Neutral Citation Number: [2023] EWHC 3188 (KB)

Case No: QB-2022-001407

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13 December 2023

Before:

MR CASPAR GLYN KC

(Sitting as Deputy Judge of the High Court)

- -

Between:

RAPHEAEL OLUFEMI OLUPONLE **Cla**

- and -

THE HOME OFFICE **Defe**

- -

- -

Kim Renfrew (instructed by **Dylan Conrad Kreolle Solicitors**) for the **Claimant**

Matthew Howarth (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 14-15 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR CASPAR GLYN KC:

Introduction

1.
The claimant, a Nigerian national, claims damages for false imprisonment, unlawful detention and personal injury following detention by the defendant between 4 May and 2 November 2016 – a period of 182 days, almost 6 months.

2.
It is not in issue that the claimant was detained. The issues are

i)
First, was any part of the claimant's detention unlawful at Common Law?

ii)

Second, was any part of the claimant’s detention unlawful by reason of a public law error bearing on the decision to detain?

iii)
Third, if any part of the claimant’s detention was unlawful by reason of the public law error on the decision to detain, can the defendant prove that the claimant could and would have been detained in any event?

iv)
Fourth, if the claimant was falsely imprisoned or unlawfully detained in in what sum should damages be assessed?

3.
The claimant’s pleaded case is that he was detained in breach of the Hardial Singh principles because

i)
The defendant was unable to act with reasonable diligence and expedition to effect the claimant's removal;

ii)
There was a legal barrier to removal;

iii)
The certification of the claimant's Protection and Human Rights claim was unlawful;

iv)
The unlawful certification of the claim rendered the decision to detain him automatically unlawful;

v)
The unlawful certification of the claim had a direct material bearing on the decision to detain the claimant;

vi)
The defendant failed to take relevant considerations into account particularly the claimant ties;

vii)
The defendant failed to appreciate that removal could not be effected within a reasonable time;

viii)
The defendant failed to apply its policy on detention of asylum seekers and vulnerable individuals;

ix)
The defendant failed to carry out a satisfactory and adequate review of the claimant’s detention;

x)
The defendant failed to consider alternatives to detention or other legitimate ways of securing the claimant’s removal from the UK.

xi)
The defendant acted in breach of the claimant’s right to liberty and his right to respect for his private life under Articles 5 and 8 respectively of the European Convention of Human Rights.

PRELIMINARY MATTERS

4.
At the Pre Trial Review Soole J refused to grant an application for the defendant's witness to give evidence remotely – no application had been made, the witness was not identified and full reasons not given as to why remote evidence was required.

5.
Mr Howarth renewed the application on the morning of the trial. The reasons for the application are that the defendant's witness, Ms Pritchard, lives in the Liverpool area. She is the sole parent of a 9-year-old child, would not be able to take her child to school if she had to come to London, has no alternatives for childcare. She had no one else to ask save for her mother who is 80 and would be unable to pick her up and drop her off from school.

6.
Ms Renfrew objected to Ms Pritchard giving evidence by CVP. She submitted that the reasons were not substantial enough, the claimant would suffer prejudice through not being able to cross examine the defendant, on whose evidence the defendant's case was reliant, in person. Ms Renfrew accepted that no other witness could be found in time and that, therefore she submitted that the application should be dismissed, the case adjourned, refixed and the defendant pay the costs of and occasioned by the adjournment.

7.
I granted the defendant's application with the expressed reservation to Mr Howarth that the late application was such that it tended to present the Court with a fait accompli, as the Court would have to grant the application, or adjourn. The strong message should be sent back to those instructing Mr Howarth that a late application such as this one was wholly inappropriate. If there are reasons as to why a witness cannot travel then another should be selected in good time for the trial or an early application made.

8.
However, I was entirely satisfied that it was in the interests of justice to grant the application. Ms Pritchard had some dealings with this case. The only alternative would have been to adjourn the case, wasting the time set aside by the Court, wasting a large amount in costs and delaying this litigation and other cases which could use the time in which the case would be refixed. I was satisfied that this was a case where credibility would be tested on the documents and that that could be adequately performed via CVP. I was assured that an electronic bundle would be provided to Ms Pritchard.

9.
When Ms Pritchard began to give evidence there was an issue with the correct bundle. It was solved within 30 minutes. The link was of excellent quality. Ms Pritchard's face was clearly visible. She used a headset so that her answers were easy to hear. Ms Renfrew was able to ask all her questions, take the witness to the documents and cross-examine her effectively as some of my findings below demonstrate.

10.
Further, Ms Renfrew invited me to allow her to ask, in chief, questions surrounding the allegation in respect of the defendant's contention that he absconded in or around 3 December 2006.

11.
CPR 32.5(1) sets out the rules in respect of the limitation of evidence to exchanged witness statements. It provides materially that that

“(2)
Where a witness is called to give oral evidence under paragraph (1), his witness statement shall stand as his evidence in chief unless the court orders otherwise.

(3)
A witness giving oral evidence at trial may with the permission of the court—

(a)
amplify his witness statement; and

(b)
give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

(4)
The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.”

12.
The parties agreed that on his release reporting conditions were imposed on Mr Oluponle. Further, the claimant’s statement did not deal with any matters as to absconding or failing to report. The only evidence in respect of that issue were the records of the Home Office to which Ms Pritchard referred which dealt with notes taken from 2006. At this stage of the case I considered that an assessment of risk in this case would be informed by the evidence as to whether the defendant absconded or whether he stopped reporting because he was told to do so by the Home Office. This case involves important rights as to unlawful detention and false imprisonment. I considered, at this stage, that it was important, to hear the only direct oral evidence currently available to the court. I wanted to see if Mr Oluponle could provide an explanation as to why, as agreed, he stopped reporting.

13.
Mr Howarth objected on the grounds that he would be taken by surprise by this evidence. He did have the notes which gave his client’s version of events. I balanced the issue of surprise by making it clear that I would limit Ms Renfrew to only a few questions directly related to the claimant’s failure to report and would take into account that the evidence was presented late.

THE FACTS

14.
I heard from Mr Oluponle in person and, as set out above, from Ms Pritchard on a video link. She is a Senior Operations Manager with the defendant who manages teams which consider and progress deportation action against foreign national offenders. The facts were largely agreed by counsel based on the notes kept by the Home Office. Both Mr Howarth and Ms Renfrew cooperatively worked together, presented their cases ably and professionally and provided me with great assistance. I record my thanks to both of them.

2006 Events

15.
Mr Oluponle was born in Nigeria on 22 June 1967. He told us in his statement that he entered the United Kingdom in about July 1999 but the verified Particulars of Claim signed by him assert that he

entered the UK in about November 2005. Mr Olunpole was not satisfactorily able to answer why there was a difference between the two documents. He told me that he entered the UK in about 1999.

16.
On 23 February 2006 the claimant was arrested at Stansted Airport when he attempted to fly to Ireland on a counterfeit passport in the false name of Mr Michael Orija. On 21 March 2006 he was convicted at Basildon Crown Court in the name of Orija and sentenced to 12 months' imprisonment. There is a description of one conviction and two offences but no PNC record was shown to me. Mr Howarth submitted that there were two offences namely of having a counterfeit passport and using that passport. The material facts for any risk assessment were that the claimant had a counterfeit passport and used it to attempt to defeat immigration controls.

17.
Throughout this period the defendant only knew the claimant as Michael Orija, the name on the counterfeit passport, and it was in that name that all the Orders and records were made in 2006 and thereafter in pursuing the claimant who was only known to the defendant as Michael Orija.

18.
The claiment was served with a Notice of Decision to Make a Deportation Order on 7 June 2006 and he signed a disclaimer waiving his appeal rights and requesting to be removed to Nigeria. An Emergency Travel Document (ETD) Interview was held on 19 July 2006 and the application for the ETD was made to the Nigerian High Commission on 1 August 2006. The claimant was lawfully detained between 19 September and 19 October 2006 whereupon he was released on bail subject to reporting conditions.

19.
The defendant recorded on 21 September 2006 that the claimant"didn't show up to [sic] had a face to face I/V With the NGA H/C @ Harmondsworth on the 20/09/06." This is recorded in later notes where it is said that the claimant 'failed to attend' a face-to-face interview which had been set up at the Nigerian High Commission on 30 September 2006. However, the claimant was in detention during this period and I am not satisfied that the evidence showed that his failure to attend was attributable to him. Mr Howarth attempted to make good this point by giving evidence that detention centres make allowances to ensure that the parties can attend but there was no admissible evidence to support this proposition.

20.
A note on 18 October 2006 sets out that claimant was "released on bail to a new address on CID on 19 October 2006". In his evidence to me Mr Oluponle helpfully confirmed that he was released on the condition that he go to a centre in London every week to sign in.

21.
On 1 November 2006 the ETD had been agreed and Removal Directions were set for 9 December 2006. Travel documents were readied in December 2006 and couriered to Gatwick on 6 December 2006.

Did the claimant abscond?

22.
There is a factual dispute between the claimant and the defendant as to whether he absconded and if so the date on which he did so.

23.
The claimant told me in his evidence that he stopped reporting when, after a period of time, he was told by an immigration officer that he had been reporting for such a long time that he should go and see his family in Ireland. After that conversation the claimant said that he did not go again. After he said that he did not go the claimant was asked what, if any, information he was told about his next date, the claimant said that the defendant did not give him any date. The claimant did not tell me that the reporting restrictions were lifted and simply said that after this conversation he stopped going and was not given any further dates.

24.
The defendant's GCID records provide a number of histories

i)
First, contemporaneous documents provide that

a)
On 27 October 2006 record that the claimant had been released on bail to a new address on 19 October 2006;

b)
1 November 2006 the case had been considered on paper and agreed by the Nigeria High Commission on 30 October 2006 and then Removal Directions were applied for on 1 November 2006;

c)
On 6 December 2006 it is recorded that the "Payment and paper work couriered to NGA HC on 01/12/06. ETC received back in ISDU on 05/12/06. ETC issued 01/12/06. ETC expires 31/12/06";

d)
The next record is "Next: Was the subject removed?".

e)
On 7 October 2008 the Police National Computer was checked and new address was found and Beckett House was contacted to set up reporting instructions to the claimant;

f)
There are various notes and it is noted on 7 November 2008 that the claimant had failed to report and a warning letter was issued which was returned as it was not signed for.

ii)
Mr Howarth also referred me to notes entered on 23 December 2019 after the events concerning this claim. These notes were not, of course, available to the defendant in 2016. However, the notes contained in the December 2019 entry were obviously taken from contemporaneous notes which were made in 2006. The following is recorded:

a)
On 24 February 2006 it is recorded that the claimant was arrested on 23 February 2005 (this must be an error and be 2006) and the note goes on to provide that

"The subject was arrested at 20.00 on 23/02/2005 attempting to check in for a flight to Shannon, Ireland using a counterfeit British passport. The subject was taken to Stansted Airport Police Station. Checks revealed no trace of the subject on any HO system or database. The subject was interviewed under caution by IO C Evans along with PC D Smith of Essex Police. The subject stated that he was a

Nigerian national and that he had entered the UK from Ireland in November 2005. The subject stated that he had entered the UK by bus and that he had not sought and had not been given leave to enter the UK. He also stated that since arriving the UK he has not sought to regularise his stay. He also admitted entering Ireland illegally by hiding in the hold of the aircraft: for the -flight from Nigeria. The subject stated that he has no family in the UK or Nigeria and that all is family live in Ireland. The subject stated that he does not have any valid leave to remain in Ireland…."

b)
The notes confirm that the claimant was sentenced to 12 months' imprisonment.

