset recounting this story and gave good detail of how she was beaten.
>
> I have referred her to our Mental Health Team for support and they will alert accordingly should there be a decline."

33. By letter dated 6 March 2017, the Defendant wrote to the Claimant in relation to the Rule 35 report. The Defendant noted that the rule 35 Report did not indicate that continued detention would give rise to harm (or significant harm). Having summarised the report, the Defendant stated that the Claimant's account met the definition of torture and that she was accordingly regarded as an adult at risk under the policy. The Defendant summarised the Claimant's immigration history and noted that a decision was "*currently being drafted*" in respect of her claim for asylum.

34. Under the heading "*Public Protection factors*" the Defendant stated:

> "You appeared at Southwark Crown Court on 22 September 2016 and were sentenced to 30 weeks imprisonment for various fraud offences. It is considered that you would pose a risk of harm to the public."

35. Under the heading "*Balancing risk factors against immigration control factors*" the Defendant stated:

> "Careful consideration has been given to balance your wellbeing whilst in detention against the risks of harm to the public and the need to maintain effective immigration control.
>
> You were issued with a visa which granted you entry for a limited period and a limited purpose. You were required to return to China once your leave to remain had expired. You did not do so and instead went to ground, only physically coming to our attention after your arrest in 2016.
>
> It is noted that your asylum claim was based on events occurring before your visa was issued, but there is no evidence that you disclosed your fear of persecution to the entry clearance officer or the immigration officer who saw you on arrival.
>
> There is also the fact that you have been convicted of criminal offences relating to fraud/embezzlement. Those offences demonstrate a fundamental lack of respect for this country's laws, especially those regarding financial conduct.
>
> No issues in regard to your physical or mental health, whilst in detention, were indicated. In addition the doctor has not indicated in the Rule 35 report that continued detention will have a negative impact on your health.
>
> A primary consideration when detaining any individual under immigration powers is the imminence of removal. Your asylum claim is being processed and we have your valid passport. If your claim is refused then it is expected that it will be certified,

in which case there will be no barriers to your removal. It is expected that your removal from the UK will take place in the next six weeks. If however your asylum representations are refused with an in-country right of appeal then your detention will be reviewed immediately. If you are granted asylum you will be released.

Conclusions

In summary, it is acknowledged that you are an Adult at Risk but it is considered that your removal can be enforced within a reasonable timescale.

There when balancing the indicators of vulnerability against the negative immigration factors highlighted above and the speed with which your removal could be effected, it is considered that the negative factors substantially outweigh the risks in your particular circumstances. Therefore a decision has been made to maintain your detention."

36. On or around 9 March 2017, the Claimant applied for bail accommodation under section 4 of the Immigration and Asylum Act 1999. By letter dated 11 March 2017, the Claimant was informed that she was being granted bail accommodation in the event that she made a successful application for bail.

37. On or around 21 March 2017, the Claimant's detention was considered at a case progression panel. The minutes state:

"*Official Sensitive - Contains Personal Information*

After reviewing [YH], Person ID: [] at the case progression panel held on 21/03/2017, a recommendation was reached based on all the information and evidence provided on the day.

After considering all the evidence and information presented at the case progression panel, the panel is satisfied that continued detention is appropriate, justified and reasonable. However the panel has identified actions to progress the case and ensure detention remains appropriate.

Panel Chair: Jenny Sutherland

Chair Unit: CC

Chair Grade: SEO

Barriers to removal

ETD status:

Outstanding Application:

Subject to deportation:

First Offence:

Type of offence: Fraud/Embezzlement

Length of sentence: 6 MONTHS 25 DAYS

Factors in favour of Maintain Detention: There is a valid passport which she could be removed on. Need to get the asylum claim concluded.

Factors in favour of Release:

Reason for balance: The panel have recommended to maintain detention with case progression actions as there is a prospect of removal within a reasonable timescale. There is clear progression on the asylum, and need to have the Asylum concluded in order to serve RD's.

Panel decision: Recommend maintain detention with case progression actions

Mandated actions: Need to review the AAR flag. Need to get to SPOE and SCW dealt with. Need to get the asylum claim dealt with in order to serve RD's"

38. By letter dated 24 March 2017 the Claimant's solicitors wrote a pre-action protocol letter threatening judicial review of the Claimant's detention. On the same date, the case officer requested that the asylum decision be expedited, which was agreed on or around 29 March 2017.

39. On 24/29 March 2017, the Claimant's detention was reviewed ("***the 24 March review***"). The review noted that the Rule 35 report had been considered and the decision made to maintain detention, adding that "*A request has also been sent to ACD to expedite the SPOE for the subject's asylum decision*". The review also included the following entries:

"5. Assessment of removability.

Medium – We are in possession of the subject's valid passport, the only barrier to removal is the subject's asylum claim and the decision is awaiting SPOE.

6. Previous immigration compliance and non compliance

The subject has failed to leave the UK after her application to vary her leave was refused on 05/12/2015 and her leave subsequently expired on 18/02/2016. Her administrative review, PaP and Judicial review were all refused and she then claimed asylum. The timing of which places doubt on her credibility and suggests that it is an attempt to frustrate removal. She has also demonstrated a propensity for deception and is unlikely to adhere to reporting conditions.

7. Assessment of risk of harm to the public

There is no evidence that the subject presents a risk of harm to the public, however she has shown a disregard of the law, and presents a high risk of recidivism. CID Harm assessment: B

8. Known or claimed medical conditions (including mental health and/or self-harm issues and any reference to a Rule 35 report)

The subject has diabetes mellitus type 2, insulin is not required and it is controlled by medication.

A Rule 35 report was received on 02/03/2017. …

It was accepted that the account of ill-treatment met the definition of torture, however there is no evidence that continued detention would lead to a risk of significant harm or detriment and the decision was made to maintain detention.

…

13. Action plan for next review period …

If the subject's asylum claim is refused and certified a submission for authority to remove will be made.

14. Recommendation (whether to maintain detention or release, supported by reasons)

The subject has been assessed as evidence based risk level 2 under the 'Adults at Risk' policy however there is no evidence that continued detention is likely to lead to a risk of significant harm or detriment to the individual.

She has demonstrated a disregard to immigration rules and a propensity for deception. She is unlikely to adhere to reporting conditions and removal is unlikely to be effected without detention. There is no evidence that the subject would present a risk of harm to the public, however she would present a risk of recidivism.

A CID note by Liverpool Asylum Team on 06/02/2017 indicates that file has been sent to SCW for SPOE. A request to expedite the SPOE was sent on 24/03/2017.

Removal within a reasonable time remains a realistic prospect and therefore I recommend that detention is maintained in order to effect removal."

40. The authorising officer stated:

"Continued detention authorised.

Subject presents a high risk of absconding.

I note the asylum claim is being progressed.

I am satisfied that removal can be effected within a reasonable timeframe.

Consequently detention justified."

41. On or around 29 March 2017, the Liverpool asylum team agreed to prioritise the SPOE review of the asylum decision. On 30 March 2017, a draft decision was produced refusing the asylum claim but not certifying it as clearly unfounded.

42. On or around 5 April 2017 the Defendant faxed the Claimant's solicitors Duncan Lewis in the following terms:

> "I am writing in response to your letter, dated 24 March 2017 in which you advise of your intentions to initiate Judicial Review proceedings for your client above.
>
> We respectfully request that your deadline for a response to your letter is extended until 18.00 hours on 07 April 2017, to enable full consideration of your client's case.
>
> Please note that your client's asylum claim has been considered and she may be entitled to a right of appeal against the decision, we are therefore considering granting her Temporary Admission."

43. On 5 April 2017, the Claimant issued an application for judicial review accompanied by an application for urgent consideration and for interim relief. On the same day, Collins J refused the application for interim relief, noting that the Claimant could apply for bail or temporary admission on terms at a hearing.

44. A note on the Defendant's Case Record Sheet dated 12 April 2017 stated that there was a provisional clearance/review date for the asylum decision of 9 May 2017, and:

> "The subject is due to be released so the provisional clearance/review date reflects the diminished priority."

45. The Claimant was released from detention on 21 April 2017.

(C) APPLICABLE PRINCIPLES

(1) General position and public law error

46. The power to detain pending administrative removal[2] derives from Immigration and Asylum Act 1999 section 10(9)(b) read with Nationality and Asylum Act 2002 section 62. Section 10 of the 1999 Act provides *inter alia* as follows:

> "(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it.
>
> …
>
> (7) For the purposes of removing a person from the United Kingdom under subsection (1) or (2), the Secretary of State or an immigration officer may give any such direction for the removal of the person as may be given under paragraphs 8 to 10 of Schedule 2 to the 1971 Act.

[2] So far as appears from the evidence and submissions, no steps have been taken to deport the Claimant as opposed to removing her administratively as an overstayer.

…

(9) The following paragraphs of Schedule 2 to the 1971 Act apply in relation to directions under subsection (7) (and the persons subject to those directions) as they apply in relation to directions under paragraphs 8 to 10 of Schedule 2 (and the persons subject to those directions)—

…

(b) paragraph 16(2) to (4) (detention of person where reasonable grounds for suspecting removal directions may be given or pending removal in pursuance of directions)"

47. Schedule 2 §16(2) of the Immigration Act 1971 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."

48. Section 62 of the 2002 Act includes these provisions:

"(1) A person may be detained under the authority of the Secretary of State pending—

(a) a decision by the Secretary of State whether to give directions in respect of the person under section 10 of the Immigration and Asylum Act 1999 (removal of persons unlawfully in the United Kingdom) …, or

(b) removal of the person from the United Kingdom in pursuance of directions given by the Secretary of State under any of those provisions.

…

(3) A provision of Schedule 2 to that Act about a person who is detained or liable to detention under that Schedule shall apply to a person who is detained or liable to detention under this section: and for that purpose—

(a) a reference to paragraph 16 of that Schedule shall be taken to include a reference to this section,

…

(c) a reference to detention under that Schedule or under a provision or Part of that Schedule shall be taken to include a reference to detention under this section.

…

> (7) A power under this section which is exercisable pending a decision of a particular kind by the Secretary of State is exercisable where the Secretary of State has reasonable grounds to suspect that he may make a decision of that kind."

49. In relation to the parallel power in the context of deportation,[3] in Schedule 3 § 2 to the 1971 Act, the Court of Appeal in *R (Sezek) v Secretary of State for the Home Department* [2002] 1 WLR 348 rejected an argument that detention is incompatible with Article 5(1)(f) of the Human Rights Convention (which permits, in accordance with a procedure prescribed by law, *"the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation ..."*) if other ways of preventing him absconding are available. That conclusion was consistent with the statement in *Chahal v UK* (1997) 23 E.H.R.R. 413 that "*Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing*" (§ 112).

50. As the House of Lords noted in *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131, the court in *Chahal* added that:

> "Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of article 5, namely to protect the individual from arbitrariness" (§ 118)

51. The Secretary of State bears the burden of proof to justify detention: see, e.g., *Lumba* [2011] UKSC 12 [2012] 1 AC 245 § 44 citing *Allen v Wright* (1838) 8 C&P 522 and Lord Atkin's dissenting speech in *Liversidge v Anderson* [1942] AC 206, 245 ("*every imprisonment is prima facie unlawful and ... it is for a person directing imprisonment to justify his act*"). Similarly, in *R v Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74 Lord Scarman stated that the burden of proving the legality of detention lay on the Defendant:

> "In English law every imprisonment is prima facie unlawful and…it is for a person directing imprisonment to justify his act."

52. It is common ground that the Secretary of State's power to detain must be exercised in accordance with the principles derived from *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704.

53. Moreover, it is clear that the public law constraints to which detention decisions are subject are not limited to the *Hardial Singh* principles. In *Lumba* Lord Dyson stated:

> "… The requirements of the 1971 Act and the Hardial Singh principles are not the only applicable "law". Indeed, as Mr Fordham QC points out, the *Hardial Singh* principles reflect

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[3] "(3) 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 ...."

Where the criminal court has recommended deportation, then Schedule 3 § 2(1) provides that the defendant "*must*" detain the person unless the court otherwise directs, or the Defendant directs him to be released pending further consideration of his case, or he is released on bail.

> the basic public law duties to act consistently with the statutory purpose (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 b-d) and reasonably in the *Wednesbury* sense: *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. But they are not exhaustive. If they were exhaustive, there could be no room for the public law duty of adherence to published policy, which was rightly acknowledged by the Court of Appeal at paras 51, 52 and 58 of their judgment. …" (§ 30)
>
> "…A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity. …" (§ 66)
>
> "…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." (§ 68)
>
> "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." (§ 88)[4]

54. In order to render detention unlawful, a public law error must be one which "*bears directly*" on the discretionary power to detain: *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 (SC).

55. Where, for example, detention is challenged on the basis of breach of the Secretary of State's own policy, the challenge is brought on conventional public law principles, and as such the issues which arise are not generally ones for the court to resolve as though it were primary decision-maker: see, e.g., the observations of the Court of

[4] See also the statements of Baroness Hale at §§ 207-208, Lord Collins at § 221 and Lord Kerr at §§ 239-240 and 248-251.

Appeal in *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ 597 at § 29.

56. However, if on a balance of probabilities a claimant could and would lawfully have been detained notwithstanding a public law error, then it is likely that only nominal damages will be awarded:

> "I can see that at first sight it might seem counter-intuitive to hold that the tort of false imprisonment is committed by the unlawful exercise of the power to detain in circumstances where it is certain that the claimant could and would have been detained if the power had been exercised lawfully. But the ingredients of the tort are clear. There must be a detention and the absence of lawful authority to justify it. Where the detainer is a public authority, it must have the power to detain and the power must be lawfully exercised. Where the power has not been lawfully exercised, it is nothing to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort has not been committed" (*Lumba* § 71 per Lord Dyson)

(2) The Hardial Singh principles

57. In *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704 Woolf J stated:

> "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 in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, 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 on 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 its powers 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." - emphasis added.

58. The *Hardial Singh* principles were summarised by Dyson LJ in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 [2003] INLR 196 at [46] as follows:

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

59. Lord Dyson in *Lumba* § 104 cited his statement at § 48 of *R (I)* setting out factors relevant to the determination of how long it is reasonable to detain pending deportation:

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

60. Determining what is a reasonable period in all the circumstances is a fact-sensitive exercise. There is no tariff or maximum period of detention: each case will depend on its facts: see, e.g., *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at §§ 37-39:

> "37 The Secretary of State acting through his officials has to determine whether the period of detention is reasonable when deciding whether or not to continue the detention, subject to the right of any detainee to apply for bail. It is a judgment which has to be made on the evidence and in the circumstances as appear to the officials in each case.
>
> 38 There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.
>
> 39 McFarlane LJ said in R (JS (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 1378 at paragraphs 50-51 that fixing a temporal yardstick might cause the courts to

> accept periods of detention that could not be justified on the facts of a particular case. In R (NAB) v Secretary of State for the Home Department [2010] EWHC 3137 (Admin) Irwin J made clear at paragraphs 77-80 that a tariff would be repugnant and wrong. He added:
>
> "It would be wise for those preparing legally for such cases to abandon the attempt to ask the courts to set such a tariff by a review of the different periods established in different cases""

61. As regards risks of absconding and re-offending, in *Lumba* Lord Dyson said at § 121:

> "…The risks of absconding and re-offending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place."

62. Lord Dyson elaborated upon the relevance of risk of reoffending in §§ 106-109 of *Lumba*, which need to be set out in full:

> "106 Mr Husain accepts that, where there is a risk that the detained person will abscond, the risk of reoffending is relevant to the assessment of the duration of detention that is reasonably necessary to effect deportation. But he submits that, where there is no real risk of absconding, the risk of reoffending cannot of itself justify detention. Where there is no such risk, detention is not necessary to facilitate deportation, because it will be possible to effect the deportation without the need for detention. The underlying purpose of the power to detain is not to prevent the commission of criminal offences, but to facilitate the implementation of a deportation order.
>
> 107 I have some difficulty in understanding why the risk of reoffending is a relevant factor in a case where there is a risk of absconding, but not otherwise. It seems to me that it is possible to construe the power to detain either (more narrowly) as a power which may only be exercised to further the object of facilitating a deportation, or (more broadly) as a power which may also be exercised to further the object which it is sought to achieve by a deportation, namely, in the present case, that of removing an offender whose presence is not conducive to the public good. The distinction between these two objects was clearly drawn by the Court of Appeal in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804. Toulson LJ said, at para 55:
>
> > "A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the

> reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

Para 78 of Keene LJ's judgment is to similar effect.

> 108 I acknowledge that the principle that statutory powers should be interpreted in a way which is least restrictive of liberty if that is possible would tend to support the narrower interpretation. But I think that the Court of Appeal was right in A's case to adopt the interpretation which gives effect to the purpose underlying the power to deport and which the power to detain is intended to facilitate. Perhaps a simpler way of reaching the same conclusion is to say, as Simon Brown LJ said in *I's* case at para 29, that the period which is reasonable will depend on the circumstances of the particular case and the likelihood or otherwise of the detainee reoffending is "an obviously relevant circumstance".
>
> 109 But the risk of reoffending is a relevant factor even if the appellants are right in saying that it is relevant only when there is also a risk of absconding. As Lord Rodger of Earlsferry JSC pointed out in argument, if a person re-offends there is a risk that he will abscond so as to evade arrest or if he is arrested that he will be prosecuted and receive a custodial sentence. Either way, his reoffending will impede his deportation."

63. It will be noted that §§ 106-108 focus mainly on considerations specific to deportation cases, where the detention power can be construed as "*a power which may only be exercised to further the object of facilitating a deportation, or (more broadly) as a power which may also be exercised to further the object which it is sought to achieve by a deportation, namely, in the present case, that of removing an offender whose presence is not conducive to the public good*". Paragraph 109 (along with the last sentence of paragraph 108) is potentially of broader application.

64. Jay J in *AXD v Home Office* [2016] EWHC 1133, after citing the statements of Toulson LJ in *R(A)* and Dyson LJ in *R(I)*, stated:

> "181 The absconding risk is important because a former detainee who absconds will be frustrating the public interest in favour of his deportation. The risk of reoffending is relevant but it must be less important, because the purpose of immigration detention is not to provide indirect facilitation to the separate policies and objects of the criminal law."

65. The Court of Appeal also commented on absconsion risk in *Fardous:*

> "44 It is self-evident that the risk of absconding is of critical and paramount importance in the assessment of the lawfulness of the detention. That is because if a person absconds it will defeat the primary purpose for which Parliament conferred the power to detain and for which the detention order was made in the particular case. This has been made clear in a number of

> cases: see for example paragraph 54 of the judgment of Keene LJ in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 and the judgment of Lord Dyson in *Lumba* at paragraph 121.
>
> 45 Although the risk of absconding will therefore always be of paramount importance, a very careful assessment of that risk must be made in each case, as the magnitude of that risk will vary according to the circumstances. It may be very great, for example, where the person has, as in this case, a clear track record of dishonesty and a knowledge of how to "work" the controls imposed to regulate immigration in the European Union. Another example where the risk may be high is where the person refuses voluntary repatriation that is immediately available to him. It is important to emphasise that the risk of absconding is distinct from the risk of committing further offences and not dependent on that further risk. The risk of re-offending requires its own distinct assessment.
>
> 46 However, as is accepted on behalf of the Secretary of State, the risk of absconding cannot justify detention of any length, as that would sanction indefinite detention. It is therefore not a factor that invariably "trumps" other factors, particularly the length of detention. It is nonetheless a factor that can, depending on the circumstances, be a factor of the highest or paramount importance that may justify a very long period of detention"

66. In some cases, the fact that it is open to a person voluntarily to return is also a relevant factor. However, it was common ground in the present case that, the Claimant having made an asylum claim, her unwillingness to accept an offer of voluntary return was not relevant (cf *Lumba* §§ 127-128).

67. As to the relevance to detention of merits of an asylum claim, Lord Dyson in *Lumba* stated:

> "120 … Time taken in the pursuit of hopeless challenges should be given minimal weight in the computation of a reasonable period of detention. Nor do I accept that it is undesirable (or indeed unduly difficult) to identify hopeless or abusive challenges. There exist statutory mechanisms to curb unmeritorious appeals. If a claim is "clearly unfounded", certification under section 94(2) of the Nationality, Immigration and Asylum Act 2002 precludes an in-country appeal. If a claim relies on a matter which could have been raised earlier in response to an earlier immigration decision or in response to a "one-stop notice", certification under section 96 of the 2002 Act precludes any appeal at all. In any event, a court considering the legality of a detention will often be able to assess the prima facie merits of an appeal. Where, as in the case of Mr Lumba, there have been orders for reconsideration, or where there has been a grant of permission to appeal to the Court of Appeal, the court will easily recognise that the challenge has some merit. Conversely, there may be one or

more determinations from immigration judges dismissing claims as wholly lacking in credibility.

121 To summarise, I would reject the exclusionary rule. If a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his detention during the challenge should be given minimal weight in assessing what is a reasonable period of detention in all the circumstances. On the other hand, the fact that a meritorious appeal is being pursued does not mean that the period of detention during the appeal should necessarily be taken into account in its entirety for the benefit of the detained person. … The risks of absconding and reoffending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one."

68. As to when there is a sufficient prospect of removal having regard to the circumstances, in the pre-*Lumba* case *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112 the Court of Appeal said:

> "64 … the approach of Toulson LJ in *A (Somalia)* seems to me to be particularly helpful when considering the issues raised here about the prospect of securing the claimant's removal to Somaliland. As Toulson LJ said, there must be a "sufficient prospect" of removal to warrant continued detention, having regard to all the other circumstances of the case (see [32] above). What is sufficient will necessarily depend on the weight of the other factors: it is a question of balance in each case.
>
> 65 I do not read the judgment of Mitting J in *R (A and Others) v Secretary of State for the Home Department* as laying down a legal requirement that in order to maintain detention the Secretary of State must be able to identify a finite time by which, or period within which, removal can reasonably be expected to be effected. That would be to add an unwarranted gloss to the established principles. ... Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing

exercise. There must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors. Thus in *A (Somalia)* itself there was *"some prospect of the Home Secretary being able to carry out enforced removal, although there was no way of predicting with confidence when this might be"* (per Toulson LJ at para 58); and that was held to be a sufficient prospect to justify detention for a period of some four years when regard was had to other relevant factors, including in particular the high risk of absconding and of serious re-offending if A were released."

69. Following *Lumba*, *MH* was applied by the Court of Appeal in *R (Muqtaar) v Secretary of State* [2012] EWCA Civ 1270, where the claimant contended that it should at least have been clear to the Secretary of State that removal to Somalia was not going to be possible within a reasonable period once the Strasbourg Court had issued a Rule 39 measure prohibiting removal. The court stated:

> "36. … At the time of receipt of the rule 39 indication there was a realistic prospect that the ECtHR proceedings concerning removal to Somalia would be resolved within a reasonable period: it was possible but was not apparent that they would drag on as in practice they did. Nor was it apparent that the ECtHR's final decision would be such as to prevent the appellant's removal. I stress "apparent", because that is the word used in the approved formulation of *Hardial Singh* principle (iii) and in my view it is important not to water it down so as to cover situations where the prospect of removal within a reasonable period is merely uncertain.
>
> 37. Mr Husain submitted that for continued detention to be lawful it was necessary for the Secretary of State to identify the timescale within which removal could be effected, whereas in this case the timescale was wholly uncertain. An argument along those lines was rejected in *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112. …
>
> 38.Mr Husain submitted that that reasoning cannot live with the formulation of the *Hardial Singh* principles by the Supreme Court in *Lumba*, in particular at paras 103-104 where Lord Dyson said that a convenient starting point in the application of the principles to Mr Lumba's appeal was *"to determine whether, and if so when, there is a realistic prospect that deportation will take place"* and that *"if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful"*, and where he went on to identify factors relevant to the question of how long it is reasonable to detain a person pending removal. There is nothing to show, however, that Lord Dyson was intending to address the point made in the passage quoted above from *MH*, and there does not seem to me to be any inconsistency between his observations and that passage. I adhere to the view that there can be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. At the time

> of receipt of the rule 39 indication in the appellant's case, although it was not possible to say when the ECtHR proceedings would be concluded, there was nonetheless a realistic prospect of their being concluded and of removal being effected within a period that was reasonable in all the circumstances."