25.
The defendant next relies on a précis of a note made on 12 June 2014 where it is recorded that

"….the Appellant, under the name Michael Orija (O1 101212] and with a date of birth of 22 June 1965 was convicted of possession of a false instrument (British passport in said name). he received a twelve-month sentence. He signed a disclaimer waiving his appeal rights. We obtained an ETD in said identity. The Appellant absconded from immigration bail, failing to show on the reporting date where we were planning to detain him for removal."

26.
Mr Howarth read over many other notes repeating the history of absconding such as, by way of example, the GCID notes from 12 July 2013, 12 June 2014 and then various notes of the history set out in detention review. These notes were not contemporaneous. The only source that I was given for these later notes was the contemporaneous notes I set out at paragraph 24 above. Accordingly, it is what is contained in the contemporaneous note which is relevant to my fact finding rather than comments and histories repeated in further documents.

27.
The starting point in this case is that the parties agree that the claimant was placed on a reporting restriction when he was released on 27 October 2006. Further it is clear that removal directions were set a very short time after that date on 6 December 2006 and the claimant did not surrender to them or report on or around that date – had he done so, he would have been removed.

28.
I am quite satisfied that the claimant stopped reporting on or close to the date set for his deportation, in his false name. The records set out that the claimant did not report again and failed to report subsequently after the date set for his deportation.

29.
On the claimant's own evidence the claimant did not report again after he said that that he was told that he should go to Ireland. This was 'some time later'. Further, his evidence was then that it was because of his conversation with an immigration official that the did not report again. Whilst the claimant said that he was not told of his next reporting date when prompted, he did not say that his reporting restriction was removed, simply that he was not given another date. The reason that he ascribed to not being given a date in his evidence was the immigration officer saying to him that he had been 'reporting for such a long time'.

30.
The claimant's evidence is manifestly incredible on the absconding issue. The claimant's evidence against the contemporaneous notes is simply inexplicable for the following reasons

i)
It is agreed that he was released under a reporting restriction on 27 October 2006;

ii)
It is agreed that removal directions were set on 6 December 2006, fewer than 6 weeks later;

iii)
The reason why the claimant said that he was not given a further date to report was, as he told me, the fact that he had been reporting for ‘such a long time’. It was his reporting ‘for such a long time’ that he said prompted the immigration official to note the length of time and suggest that he should visit his family in Ireland and that is why no further date to report was set.

iv)
However, the period that he was reporting could only have been six weeks and during the time that removal directions were being obtained. It is wholly incredible that an immigration officer would have said that the reporting had been going on ‘for such a long time’ to the claimant during this very short period and whilst facing imminent deportation;

v)
Further, Mr Oluponle had recently been released from a period of imprisonment for using a counterfeit passport to visit Ireland. I find it incredible that against that background an immigration officer should suggest that the claimant should visit Ireland;

vi)
The claimant is an unreliable historian even when it comes to confirming verified statements or before me on oath. The claimant was unable to explain how the difference between the 1999 entry date to the UK in his witness statement and the 2005 entry date in his verified particulars of claim had arisen. The 1999 date is further contradicted by the version of events he gave in the notes dated February 2006.

vii)
Further, throughout 2006 Mr Oluponle was using a false name with the immigration authorities.

viii)
When he stopped reporting he did not set that record straight until July 2013. Mr Oluponle was not honest with the defendant as to who he really was in 2006;

ix)
I note the passage of time in that the claimant was giving evidence on events that occurred 17 years before this trial. There was no mention of this issue in his witness statement. However, of course, the issue of absconding and the risk that it would create would be of ‘paramount’ importance.

31.
Against the contemporaneous notes, and the agreed history in 2006 of the imminent deportation I find that the claimant’s version of events is wholly unbelievable for the reasons set out above. Facing imminent deportation he stopped reporting and started to live in his real name without telling the defendant.

32.
Ms Renfrew asserts that because the defendant did not cross-examine the claimant on the version of events that he gave late that I am not entitled to reject his evidence on such an important issue.

Whilst agreeing with Ms Renfrew that this issue was important, I reject that submission. I considered that the claimant's evidence was manifestly incredible, when weighed against contemporaneous notes, for the reasons set out above.

33.
Accordingly, on the facts I find that the claimant stopped reporting at or around the time of his deportation in the false name of Michael Orija. He absconded.

34.
In any event Ms Pritchard accepted that it had been ten years since the original conviction, the use of the name 'Michael Orija', the evidence as to absconding there was no other evidence that the claimant would reoffend.

2008 - Mr Oluponle Applies for a Residence Card and starts a family

35.
On 17 July 2008 the claimant met his future wife. Ms Pritchard told me, and it was not challenged, that the claimant applied for applied for a Residence Card as he was an extended family member of an EEA national in the name of Awoponle on 4 June 2008. The defendant was unaware that the claimant was also Mr Orija. That application was refused on 8 September 2010. The claimant, in his true name, made an application for settlement on the grounds of long residency. The application for settlement was refused on 14 February 2011 but discretionary leave to remain was granted until 13 January 2014. The claimant's oldest daughter was born on 29 January 2011 and his younger daughter on 21 July 2013.

2013 – Application by Mr Oluponle to revoke the Orija Deportation Order

36.
Around 3 July 2013 Mr Oluponle had clearly decided to regularise his position and

i)
He applied to revoke the Deportation Order in the name of Orija and his true identity was disclosed to the Home Office;

ii)
He began reporting to the Home Office and did so compliantly until he was detained on 4 May 2016 almost three years later.

Prior to this application the parties agree that the defendant had 'no idea' that the claimant, qua Oluponle, was subject to a Deportation Order.

37.
The application to revoke was refused on 18 November 2013 and the claimant appealed on 3 December 2013. On 24 May 2014 the defendant sent a supplementary decision letter maintaining the decision it made on 18 November 2013.

38.
On 1 December 2014 the claimant's appeal against that revocation was dismissed. Permission to appeal was made citing Article 8 and respect for the claimant's family rights with his wife who has sickle cell anaemia and his two daughters born on 29 January 2011 and 21 July 2013 to the First Tier and Upper Tier Tribunals. Those appeals were refused on 2 January and 27 April 2015 respectively. The claimant was making arguments in this appeal that were not, of course, open to him in 2006 when

he had no such family connections. One of the judgments, probably the First Tier, described the claimant's Article 8 claim as speculative.

39.
The claimant's claim for Judicial Review filed on 24 June 2015 challenging the Tribunal's previous decision and the decision to deport him was refused on 29 March 2016. By this stage it is agreed that Mr Oluponle had exhausted all his appeal rights. I note that when an update of the Judicial Review was requested on 3 March 2016 the reply came back, and I find that this referred to the permission application as it referred to an order of the same date as the agreed date for the refusal that "Please see order saved on Doc Gen refusing permission in this case and certifying it totally without merit. The order was sealed on 29 March 2016. The claimant was not given a right to appeal to it."

40.
On 21 April 2016 Removal Directions to Nigeria were set for 24 May 2016 under a valid passport in the claimant's name.

The Detention Decision

41.
On 21 April 2016 the defendant, through Mr Blanchflower, carried out an assessment as to whether the claimant should be detained. Mr Blanchflower set out

i)
the criminal offending;

ii)
the use of the false name which was only remedied in July 2013 whereupon he recommenced reporting;

iii)
the history that the claimant failed to report for removal on 9 December 2006 and then his reporting from July 2013 so that he had absconded between these two dates;

iv)
the Deportation Order in the context that the claimant had exhausted all his rights to appeal and that there was no barrier to his removal;

v)
he was assessed at medium risk of re-offending and medium risk of harm to the public;

vi)
he balanced the presumption to liberty against the need to protect the public to reduce offending and maintain effective immigration control; and

vii)
the claimant had two children in the UK and would cause a family split; and

viii)
the claimant would be included on the Nigerian charter on 21 May 2016.

42.
Ms Renfrew suggested to Ms Pritchard that the failure to set out and list alternatives to detention such as electronic tagging and or a financial condition were not set out and therefore they were not

considered. Ms Pritchard said that she was not sure that electronic tagging was available in 2016. In any event Ms Pritchard denied this. They had set out the presumption of liberty and that had only been outweighed by the factors set out above. The detention decision on 20 April set out at its recommendation as follows:

“In assessing this case I have balanced the presumption to liberty against the need to protect the public, reduce reoffending and to maintain an effective immigration control.

Mr Oluponle is the subject of a signed Deportation Order and he has no outstanding barriers to his removal. He is assessed as medium risk of harm and re-offending and a high risk of absconding.

Mr Oluponle has a valid passport which will be used to include him on the Nigerian Charter scheduled for 21 May 2016. Therefore his removal can be completed within a reasonable timescale.

Mr Oluponle has two children who he is the biological father to his current partner. His family life has already been fully considered in the Deportation Decision dated 18 November 2013. He appealed this decision, however his appeal was dismissed on 1 December 2014 and his appeal rights became exhausted on 27 April 2015. A family split will be completed prior to detention.

In summary the presumption to liberty in this case is outweighed by the need to maintain an effective immigration control. Its [sic] is considered that Mr Oluponle’s removal from the UK can be achieved within a reasonable timescale and therefore detention is considered necessary and proportionate at this time.”

And the decision was as follows

“I agree with the proposal, Mr Oluponle is the subject of a signed Deportation Order, is ARE and there are no barriers to his removal. Mr Oluponle is fully aware of Home Office intentions to deport him from the UK and at this late stage of the process is considered a high risk of absconding and medium risk of re-offending and harm to the public.

Although the presumption to liberty has been considered, detention is now appropriate and removal is expected on the next Nigerian charter scheduled for 21/5/16.”

43.
On 4 May 2016, when the claimant reported, as he had been regularly doing since 3 July 2013 the claimant was taken into detention under the name Michael Orija although he confirmed his real name.

The Claimant’s Experience of Detention

44.
The claimant was fearful and scared when he was detained with others. They had committed a number of offences. Drugs were endemic, he witnessed detainees harming each other. The nights were filled with banging and screaming. The food was of low quality and arguments surrounded it. He was pinned down on one occasion when his cell mate was forcibly removed for deportation. He saw others trying to kill themselves and witnessed a ligature having to be cut, he saw others being manhandled by the authorities. He worries that people will come to get him when he hears sirens or when people knock on the door fearing that he will be removed. The claimant did not see his family as he considered it would be too traumatic and his wife was not well. The detention causes his children to have separation anxiety and affected their sleep and night time continence.

45.

His worst memories were being manhandled, the verbal and racial abuse and being treated like an animal. He felt low in mood and found it difficult to relate to people with a sensation of being cut off. There is no medical report and no claim for personal injuries.