70. The issue of whether a detention is unlawful is a matter for the Court to decide, with little or no deference to be given to the views of the Secretary of State. In *A v. Secretary of State for the Home Department* [2007] EWCA Civ 804 Toulson LJ stated at paragraph 60-62:

> "60 My conclusion as to the disposal of this appeal would be the same whether it is for the court to decide if A's detention for the period in question was reasonably necessary or whether the court's role is limited to reviewing on a narrower basis the reasonableness of the Home Secretary's decision to exercise his power of detention during that period.
>
> 61 Mr Giffin advanced a subtle argument in support of the latter, based on certain passages in *Tan Te Lam* and *Khadir*, although I am not entirely clear what is the suggested scope of the court's power of review. Mr Giffin said that the test would be broader than whether the Home Secretary's decision was *Wednesbury* unreasonable and would involve "strict scrutiny", but it is less clear what strict scrutiny would connote in this type of case.
>
> 62 I intend no disrespect by not going into the refinements of Mr Giffin's argument but dealing with the matter on a broader basis. Where the court is concerned with the legality of administrative detention, I do not consider that the scope of its responsibility should be determined by or involve subtle distinctions. It must be for the court to determine the legal boundaries of administrative detention. There may be incidental questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself, and the court will no doubt take such account of the Home Secretary's views as may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention, and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court at common law and does not depend on the Human (although Human Rights Act jurisprudence would tend in the same direction)."

71. The court has to make its assessment on the basis of the circumstances as they presented themselves to the Secretary of State at the time, rather than with hindsight: see, e.g., *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 § 42.

72. The *Hardial Singh* principles are not statutory rules, a breach of which gives rise to right to damages: see *R(Krasniqi) v Secretary of State for the Home Department* [2011] EWCA Civ 1549 at [12]:

> "The Hardial Singh principles, though approved as such by the Supreme Court, are not the equivalent of statutory rules, a breach of which is enough to found a claim in damages. As I understand them, they are no more than applications of two elementary propositions of English law: first, that compulsory detention must be properly justified, and, secondly, that statutory powers must be used for the purposes for which they are given. To found a claim in damages for wrongful detention, it is not enough that, in retrospect, some part of the statutory process is shown to have taken longer than it should have done. There is a dividing-line between mere administrative failing and unreasonableness amounting to illegality. Even if that line has been crossed, it is necessary for the claimant to show a specific period during which, but for the failure, he would no longer have been detained."

They are not to be applied rigidly or mechanically (*Lumba* § 115). The Court will make allowances for the way in which Government functions: *HXA v The Home Office* [2010] EWHC 1177 QB § 71.

73. As noted earlier, Lord Dyson in *Lumba* § 44 made clear that the burden is on the Defendant to justify the legality of the detention. In *R (OM (Nigeria)) v Secretary of State for the Home Department* [2011] EWCA Civ 909 the Court of Appeal had to consider whether a claimant who had been unlawfully detained after a decision that failed to take account of a relevant policy should recover damages, or whether she would have been detained anyway on a correct application of the policy. The court observed:

> "23 … It seems to me that on normal compensatory principles it would be for a claimant to prove his loss on the balance of probabilities. It well may be that in circumstances such as these the burden shifts to the defendant to prove that the claimant would and could have been detained if the power of detention had been exercised lawfully, but again I see no reason why the standard of proof should be anything other than the balance of probabilities.
>
> 24 In reality, however, the debate is academic in this case. Irrespective of where the burden of proof lies and whether the standard of proof is balance of probabilities or inevitability, I am satisfied that the appellant would in fact have been detained during the first period if account had been taken of the paragraph of the policy relating to mental illness. That is clear from what happened in practice in the second period, from 29 April 2010, when the Secretary of State did take the relevant paragraph of the policy into account: the decision to detain the appellant was not only maintained but was defended vigorously in the judicial review proceedings. The question whether the appellant could lawfully have been detained is a matter of legal assessment in relation to which the burden and standard of proof are of no materiality. The assessment has two separate strands to it. The first, concerning the policy itself, depends on normal Wednesbury principles: would it have been open to a reasonable decision-maker, directing himself correctly in relation to the policy, to detain the appellant in the

> circumstances of the case? The second requires the lawfulness of continued detention to be assessed by reference to Hardial Singh principles."

74. I do not read those observations as indicating that burden of proof has no part to play in the application of the *Hardial Singh* principles. Questions of reasonableness are matters for the court's assessment, but burden of proof remains relevant to questions of underlying fact. If, for example, the Secretary of State seeks to justify detention on the basis of risk of absconsion or risk of reoffending, then she bears the burden of establishing that risk, or at least the facts from which it is said such a risk should be inferred, to the usual standard of proof. Any other approach would be inconsistent with the fundamental principle referred to in §46 above. As part of that process it may be appropriate for the court to take proper account of the Secretary of State's views on matters of incidental fact, as indicated by Toulson LJ in *A* (see § 70 above), though the court will do so only to the extent that any such views have been arrived at on a rational basis.

75. The approach the court should take in considering an unlawful detention challenge was summarised by Jay J in *AXD v Home Office* [2016] EWHC 1133 (QB) in this way:

> "176 In unlawful detention cases, the court does not conduct a Wednesbury review but assumes the role of primary decision maker: see *R(A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 , per Toulson LJ at paragraph 90. The court can take into account any facts that were known to the Defendant at the time, even if they did not feature in the reasons for detention that were furnished: see *R(MS) v Secretary of State for the Home Department* [2011] EWCA Civ 938. Hindsight is no part of the exercise: see *R(Fardous) v Secretary of State for the Home Department* [2015] EWCA Civ 931. The weight to be given to the Defendant's view is a matter for the court, although certain issues are more within the expertise of the executive than the judiciary, for example the progress of diplomatic negotiations and the attitude of other countries to accepting returnees. I would add that in my judgment the Defendant knows more than judges sitting in this jurisdiction about the absconding risk of immigration detainees."

76. Once the Secretary of State has decided that a person should be released, she is entitled to a short grace period in order to make any necessary arrangements, the length of which will depend on the circumstances: see *FM v Secretary of State for the Home Department* [2011] EWCA Civ 807 § 60:

> "60 I have already expressed my opinion that the test for the lawfulness of a period of detention is one of reasonableness. The obligation of the Secretary of State is to cease detention when it becomes clear that detention is no longer required to effect removal but, in my view, common sense demands that a short period of grace is required for the decision-making process to take place which may include a decision as to the management of the detainee on release. First, there is, I think, a distinction between cases in which it is clear that removal directions will not be re-set (e.g. upon grant of ILR) and those

> in which the decision whether to re-set removal directions depends upon the outcome of proceedings (as in the present case). The Secretary of State will in the latter cases be concerned to ensure that she is kept aware of the whereabouts of the released detainee. That may require administrative arrangements for appropriate accommodation to be made available. I do not think that the Secretary of State is bound to release without regard to a residual risk of absconding (see, for example, *R (Wang) v Secretary of State for the Home Department* [2009] EWHC 1578 (Admin)). Secondly, I do not consider, as Mr Husain argues, that the Secretary of State's assumption of responsibility for the welfare of these two children in detention can lightly be segregated from a responsibility to take reasonable steps to ensure that they are properly accommodated on release. There is no policy of the Secretary of State which requires case workers to turn detainees out of a detention centre without first ensuring that they can survive. On the contrary, it is the policy of the Secretary of State (EIG 55.6.3) that detention may be necessary "whilst alternative arrangements are made" for the detainee's care (provided, of course, that the purpose of detention was to effect removal). It is not difficult to envisage circumstances in which the Secretary of State could be said to be acting in dereliction of the duty undertaken by the act of detention if she took no action but to release the detained person immediately removal within a reasonable period became, as a matter of fact, not possible."

In that case a further detention of two days before final release was held to be lawful.

(3) The Defendant's Adults at Risk policy

77. The Defendant's power to detain must be exercised in accordance with her published policy unless there are good reasons for not doing so, and her policy must be consistently applied: *Lumba* § 26.

78. The approach to claims based on an alleged failure to comply with the Defendant's published policy is different from the approach to a *Hardial Singh* claim. In *K v Secretary of State for the Home Department* [2017] EWHC Admin 1543, King J set out the approach to be taken to policy challenges as follows:

> "11 It has been accepted for the purposes of the hearing before me that the approach of the court to a challenge, as here, to a discretionary decision, on the basis of misapplication of or inconsistency with policy, is two-fold. The first question the court has to ask itself is, has the decision-maker correctly directed himself to the meaning of the applicable policy? This is a matter upon which the court is the ultimate decision-maker. Secondly, if so, has the decision-maker acted within the limits of his discretion when applying the policy to the facts and circumstances of this case?, a matter in relation to which a Wednesbury test applies. In other words, the court has to ask itself at this stage whether the decision-maker has acted within the limits of the discretionary power conferred on him by statute. Was it, in other words, a rational decision with proper

regard to the matters which were relevant and to be taken into account?"

79. It is common ground that the relevant policy in the present case is the Defendant's guidance "*Adults at risk in immigration detention*" ("***AAR***"), Version v2.0 published on 6 December 2016. AAR explains how a person's vulnerabilities are to be weighed against immigration control factors in deciding whether to detain that person. It describes three different levels of risk, depending upon the cogency of the evidence supporting the vulnerability.

80. In the present case, following the receipt of a Rule 35 report in respect of the Claimant she was accepted as demonstrating a "Level 2" risk. Level 2 means that there is professional evidence (e.g. from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that a claimant is an adult at risk.

81. The introductory part of AAR includes the following:

> "There is an underpinning presumption in immigration policy that a person will not be detained. However, detention may still be appropriate at the point at which immigration control considerations outweigh the presumption of release, even for a person considered to be at risk.
>
> In all cases in which an individual is being considered for immigration detention in order to facilitate their removal an assessment must be made of whether the individual is an 'adult at risk' in the terms of this policy and, if so, the level of risk (based on the available evidence) into which they fall. If the individual is considered to be at risk, a further assessment will be made of whether the immigration considerations outweigh any risk identified. Only when they do will the individual be detained. …
>
> **Assessment: general principles**
>
> The decision making process a decision maker should apply is:
>
> - does the individual have need to be detained in order to effect removal?
>
> - if the answer is no, they should not be detained
>
> - if the answer is yes, how long is the detention likely to last?
>
> - if the individual is identified as an adult at risk, what is the likely risk of harm to them if detained for the period identified as necessary to effect removal given the level of evidence available in support of them being at risk?
>
> If the evidence suggests that the length of detention is likely to have a deleterious effect on the individual, they should not be detained unless there are public interest concerns which outweigh any risk identified. For this purpose, the public interest in the deportation of foreign national offenders (FNOs)

will generally outweigh a risk of harm to the detainee. However what may be a reasonable period for detention will likely be shortened where there is evidence that detention will cause a risk of serious harm. Where the detainee is not an FNO, detention for a period that is likely to cause serious harm will not usually be justified."

82. AAR goes on to consider the assessment of immigration factors and the balancing of those factors against risk factors:

> **"Assessment of immigration factors**
>
> In all cases in which the detention of an individual is being considered, the decision maker deciding on detention should first assess whether there is a realistic prospect of removal within a reasonable timescale. If there is not, the individual should not be detained. In cases in which there is such a prospect, and in which the individual is determined to be at risk in the terms of this policy, the decision maker should carry out an assessment of the balance between the risk factors and the immigration factors. This should involve a weighing of the evidence-based level of risk to the individual against:
>
> - how quickly removal is likely to be effected
> - the compliance history of the individual
> - any public protection concerns
>
> An individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained. This will be a highly case specific consideration taking account of all immigration factors. In each case, however, there must primarily be a careful assessment of the likely length of detention necessary and this should be considered against the likely impact on the health of the individual if detained for the period identified given the evidence available of the risk to the individual.
>
> In deciding whether to detain, the likely risk of harm (as assessed in accordance with the risk factors identified and the evidential weight that has been afforded to them), must be weighed against any immigration control factors, set out below:
>
> <u>Length of time in detention</u>
>
> In all cases, every effort should be made to ensure that the length of time for which an individual is detained is as short as possible. In any given case, it should be possible to estimate the likely duration of detention required to effect removal. This will assist in determining the risk of harm to the individual. In balancing risk issues against the prospect of removal, the basic principle is: the higher the level of risk to the individual (on the basis of the available evidence), the shorter the length of detention that should be maintained. In each case there should

be a careful assessment of the likely length of detention and this should be considered against the likely impact on the health of the individual given the evidence available. Individuals who arrive at the border with no right to enter the UK are likely to be detainable notwithstanding the other elements of this policy, on the basis that such individuals are likely to be detained for only a short period of time before being removed.

Public protection issues

Consideration will be given to whether the individual raises public protection concerns. The following issues should be taken into account in assessing the level of public protection concern represented by the individual:

- is the individual a foreign national offender (FNO)?
- if so, how serious was the offence / offences?
- is there available police or National Offender Management Service (NOMS) evidence on the level of public protection concern?
- is the person being deported on national security grounds?
- has a decision otherwise been made to deport (or remove through administrative means) the individual on the basis that their presence in the UK is not conducive to the public good?

Compliance issues

An assessment must be made, based on the previous compliance record of the individual concerned, of whether that individual is likely to leave the UK voluntarily or whether the individual is likely to be removable only if they are detained for that purpose (in line with the principles set out in Assessment: general principles).

All reasonable and proportionate voluntary return options should be pursued before consideration is given to detaining at risk individuals. Where there are reasonable grounds to believe that the individual would not return without the use of detention to support enforced removal (for example, they have previously been offered the chance to pursue a voluntary return and not taken it up or complied with the process, or, they have been living and working illegally in the UK for some time, or they have made attempts to frustrate their return), this should be regarded as a matter of non-compliance.

By definition, all individuals who, for example, enter the UK illegally or who stay in the UK beyond the date of expiry of their leave, will have been non-compliant with immigration law. However, some acts of non-compliance are more significant than others, and the level of non-compliance should

be regarded as indicative of the appropriateness of detention for the purpose of removal.

Positive indicators of compliance will include:

- having fully complied with conditions of leave or any restrictions attached to temporary admission, immigration bail or release on restrictions
- having been compliant with attempts to effect voluntary return
- having made any immigration applications at the earliest opportunity

Negative indicators of compliance will include:

- having previously absconded
- having failed to comply with conditions of stay, including having failed to comply with conditions of temporary admission, immigration bail or release on restrictions
- having failed to comply with attempts to effect voluntary return
- having made a protection or human rights claim only after having been served with a negative immigration decision unless there is good reason for them to have delayed the claim
- having been in the UK illegally for a protracted period of time without having come into contact with the authorities
- having engaged in 'nationality swapping'
- having failed to comply with re-documentation processes

The level of non-compliance will be considered against the level of risk and alongside any other relevant immigration factors.

Balancing risk factors against immigration control factors

Consideration of the risk and immigration issues set out above should result in a determination of whether the risk factors are outweighed by the immigration factors. An individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained. The _Evidence_assessment_tableguidance below is designed to assist decision makers in weighing the evidence.

Evidence assessment

As in any case of potential detention, in order to detain there must be a realistic prospect of removal within a reasonable period. In cases of adults at risk in which this condition is met, the following is a guide to balancing any identified risk issues relating to the individual concerned against the immigration considerations. In all cases, the primary consideration should be based on the length of time for which detention is expected to be required and the likely impact of the length of detention on the individual given the evidence of risk.

(…)

Level 2

Where there is professional and / or official documentary evidence indicating that an individual is an adult at risk but no indication that detention is likely to lead to a significant risk of harm to the individual if detained for the period identified as necessary to effect removal, they should be considered for detention only if one of the following applies:

- the date of removal is fixed, or can be fixed quickly, and is within a reasonable timescale and the individual has failed to comply with reasonable voluntary return opportunities, or if the individual is being detained at the border pending removal having been refused entry to the UK

- they present a level of public protection concerns that would justify detention – for example, if they meet the criteria of foreign criminal as defined in the Immigration Act 2014 or there is a relevant national security or other public protection concern

- there are negative indicators of non-compliance which suggest that the individual is highly likely not to be removable unless detained

Less compelling evidence of non-compliance should be taken into account if there are also public protection issues. The combination of such non-compliance and public protection issues may justify detention in these cases."

(D) OUTLINE OF THE PARTIES' CASES

83. The Claimant challenges her detention on the following grounds:

i) The Defendant's detention of the Claimant was unlawful from 4 (or 1) January 2017 until 21 April 2017, or from any period between those dates, as it was contrary to the second and third principles in *Hardial Singh*. The Claimant, as an asylum seeker with a pending application and no notification of any deportation decision, was detained for an unreasonable period and it was at all material times manifestly apparent to the Defendant that the Secretary of State would not be able to effect deportation within a reasonable period.

ii) The Secretary of State erred and acted unreasonably in continuing to detain the Claimant in circumstances where she had accepted that the Claimant was an adult at risk under AAR.

iii) In particular, the Defendant erred and acted unreasonably in maintaining by letter dated 6 March 2017 that, notwithstanding the Claimant's account of ill-treatment meeting the definition of torture, the Claimant would pose a risk of harm to the public if released.

iv) The Defendant erred and acted unreasonably in maintaining by letter dated 6 March 2017 that detention of the Claimant should be maintained as it was considered that her removal could be enforced within a reasonable timescale. The Claimant's removal was clearly not imminent at the date of the Rule 35 report because at all material times (including as at 5 March 2017) the Claimant's asylum application remained outstanding. The Claimant's removal date was not fixed and could not be fixed within a reasonable timescale as a decision on her asylum claim remained pending. In the event that the Claimant's asylum claim were refused she would be entitled to a right of appeal. In the event that the claim were certified pursuant to section 94 of the 2002 Act as clearly unfounded, the Claimant would have an opportunity to challenge that decision by way of judicial review.

v) The reasons given by the Defendant for continuing to detain the Claimant upon receipt of the Rule 35 report were unreasonable. Amongst other things, the Defendant was wrong to consider that the Claimant posed a risk of harm when:

a) The Claimant's conviction was not for a violent offence

b) The Claimant had no previous or subsequent convictions and did not fall within the automatic deportation regime

c) The Claimant complied with reporting requirements

d) The Claimant was granted bail prior to conviction and sentencing.

84. The Claimant seeks permission to amend to add to further grounds which were included in draft amended grounds dated 19 October 2017:

i) (Ground 1A) In the event that the Claimant was detained solely under immigration powers from 1 January 2017, as contended by the Defendant in her detailed grounds of defence, then the Claimant was detained unlawfully as the Defendant failed to conduct a detention review within 24 hours and thus acted contrary to her policy.

ii) (Ground 6) The Defendant unreasonably delayed in failing to release the Claimant from 5 April 2017, at which point she was actively considering granting the Claimant temporary admission, until the Claimant's actual release on 21 April 2017.

85. The Defendant denies that the Claimant's detention was contrary to the *Hardial Singh* principles and, in particular, the second and third of those principles. The Defendants says the Claimant's detention did not exceed a period that was reasonable in all the circumstances; and nor was it apparent that there was not a sufficient prospect of removing her within a reasonable period until the decision was made to release her.

86. The Defendant says the following facts are particularly pertinent:

i) The Claimant was assessed as posing a high risk of absconding, and that was clearly the right assessment in circumstances where the Claimant had chosen to remain in the UK unlawfully as an overstayer, made her claim for asylum at a very late stage and been convicted of an offence of dishonesty.

ii) The Claimant also posed a risk of re-offending and therefore of harm. She had been convicted of six offences of fraud/theft.

iii) There was no suggestion from healthcare that the Claimant should have been released on medical grounds, and there was nothing to suggest that the Claimant did not have appropriate access to healthcare while in detention.

iv) The Claimant had a valid travel document.

v) The Claimant's asylum claim was being actively progressed. The Claimant does not argue that there was any breach of the fourth *Hardial Singh* principle

vi) The Defendant considered there to be a real prospect of her asylum claim being certified, as a consequence of which any appeal would have to be brought out of country.

87. The Defendant submits that during the period of the Claimant's detention, it was reasonable to expect her removal within a matter of weeks, rather than months, taking account of the 14-day "service level agreement" aspiration referred to in § 19 above, the lack of merit in the Claimant's asylum claim and its prospects of certification, and the fact that everything else was in place. Even if the foreseeable period was months rather than weeks, that was a reasonable period given the risk of the Claimant absconding and the lack of merit in her asylum claim. Even as little as a 50% chance of certification could be enough to make a period of detention reasonable.

88. As to the AAR policy, the Defendant makes the point that the policy does not provide that all persons found to fall within the policy will be released; the contrary is expressly stated. It cannot be said that the Defendant has misunderstood her policy, nor that her decision to maintain decision was *Wednesbury* unreasonable. The Defendant properly balanced the fact that the Claimant fell within the policy against the countervailing immigration factors in favour of maintaining detention and reached a reasonable conclusion that detention should be maintained.

89. Further, there was no requirement that the Claimant's removal had to be "*imminent*": the question was whether there was a sufficient prospect of removal within a reasonable period of time, having regard to all of the relevant circumstances. The fact that the Claimant would have a right of appeal or be able to seek judicial review of a certified decision did not mean that it was unreasonable to conclude that her removal could be effected within a reasonable period of time. Not all individuals choose to appeal; and a process exists for expedited appeals. In any event, the weight to be given to any time spent challenging a decision would in part depend on the merits of that challenge: see the discussion in *Lumba* referred to above.

90. The Defendant further submits that none of the reasons given for maintaining detention after receipt of the Rule 35 report could be said to be irrelevant or matters which it was *Wednesbury* unreasonable to take into account; and nor could the Defendant's decision to maintain detention be said to be *Wednesbury* unreasonable. Moreover, the concept of public harm is not confined to physical harm. The Defendant was entitled to consider that the Claimant posed a risk of harm in

circumstances where she had been sentenced to 30 weeks' imprisonment for dishonesty offences. That was neither a misreading of the Defendant's policy nor unreasonable.

(E) ANALYSIS

(1) Overall approach

91. The case law summarised above, in particular the decision in *A v Secretary of State for the Home Department,* indicates that it is for the court to decide whether a period of detention was reasonable under *Hardial Singh* principles, with the result that a detention may be held to be unlawful even if the Defendant's decisions would not be held to be irrational.

92. The Defendant submits that the converse is also true: even if detention reviews indicate that decisions to maintain detention have been affected by public law errors, the detention may still be lawful under *Hardial Singh* principles.

93. Thus, the Defendant submits, the contents of her officers' detention reviews are relevant only:

    i) as evidence of what the Defendant knew at the relevant time;

    ii) on any incidental questions of fact which may arise; and

    iii) potentially, to material public law error, though it was rare for detention to be held to be unlawful solely on that ground.

94. On this approach it would follow, for example, that the fact that a decision to detain or to continue detention is tainted by taking into account irrelevant considerations, or a failure to take account of relevant considerations, is irrelevant to the *Hardial Singh* analysis. Alternatively, the Defendant submits, it would be relevant only to any question of damages.

95. In principle, a decision to detain a person that is vitiated by a public law error bearing on and relevant to the decision to detain is unlawful. The same must, in my view, apply to a decision to continue to detain a person, particularly where a series of ongoing periodic decisions is made, upon each review of the detention, as to whether it should be continued. It would be absurd to hold that, for example, a rational detention decision at the outset would prevent any subsequent irrationality in decisions to continue detention from being unlawful.

96. Further, these considerations must apply regardless of the nature of the public law error – error of law, *Wednesbury* unreasonableness, failure to take account of relevant considerations, the taking into account of irrelevant considerations – provided that the error had a bearing on and was relevant to the decision to detain.

97. As indicated in *Lumba* § 30, the *Hardial Singh* principles reflect basic public law duties to act consistently with the statutory purpose (*Padfield*) and reasonably in the *Wednesbury* sense. They are thus an application of general public law principles, and may be regarded as a subset of the public law principles applicable to any decision to detain or to continue a detention.

98. However, other factors complicate the position here.

99. The first is that, whilst the Claimant's Grounds quote § 66 of *Lumba*, with its reference to detention being unlawful if the relevant decision is affected by public law error (see § 53 above), with the exception of the grounds based on the AAR policy the Claimant's Grounds and Amended Grounds are based on the second and third *Hardial Singh* principles as opposed to any broader public law allegations.

100. Secondly, whilst a detention decision affected by public law error may be unlawful, under section 31(2A) of the Senior Courts Act 1981[5] the court must refuse to grant relief if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Similarly, in a claim for false imprisonment only nominal damages will be awarded if the court finds that the claimant could and would have been detained even had the error not been made: see *Lumba* § 71 quoted in § 56 above.