The Asylum Application

46.
The claimant filed an application for the Deportation Order to be revoked, made further submissions on 7 May 2016 based on the Article 8 claim. He was served with Removal Directions on 17 May 2016 with his further submissions refused by the defendant on 20 May under §353 Immigration Rules.

47.
On 21 May 2016 the defendant was served with an IDC.4995 Paragraph 353 refusal setting out that there was no prospect of success of his further submissions. It seems to me that they had all been made before.

48.
On 24 May 2016 the claimant applied for asylum on the grounds that he was bi-sexual and had been tortured by the Nigerian police in 1985. The removal directions were deferred. This was described, correctly in the circumstances given that deportation was imminent and this part of the process had begun in July 2013, as a "last minute asylum claim and this has deferred removal. If the claim is refused, removal can be achieved within a reasonable timescale." An application for bail was made on 26 May 2016 which was refused on 1 June with reasons for that decision served on 6 June 2016 and, on the same day the claimant's solicitors submitted a Temporary Admission (**"TA"**) request.

The First Detention Review

49.
On 1 June 2016 the defendant carried out its first detention review through Ms Pritchard. The expectation had been for the claimant to be on the 21 May 2016 flight to Nigeria. The review noted that on 24 May 2016 the Asylum claim had been made and that Removal Directions were deferred because of it. The decision noted the same factors as set out above. However, it was still considered at that stage that the claimant's removal could be completed within a reasonable timescale. It was noted that the submission of the asylum claim was 'last minute' and that this caused the deferral.

50.
Ms Renfrew again suggested that no alternatives were considered as they were not set out in terms. Ms Pritchard denied this for the same reasons as set out above. Further Ms Pritchard referred to Section 6 of the review which reads as follows

"6 Current barriers to removal (including documentation and compliance). Asylum claim raised 24/05/16…….

When do we expect a travel document/EU letter to be issued?

1-3 months Yes

3-6 months

6+ months"

Ms Pritchard said that the 1-3 months, although a reference to travel documents, should be read as the likely timescale as to when deportation was considered to be possible. I find that although the

reference was to travel documents, given that Mr Oluponle had the requisite travel documents as set out above, that this reference was indeed used as a proxy, by the defendant, for the expected date of deportation.

51.
Ms Pritchard agreed with Ms Renfrew that prior to considering whether or not to certify the Asylum claim under section 96(1) of Immigration and Nationality and Asylum Act 2002 (**"s. 96(1)"**) the defendant would need to know some facts about the claim and that there was approximately a 6 week delay between the claim and the interview. In respect of certification Ms Pritchard said that that was a matter for the caseworker and not her. However, Ms Pritchard did say that the defendant could not take a view on certification until after the interview although they had enough to make an educated assumption. Ms Pritchard agreed that at that stage the defendant would not have been in a position to know all the facts and that the detention reviews set out the likely timescale.

52.
The defendant set out in that detention review the actions that it had followed and then an action plan once the Asylum and Protection claim had been made namely

"….24/05/16 – Asylum claim received from reps forwarded to OSCU to consider.

24/05/16 – RD's deferred due to asylum claim

13.
Action plan for next review period (in bullet point format only).

Complete asylum referral for asylum interview

Consider asylum claim

Complete any bail and TA requests"

53.
The detention review recommendation was as follows:

"In assessing this case I have balanced the presumption to liberty against the need to protect the public, reduce reoffending and to maintain an effective immigration control.

Mr Oluponle is the subject of a signed Deportation Order.. He is assessed as medium risk of harm and re-offending and a high risk of absconding. He was scheduled for removal on 24/5/16 however he lodged an asylum claim and RD's were deferred.

Mr Oluponle has two children who he is the biological father to his current partner. His family life has already been fully considered in the Deportation Decision dated 18 November 2013. He appealed this decision, however his appeal was dismissed on 1 December 2014 and his appeal rights became exhausted on 27 April 2015. A family split will be completed prior to detention.

In summary the presumption to liberty in this case is outweighed by the need to maintain an effective immigration control. It is considered that Mr Oluponle's removal from the UK can be achieved within a reasonable timescale and therefore detention is considered necessary and proportionate at this time."

The authority to detain was in the following terms on 1 June 2016

“I have considered all the relevant factors contained within this review and I authorise the continued detention of Mr Olunponle [sic]. In reaching my decision, I have balanced the presumption of liberty against the protection of the public, an effective immigration control and national security.

Mr Olunponle [sic]has been convicted of a serious offence and has previously absconded from Immigration reporting conditions. It is considered that if released, Mr Oluponle poses a significant risk of absconding again, particularly given the late stage of his case.

Mr Olunponle [sic] has submitted a last minute asylum claim and this has deferred removal. If the claim is refused, removal can be achieved within a reasonable timescale.

I am therefore satisfied that continued detention is justified, legitimate and proportionate.”

54.
On 8 June 2016 further information in respect of the Asylum claim was requested by the defendant. On 13 June 2016 the TA request was refused. On 14 June 2016 the claimant replied to the request for further information from the defendant.

55.
On 24 June 2016 it was minuted that the “s96 certified non comp refusal to SPoE **(**Second Pair of Eyes – **“SPoE”)** who was, as the name suggests was the check and balance which the defendant maintained.

56.
The claimant made a Rule 35 application on 27 June 2016 which was referred to the Asylum Casework Directorate (**“ACD”**). The claimant asserted that he had been a victim of torture by Nigerian Police in 1985 for 3 days as a result of being in a sexual relationship with a man. I do not have the Rule 35 Report but only the response to it.

57.
On 28 June 2016 an interview with the claimant was booked with Mr Allen the Immigration Officer attending.

The Second Detention Review

58.
On 29 June the defendant carried out her second detention review. Ms Renfrew again suggested that the defendant did not know as to when deportation would be expected to take place. Ms Pritchard referred to her section 6 answer on the Detention Review form that I have noted above and in this form the proxy of 1-3 months remained as before. It was noted that a current barrier to removal was the Asylum claim that had been raised.

59.
The form set out a number of actions that the defendant was progressing:

i)
On 1 June Mr Oluponle’s application for bail was refused and he was served with the reasons for refusal on 6 June 2016;

ii)
A TA request was submitted on 6 June and then refused on 13 June;

iii)

On 8 June Mr Oluponle was served with documents requesting more details of his asylum claim to which he replied on 24 June 2016; and

iv)
On 27 June an asylum referral was completed and forward to the Asylum Casework Directorate (ACD) with the ACD to arrange an interview.

The review spoke of an action plan to consider both the Asylum claim and the Article 8 representations and complete any bail or TA requests.

60.
The review recommendation repeated the other matters contained in the 1 June review but added the further matters set out below in the square brackets in its recommendation:

“An asylum interview will now be scheduled to consider his claim. [Once this has been conducted his Article 8 representation will be concluded. It is still considered that his removal can be completed within a reasonable timescale.]”

and further

“A family split [has been completed and was authorised by AD on 26 April 2016]”

61.
The authorisation had the same first and last paragraph of the 1st review and between those two paragraphs set out materially that

“Mr Oluponle has been convicted of a serious offence. It is noted that Mr Oluponle has a history of absconding and has used alias information in an attempt to deceive both the Police and Immigration as to his true identity and lack of Immigration status. It is considered that Mr Oluponle poses a significant risk of absconding if released from detention at this stage.

It is noted that the last minute asylum claim remains a barrier to removal. However, this interview and claim can be expedited and removal could therefore be achieved in a reasonable timescale.

I note that a Rule 35 application has been submitted however, it has not been accepted that Mr Oluponle is a victim of torture.”

62.
The Rule 35 Report was considered by the defendant. The defendant had not produced the report. She accepted that the claimant had scars and that they could relate to the events which the claimant relayed. However, there was no other corroborative evidence as to the cause of the scars, no independent evidence of torture and, although the claimant had encountered immigration officers over an 11 year period, this was the first occasion on which he had raised torture and had only done so in the face of his imminent deportation. She decided to continue to detain the claimant and served her response on 30 June 2016.

63.
On 1 July the GCID notes that ‘NSF – being dealt with by CC and cannot be decided within 6 months. CC to manage the asylum claim. Authorised by SEO Mandy Baily ASY Cat 4 – Specialist Unit Referral.’ It was suggested by Ms Renfrew that ‘NSF’ meant not straightforward. Mr Howarth, in his submissions, took me to, a note that read as follows:

“Not Straightforward Flag CID Data Cleanse conducted. The NSF Flag has now been closed on the Admin and Standard events screen as it is only required for statistical purposes whilst the case is with the ACD to decide the protection element of the case. It enables measurement of performance against asylum decision service standard targets so is no longer needed on the case given that the case is no longer with ACD.”

Mr Howarth suggested helpfully, that it meant “Not Straight Forward Flag” and it was purely a statistical record in that the same targets do not apply. For the purposes of my assessment that is a distinction without a difference. The flag or the comment has the same effect. NSF denoted that this was not a simple case. It was considered, at this stage as being not straightforward. It would require, I infer, more consideration because it was more complicated and the corollary of that, which is that it would require more time to consider which might delay the time for deportation.

64.
Ms Renfrew suggested by that time that it was clear that the matter would not be decided within 6 months. However, Ms Pritchard suggested that the note was misleading. She said that at time that the note was made, the case was ‘not being’ dealt with by CC (Criminal Cases) but was transferred there because the transferring department could not deal with the case within six months and that the CC timeline may be different. Ms Pritchard said that she appreciated that the note was badly worded. Mr Howarth in support of this version of events noted the words below the entry which provided for the referral. However, I reject the defendant’s explanation because the language was clear that the case, at that time, was ‘being dealt with by CC’ and the statement ‘cannot be decided within 6 months’ was a reference to CC who were also ‘to manage the asylum claim’. I accept that this was a note and that time estimates might change but on the evidence there was now an indication that the claimant’s immigration status could not be decided upon within 6 months in the view of the Criminal Cases team that was handling the decision. I accept that this was not a formal decision minute or conclusion of a decision review process. However it was an indication of timescales at that stage which, for the first time, differed from the 1-3 month assessments albeit before the interview.

65.
The claimants’ asylum interview was conducted on 7 July 2016. A further TA request was submitted on 18 July. The Asylum referral was completed on 26 July 2016 with transcripts of those interviews requested by the claimant’s solicitors on 2 August 2016 (a second request was made on 10 August 2016 and a third request on 25 August 2016). On 26 July 2016 a request was made by the defendant to allocate the asylum claim as the interview was complete.

Third Detention Review

66.
A 3rd detention review took place on 27 July 2016. It noted the following actions that had been carried. The first entry partly repeats an earlier entry with the new words in square brackets.

i)
On 27 June [the claimant submitted a Rule 35 application, the] Asylum referral was completed that day and forwarded to the ACD to arrange an interview; and

ii)
On 29 June 2016 the Rule 35 response was completed and served on the claimant.

The action plan was the same as the 2nd review to consider both the Asylum claim and the Article 8 representations and complete any bail or TA requests.

67.
The recommendation was in the same terms as the second review save that it was set out that

“An asylum interview has now been conducted and a referral has been forwarded to the appropriate department to consider his claim. Once this has been considered, his Article 8 representations will be considered and served with his asylum claim, It is still considered that his removal can be completed within a reasonable timescale.”