101. Thirdly, however, there may well be significant overlap between the considerations likely to be relevant to any analysis under general public law principle, and those relevant to the second and third *Hardial Singh* principles: such as proximity in time of removal, risk of absconsion and risk of reoffending. In the present case, the issues on which the Claimant alleges the Defendant took account of irrelevant considerations, or failed to take account of relevant considerations – for example in relation to absconsion risk – are (as *R(I)* and *Lumba* show) relevant as part of the *Hardial Singh* analysis as well as to any broader public law analysis.

102. In the light of these points and the way in which the Claimant's case has been framed, the correct approach seems to me to be to consider the Claimant's claim in respect of the detention period as a whole under the second and third *Hardial Singh* principles, and her claim arising from the Rule 35 report and AAR policy under standard public law principles, recognising however the potential for overlap of issues as indicated above.

(2) Detention up to the Rule 35 report

103. The Claimant became an overstayer on 18 February 2016 when her student visa expired. She had applied on 16 January 2015 for further LTR, but that application was refused on the basis that a false certificate of sponsorship number had been used and thus a deception practiced. According to the Upper Tribunal's Notice of Decision dated 18 April 2016, the initial decision letter had concluded that the Claimant herself had practised deception, but the administrative review letter of 25 January 2016:

> "maintained the Decision but on rather different terms. In particular, the administrative review letter did not suggest that [the Claimant] had actively practised deception. Rather, it was her duty to ensure submitted documents were accurate and genuine. The summary grounds in the AOS likewise conclude that "someone" had practised deception."

The tribunal held that the application nonetheless must fail under paragraph 322(1A) of the Immigration Rules, which applied where false documents had been submitted

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[5] "(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

"whether or not to the applicant's knowledge".

104. Following the rejection of the Claimant's administrative review application on 25 January 2016, there is no indication that the Secretary of State sought to detain her for removal prior to her arrest by the police on 1 April 2016, or during her subsequent period of bail pending trial. Instead she was placed on reporting conditions.

105. At the end of the custodial part of the Claimant's sentence at the beginning of January 2017, she was immediately detained pending removal under the Immigration Acts. As noted earlier, the reasons for detention set out in the IS.91R notice did not suggest that Claimant's removal was imminent. The reason given for detention was that the Claimant was "*likely to abscond if given temporary admission or release*", based on the factors that the Claimant had:

    i) previously failed to comply with conditions of her stay, temporary admission or release;

    ii) used or attempted to use deception in a way that led the Defendant to consider that she may continue to deceive;

    iii) not produced satisfactory evidence of her identity, nationality or lawful basis to be in the UK; and

    iv) previously failed or refused to leave the UK when required to do so.

106. So far as the subsequent documents reveal, factors (i) and (iii) were based on the fact that the Claimant was an overstayer.

107. Factor (ii) may well have been based on the Claimant's conviction for fraud (as to which see below). If, on the other hand, the decision-maker did have in mind the sponsorship issue then he/she was in error because, as the Upper Tribunal had noted, the Secretary of State's administrative review finding did not conclude that the Claimant had herself practised deception.

108. Factor (iv) may have referred to the mere fact of the Claimant being an overstayer. Alternatively, if it referred to the Claimant's having declined to accept voluntary return in October 2016, then it took account of an irrelevant consideration given that the Claimant had claimed asylum (see § 66 above).

109. The Defendant has provided no witness evidence to clarify the reasoning set out in the notice of detention, or indeed any other matters relevant to the Claimant's initial or continued detention.

(a) Timescale for dealing with asylum application

110. The first and second 5 January detention reviews, 13 January review, 27 January review and 24 February review referred to a "*service level agreement*" under which, the reviews said, a written decision would be made on the Claimant's asylum claim within 14 days.

111. However, as noted earlier (§ 19 above) the Defendant has explained in her Detailed Grounds of Defence that the 14-day period (a) was no more than an internal aspiration rather than a commitment or policy, (b) meant 14 days from the date of acceptance of the referral by the asylum team and receipt of the Home Office file, and (c) did not take account of the separate Article 8 component of a decision.

112. In the present case, the 27 January and 24 February reviews noted that an ACD referral had been made on 23 January, and that on or by 6 February the file had been sent for "***SPOE***" (second pair of eyes) review. The Defendant's Supplemental Information dated 28 November 2017 explains that:

> "In practice, the Defendant's officials often refer decisions involving LGBT issues or section 94 certification to a more senior official for authorisation before it is finalised. The Defendant wishes to make clear that there is no policy requirement (published or otherwise) for an "SPOE" assessment for all asylum claims, or for asylum claims of the type pursued by this Claimant."

113. The Defendant submits that she was entitled to take account of the 14-day aspiration when considering how long it was likely to take to effect the Claimant's removal, and that as at January 2017 it was foreseeable that the Claimant would not be detained for much more than 14 days.

114. By contrast, the Defendant's letter of 24 November 2016 to the Claimant began:

> "Further to your asylum claim of 14 June 2016, I am writing to inform you that we are not able to make a decision on your claim within 6 months of your application date.
>
> Unfortunately, at this point in time we are unable to advise exactly when we will be able to deal with this particular claim but we will endeavour to ensure that it is undertaken as soon as we are in a position to proceed with it."

No further explanation was provided. The letter did not, for example, state that the Defendant was unable or unwilling to conduct the Claimant's substantive asylum interview while the Claimant was in prison.

115. The Defendant submits that this letter is, however, of limited relevance because the Claimant was not in immigration detention at the time, and it is common practice to wait until the end of a custodial criminal sentence before determining an asylum claim.

116. Counsel for the Claimant handed up at the hearing information published on the government website www.gov.uk/claim-asylum stating that "*Your application will usually be decided within 6 months*" but may take longer if it is complicated, for example if "*you need to attend more interviews*" or "*your personal circumstances need to be checked, for example because you have a criminal conviction or you're currently being prosecuted*". It appears from the layout of this document that the 6-month period runs from the date of the substantive asylum interview, which in the present case took place on 4 January 2017.

117. The Defendant did not object to this material being provided to the court, but I indicated that as it had been produced only at the hearing I would give the Defendant an opportunity to respond to it after the hearing.

118. At the hearing counsel for the Defendant made the point that the 6-month statement appeared to apply across the board, whereas the cases of persons in detention may be prioritised. This could be inferred from a note on the Case Record Sheet for Claimant dated 12 April 2017 stating "*The subject is due to be released so the provisional clearance/review date reflects the diminished priority*."

119. The Defendant's Supplemental Information dated 28 November 2017 states:

> "There were no relevant policies modifying the timeframe within which this Claimant's asylum claim was to be determined because of her detention. There are, however, a variety of other tools for ensuring the expeditious resolution of the asylum claims of those in immigration detention, including amongst others the service level agreement referred to in this case, and intra-departmental requests for expedition."

120. Viewing this evidence in the round, the significant qualifications to the 14-day aspiration referred to in the "service level agreement" (which was in any event not produced to the court or the subject of any witness evidence) mean that the court is able to place relatively little weight on it as a guide to the likely actual timescale in which, as at the time she was detained, the Claimant's asylum claim would be dealt with. Overall there is no evidential basis on which to conclude that the claim would be dealt with (even leaving out of account any in-country appeal in the event of a non-certified refusal) in less than a period of several weeks or months.

(b) Merits of asylum claim and prospective certification

121. The first and second 5 January review forms and the 13 January review forms each stated that if the Claimant's asylum claim could not be certified under section 94 (of the Nationality and Immigration Act 2002) then it was likely to be certified under section 96.

122. That was clearly erroneous: the Claimant having made no previous asylum or other claim carrying a right of appeal under section 82, there could be no question of her present asylum claim being certified under section 96. Further, removal of the Claimant would be to China, which is not one of the 'safe' countries listed in section 94(4), thus precluding certification under section 94(3).

123. Any certification could therefore have been made only under section 94(1), which would have required the decision-maker to conclude that the Claimant's asylum claim was clearly unfounded, applying the anxious scrutiny standard: as to which standard see, e.g., *R (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116 § 24 (*"ensuring that decisions show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account"*).

124. The authorising officer's comments on the second 5 January review, both officers' entries on the 24 February review form, and Mr Robinson's entries on the 24 March review form, each indicated that the prospect of removal within a reasonable time was considered to be conditional on certification of the Claimant's asylum claim: *"If the subject's claim is refused and certified, removal can be effect within a reasonable period of time"*. It was not suggested in those reviews that removal could be effected within a reasonable time in the absence of certification.

125. Mr Robinson's comments in the 27 January, 24 February and 24 March detention review forms indicated that the fact that the Claimant did not claim asylum until after the refusal of her judicial review application "*places doubt on her credibility and suggests that it is an attempt to frustrate removal*". There is no indication that Mr Robinson, in forming this view, consulted the team considering the Claimant's asylum claim. Indeed it appears from the Case Record Sheet that by 30 March 2017, one day after the authorising officer's decision on 29 March 2017 to continue detention, the asylum team had produced a draft non-certified refusal.

126. The Defendant nevertheless invites the court to conclude that there was a sufficient prospect of removal within a reasonable time because the asylum claim might well have been certified; and that, in addition, the lack of merit in the Claimant's asylum claim is relevant in considering what would be a reasonable period of time under the *Hardial Singh* principles: see *Lumba* §§ 120-121 (quoted in § 67 above).

127. Lord Dyson in those passages drew a distinction between hopeless or abusive challenges and meritorious challenges, noting that:

> " … There exist statutory mechanisms to curb unmeritorious appeals. If a claim is "clearly unfounded", certification under section 94(2) of the Nationality, Immigration and Asylum Act 2002 precludes an in-country appeal. If a claim relies on a matter which could have been raised earlier in response to an earlier immigration decision or in response to a "one-stop notice", certification under section 96 of the 2002 Act precludes any appeal at all. In any event, a court considering the legality of a detention will often be able to assess the prima facie merits of an appeal. Where, as in the case of Mr Lumba, there have been orders for reconsideration, or where there has been a grant of permission to appeal to the Court of Appeal, the court will easily recognise that the challenge has some merit. Conversely, there may be one or more determinations from immigration judges dismissing claims as wholly lacking in credibility."

128. In the present case, none of those specific bases on which one might conclude that an asylum claim/appeal is hopeless was available to those making decisions on the Claimant's detention, nor is available to the court now. In particular, there has been no certification and no relevant determination by an immigration judge. Nor has the Defendant adduced any witness evidence in support of the proposition that, as at the time of the detention, there were grounds on which the asylum claim should be regarded as so weak as to be likely to be certified under section 94 as clearly unfounded applying the anxious scrutiny standard.

129. The Claimant's asylum claim was made late in the sense that she had been in the UK since September 2013, yet claimed asylum only in June 2016 after the rejection in December 2015 of her further LTR application and in April 2016 of her judicial review application. Under section 8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 a failure to make an asylum claim before being notified of an immigration decision is a matter to be taken into account, as damaging the claimant's credibility, when deciding whether to believe a statement made by the claimant, unless the claim relies wholly on matters arising after the notification.

130. In the present case, two of the bases for the Claimant's asylum claim (her alleged conversion to Christianity in October 2016 and her alleged realisation of her sexuality in March 2016) arose either after or at about the same time as the immigration decision. Others (based on physical abuse during childhood, diabetes treatment in China and threats/harassment in China after raising issues of corruption) predated it.

131. This is therefore a case where section 8(5) applied. At the same time, however, in circumstances where two free-standing bases for an asylum claim could, if true, not have been raised at an earlier stage, it would not be logical to assume from the mere fact that the claim has been late that it is weak as a whole, nor that it is clearly

unfounded and likely to be certified, particularly at a stage before the asylum claim has been considered by any relevant decision-makers.

132. In oral submissions the Defendant handed up (without objection from Claimant) a copy of the actual asylum decision, which is dated 3 November 2017. The decision rejects the Claimant's claim, but does not certify it as clearly unfounded.

133. Counsel for the Defendant makes the point that the decision indicates that after the end of the Claimant's detention, the Claimant had a supplementary asylum interview in August 2017 and submitted further evidence and representations in the period July to September 2017. This subsequent information may have saved the claim from being certified as clearly unfounded.