68.
The decision recorded that

“I agree with the proposal, Mr Oluponle is the subject of a signed Deportation Order and is fully aware of Home Office Intentions to deport him from the UK. Mr Oluponle has a history of absconding and is considered a high risk in the future, together with a medium risk and harm to the public. The late asylum claim remains the barrier to removal, however the asylum interview was conducted on 7 / 7 /16 with "Mr Oluponle and is now being expedited.

Although the presumption to liberty has been considered, removal is still a realistic prospect within a reasonable time frame and therefore maintaining detention at this time is considered appropriate and justified.”

On 27 July 2016 the case was allocated.

69.
An email dated 5 August 2016 showed that the case had been accepted by the ACD. Ms Wall wrote that ‘this will be allocated to a case owner and completion may take 3 weeks. I have further discussed this with SEO Nina Pritchard to see if this case can be prioritised as the further submissions (Article 8 to also be address also by myself) are the only barrier to removal….”

70.
On 3 August it was recorded in an email that the interview was “not of sufficient quality for certified decision….and some aspects of case not covered in sufficient detail.” The claimant’s solicitors wrote to the defendant in respect of the asylum claim on 6 August 2016.

71.
A bail application made on 8 August 2016 and was refused on 11 August 2016.

72.
On 10 August 2016 Mr Mullin emailed

“at Interview his current lifestyle has not been explored, does he chose [sic] to be discrete and if so why, so this argument will lack weight.

Also his future decisions have not been explored in line with HJ Iran and we could also do with more information about his arrest and escape in Nigeria which do not appear to be credible at all.

His relationships in Nigeria have also not been explored, he claims to have only had one same sex relationship in Nigeria yet later on he attributes his escape to powerful "sugar daddies" this discrepancy has not been put to him.

Basically I would have him re interviewed but as you want the case expedited I thought I would ask if you would like me to do my best with what I have”

73.
On 10 August a request was made by Ms Wall for a further interview. In a separate note she also wrote that ‘Email received from Jacqueline Carrington to advise this case will be prioritised by the Asylum Team and it is anticipated that a decision will be made by 23/08/16 (date the next detention review is due by).’ By 11 August it was decided that a further interview was no longer required and the Asylum decision was in the process of being completed.

Fourth Detention Review

74.
The fourth detention review was carried out on 23 August 2016 and it was noted that aside from refusing a TA and opposing bail that the “Action taken to progress case since last review was

“22/08/16 Liaised with ACD and requested for the asylum decision to be treated as a priority.”

The action plan was to deal with further TA and bail applications and request removal directions once the Asylum claim and Article 8 representations were made.

75.
The decision of 23 August is in the same words as the first three paragraphs and the last paragraph of the decision on 29 June 2016.

76.
On 7 September 2016

i)
the Asylum decision was concluded by the ACD and a draft refusal letter was sent to the Senior Case Worker;

ii)
the SPoE LGBT check was completed;

iii)
the draft completed and sent to the CCD;

iv)
It was noted that the

“ACD have now completed their decision and forwarded this to me by email. I have assessed this case and there is no new evidence/change of circumstances regarding Mr Oluponle’s Article 8 claim since the last decision was made on 20 May 2016. The Article 8 element to be considered under paragraph 353 with no ROA. To be discussed with SCW.

Charter referral completed and forwarded to the RL Charters Operation Majestic Inbox. RD’s requested for the Nigerian Charger Scheduled for 27.09.16.”

77.
On 13 September 2016 that

“Combined HR/Protection refusal required.

ACD have certified the asylum under S96(1) - A8 is identical to what has previously been considered in all decisions, at appeal and in 353 refusal dated 20/5/2016 therefore 353 can be applied again.

Caseworker provided template for combined decision - has to be served 5 working days prior to RD date of 27/9/2016."

78.
On 19 September 2016 the defendant served the claimant with their decision refusing his asylum claim and it was certified under section 96(1) with no right of appeal and also refused the Human Rights claim with no right of appeal under Paragraph 353 of the Immigration Rules, with removal directions set for 27 September 2016 on a charter to Nigeria.

79.
The defendant admits that the case should not have been certified on the basis that the Asylum interview did not provide enough detail to allow a decision to certify the application.

The Fifth Detention Review

80.
On 20 September, detention was further reviewed. It was noted that the asylum claim was concluded by ACD on 7 September with removal directions requested on the same day and deportation was planned for 27 September. It was noted that the claimant's appeal rights had been exhausted clearly on the basis that the claim had been certified. On that basis the claimant's detention continued.

81.
On 23 September 2016 the claimant served a letter of claim under the Pre-Action Protocol and the defendant withdrew the decision refusing both the Protection and Human Rights claim and deferred the removal directions.

82.
Accordingly, the certification was reviewed, the asylum and Article 8 applications rejected but this time an in-country right of in-country appeal was granted with the Certification withdrawn on 26 September and a new decision was served on 27 September 2016 granting the claimant a right to appeal from the UK.

83.
On 23 September the GCID recorded that the

"Asylum claim had not been certified and therefore needs taking off the charter as originally it was certified under s.96(1) but SPOE disagreed with the certification….withdraw from charter and we will withdraw and decision and reissue with an ICROA (In Country Right of Appeal) for the Asylum and A5 claim. Detention now needs to be urgently reviewed in light of the above. PAP needs responding to stating subject no longer on charter and that his asylum claim and his detention is being reviewed."

84.
Ms Pritchard told me that there was a reasonable likelihood of certification when the Asylum and Human Rights claims were made. However, when it was apparent that certification under section 96(1) was not going to be a possibility then then the new decision averted to above was issued. In any event before the interviews or information gathering the defendant did not have the information on whether to certify the claim and therefore her evidence was that it was reasonable for the defendant to continue her inquiries into this late asylum claim.

85.
By a note on 17 October 2016 the defendant noted that they received the claimant's appeal dated 10 October 2016 and that it had already been sent to the First Tier Tribunal. It was recorded that an inquiry should be undertaken as to whether the appeal could be expedited as it was the only barrier to the claimant's removal.

The Sixth Detention Review

86.
This review of 18 October 2016 noted that which had gone before and set out that there was a need to "urgently consider the appeal against the Deportation decision to determine if it can be expedited and whether a release submission is appropriate". Detention was appropriate, the review considered, whilst those inquiries were undertaken.

87.
The defendant's case was that it could not consider how long an appeal might take, until an appeal was made. Once the appeal was made then the defendant considered whether the claim could be expedited. On 19 October the GCID records that the Criminal Case Review Team / Casework Team ("CC") expressed the fact that they had sent a response "explaining why I do not think that this an appropriate case to seek an expedited hearing. Spreadsheet completed" by Ms Rackstraw. This view was queried and discussed and then on 20 October where it was said "As this subject is detained, has a valid passport, and the appeal is the only barrier to his removal, is this not considered as compelling circumstances?" – the reference to 'compelling circumstances' is a reference as to whether there were good reasons for seeking to expedite the appeal. The notes record that a decision needed to be made as to whether the factors set out above were not compelling circumstances.

88.
Ms Pritchard accepted that there was no application to the Court for expedition. Ms Pritchard's evidence was that if there were compelling circumstances then the case could be expedited and the decision be delivered or at least a first hearing within a space of 1-2 months as some claims could be dealt with more quickly. On 21 October 2021 Ms Rackshaw confirmed with Ms Pritchard that "the appeal could not be expedited. It has been agreed to progress with a release submission. Release referral completed and forwarded by email." The same Caseworker noted the next day that it had been agreed to make a release submission that was made on 25 October 2016 and although the claimant should have been released on 30 October 2016, he was released on 2 November 2016.

89.
Thereafter the claimant applied for a Derivative Residence Card on 6 December 2018 which was refused on 5 April 2019. On 20 July 2019 the claimant filed an application under the EU Settlement Scheme – Zambrano Right. Immigration Judge Peer's decision was served on 20 October 2019, and the Upper Tribunal granted permission to appeal on 12 May 2020 and gave Directions on 18 August 2020. The Appeal to the Upper Tribunal was dismissed on 4 May 2021 (the decision of Upper Tribunal Judge Pickup was served on 15 August) and the Zambrano application was refused on 20 May 2021. The High Court refused permission for Judicial Review on 28 May 2022. On 7 February 2023 the claimant's EU Settlement Scheme (Zambrano Right) was refused.

90.
The claimant requested an administrative review of the defendant's decision on 20 February 2023 and a Deportation Order was withdrawn and no further action was decided upon.

THE LAW

91.
The tort of false imprisonment has two parts: first, the fact of imprisonment and second, an absence of lawful authority to justify it. As Lord Dyson JSC said in R (Lumba) v Secretary State of for the Home Department [2011] UKSC 12 ("Lumba") at paragraph 65

"All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge said in R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58, 162C-D: "The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it."

92.
In this case where the parties agree that the claimant was imprisoned, the burden of showing that the detention was lawful lies upon the defendant. The parties agree that any lawful authority for the defendant to detain the claimant arises out of Paragraph 2(3) of Schedule 3 to the Immigration Act 1971 which provides that

"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 (and if already detained by virtue of subparagraph (1) or (2) above when the order is made, shall continue to be detained [unless he is released on immigration bail under Schedule 10 to the Immigration Act 2016)."

93.
That lawful authority is subject both to

i)
The common law limits, the principles of which were summarised by Woolf J, as he then was, in his canonical judgment in R v Governor of Durham Prison ex parte Hardial Singh [1984] I WLR 704 known as 'the Hardial Singh principles';

ii)
The limit arising from unlawfulness related to a breach of a public law rule bearing on the decision to detain which includes such relevant policy as considered by the Supreme Court in Lumba.

The Common Law

Hardial Singh Principles

94.
The Hardial Singh principles were authoritatively and helpfully summarised by Dyson LJ, as he then was in R(I) v Secretary of State for the Home Department [2002] EWCA Civ 888 ("R(I)")at paragraphs 46-48

"46.
There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in Re Hardial Singh [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne−Wilkinson in Tan Te Lam v Tai A Chau Detention Centre [1997] AC 97, 111A−D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:

i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.

47.
Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.

48.
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.”

95.
In this case both parties rely upon either the absence or presence of obstacles preventing deportation. The claimant also places particular emphasis both on the conditions of the detention in which he was detained and also the effect of the detention both on him and his family.

96.
The court assesses the Secretary of State’s decision having regard to the principles but I do not apply them rigidly or mechanically (Lumba paragraph 115). There is considerable guidance from the Appellate Courts as to the application of the principles and the different factors that apply. However, each case is fact dependant and the balancing of those relevant factors depends on all the different factual aspects of each individual case. In Fardous v SSHD[2015] EWCA Civ 931 the Court of Appeal held that there are no particular yardsticks during which detention will be presumed lawful;

“Each deprivation of liberty pending deportation requires proper scrutiny of all the facts by the Secretary of State in accordance with the Hardial Singh principles. Those principles are the sole guidelines.”

In Lumba Lord Dyson set out at paragraph 104

“A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place. … if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful.”

97.
The assessment is on the state of the evidence as known to the Secretary of State at the time. It is not an assessment based on hindsight. In Fardous v Secretary of State for the Home Department [2015] EWCA Civ 931 (“Fardous”) the Lord Chief Justice held at paragraph 42 that

“In determining the lawfulness of the decision made by the Secretary of State, the court examines the decision on the basis of the evidence as known to the Secretary of State when she made the decision. Although the decision of the court is necessarily ex post facto, the court does not take into account matters that subsequently occurred. As Sales J explained in R (MH) v Secretary of State for the Home Department [2009] EWHC 2506 (Admin), at paragraph 105:

“In my view, although the court is the judge of whether reasonable grounds for detention existed at any particular point in time, it makes that assessment by reference to the circumstances as they presented themselves to the Secretary of State. The Secretary of State needs to have means of assessing the legality of his actions at that time, in order to know what his legal duty is. Rule of law values indicate that the Secretary of State should be entitled to take advice and act in light of the circumstances known to him, without fear of being caught out by later circumstances of which he could have no knowledge.””

98.
A ‘sufficient prospect of removal’ does not require a predicted date of removal – it is part of the balancing exercise. In R. (on the application of MH) v Secretary of State for the Home Department [2010] EWCA Civ 1112, Haddon-Cave J, as he then was considered that there could be a realistic prospect of removal without being able to predict a date and that question and any considered date would affect the balancing exercise when taking into account all the other factors at paragraph 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. In my view Mitting J was not purporting to do that but was simply asking himself the questions “by when?” and “on what basis?” for the purposes of his own consideration of the case before him. 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."

99.
The defendant places particular emphasis on the risk of absconding. It is of critical and paramount importance. In Fardous the Lord Chief Justiceexpressed the following view at paragraphs 44-46:

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."

100.
Whilst the risk of offending is "paramount" and the refusal to accept voluntary repatriation, neither constitutes "a trump card". As for the risk of absconding, in R(A) v. Secretary of State Home Department[2007] EWCA Civ 804 (at paragraph 54) ("A") Toulson LJ said that:

"…where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made."

101.
However, although a 'paramount' factor, the risk of absconding must not be overstated. In R(I) Lord Dyson said:

"the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length

of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake."

102.
Further the defendant places reliance on the risk of reoffending which is an additional relevant factor which depends on the both the likelihood of the risk occurring and the harm that would be caused. Toulson LJ stated in A at paragraph 55that:

"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."

Keene LJ put it thus

"If the Secretary of State were to be entitled to determine what weight should be attached to, say, the risk of the detainee absconding if released, as compared to the weight to be attached to other factors, and so to decide whether the length of detention was reasonable, with the court only intervening if his decision was not one properly open to him, the erosion of the protection of human liberty referred to by Lord Browne-Wilkinson would be very substantial indeed."

103.
In applying Hardial Singh Principle 3 per R (Muqtaar) v Secretary of State of the Home Department [2012] EWCA Civ 1270 paragraph 36, the inability to deport within that reasonable period must be 'apparent' to the Home Secretary.

…….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.

104.
Deportation proceedings must be pursued with due diligence. In R (Krasniqi) v Secretary of State for the Home Department [2011] EWCA 1459 Carnwath LJ, as he then was, drew out a dividing line between administrative failure and illegality and the need to demonstrate that but for the illegality, he would no longer have been detained at paragraph 12

"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."

105.
A relevant factor is whether any delay is caused by the claimant due to their lack of cooperation. Bean J, as he then was, set out a number of factors that may bear on the Hardial Singh principles at paragraph 12(v) of his judgment including cooperation namely

"(a)
The extent to which any delay is being or has been caused by the deportee's own lack of cooperation in, for example, obtaining an emergency travel document ("ETD") from his country of origin."

Per Lumba at paragraph 123 a refusal of a person to return voluntarily is relevant to an assessment of what is a reasonable period of detention if a risk of absconding can properly be inferred from that refusal. One needs to have regard to the history and the particular circumstances of the detained person and it would not be appropriate to draw an inference that the person would abscond in every case.

106.
However, refusal of voluntary return does not necessarily permit an inference of a risk of absconding and, where a person has issued proceedings challenging his deportation then it is reasonable that he should remain in the UK pending determination of those proceedings, and the refusal to accept an offer of voluntary return is irrelevant at Lumba paragraph 127.

107.
The claimant asserted that he had been tortured in 1985. R (EO & Ors) v Secretary of State for the Home Department 2013 EWHC 1236 provides a useful consideration of corroborative evidence of torture from the judgment of Burnett J, as he then was at §65

"The meaning of 'independent evidence of torture' was considered by the Court of Appeal in AM. The Court rejected a submission that a report on a claimant's scarring did not provide independent evidence of torture, if it was unable to shed light on how the injuries resulting in scarring were caused. One of the underlying factors in that case was the claimant's credibility. There had been a Tribunal decision that included the finding, "I believe none of her evidence." Scarring, some of which was consistent with, or highly consistent with and one of which was tantamount to being "diagnostic" of torture amounted to independent evidence of torture. All three descriptions are terms used in the Istanbul Protocol. The author of the report in that case used the first two terms, but not the third. There are two further descriptions found in the Istanbul Protocol which should be mentioned in this context, namely "not consistent" and "typical of".

"Not consistent" means:

"[T]he lesion could not have been caused by the trauma described."

"Consistent" means:

"[T]he lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes."

"Highly consistent" means:

“[T]he lesion could have been caused by the trauma described, and there are few other possible causes.”

“Typical of” means:

“[T]his is an appearance that is usually found with this type of trauma, but there are other possible causes.”

“Diagnostic” means:

“[T]his appearance could not have been caused in anyway other than that described.””

108.
In Lumba the Supreme Court considered the weight to be given to detention during the appeal process which would depend on the appeal’s merits at paragraph 121

“(a)
The extent to which any delay is being or has been caused by the deportee's own lack of cooperation in, for example, obtaining an emergency travel document ("ETD") from his country of origin.”

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. Indeed, Mr Husain does not go so far as to submit that there is any automatic rule, regardless of the risks of absconding and/or re-offending, which would compel an appellant’s release if the appeals process lasted a very long time through no fault of the appellant. He submits that the weight to be given to time spent detained during appeals is fact- sensitive. This accords with the approach of Davis J in Abdi and I agree with it. 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. 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.”

109.
A breach of a principle of public law may also render detention unlawful but it must be a material breach i.e. one which bears on and is relevant to the decision to detain. In Lauzika, R (On The Application Of) v Secretary of State for the Home Department [2018] EWHC 1045 (Admin) Michael Fordham QC, sitting as a Deputy High Court Judge, summarised the position as follows [18]

“iv) Lord Dyson articulated the What-Breach Principle as follows (§68): “the error must be one which is material in public law terms. 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.”. He continued: “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. They are not capable of affecting the decision to detain or not to detain”.

v) In the subsequent case of R (Kambadzi) v SSHD [2011] UKSC 23 [2011] 1 WLR 1299 Lord Hope spoke (at §41) of “a breach of public law which bears directly on the discretionary power” and Lord Kerr spoke (at §80) of “an adequate connection between compliance with the duty and the lawfulness of the detention” and (at §88) “a public law error that bears directly on the decision to detain”.

The Court went on to summarise the principals at [53] noting that the governing principle is the “What Breach Principle”.

110.
In this case the decision communicated on 23 September was certified under Section 96(1) of the Nationality Immigration and Asylum Act 2002. That section provides as follows

“(1)
A person may not bring an appeal under section 82 against a decision (“the new decision”) if the Secretary of State or an immigration officer certifies—

(a)
that the person was notified of a right of appeal under that section against another decision (“the old decision”) (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b)
that the claim or application to which the new decision relates relies on a ground that could have been raised in an appeal against the old decision, and

(c)
that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in an appeal against the old decision.”

111.
In R(J) v Secretary of State for The Home Department [2009] EWHC 705 Stadlen J considered the approach to Section 96 namely

“Under Section 96 (1) and (2) before the Secretary of State can lawfully decide to certify, she has to go through a four stage process. First she must be satisfied that the person was notified of a right of appeal under Section 82 against another immigration decision (Section 96(1)) or that the person received a notice under Section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision (Section 96(2)). Second she must conclude that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision (Section 96(1)(b)) or that the new decision relates to an application or claim which relies on a matter that should have been but has not been raised in a statement made in response to that notice (Section 96(2)(b)). Third she must form the opinion that there is no satisfactory reason for that matter not having been raised in an appeal against the old decision (Section 96 (1) (c)) or that there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice (Section 96 (2)(c)). Fourth she must address her mind to whether, having regard to all relevant factors, she should exercise her discretion to certify and conclude that it is appropriate to exercise the discretion in favour of certification.”

112.
That jurisprudence finds expression in the Home Office Guidance on “Late claims: certification under section 96 of the Nationality, Immigration and Asylum Act 2002” which provides materially as follows:

“Process for considering certification

There are four stages to considering whether a claim can be certified under section 96(1):

1.
Was the claimant notified of a right of appeal under section 82 against a previous decision?

2.
Does the new claim rely on a ground that could have been raised at the appeal against the earlier refusal?

3.
Is there a satisfactory reason why the ground was not raised earlier?

4.
Having regard to all relevant factors, is it appropriate to exercise discretion in favour of certification?”

Pausing there, there is no dispute that the claimant was notified of the right of appeal and exercised it. The guidance continues with more detail:

“2.
Does the new claim rely on a ground that could have been raised at the appeal against the earlier refusal?

If the facts or circumstances which form the basis of the new claim did not exist at the time the appeal against the previous claim was notified or heard, that claim could not have been raised at that appeal. For example, where the new claim relies on Article 8 family life following the birth of a child, if that child was not conceived when the appeal against the previous decision was notified or heard then it would not have been possible to raise that ground at that appeal.

In claims that evolve over time, such as a developing family life, some of the facts which form the basis of the new claim may have been in existence at the time the appeal against the previous claim was notified or heard whereas others may not have.

You need to assess whether there has been a material change in the individual’s circumstances since the time of the earlier appeal with that material change being something that could not have been raised earlier because it did not exist at the time. Where family life develops significantly, for example where the new claim relies on an established marriage or the birth of children who were not conceived at the time of the earlier appeal it may not be appropriate to certify. However, where the individual’s circumstances have not changed except that time has passed, certification may be appropriate.

3.
Is there a satisfactory reason why the ground was not raised earlier?

A new claim cannot be certified just because it could have been raised earlier. If the ground could have been raised earlier, you must go on to consider the reasons why the matter was not raised at the earlier appeal, taking into account all relevant information, and whether any explanation provided is satisfactory.

Section 96 is not a means of punishing individuals by exposing them to a real risk of persecution, death or torture just because they may lie or give an incomplete version of their story at their first appeal if there was a satisfactory reason for them doing so.

The fact that an individual has lied or omitted to give information previously should be taken into account when deciding whether there is a satisfactory reason for not raising the ground earlier but it does not decide the issue. You must also consider whether there is a satisfactory reason for the lie or omission.

If a decision is made to certify, the decision letter must set out the factors that were taken into consideration and the reasons for concluding that there was no satisfactory reason for failing to raise the ground earlier.