134. For example, the Claimant claims to have converted to Christianity while in prison, in October 2016, and to fear persecution if returned to China. The decision-maker accepted the Claimant's claim to have converted to Christianity but rejected the claim that she would face persecution. Part of the reason (the Defendant says the key reason) for accepting the Claimant's claimed conversion was a baptism certificate and character statement provided after the Claimant's release from detention.

135. The Defendant submits that (a) the court may infer that, prior to the submission of the further evidence/representations, the Claimant's asylum claim was clearly unfounded and thus had a reasonable prospect of being certified under section 94, and/or (b) the lack of merit in the Claimant's asylum claim, as it stood during her detention, is in any event relevant to the reasonableness of the Claimant's period of detention.

136. I doubt it is possible to draw a reliable inference, based on the contents of a subsequent non-certified asylum decision, that as at a certain date the asylum claim ought to be regarded as having been unmeritorious, or even so weak as to be likely to be certified (applying the appropriate standard) as clearly unfounded. The subsequent asylum decision seeks to assess the strength of the claim on the totality of the evidence before the decision-maker when the decision is made, rather than to present a complete picture of the claim as it developed over time. It would not be proper to assume that if one simply subtracts from the contents of the ultimate asylum decision those parts which appear to be based on later evidence, then what remains presents a fair picture of the evidence available to support the Claimant's asylum claim at earlier stages in the process.

137. I was also handed at the hearing a typed transcript of the notes taken at the Claimant's substantive asylum interview on 4 January 2017 (the manuscript version of which was in the hearing bundle) though no detailed submissions were made in relation to it by either party. The transcript includes references to the Claimant's conversion to Christianity, realisation of her lesbianism, mental torture and bullying from relatives and family friends in China, and problems arising from misdiagnoses in China of her diabetes. I have read the transcript carefully, though for the reasons indicated below have not found it to be of particular assistance in resolving this case.

138. The section of the transcript dealing with the Claimant's conversion to Christianity, i.e. the subject-matter of the submissions referred to in § 134 above, was (in its entirety) as follows:

> "Q79 What religion are you?
>
> A79 Christian.
>
> Q80 On your screening interview you said no religion.

A80 I have changed it since I came into HMP. This has been amended on my HMP record. (Shows a letter from chaplaincy team.)

Q81 Why change in HMP?

A81 Because I had problems & no family XXX outside I had talking therapy and I had nothing here. No friends or family here. Health problems, nightmares and panic attacks so doctor referred me to chaplaincy.

Q82 Whilst anyone can talk to chaplaincy you do not have to change religion or 'sign up' XXX one.

A82 Because of my cellmate she talked to me and helped you and my grandma in a Christian XXX did not have a religion because they belong to communist party. And other relatives, my grandfather, uncle also belong.

Q83 Have you been baptised in Christian faith?

A83 No, not yet

Q84 When will that be?

A84 I don't know, what is baptised? I go to the choir, chapel, bible study, certificate shown of completion of outrageous women, bible study course dated 16/12/16.

Q85 How long have you been going to the chapel?

A85 From October 2016

Q86 How often attend?

A86 Every Tuesday is course, Sunday chapel in morning – afternoon is choir.

Q87 Will you continue with your religious studies when you leave HMP?

A87 Yes, yes

Q88 Do your parents know that you are now a Christian?

A88 No (head shaken)

Q89 Do you have Christian friends back in China?

A89 No

Q90 What's the view in Christianity of Gay people?

A90 I don't know

Q91 Has this not been raised by you as you are now gay?

A91 E.g. bible studies every time they have a topic, relationships, love. Man and women and gay relationships are same problems you can deal with them. I want to discuss it in other HMP Bronzefield in LGBT group but I was transferred here. They do not have such group here. I discussed it with doctor and mental health team and they said if they get one they will let you know."

139. The asylum decision dated 3 November 2017 highlights two points arising from this:

i) *"... you were asked about whether you have been baptised. You stated you didn't know what baptism is. Considering this is a fundamental part of entry into Christianity it is unclear as to how you had not have [sic] come across this."*

ii) *"you are asked about how your religion deals with gay people to which you reply you don't know. Considering you say you read the bible it is not reasonable you had no knowledge on this issue."*

140. There is some force in the view that apparent ignorance of baptism undermined the Claimant's claim recently to have converted to Christianity, though the Claimant seems to have given contradictory answers at A83 and A84. On the other hand, the further point about knowledge of "*the view in Christianity of Gay people*" strikes me as debatable given the wide range of views held by Christians on the topic of homosexuality.

141. Overall, I do not consider that the brief series of questions and answers quoted above provides a sufficient basis on which to conclude that the Claimant's asylum claim, in so far as it was based on her alleged conversion to Christianity, was hopeless or clearly unfounded.

142. A large part of the asylum interview on 4 January 2017 dealt with the issue of the Claimant's alleged realisation of her sexual identity: most of Questions 8-39, 58-66, 70-78, 90-96 and 120-126 (and/or the answers given to those questions) dealt with this topic. However, the reasoning in the asylum decision on this subject was based almost entirely on the Claimant's subsequent post-detention interview and witness statement. The Defendant did not seek to demonstrate that the contents of either the 4 January 2017 interview or the subsequent asylum decision provided grounds on which to conclude that this element of Claimant's asylum claim was, as at the time of her detention, evidently weak or liable to be certified; and having read both documents, that is not a conclusion I consider it reasonable to draw.

143. The Defendant submits that the asylum decision indicates that there were doubts about the Claimant's credibility, citing §§ 62-64 of the decision. In addition to the point made earlier about a post-immigration decision asylum claim falling within section 8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the asylum decision indicates:

i) that it would have been reasonable for the Claimant, on her arrival in 2013, to claim asylum based on her alleged fears relating to having reported corruption and the treatment of diabetics in China, rather than applying for a Tier 4 visa; and that her failure to do so was behaviour falling within section 8(2) of the Act (which covers behaviour designed or likely to conceal information, mislead, or obstruct or delay the handling or resolution of a claim or the taking of a decision in relation to a claimant); and

ii) that the Claimant had engaged in further *"behaviour likely to mislead or obstruct and delay the handling and resolution of a claim"* within section 8(2):

> "This behaviour comes in the form of your tier 2 visa application whereby it was concluded you had provided a falsified certificate of sponsorship and although this was sent for review the decision made was upheld. You also displayed such behaviours by not including a fundamental claim reason until your last substantive interview despite undergoing administrative reviews, judicial reviews, previous interviews and screening interviews. You have also pleaded guilty and been convicted of making false representations through fraud and theft which is behaviour considered likely to mislead and the numerous appeals adding of new information such as a rule 35 report coming to light years down the line could be seen as an attempt at frustrating the immigration decision making process. This damages your credibility under section 8(2)."

144. Point (i) above has force to the extent that the Claimant made no asylum claim on her arrival in 2013, but only in mid 2016 after exhausting her last avenue of challenge to the refusal of further LTR, even though some of the grounds of which she claimed asylum had already arisen.

145. Point (ii) is in part open to question:

i) As to its first limb (certificate of sponsorship), the Upper Tribunal decision quoted in § 103 above stated that *"... the administrative review letter did not suggest that [the Claimant] had actively practised deception. Rather, it was her duty to ensure submitted documents were accurate and genuine. The summary grounds in the AOS likewise conclude that "someone" had practised deception"*. The author of the asylum decision does not appear to have taken account of this point, which significantly reduces the force of the suggestion that the Claimant thereby engaged in *"behaviour likely to mislead or obstruct and delay the handling and resolution of a claim"*.

ii) The second limb presumably refers to the Claimant's failure to mention until her second substantive asylum interview her alleged fears arising from having reported corruption in China.

iii) The third point is that the Claimant's guilty plea and conviction of dishonesty offences were behaviour likely to mislead. Section 8(2) is not expressly confined to matters related to a claimant's immigration status or asylum claim, and in principle a conviction for dishonesty might be regarded as falling within it. In any event, regardless of section 8(2), a conviction for dishonesty even on an unrelated matter could reasonably be taken into account in assessing an asylum claimant's overall credibility.

iv) Fourthly, the decision states that *"the numerous appeals adding of new information such as a rule 35 report coming to light years down the line could be seen as an attempt at frustrating the immigration decision making process"*. Following the refusal of her further LTR application in December 2015, the Claimant had applied for administrative review and then judicial review. So far as appears from the evidence, the Claimant had made no other appeal or application. The reference to "*numerous appeals*" thus appears to be wrong. The reference to *"a rule 35 report coming to light years down the line"* is also perplexing. The evidence indicates that a Rule 35 report was

prepared in March 2017 after the Claimant had been in detention for about 2 months. There was no previous occasion on which any question of a Rule 35 report seems likely to have arisen. The Rule 35 report referred to abuse which the Claimant said she had suffered as child from her family and a neighbour; to having been beaten for going to church with her grandmother; and to the Claimant's sexuality. The asylum decision does not indicate when or why such matters ought previously have been raised, and as noted above the Claimant does not claim to have realised her sexuality until early 2016 (following which she included it in her June 2016 asylum claim) or to have converted to Christianity until October 2016. On that basis, the suggestion that these matters "*could be seen as an attempt at frustrating the immigration decision*" appears to be entirely unjustifiable.

146. Viewing the matter in the round, and as matters stood from January to April 2017, it seems to me fair to say that the Claimant's asylum claim did not appear to be obviously compelling, but that it was not (applying the requisite standard of scrutiny) clearly unfounded so as to make certification likely.

147. If the asylum claim was not so weak as to be clearly unfounded, the Defendant did not adduce evidence as to the period in which the Claimant could reasonably have been expected to be removed. Counsel for the Defendant at one stage submitted that it was sufficient for there to be a reasonable prospect of the Claimant being removed within 3½ months, because that was the period for which she was in fact detained. However:

i) the relevant question is not whether, at the time of detention/continued detention, there was a reasonable prospect of the Claimant being removed within the (at that stage unknown) period for which she was in fact detained, but rather whether there was a reasonable prospect of her being removed within a reasonable time; and

ii) if it was not correct to expect the Claimant's asylum claim to be certified, then the evidence before the court does not establish that there was a reasonable prospect of the Claimant being removed within 3½ months.

148. Ultimately the Defendant's answer was that if the asylum decision were not certified, then the Secretary of State would review the position, and in the meantime the Claimant's detention from early January 2017 to late April 2017 was justifiable in the circumstances as a whole, including the risk of the Claimant absconding and the risk of her reoffending. I therefore turn next to those risks.

(c) Risk of absconsion

149. The first 5 January review form as completed by Mr Rajan made no mention of any risk of absconsion, recording instead that the Claimant had previously been on reporting conditions and had complied with them.

150. By contrast, the second 5 January review made no mention of the Claimant's previous compliance with reporting conditions, stating instead that she was "*unlikely to adhere to reporting conditions*". No explanation was provided for this statement. The authorising officer went even further, referring to the Claimant as *"a deceptive immigration offender who has a high risk of absconding"*. Again, no explanation was provided.

151. The statement that the Claimant was unlikely to adhere to reporting conditions was then repeated in the 13 January 27 January, 24 February and 24 March detention reviews.

152. The Defendant submits that the Claimant clearly posed a high risk of absconding because:

i) she had committed six offences of fraud/theft, which indicated that she did not respect the UK's laws;

ii) her offences involved dishonesty;

iii) she had chosen to remain in the UK unlawfully as an overstayer since the expiry of her leave in February 2016, thus showing limited respect for immigration law;

iv) she had made her claim for asylum at a very late stage;

v) she had made an unmeritorious asylum claim;

vi) she had no family ties in the UK; and

vii) she had failed to report on some occasions.

153. However, each of those matters had already occurred by 14 June 2016, when the Claimant made her asylum claim, and yet she did not abscond. Instead, as the Defendant's letter of 6 March 2017 and Case Record Sheets indicate, the Claimant "*consistently reported fortnightly from 17/03/2016 until her incarceration on 22/09/2016*".