You must consider the impact the explanation has on the credibility of the new claim. For example, in an asylum claim an explanation on reasonable but very weak grounds is given. If the weak explanation is inconsistent with a genuine fear of persecution you are entitled to conclude that the explanation was not satisfactory. For example if an individual said that they didn't raise Article 3 at their appeal because they forgot, this is a reasonable explanation but is inconsistent with someone who claims to be in fear of torture on return as it is unlikely that they would forget to raise that issue at appeal.

Contrast this with an explanation given in an asylum claim on reasonable but more substantial grounds where an individual did not raise certain issues at his appeal because he was too traumatised at the time to discuss them. The reason given for not raising the grounds earlier also supports the asylum/human rights claim. You are entitled to conclude that the explanation is satisfactory.

The failure to give any explanation or a satisfactory explanation does not mean that the case must be certified. You must proceed to the next step, the exercise of discretion, before reaching a conclusion on certification.

4.
Having regard to all relevant factors, is it appropriate to exercise the

discretion in favour of certification?

It is important to remember that even if the criteria in section 96(1)(a) to (c) are met, you are not obliged to certify the case. Certification is a discretionary power that should only be used where it is right to do so, having regard to all the facts of the case.

It is not sufficient just to say that consideration has been given to the exercise of discretion and the outcome of that consideration is that the case is certified. The decision letter must set out the factors taken into account when deciding whether to exercise the discretion to certify and the basis on which you concluded that that it was right to certify in that case.

Factors to be considered are the:

-
prospects of success at appeal for the underlying claim, particularly where asylum and Article 3 issues are raised

-
reason why the claim was not advanced in the original appeal

-
impact of that explanation on the credibility of the new claim

-

fact that a claimant may have lied previously should be taken into account but is not necessarily determinative”

113.
Further, when approaching the correct approach to the 3rd Hardial Singh principle, it was held in R(Ademiluyi) v Secretary of State for The Home Department [2017] EWHC (Admin) 935 that

“60.
In this particular case, there is one particular issue which, in my judgment, illustrates the significance that could have arisen from the Secretary of State asking and answering the Hardial Singh 3 question for herself. The Secretary of State as the arm of the executive has certain powers of certification in the context of removal or deportation and human rights claims. Those certification decisions are themselves amenable to judicial review. They may have the consequence that an appeal against the certified decision is an out of country appeal, but there is then a judicial review of the certificate. That prospect is a potentially relevant feature – as indeed the bail judge here recognised – in circumstances where it is known that a deportation action will be resisted on human rights grounds, as in this case.

61.
The Secretary of State would, as it seems to me, be entitled to address her mind to her certification power, the threshold for it and the discretion to which it gives rise, where that threshold is satisfied. In this case, the Secretary of State did not address that question. She cannot, in my judgment, in this case put forward the prospect of certification as being a matter that would support a conclusion that a speedy removal was on the cards. Nor, it is fair to say, did Ms Lean for the Secretary of State seek to put forward that factor in that way. This did not feature in the list of factors which she gave me in her submissions, which she submitted would support a conclusion in the Secretary of State's favour, so far as Hardial Singh 3 is concerned. In my judgment, properly in the circumstances of this case, she treated it as at best a neutral matter. In any event, in my judgment such indications as there are in this case support this conclusion: that it could not be said that this was a case in which it was envisaged, or would have been envisaged, that there would be certification, still less that certification would realistically have led to the speedy removal of the claimant without the ventilation of his Article 8 rights.

Analysing the Hardial Sing 3 Question

62.....Viewed objectively and on the facts as they presented themselves to the Secretary of State at the relevant time, was there or was there not a realistic prospect of deportation during a time which in all the circumstances of this case would be a reasonable time? Was it sufficiently clear that no realistic prospect of that kind arose such that the Secretary of State should have released rather than detained? ....

84.
Ms Lean also emphasised the 'just the beginning' nature of the immigration detention so far as abscond risk and reoffend danger were concerned. Her submission was that abscond and reoffend risk are matters which have more weight in relation to the reasonableness of the period at the start. She cited Fardous paragraph 23 in support of that proposition, where reference is made to risk of absconding, as something which: "Might justify a detention up to a point." I accept that abscond-risk and reoffend-risk are matters which can properly be regarded as more weighty at the beginning of detention, and less weighty as detention goes on, when one is considering what is reasonable as a period in all the circumstances.

85.
In my judgment, however, these submissions on ‘just the beginning’ provide no answer to the application of Hardial Singh 3, when one is considering a position at the start of detention. The question in such a case is not whether the reasonable period has now expired. That question is the application of Hardial Singh 2. The question under Hardial Singh 3 is whether it is already clear that by a future date, in which a reasonable period will have expired, the Secretary of State will not have been able to effect removal. Hardial Singh 3 projects forward to a period which will expire at some stage in the future.

86.
Therefore, in my judgment, it misses the point to invoke the weight that would be given to factors that go to the question of whether the period has yet expired or not yet expired. The question, as I have emphasised, under Hardial Singh 3 is forward-looking. The weight to be given to such matters, the ongoing length of detention and any reduced weight to be given to abscond or re-offend risk would be part of the balance when the question would arise at a future stage as to whether the reasonable period has then expired. By then, of course, it will not be ‘just the beginning’.”

114.
Chapter 55 of the Enforcement Instructions and Guidance sets out the policy of the defendant:

“55.1.3
Detention must be used sparingly, and for the shortest period necessary.

….55.3

1.
There is a presumption in favour of temporary admission or temporary release - there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

2.
All reasonable alternatives to detention must be considered before detention is authorised.

3.
Each case must be considered on its individual merits…

…55.3.2.11 Those assessed as low or medium risk should generally be considered for management by rigorous contact management under the instructions in 55.20.5. Any particular individual factors related to the profile of the offence or the individual concerned must also be taken into consideration and may indicate that maintaining management by rigorous contact management may not be appropriate in an individual case.

In cases involving serious offences on the list here, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences.”

SUBMISSIONS

115.
On behalf of the claimant Ms Renfrew submitted that the detention was unlawful and amounted to false imprisonment from 4 May 2016. Human Rights informed her submissions but there was no

distinct claim before the Court. They are relevant to my assessment. The failures of the defendant were cumulative. The submissions included the following

i)
Alternatives to detention, from the beginning, were not considered such as financial conditions and or tagging before detaining;

ii)
The change in circumstance to the claimant being a family man was not weighed properly or at all in the balance. She refers to the monthly progress reports dated 4 May, 1 June, 29 June, 23 August, 18 October to the claimant, the defendant wrote that “You do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place” whereas the defendant knew that the claimant had a partner and two children;

iii)
The defendant had not proved that the claimant had absconded in 2006 and was at risk of so doing. In any event the risk of absconding should be put into perspective given that the claimant had been reporting for almost 3 years, including after he had exhausted all his rights of appeal. The risk of him absconding was was not properly weighed and, effectively, wrongly played as a trump card by the defendant;

iv)
In a similar vein she submitted that the risk of reoffending was exaggerated as there was only one substantive pattern of criminal offending and that was in 2006. The claimant had not reoffended by 2016 and that informed the real risk, which was low of, reoffending rather than the medium risk which the defendant adopted;

v)
The risk of harm, given the facts of the offending – it was non-violent - and its one off nature required a proper analysis of harm. It was low and there was no good reason to rate it any higher at medium nor was there evidence to support that assessment;

vi)
She criticised the defendant’s lack of disclosure. The defendant had failed to disclose the Rule 35 assessment by the doctor when the claimant was detained in Brook House and simply disclosed their report. There was no evidence of the failure that led to the certification. There was simply a concession by the defendant as to the that there had been a mistake;

vii)
The failure in disclosure was exacerbated by the failure of the defendant to provide specific and direct evidence as to the reasons for and the assessments of the defendant’s detention. The defendant had failed to set out detailed reasons justifying the claimant’s initial and then continued detention. There was not the “substantial fact-based justification” that was required for detention as demanded by Lumba [242] and Sheikh v SSHD [2019] EWHC 147 [91];

viii)
That the decision, unlawfully to certify the claimant’s protection claim under section 96(1) NIAA rendered the detention unlawful not simply from that date but ab initio. There was not only no basis for it but no evidence as to why it had happened. In her submissions she acknowledged the “What Breach” principle but submitted that it was wrong to equate that with a causation test; and

ix)
The defendant failed to show that the claimant could be deported within a reasonable period following the asylum claim, no basis for the belief that such a claim would be certifiable and thereafter a failure to act with expedition in dealing with that claim – there was delay before the interview and delay afterwards. There was further delay after withdrawing and issuing the new decision with a right of in-country appeal with a further delay of about a month until expedition inquiries were determined – throughout this period the claimant remained in detention;

x)
Without prejudice to her submissions that the detention was unlawful ab initio, the unlawfulness became more apparent as the detention continued past the date of the interview and the wrongful certification. Even an expedited appeal would take months and, at that period the claimant had been detained since 4 May 2016. Further, the detention was not being used for removal but to determine when the appeal hearing could be heard;

116.
The defendant submitted that detention was obviously lawful on 4 May 2016 and was done for the purpose of removing the claimant from the UK. There were no barriers to removal. The claimant had exhausted the appeals process and his application for judicial review had been refused. The date for removal was less than three weeks away, the claimant had a history of absconding and had done so around the time of his previous removal directions in December 2006 and had continued until July 2013 – this was rightly high risk. Mr Howarth submitted that the claimants reporting for almost three years made the risk of absconding higher, rather than lower, as the reason he started reporting was to appeal the deportation order. The claimant's offending was appropriately rated as medium risk or with a medium risk of reoffending as his offending was directly connected with avoiding immigration controls, using a counterfeit passport and using a false name. Mr Howarth further submitted that

i)
In R (Obot) v Secretary of State for the Home Department [2010] EWHC 610 (Admin) the applicant posed a high risk of absconding and there was, at all times, a sufficient prospect of removal within a reasonable time due to the hopeless nature of all the applications. In that case four and a half months was held to be reasonable. The case was distinct from R. (on the application of YH (China)) v Secretary of State for the Home Department [2018] EWHC 92 in that the claimant's position was continuously reviewed with a time frame for resolution, the risks were higher and the absconding risk rationally considered;

ii)
That the claimant obstructed the deportation period as in Kajuga [2014] EWHC 426 (Admin), and, therefore the period of reasonable detention, was longer than otherwise it may have been, because the loss of liberty arises from the claimant's own making and the risk of absconding is a factor of great importance;

iii)
The asylum claim was not a barrier to removal. The defendant had a plan to deal with the claim at each stage. It was a hopeless claim, made at the last minute, with a torture claim that was only made 11 years after entry into the UK and made to thwart removal. He submits that the asylum claim was given a 1 to 3 month turnaround on 27 June 2016 and the decision was completed by 26 September 2016. Per Lumba the time to pursue a hopeless appeal, such as this one, has less weight on the assessment of a reasonable period of detention;

iv)
Referring to the detention reviews one can see that the defendant was continually acting with reasonable expedition and with a view to deport the claimant within a reasonable period. That continued up to and through to the period when it was found that the appeal against the refusal could not be expedited;

v)
The mistake that led to certification of the claim does not render the decision to detain retrospectively unlawful. Further, the decision to certify did not bear directly on the decision to detain the claimant. For the reasons set out above the claimant would have remained in detention;

vi)
The continued detention after 26 September was entirely lawful as the defendant was clarifying whether the appeal could be expedited and, given the other factors, if it could, then continued detention would have been reasonable. Only when it was determined that the appeal could not be expedited was the claimant properly released from detention. The reasonableness of the overall period must be judged against the circumstances of all the case;

vii)
A family split was authorised prior to the claimant's decision on 26 April 2016 and considered in the Deportation decision upheld by Tribunals and the Court and therefore that element of the claim should fail;

viii)
The Detention reviews properly weighed up all the matters and made determinations which were reasonable with deportation expected within 1-3 months or a reasonable period;

ix)
The asylum claim created issues given it was raised at the last moment, an interview was held within a reasonable time, assessed within a reasonable time and removal continued to be expected within a reasonable period. The 20 September review expected removed directions for 26 September 2016. The 18 October review shows the defendant acting urgently to assess whether the claimant can be removed. The history, viewed fairly, shows the defendant reacting appropriately to an absconding offender who made a last minute but hopeless claim for asylum to thwart his removal. The detention was justified throughout under Chapter 55 EIG and on common law principles.