154. The reference in (vii) above to certain previous non-reporting arises because according to the Defendant's letter of 6 March 2017, the Claimant was "*handed a notice requiring you to report on 21 January 2016 and fortnightly thereafter*", but failed to report on 21 January 2016. According to a note on the Case Record Sheet, the Claimant failed to appear for the first two reporting events on 21 January and 4 February 2016. The Claimant indicates in her witness statement that she reported on each occasion for which she had actually received a notification of a reporting date, saying "*I reported every time I was asked to report*" and "*I do not understand why the Home Office have said that I was a previous absconder. I remember the Home Office sent me a letter dated 3 March 2016 stating that I failed to report on 04.02.16 but I did not receive any letter before this asking me to report*". In any event, the Defendant's letter of 6 March 2017 indicates that the Claimant complied with all her reporting requirements from 17 March 2016 to 15 September 2016.

155. The Defendant submitted that once the Claimant had been convicted of fraud offences, she should be considered more likely to fail to comply with reporting conditions and to abscond. However, the Claimant committed those offences in March/April 2016. Having done so, she continued to comply with immigration reporting conditions, did not abscond upon arrest, was granted and (so far as the evidence indicates) complied with criminal bail conditions from 1 April to 22 September 2016, and entered a guilty plea. In those circumstances, it does not appear logical to conclude from the fact of her subsequent conviction in September 2016 that she had thereby become a person who was unlikely to comply with reporting conditions and who presented a high risk of absconding.

(d) Risk of reoffending

156. The second 5 January detention report stated that the Claimant *"presents a high risk of recidivism"*. Similar statements were made in the 13 January, 27 January, 24

February and 24 March detention reviews. The detention reviews do not explain this view, and the Defendant has adduced no evidence in this regard.

157. The only available details of the offences are the statement in the Defendant's letter of 6 March 2017 that *"in March and April 2016 [the Claimant] had entered a number of stores and purchased various items of high value goods with fraudulent credit cards. You appeared at Southwark Crown Court on 22 September 2016 and pleaded guilty to making false representations/fraud. On 22 September 2016 you were sentenced to 30 weeks imprisonment"*. The evidence before me does not include the charges themselves or any transcript of the sentencing remarks.

158. It appears to be common ground that there were no previous or subsequent offences.

159. The fact that the Claimant had committed this series of offences over a two-month period of time gives reason to believe that there was some risk that she would offend again, but does not without more justify the conclusion that there was a high risk of recidivism. The Defendant's Detailed Grounds of Defence did not go that far, stating merely that "*The Claimant also posed a risk of re-offending and therefore of harm*".

160. An entry on the Case Record Sheet for the Claimant stated *"there is no evidence that the subject presents a risk of harm to the public, however the subject was convicted of a financially motivated offence and would appear to be unable to support herself without recourse to crime; she would therefore present a high risk of recidivism"*. However, it is unclear on what basis it was assumed, or should reasonably be assumed, that the Claimant was unable to support herself without recourse to crime. There was, for example, no evidence that the Claimant's offences in March/April 2016 were committed in order to support herself or, if so, the manner in which her financial circumstances had changed since her arrival in the UK in September 2013 (since when she appears to have supported herself until March 2016).[6]

161. Counsel for the Claimant made the further point that as an asylum seeker the Claimant would be entitled to support under the Immigration and Asylum Act 1999. As this was a new point made at the hearing, I permitted the Defendant to make a supplementary written submission on it after the hearing. The Defendant's Supplemental Information dated 28 November 2017 states:

> "It definitely does not follow from (i) the Defendant's assessment, based on the information she had available to her at the time, that the Claimant had no independent means of supporting herself and was therefore at high risk of recidivism that (ii) she would invariably have been entitled to support under section 95 of the Immigration and Asylum Act 1999 had she applied for it. The assessment of the Claimant's risk of reoffending was based on her previous conduct together with the absence of any obvious means of alternative support. The assessment of eligibility for s.95 support depends upon a 35 page application form[7], which is accompanied by 17 pages of guidance notes[8], which applicants must complete with relevant information in order to satisfy the Secretary of State that they are entitled to such support."

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[6] The Claimant in her asylum interview on 4 January 2017 stated that she had worked in China and saved money prior to coming to the UK.

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502968/asylumsupportform_-_Final_v21.pdf

[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/489117/help_guidance_for_asylum_support_manual_application_form_v11.pdf

162. However, the Defendant makes no specific submissions, on the basis of the application form and guidance notes (which I have read), as to any respects in which the Claimant would not have qualified for support, and none is obvious from those materials themselves. In these circumstances I see no basis on which to assume that the Claimant would *not* have qualified for support, or that she would have been likely to resort to crime in order to support herself.

163. As noted earlier, the observations in *Lumba* about the relevance of risk of reoffending, were partly based on considerations specific to deportation cases. Lord Dyson made the further points at § 109 that if a person re-offends there is a risk that (a) he will abscond so as to evade arrest, or (b) he will be prosecuted and receive a custodial sentence thus impeding his deportation.

164. Factor (a) should not be a weighty factor in the present case, given that the Claimant did not abscond to evade arrest in 2016 nor abscond from bail. Factor (b) is of potential relevance, but the strength of both factors must depend on the degree of risk that the person in question will reoffend. The most that could be said in the present case, on the limited evidence put forward, is that having committed several offences before, the Claimant might reoffend. In the circumstances, it seems to me right to attribute only moderate weight to the risk of reoffending in this case.

(e) Other factors

165. The 27 January and 24 February reviews stated that there was no evidence that the Claimant was vulnerable as defined under the 'Adults at Risk' policy. However, the Claimant makes the point that notes dated 18 January in the Claimant's patient record form stated *"Victim of torture .. – Was physically and mentally tortured by family members in china since 2013"*.

166. The Defendant points out that:

i) there was no suggestion from healthcare that the Claimant should be released on medical grounds, and there is nothing to suggest that the Claimant did not have appropriate access to healthcare whilst in detention. No complaint is made about the conditions of detention;

ii) the Claimant had a valid travel document; and

iii) the Claimant's asylum claim was being actively progressed. The Claimant does not argue that there was any breach of the fourth *Hardial Singh* principle.

(f) Overall view on pre Rule 35 report detention

167. In forming an overall view on the application of the second and third *Hardial Singh* principles to this case, I leave to one side the errors which, as detailed above, can be found in the successive detention reviews and seek instead to form a view on the totality of the objective evidence available at the time of the Claimant's detention.

168. I also bear in mind the totality of the principles set out in section (C)(2) above, including the points that:

i) the Defendant does not have to show a specific finite time within which a detained person can be removed;

ii) the Defendant does not have to show that removal is imminent;

iii) mere uncertainty about the timing or prospects of removal does not render detention unlawful; and

iv) the question is, rather, whether there a realistic prospect of removal being effected within a period that is reasonable in all the circumstances.

169. The main barrier to removal throughout this period was the Claimant's asylum claim, in respect of which a screening interview had been held in June 2016 but no substantive interview until 4 January 2017. Based on the materials provided to the court it is fair to say that the asylum claim, at least as it stood during the period of the Claimant's detention, did not seem an obviously compelling one. However, for the reasons given earlier I am not satisfied that it would have been right to view it as clearly unfounded, or that it was likely to be certified as such. Nor is there any sufficient basis to conclude that the claim was 'hopeless' in the sense used by Lord Dyson in his observations in *Lumba* discussed earlier.

170. The mere *possibility* of certification of the Claimant's asylum claim was not sufficient to mean that there was a realistic prospect of her removal within a reasonable time, unless other factors such as risks of absconsion and/or reoffending, or the relative weakness of her asylum claim, made it reasonable to detain the Claimant for a potentially prolonged period.

171. It is true that the Claimant had over a two-month period committed a series of crimes of some seriousness, and that is a significant factor against the Claimant. On the other hand, the Defendant does not appear to have regarded these crimes as rising to the level where the Claimant should be deported, and there is no evidence of previous or subsequent offending. For the reasons given in sections (E)(2)(c) and (d) above, I do not consider that there was evidence of a high risk either of absconsion or of reoffending in this case.

172. I am also not satisfied that the Claimant's asylum claim, even if not likely to be certified, was nonetheless sufficiently weak as to make a potentially prolonged period of detention reasonable when taken together with all the other circumstances of this case.

173. Ultimately, and although there are points to be made on both sides of the argument, the Defendant has not satisfied me that there was at any stage in the Claimant's detention a prospect of her removal in a reasonable time in all the circumstances such as to justify detention under the *Hardial Singh* principles. I consider it to have been apparent from the outset that there was insufficient prospect of removal within a reasonable time to warrant detention, having regard to all the relevant circumstances.

174. In case I am wrong in that conclusion, I go on to consider below the impact of the Rule 35 report and the subsequent assessment under the AAR policy, which is relevant to the Claimant's detention from 6 March 2017 onwards; and also the detention of the Claimant from early April onwards after it became apparent that her asylum claim would be refused but not certified as clearly unfounded.

(3) Detention after the Rule 35 report

175. It is common ground that following the Rule 35 report on 1 March, the Claimant was accepted by the Defendant as being a Level 2 detainee for the purposes of the AAR policy. The policy included the provision quoted earlier that:

"**Level 2**

> Where there is professional and / or official documentary evidence indicating that an individual is an adult at risk but no indication that detention is likely to lead to a significant risk of harm to the individual if detained for the period identified as necessary to effect removal, they should be considered for detention only if one of the following applies:
>
> - the date of removal is fixed, or can be fixed quickly, and is within a reasonable timescale and the individual has failed to comply with reasonable voluntary return opportunities, or if the individual is being detained at the border pending removal having been refused entry to the UK
>
> - they present a level of public protection concerns that would justify detention – for example, if they meet the criteria of foreign criminal as defined in the Immigration Act 2014 or there is a relevant national security or other public protection concern
>
> - there are negative indicators of non-compliance which suggest that the individual is highly likely not to be removable unless detained
>
> Less compelling evidence of non-compliance should be taken into account if there are also public protection issues. The combination of such non-compliance and public protection issues may justify detention in these cases."

176. The Defendant's response to the Rule 35 report is summarised in §§ 33-35 above. The key part of the reasoning was as follows:

> "Careful consideration has been given to balance your wellbeing whilst in detention against the risks of harm to the public and the need to maintain effective immigration control.
>
> You were issued with a visa which granted you entry for a limited period and a limited purpose. You were required to return to China once your leave to remain had expired. You did not do so and instead went to ground, only physically coming to our attention after your arrest in 2016.
>
> It is noted that your asylum claim was based on events occurring before your visa was issued, but there is no evidence that you disclosed your fear of persecution to the entry clearance officer or the immigration officer who saw you on arrival.
>
> There is also the fact that you have been convicted of criminal offences relating to fraud/embezzlement. Those offences demonstrate a fundamental lack of respect for this country's laws, especially those regarding financial conduct.
>
> No issues in regard to your physical or mental health, whilst in detention, were indicated. In addition the doctor has not

> indicated in the Rule 35 report that continued detention will have a negative impact on your health.
>
> A primary consideration when detaining any individual under immigration powers is the imminence of removal. Your asylum claim is being processed and we have your valid passport. If your claim is refused then it is expected that it will be certified, in which case there will be no barriers to your removal. It is expected that your removal from the UK will take place in the next six weeks. If however your asylum representations are refused with an in-country right of appeal then your detention will be reviewed immediately. If you are granted asylum you will be released.
>
> Conclusions
>
> In summary, it is acknowledged that you are an Adult at Risk but it is considered that your removal can be enforced within a reasonable timescale.
>
> There when balancing the indicators of vulnerability against the negative immigration factors highlighted above and the speed with which your removal could be effected, it is considered that the negative factors substantially outweigh the risks in your particular circumstances. Therefore a decision has been made to maintain your detention."

177. As to the first of the three specific bullet points quoted above from the AAR policy, this was not a case where the date of removal had fixed, or could be fixed quickly, given the Claimant's outstanding asylum claim.

178. The Defendant's letter of 6 March stated "*If your claim is refused then it is expected that it will be certified, in which case there will be no barriers to your removal. It is expected that your removal from the UK will take place in the next six weeks.*"

179. However, it is unclear on what basis the decision-maker felt able to assert that if the asylum claim were refused then it was expected to be certified. The letter stated in an earlier paragraph that an asylum decision was currently being drafted, but there is no evidence of any enquiry being made of the team working on the asylum decision as to the likely outcome. By 30 March the team had produced a draft non-certified decision, and there is no evidence to suggest that as of 6 March the team envisaged a certified refusal or had communicated any such expectation to the author of the 6 March letter. On the available evidence before the court, the far more likely explanation appears to be either (a) the decision-maker made the assertion without enquiry, or (b) was misinformed.