ANALYSIS

117.
I have set out the facts above as I have found them at some length. I have then set out the legal principles which I apply to those facts to reach my decision. Given the full narrative of facts and law I can express my conclusion, relative to the length of those parts of my judgment comparatively shortly.

The Decision to Detain

118.
The claimant's offending was non-violent and occurred by the possession and use of a counterfeit passport in the false name of "Orija". However, his history of offending is particularly relevant to the defendant who, in this case is enforcing immigration controls. It is relevant because the facts of the claimant's criminal undertaking, including not just the use of the passport but using it in a false name, directly undermined the defendant's immigration controls. Unlike other offences, the offence of which

the claimant was convicted created not only a risk of reoffending but a risk of again undermining the immigration control to which the claimant was subject. There was not more than one criminal course of conduct.

119.
I have found that the claimant absconded. He absconded around the time of his planned removal from the UK. The timing is clear. I draw the obvious inference from the timing that the claimant absconded in order to avoid deportation.

120.
Further, the claimant absconded in his false name. He did not correct the defendant's understanding of his true identity. I find that the claimant applied in his current name in 2008 for settlement. He did not tell the defendant then that he had been convicted in another name. It was only in July 2013 that the claimant properly identified himself.

121.
Whilst the conviction was, as Ms Renfrew submitted, relatively stale, it was stale because the claimant had absconded over time and never corrected the defendant's incorrect understanding that he was the same Michael Orija who had committed that offence until July 2013. The history of offending was hidden by the claimant.

122.
By 26 April 2016 there were no barriers to the claimant's deportation. None. All appeals had been exhausted. A flight was scheduled for 24 May 2016. However, the claimant now had a family with two young daughters which were matters that had been considered by the courts and were no bar to his removal. Further, the claimant had been reporting faithfully since 3 July 2013.

123.
In my view the defendant's decision to detain the claimant when he reported on 4 May 2016 was entirely reasonable. The purpose was to ensure that he would be removed in 20 days' time. The claimant's offending was directly relevant to his risk of evading immigration controls, the use of the false name and the failure to correct that false name throughout the period (and in the application for settlement in 2008) were matters that exacerbated the risk of undermining immigration controls.

124.
The history of absconding around the time of the first removal should have, and did weigh heavily in the balance. Given the imminent removal of the claimant, his history of offending with a false passport which directly undermined immigration controls, his use of a false name, his failure reveal his false name and absconding to avoid a previous deportation order (**"the risk factors"**), I am quite satisfied that it was reasonable not to consider that alternatives such as a financial bond addressed the risks factors.

125.
Further, whilst the claimants changed family life circumstances, faithful reporting over the previous three years and the upsetting conditions in which he was detained in Brook House (**"the claimant factors"**) were matters that affected the balance, they were not then, such as to outweigh the risk factors and the short period of detention that would occur prior to his detention at this stage. I am satisfied that the initial detention review, including the decision to detain did consider the claimant's family life as a relevant factor. The error in the monthly progress report with respect to the claimant

and his lack of family ties is not replicated in the reviews which are, of course, the material documents which set out the reasons as to why the defendant acted as she did.

126.
The decision taken by the defendant on 21 April 2016 was eminently reasonable against the factual matrix, lawful and wholly justified on the facts given that balance, at that stage between the risk factors and the claimant factors where the period of detention would be very short and the deportation imminent.

The Protection Claim

127.
The Claimant made a last minute claim for asylum. It prevented his deportation. For whatever reason the late raising of this claim by the claimant placed the defendant in a difficult position. Throughout the layers of appeals, consultations with lawyers engagement with the defendant this claim of torture had never been advanced before. I was not told the reason as to why that should be so. Many different explanations are possible but, in any event, the claim of asylum needed to be investigated and determined. That the claim was made late, in my view, bears on the reasonable period of detention because, given the risks set out above, the defendant needed a reasonable period of time to assess the claim and establish whether it would be a barrier to detention within a reasonable time. Whatever the reason for making the claim late it needed to be investigated although with diligence given that the claimant was detained.

1 June 2016 Review

128.
I bear well in mind that Hardial Singh 3 is a forward looking principle. I am quite satisfied that at the time of the detention review on 1 June 2016, the defendant was justified in coming to the view that this late made asylum could be assessed within a reasonable time of between one and three months and it was reasonable to expect the claimant’s removal within that time. It was not unreasonable to expect the asylum claim to be certified and for removal to follow.

129.
The defendant was acting with reasonable diligence and expedition given that the asylum claim was made not simply at the last minute but as the bell was striking. The claimant needed to be referred to the correct department, have an asylum interview and for that claim to be considered. Accordingly, the continued detention, against the background above, was reasonable because of the risk factors and it was reasonable on the evidence then apparent that deportation would occur within three months as Mr Pritchard said.

29 June Review

130.
In June details were requested and provided for the asylum claim. These were needed prior to the asylum interview. The 24 June 2016 minute in respect of certification is difficult to understand as it was a comment prior to the interview and assessment of the asylum claim. I do not consider that it put the defendant on notice that the claim would not be capable of certification. Those were matters to be determined and because the asylum claim had been raised late by the claimant, that had yet to happen. Further, the claimant’s rule 35 application had been made and, on 28 June 2016 an asylum interview was booked.

131.
At this stage the further authorisation of detention was clearly to effect removal of the claimant given the risk factors and was reasonable in all the circumstances given the late asylum claim. The risks factors rightly continued to weigh heavily and justified detention where it was not yet clear that this would be a relatively short investigation and deportation. There was a reasonable basis to consider that the late asylum claim would be rejected and removal within a reasonable time of 2-3 months be effected. However, the clock was ticking. The asylum claim made on 24 May 2016 needed to be assessed diligently and with reasonable expedition.

132.
Consideration of Hardial Singh 4 now starts to weigh more heavily in the balance over a month after the asylum claim was made. Was the defendant proceeding with reasonable diligence to effect removal which, in this case, is answered by how the defendant was dealing with the barrier to removal – the asylum and human rights claim.

133.
In my view the defendant was acting with reasonable diligence. It was sourcing the information on which the interview would be based, the referral to the ACD had been made and the interview booked. The Rule 35 Report had been considered and rejected as there was no independent evidence of torture.

134.
Based on these investigations the expectation that deportation would still occur within a reasonable period was based on sound reasoning that matters were progressing with the asylum claim and it should be determined within a reasonable period of 2-3 months.

135.
The decision to continue detention was reasonable as the risk factors continued substantially to outweigh the claimant factors. The change in circumstance prompted by the application for asylum was not so great as materially to change the reasonableness of the decision to continue to detain given the timing of the asylum claim.

27 July Review

136.
The 1 July 2016 note that the asylum claim could not be dealt with or decided within 6 months was the alarm bell that matters might take considerably longer than had been considered – the range of 2-3 months was changing. This was simply a note of the team dealing with the claim. It was not the result of a formal meeting but it was the first indication that this claim might take longer to conclude that had been considered hitherto. However, the note also came before the asylum interview and I consider it would only be after consideration of that interview that one could arrive at an informed view as to how long the claim would take. After the interview a request was made to allocate the asylum claim as the interview was complete.

137.
By this stage it had taken the defendant just over two months since the claim had been made to gather details on the asylum claim and effect an interview on 6 July 2016 which had not yet been assessed and was referred for assessment on 26 July 2016. However, I am satisfied that the defendant was still proceeding with reasonable diligence in the circumstances of the late asylum claim and to gather information and then assess it. The expectation from the assessment on 29 July was that the

assessment of the asylum claim should still allow removal within a reasonable period – which I take to be the 1-3 months' timescale set by Ms Pritchard at the time of the first review on 1 June 2016. Whilst there was not a predicted date there was a sufficient prospect of removal in this time period to justify, given the risk factors to continue reasonably to justify detention.

The August Detention Review

138.
I am satisfied that the expectation of removal within 1-3 months by Ms Pritchard could only be based on the expectation of certification of the asylum and Article 8 claim. It would be the certification that would allow the removal of the claimant within a reasonable time. I am satisfied that hitherto, the expectation that the decision would be capable of certification was a reasonable one. The claimant had raised an Article 8 claim in his previous litigation and had exhausted the full panoply of rights and appeals. The asylum claim made very late.

139.
Once the interview transcript was available I take the view the position began to change. The email of 3 August 2016 put the defendant on notice that, in the view of the assessment of the author of that email, the interview 'was not of sufficient quality for a certified decision.' This email is contradicted by the note of 5 August 2016 which suggested that the claim should only take 3 weeks to finalise. The position remained uncertain. The defendant needed to analyse the interview and come to a decision on the asylum claim and whether it could be certified.

140.
On 10 August Mr Mullin set out the note in which it was clear both that he considered that the asylum claim was likely to be weak and incredible. However, he also expressed the view that there had been a failure to explore other issues in sufficient detail and it was that failure I infer from all the evidence, given that the defendant supplied me with no detailed explanation as to why the certification was wrongly made, that meant that the claim could not properly be certified. Mr Mullin wanted the claimant re-interviewed but as he had been asked to expedite the matter would assess it as it stood and do his best. That informed the decision not to re-interview the claimant on 11 August 2016 with an expectation for a decision by 23 August 2016. The defendant realised that matters had now become urgent and therefore expedited consideration of that claim given the next detention review on 23 August 2016.

23 August Review

141.
The 23 August 2016 review was entirely performative and lacked any substance. I am not satisfied that any proper review of the facts of the case was conducted. The review, as I set out above, was simply a "cut and paste" of the 29 June 2016 review with no thought and no consideration applied to the evolving facts and the claimant factors or the risk factors. It was window dressing. Rather, the defendant's considerations on 23 August 2016 are set in the aspic of the factors as they were on 29 June 2016.