180. The Defendant's letter also included the statement:

> "It is noted that your asylum claim was based on events occurring before your visa was issued, but there is no evidence that you disclosed your fear of persecution to the entry clearance officer or the immigration officer who saw you on arrival".

181. That point was valid in respect of only some, not all, of the bases for Claimant's asylum claim. It did not take account of the fact that the bases for the claim also

included the Claimant's sexual orientation, which she claims to have realised in March 2016, and her claimed conversion to Christianity in October 2016.

182. The Defendant responds that she is not obliged to accept the Claimant's account on these matters, nor the Claimant's contention that she "*did not know about asylum*" until she met solicitors in around May 2016. That submission does not, however, meet the point. The letter of 6 March took into account as a relevant consideration that "*your asylum claim was based on events occurring before your visa was issued*", but at least as regards the Claimant's claimed sexuality and religious belief that was incorrect.

183. In addition, given that the Claimant had claimed asylum, this could not properly be regarded as a case where the Claimant had failed to comply with reasonable voluntary return opportunities.

184. Thus it appears from the 6 March letter that the decision was based on an assumption – that the Claimant's asylum claim was expected to be certified, leading to her likely removal within 6 weeks – which (a) was made without any or any proper enquiry of the asylum team as to the actual expectations in that regard, and (b) was based on the fact that the asylum claim post-dated the issue of a visa to the Claimant, taking no account of the point that two of the grounds of that claim post-dated the issue of the Claimant's visa. The decision was accordingly made without taking relevant considerations into account, and/or based on an irrelevant consideration viz a perceived expectation of certification with no properly reasoned basis. Moreover, these public law errors were made on a highly material matter (imminence of removal) which the letter itself referred to as a "*primary consideration*".

185. As regards the second bullet point in the AAR policy, the Defendant's letter referred to the Claimant's convictions, which it said showed a fundamental lack of respect for this country's laws especially those relating to financial conduct. However, the letter did not suggest that these gave rise to public protection concerns rising to the level of those contemplated in the policy. The Defendant's letter did not suggest that the Claimant met the criteria for a foreign criminal as defined in the Immigration Act 2014,[9] or a national security concern; and there was no reference to any police or National Offender Management Service evidence as to the level of any public protection concern such as might have justified the continued detention of a Level 2 adult at risk. Nor did the 6 March letter in terms suggest that the second bullet point applied.

186. As to the third bullet point in the policy, for the reasons given in section (E)(2)(c) above, there was no rational basis on which it could have been concluded that there were "*negative indicators of non-compliance which suggest that the individual is highly likely not to be removable unless detained*", and the Defendant's letter of 6 March drew no such conclusion.

187. The section of the Defendant's letter headed "*Balancing risk factors against immigration control factors*" also includes the statement "*You were required to return to China once your leave to remain had expired. You did not do so and instead went to ground, only physically coming to our attention after your arrest in 2016*." The

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[9] Section 117D(2) of the Act provides that *"(2) In this Part, "foreign criminal" means a person—*
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender".

reference to the Claimant going to ground implies, as a matter of ordinary language, some kind of deliberate disappearance from the attention of the immigration authorities. However, by the time the Claimant's LTR expired in February 2016 she had already submitted an application for further LTR in November 2015, and had applied for administrative review following the rejection of that application. She then filed a judicial review application on 8 March 2016. Moreover, as the letter notes, the Claimant started to report on 17 March 2016 and continued to comply with reporting requirements until September 2016.

188. In these circumstances, the statement that the Claimant "*went to ground, only physically coming to our attention after your arrest in 2016*" appears to have been wrong and indeed without foundation. Given that this passage purports to form part of the Defendant's balancing of risk factors against immigration control factors, I do not accept the Defendant's submission that it does not amount to a material error and can in effect be ignored. The decision-maker erred in law by taking into account irrelevant considerations.

189. The Defendant drew attention in oral argument to the paragraph in the AAR policy immediately following the three bullet points, which indicates that "*Less compelling evidence of non-compliance should be taken into account if there are also public protection issues. The combination of such non-compliance and public protection issues may justify detention in these cases*." However, the only parts of the reasoning section in the Defendant's 6 March 2017 letter (i.e. the section headed "*Balancing risk factors against immigration control factors*") that considered non-compliance were (a) the paragraph containing the erroneous reasoning discussed in § 187 above and (b) (possibly) the discussion of the Claimant's asylum claim, which was also defective for the reasons discussed in §§ 178-184 above.

190. As a result, the Defendant's letter cannot be regarded as having rationally and lawfully concluded that detention was justified as a result of a combination of non-compliance and public protection concerns.

191. For all these reasons, I conclude that the decision set out in the Defendant's 6 March 2017 letter to continue to detain the Claimant notwithstanding her acceptance as a Level 2 adult at risk was in breach of established public law principles.

192. Further, I do not consider it highly likely (for the purposes of section 31(2A) of the Senior Courts Act 1981) that the outcome would not have been substantially different if these breaches of public law had not occurred. A decision unaffected by such errors would in my judgment be likely to have resulted in the Claimant's release from detention.

193. In the absence of specific evidence as to what would have been an appropriate grace period to effect the Claimant's release following a lawful decision on 6 March to release her, I conclude that her detention (if not already unlawful for the reasons given in section (E)(2) above) was unlawful from 8 March 2017 i.e. allowing a two day grace period.

(4) Commencement date of detention

194. The Claimant seeks permission to amend to claim that if she was detained solely under immigration powers from 1 January 2017, as stated by the Defendant in her detailed grounds of defence, then the Claimant was detained unlawfully because the Defendant failed to conduct a detention review within 24 hours and therefore acted contrary to her policy.

195. The Claimant's instructions were that the correct date was 4 January. The Defendant's summary grounds of defence stated that the Claimant's custodial sentence ended on 4 January 2017 and she was then transferred to immigration detention. However, paragraph 3 of the Defendant's detailed grounds of defence stated:

> "It is denied that the Claimant was detained unlawfully, save in one respect which is not pleaded by the Claimant. The Claimant's detention commenced on 1 January 2017. Under the Defendant's policy, her detention ought to have been reviewed within 24 hours. In the event, the 24 hour review did not take place until 5 January 2017. As it is clear that the Claimant would have been detained had the 24 hour review taken place when it is supposed, she would be entitled to no more than nominal damages; and as this is not a matter relied on by the Claimant the Court should in its discretion refuse even that relief."

196. I asked during the hearing whether the end date of the Claimant's imprisonment, pursuant to the sentence passed in September 2016, was not simply a matter of public record. However, neither party was able to produce a document indicating this date definitively.

197. The position that emerges from the available contemporary documents is this:

i) The form IS.91R giving notice of the Claimant's detention under immigration powers was dated 30 December 2016, but appears to have been served on the Claimant on 3 January 2017.

ii) The Licence and Notice of Supervision issued on behalf of the Ministry of Justice, date stamped 30 December 2016, stated "*Your supervision on licence commences on 04/01/2017 and expires on 19/04/2017 unless this licence is previously revoked*." It required the Claimant to report on release from prison to report to Dorset Close Probation Office at noon on 4 January.

iii) A form completed by the prison establishment for the purposes of identifying the Claimant's eligibility for Home Detention Curfew (a copy of which was attached to the Defendant's Supplementary Information dated 28 November 2017) gave the Claimant's release date as 4 January.

iv) The chronologies within the detention reviews gave the date as 1 January.

v) The Defendant's letter dated 6 March 2017 indicated that the custodial part of the Claimant's sentence ended on 4 January.

198. The Defendant's Supplemental Information dated 28 November 2017 states *"The Claimant's custodial sentence came to an end on 4th January 2017, not 1st January 2017 as previously asserted"*, relying in particular on documents (ii) and (iii) above.

199. The Claimant submits that the reason why the point was not pleaded earlier is that the Claimant's solicitors reasonably relied on the Defendant's assertions in the letter dated 6 March 2017, as subsequently confirmed in the summary grounds of defence, that immigration detention commenced on 4 January 2017.

200. In these circumstances it is right to allow the amendment of the Claimant's grounds. However, the preponderance of the documentary evidence, including in particular the

Licence and Notice of Supervision which is probably the most authoritative document in this context, indicate that immigration detention did not commence until 4 January 2017, and I so conclude.

(5) Detention from 5 to 21 April 2017

201. The Claimant also seeks permission to amend her Grounds to claim that the Defendant unreasonably delayed in failing to release her from 5 April 2017, at which time the Defendant was actively considering granting the Claimant temporary admission, until the Claimant was released on 21 April 2017. I give permission to amend to make this further claim, which relates to matters occurring after the filing of the original grounds on 4 April 2017.

202. On 5 April 2017 a letter was sent on behalf of the Defendant, in response to the Claimant's pre-action letter dated 24 March 2017, requesting an extension until 7 April 2017 to enable full consideration of the Claimant's case, and adding *"Please note that your client's asylum claim has been considered and she may be entitled to a right of appeal against the decision, we are therefore considering granting her Temporary Admission"*.

203. This stance seems likely to have been linked to the fact that (according to a Case Record Sheet entry for 30 March) a draft non-certified refusal of the Claimant's asylum claim had been produced, and had been sent to the criminal casework directorate for consideration.

204. A file note of a conversation on 6 April 2017 between Iylicia Weston of the Claimant's solicitors Duncan Lewis and a Home Office representative indicated that an officer was *"considering releasing her on [temporary admission]"* but that the officer *"hasn't committed either way to a decision"*.

205. Ms Weston states in her witness statement:

> "On 7 April 2017 at 10:15am I spoke to the Claimant's caseowner who confirmed that they are still waiting for a final decision on the Claimant's asylum claim but she may have a right of appeal against the decision so it would be unreasonable to continue detaining her. When I asked him if the Claimant's Section 4 bail address is sufficient for temporary admission purposes, he stated that is just for bail. When I asked him if that means we would have to apply for bail even though it means they would not be opposing bail, he stated unfortunately yes. He also stated that he is thinking of releasing the Claimant soon; probably in the next 5 working day."

Ms Weston exhibits her attendance note, which is consistent with the account quoted above.

206. Duncan Lewis applied for bail on the Claimant's behalf on 7 April, and on 21 April received a notice of hearing indicating that the application was due to be listed on 27 April.

207. A note dated 12 April on the Defendant's Case Record Sheet includes the statement *"The subject is due to be released so the provisional clearance/review date reflects the diminished priority."*

208. The Defendant says the statements made on 5, 6 and 7 April were all tentative, and that the 12 April note reflected only a provisional decision. The final decision was made only when the Defendant prepared the IS.106 release authorisation referred to in a Case Record Sheet entry dated 21 April.

209. The Claimant argues that as by 7 April the Defendant did not intend to oppose bail, it was not reasonable to detain the Claimant for any further period thereafter. Further, if by 12 April the Claimant was "*due to be released*" then the relevant decision had been taken by that date so further detention was unjustifiable.

210. The notes and correspondence also include reference to an issue about the address to which the Claimant could report following release, and whether that could be the same as her bail address.

211. However, the Defendant has provided no evidence detailing the steps which were being taken during this period. The documents indicate that by 30 March a draft non-certified refusal of the Claimant's asylum claim had been produced. Unless the position altered, the Claimant would therefore have an in-country right of appeal, and there was no suggestion that it would be reasonable to detain her for the duration of any such appeal process. By 12 April an internal note referred to the Claimant as "*due to be released*". Even allowing for a grace period, and in the absence of any satisfactory evidence from the Defendant, I conclude that (even it was not unlawful for the reasons set out in sections (E)(2) and (3) above) the detention of the Claimant from 14 April 2017 onwards was unlawful.

(F) CONCLUSIONS

212. For the reasons set out in this judgment I conclude that:

i) the detention of the Claimant from 4 January 2017 to 21 April 2017 (inclusive) was unlawful as being in breach of the *Hardial Singh* principles;

ii) the detention of the Claimant from 8 March 2017 to 21 April 2017 (inclusive) was unlawful because it was inconsistent with the Defendant's policy "Adults at risk in immigration detention", the Defendant's consideration of the application of that policy in the present case being vitiated by errors of law; and

iii) in any event, the detention of the Claimant from 14 April 2017 to 21 April 2017 (inclusive) was unlawful as being in breach of the *Hardial Singh* principles.