142.
The review should have, with reasonable diligence, considered the 3 August, 5 August and 10 August history. The defendant knew of this emerging position. The review did not engage with the twice expressed view that the interview was insufficient to allow certification of any determination of the asylum claim. As R(J) sets out, it should have been apparent to the defendant that could not satisfy all

four tests to certify the decision and, in particular, the defendant could not be satisfied why the matter had not been raised earlier as no evidence was ever led as to why this should or should not be the case. The interview was insufficient for this purpose. The review simply kicked the can of the decision further down the road, holding a Nelsonian telescope to that which was revealed by the recent facts.

143.
Given the issues as to the interview I find that expediting the decision on the inadequate interview would have been the defendant acting with reasonable expedition. That decision should have been ready by 22 August 2016 if the defendant had acted with reasonable dispatch. No more inquiries were necessary. The 22 August 2016 is not a date plucked out of the air by the Court but the defendant's own anticipated date for its decision and it was right to put that as the anticipated date given the inadequate interview and the likely impact on certification which would prompt an urgent review of the decision to detain.

144.
By this stage it was necessary to arrive at an expedited decision as there were real doubts that any decision could be certified. If the decision could not be certified then the time until deportation would stretch far into the future altering the balance of risk and likely changing that which was reasonable, which would demand review. As the next review was on 23 August 2016 the decision needed to be completed by then.

145.
Had the decision been made on 22 August 2016, as reasonable expedition demanded that it should have been, it would have resulted an uncertified refusal and therefore, that there would be a need for an in country right of appeal.

146.
The review of 23 August 2016 should have been informed by an uncertified decision to refuse the Protection claim. Had Hardial Singh 3 been considered at the 23 August 2013 review in the light of the above, it would have been clear that removal would likely not be effected within a reasonable time given the claimant's continued detention, subject to the single question as to whether an appeal could be expedited.

147.
I am satisfied that had the appeal against the decision to refuse the asylum claim been capable of expedition then continued detention may well have been reasonable depending on the timescale for the hearing of the appeal. There might then, have been a realistic prospect that deportation would take place within a reasonable time, and that might justify further detention balancing the claimant factors against the risk factors.

148.
The same urgent consideration that was to be given to the decision whether it would be possible to expedite the appeal, that was eventually considered in the 18 October 2016 Review, should have been considered at this review on 23 August 2016. The 18 October 2018 review including inquiries and discussion took one week to arrive at the conclusion that expedition was either not possible or appropriate and to prepare a release submission which was done on 25 October 2016. That is a reasonable period of time to make inquiries and receive replies to the inquiry. The same urgent review and decision in respect of any appeal not being expedited should have taken one week after the 23 August 2016.

149.
In my view, therefore, the further inquiries as to expedition and its length of time should have been completed and a release submission made by 30 August 2016. There is no evidence other than they would have had the same result as the inquiries that led to the conclusion that expedition was not possible. The factors were no different on 30 August 2016 to those on 21 October in the conclusion that expedition was not possible or appropriate.

150.
Accordingly, on 30 August 2016 the defendant ought to have arrived at the same conclusion that she did on 25 October 2016 that the claimant should be released given the length of time until the deportation and the claimant factors. Yes, the claimant had absconded in a false name between 2006 and 2013 and interacted with the immigration authorities without disclosing his conviction or use of his false name. Further, absconding is a paramount consideration but it is not a trump card. The claimant, when not under imminent threat of removal as was the case again on 30 August 2016, had faithfully reported between July 2013 and May 2016. The risk of absconding against this history and without an imminent date of deportation must not be overstated. Further, the claimant was approaching having been detained for four months. The claimant factors, weighed against the time that would now be necessary to consider his case, rendered his continued detention unreasonable set against the fact that the deportation could not be effected within a reasonable time.

151.
I consider that some 3 or so days would have been reasonable to organise the claimant's release and that any detention beyond 3 September 2016 was unlawful.

152.
Mr Howarth submits that the hopelessness of the asylum claim should inform the reasonableness of the period of detention. I agree that that is a relevant factor but it is not such as to justify continued detention when removal cannot be achieved within a reasonable period of time and given the countervailing claimant factors against the risk factors, now deportation was not imminent.

153.
I reject Ms Renfrew's submission that the unlawful certification of the asylum claim rendered the detention unlawful from first to last. In my view, it was not the unlawful certification per se, that rendered this detention unlawful. It was the failure of the defendant to apprehend, as was obvious, by 23 August 2016, that the claim would not be capable of certification and a right of appeal in country would be necessary extending the time until deportation which, balanced against the claimant factors would no longer justify detention..

154.
I agree with Ms Renfrew that the subsequent certification was unlawful. However, the defendant, in all the circumstances of this case, and particularly the risk factors, would not be able to assess the likelihood of certification until the interview had been transcribed and assessed. Given the late asylum claim that required time, and acting with reasonable diligence, that assessment would reasonably have been made on 23 August and should have resulted in the outcome I have set out above.

155.
I have not set a date earlier than the 23 August for the review because as I have found the assessment of the interview was performed on 3 and 10 August 2016 should have led to a refusal decision on 22 August 2016 which would then have been assessed the next day in the detention review.

156.
I reject Mr Howarth's submission that inquiries as to the time required for an appeal against the decision should await an appeal by the claimant, as the claimant might not appeal and therefore would simply be removed. On the facts of this case that is an unworldly submission. This claimant exercised all his rights on each occasion as he was entitled so to do.

157.
In any event for completeness I go on and make findings in respect of September and October 2016 although my decision as to the unlawfulness of the detention is set out above. It should have been clear throughout September that the refusal could not be certified. The review on 20 September wrongly concluded, because of the unlawful certification of the refusal, that all rights to appeal had been exhausted and that the claimant would be removed on 27 September. The SPOE disagreed with the certification of the claim. There is no evidence as to why from the defendant. I have set my findings out as to the error in the certification decision.

158.
The delay to assess the impact of the reversal to certify the decision until 18 October was wholly unreasonable. The claimant was in detention. No evidence was provided as to any inquiries being made prior to 18 October 2016 and I have rejected Mr Howarth's submission that no inquiry was necessary until an appeal was received on 10 October 2016. The defendant failed to act with reasonable diligence during this time as well. The inquiries were urgent as set out on 18 October 2016 and had been urgent since the defects in the interview were apparent. Such an inquiry and a release submission should have taken a week with release a matter of 3 days afterwards.

ASSESSMENT OF DAMAGES

159.
As a result of my findings above it is clear that the claimant was detained lawfully from 4 May 2016 until 3 September 2016. He was unlawfully detained from 4 September until his release 60 days later. Compensatory including aggravated damages are pursued, exemplary damages are not.

160.
Ms Renfrew conceded that there was no claim for personal injury. There is no medical evidence. I take into account the effect of the detention on the claimant set out above. I discount the claimant's own evidence of medical conditions as that would require expert evidence and due to Ms Renfrew's concession. I note that the claimant's unlawful detention followed on from an almost four month period of a lawful detention. The claimant's unchallenged evidence was of frightening conditions in his continued detention into the unlawful period. It extended the claimant's separation from his family and extended his experience of these conditions. I take into account that he was racially abused and man handled. I take into account that the first and greater period of detention was lawful so that the initial shock of detention and separation from his family was attributable to lawful conduct and does not sound in damages. However, that his detention was wholly unnecessarily and unreasonably extended by the defendant's failures for a period of 60 days.

161.
Compensatory damages comprise two elements: the first to reflect the fact of the detention and the restrictions and deprivations that are the ordinary consequences of the deprivation of liberty and secondly whether those damages are aggravated by any special features of the case such as the circumstances of the detention or the defendants conduct. The parties agreed that MK (Algeria) v Secretary of State for the Home Department [2010] EWCA Civ 980, sets out the principles regarding

an award of basic or compensatory damages, so that any assessment depends on a precise evaluation of the circumstances and the degree of harm. It is not a mechanistic approach and a global approach should be taken rather than a daily rate.

162.
The gravity of the wrongdoing of false imprisonment is worsened by its length, that longer time should be tapered in respect of damages or placed on a reducing scale.

163.
In R (on the application of Chaparadza) v Secretary of State for the Home Department [2017] EWHC 1209 (Admin) decided on 24 May 2017 resulted in an overall award of £10,500 of which £3,500 was for the initial shock of being detained (uplifting for inflation the £3,000 for the initial 24 hour period from Thompson v Commissioner of Police [1998] QB 498) and £7,000 for the remaining period of 70 days. £7,000 would give a sum of £9,750. Ms Renfrew submits that no evidence of harm was adduced in Chaparadza and it can be seen that the evidence as to the impact of the detention at paragraph 14 of that claimant's statement was minimal. That claimant did not condescend to the detail and the impacts that the Mr Oluponle outlined to me in his unchallenged evidence.

164.
I regard the impact on this claimant as in a wholly different class of severity. Equally there was no first shock and the claimant was detained in what by then, were surroundings which he had come to know over the previous four months although I take into account that they were frightening and had a severe effect on him although there is no evidence of personal injury.

165.
The claimant referred me to Muuse v SSHD [2010] EWCA Civ 453 where the claimant had been wrongly imprisoned from first to last by the defendant and was awarded £25,000 uplifted to £40,952 and this included the terror that the claimant felt in facing a wrongful deportation to Somalia over a period of 128 days. That period of detention was roughly twice that in Mr Oluponle's case and included the shock of initial detention and the fear of being wrongfully deported whereas Mr Oluponle was facing a lawful deportation certainly until 24 May 2016. This case is more serious by reason of the length of the period and the other factors that I have referred to above.

166.
The Claimant agrees that some of the cases are an aid to quantum. In particular Foster J's decision in R. (on the application of Abulbakr) v Secretary of State for the Home Department [2022] EWHC 1183 (Admin) where £17,500 (updated £19,500). In Abulbakr there was no initial shock, the length of time of the detention was shorter than that which is currently before me however it was uplifted due to the effect of the Covid-19 pandemic. Further Foster J declined to award aggravated damages as the failures were careless and unnecessary.

167.
In my view the appropriate sum of damages for Mr Oluponle's continued detention for 60 days is £20,000. The effect on him was serious, the conditions appalling and he told me of the long-lasting effects on him. However, there is no evidence to support any personal injury to him.

Aggravated Damages

168.

Ms Renfrew refers me to Thompson p.417 (8) where Lord Woolf MR explained, in respect of aggravated damages

“….Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted.”

169.
I am unpersuaded that an award of aggravated damages applies in this case. The compensatory damages fully reflect the conditions in which the claimant was unlawfully detained and compensate him for his unlawful extended imprisonment.

170.
The defendant’s failure was a failure to review the detail of the interview and mistakes were made in respect of certification and then there was a delay before the case was properly reviewed. The mistakes resulted in unlawful conduct and should not have occurred but they were not highhanded, oppressive, insulting or malicious. The claimant’s remedy lies in the compensatory award that I have made.

171.
Accordingly, judgment for the claimant in the sum of £20,000. I would be grateful if counsel could agree any award of interest and the minute of the judgment. They should liaise as to the issue of costs, and in respect of any other consequential issues, with a view to agreeing those.

172.
If agreement is not possible then I direct that they make concise written submissions on the outstanding issues including whether they consider there is a need for a further hearing. I shall determine whether there is a need for a further hearing and if not, then make any further orders having considered their written submissions.