Neutral Citation Number: [2021] EWHC 1043 (QB)

Case No: QB-2019-001726

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

Between :

AO	**Claimant**
- and –	
The Home Office	**Defendant**

- -
- -

Greg Ó Ceallaigh (instructed by **Leigh Day Solicitors**) for the **Claimant**
Rory Dunlop QC (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 13, 14, 15, 16 and 19 October 2020

- -

Approved Judgment

Mr Justice Morris:

Introduction

1. The Claimant, OA, ("the Claimant") is an Afghan national, now aged 27. By this claim, he seeks declarations that he was falsely imprisoned and unlawfully detained between 7 February 2017 and 25 January 2018 by the Secretary of State for the Home Department and that he was released to street homelessness in breach of Article 3 ECHR. He seeks damages for false imprisonment and for breach of his Convention rights. Whilst formally named in these proceedings as the Home Office, for ease of reference, in this judgment the defendant is referred to as "the Secretary of State".

2. The Claimant's essential case is that his detention, pending deportation to Afghanistan, was unlawful either by reason of what are commonly termed *Hardial Singh* principles or by reason of public law error.

3. The structure of this judgment is as follows. In section A, I identify the seven issues. Section B sets out the relevant legal background. Section C addresses the evidence. In section D I set out the facts, and at section E I refer to the expert evidence. Section F contains my analysis addressing each of the seven issues. My conclusion are summarised at paragraph 279 below.

The facts in summary

4. The Claimant came to this country on a lorry on 27 November 2007 and claimed asylum. He has, and has had, severe mental health problems, having been diagnosed with bipolar disorder in March 2016.

5. On 30 June 2016 he was sentenced to 26 months imprisonment for various offences, including offences of violence. On or around 19 July 2016 the Secretary of State gave notice of a decision to make a deportation order under s. 32(5) UK Borders Act 2007. Upon release from imprisonment on 7 February 2017, the Claimant was then immediately detained, pending the making of the deportation order, under paragraph 2 of Schedule 3 to the Immigration Act 1971. He was detained in prison, rather than in an immigration removal centre ("IRC"). The Secretary of State made the deportation order itself on 18 July 2017. The Claimant appealed against the deportation order. Applications for bail were refused in October and November 2017. However on 25 January 2018 he was granted bail and released from detention. On 17 April 2019 his appeal was allowed by the First-tier Tribunal ("FTT"). He now has leave to remain and has been granted refugee status.

6. His detention was managed by the Criminal Casework team within the Home Office and a caseworker (also referred to as a case owner) was assigned to his case, from time to time. His detention was subject to monthly detention reviews carried out by the caseworker, and subject to authorisation by a more senior officer within Criminal Casework, referred to as the "authorising officer". For most of the period of his detention, Mr Bertrand Walker was the assigned caseworker. Mr Walker carried out all the detention reviews, apart from the first. Since the Claimant was detained in prison, he was under the control of prison staff and ultimately the prison governor. However, the Criminal Casework team has a presence in a prison through its Prisons Operations and Prosecutions Team ("POP"). These are Home Office staff immigration officers

based in prisons to deal with immigration detainees who remain imprisoned. There are surgeries within prison for foreign offenders to go and see those immigration officers.

(A) The issues in summary

7. The Claimant's case is that his detention was unlawful on the following bases:

(1) by reference to *Hardial Singh* principles;
(2) as a result of public law errors bearing on the decision to detain;
(3) in breach of Article 5(1)(f) ECHR;
(4) in breach of Article 8 ECHR.

He further claims that his treatment by the Secretary of State was in breach of Article 3 ECHR and further contends that, if she had applied her policies lawfully, he would not have been detained at all or he would have been released significantly earlier. On that basis, he claims to be entitled, in principle, to substantial damages.

8. The Secretary of State accepts that the periods of detention between 4 April and 24 August 2017 and between 9 and 25 January 2018 were unlawful, as a result of breach of policy and thus public law error. Otherwise the Secretary of State denies that the detention was unlawful, whether by reason of *Hardial Singh* principles or of other public law error. Further and in any event, she could and would have detained the Claimant, even if no public law error had been made. Accordingly the Claimant is not entitled to substantial damages.

9. Whilst there have been substantial and detailed pleadings, it is agreed that the issues which fall to be determined are as follows:

(1) Was any of the detention unlawful by reference to *Hardial Singh* principles?

(2) Was any of the detention (other than the periods conceded to have been unlawful) unlawful by reason of being inconsistent with published policy? (The relevant published policy being policy in relation to "Adults at Risk" and policy under Enforcement Instructions and Guidance Chapter 55 ("EIG 55") both generally and, specifically, in relation to family and children).

(3) Was any of the detention (other than the periods conceded to have been unlawful) vitiated by any other public law error? (The other alleged public law errors are breach of the *Tameside* duty of inquiry; breach of duty to determine section 4 accommodation application; and failures in relation to the Home Office's Case Progression Panel).

(4) Was any of the detention in breach of Article 5(1)(f) ECHR?

(5) Were the Claimant's rights under Article 3 ECHR breached either (a) by his detention in "wholly unsuitable accommodation" or (b) by his alleged "release to street homelessness"?

(6) Were the Claimant's rights under Article 8 ECHR breached by his detention or decisions to detain?

(7) Could and would the Secretary of State have detained the Claimant throughout the period if she had applied her policies lawfully and/or not committed any other public law error?

(B) The relevant legal background

(1) Powers of detention

10. Schedule 3 paragraph 2 to the Immigration Act 1971 ("the 1971 Act") provides, inter alia, as follows:

> *"(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.*
>
> *(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 (an if already detained by virtue of sub-paragraph… (2) above when the order is made)."*

The *Hardial Singh* principles

11. The principles to be applied in determining the length of time for which a person may be so detained under the 1971 Act were established by Woolf J in *R v Secretary of State for the Home Department, ex parte Hardial Singh* [1984] 1 WLR 704. These well-known principles, as stated by Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 345 at §22, are as follows:

(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose ("Hardial Singh 1");

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances ("Hardial Singh 2");

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention ("Hardial Singh 3");

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal ("Hardial Singh 4")."

12. As regards the question, under Hardial Singh 2 and 3, of how long is a reasonable period, the list of relevant circumstances include: the length of the period of detention;

the nature of the obstacles which stand in the path of the Secretary of State preventing 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. See *Lumba* §§104 and 105, citing *R(I) v SSHD* [2002] EWCA Civ 888 at §48.

13. As regards the risk of re-offending, the magnitude of the risk includes both the likelihood of re-offending and the potential gravity of the consequences. The purpose of the power to deport is to remove a person whose continued presence would not be conducive to the public good. As regards the risk of absconding, the likelihood should not be overstated. It is not "a trump card": *R(I)* at §53 cited at *Lumba* §123.

14. As regards the nature of the obstacles standing in the path of deportation, delays attributable to the fact that a detained person is challenging the decision to deport by appeal, and will not generally be deported until these challenges have been determined, was addressed by Lord Dyson in *Lumba* at §§111-121. First, if a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, the detention during the challenge should be given minimal weight in assessing what is a reasonable period in all the circumstances (i.e. the period should be deducted from the period of time which has elapsed). Secondly, the fact that a meritorious appeal is being pursued does not mean that the period of detention during that appeal should necessarily be taken into account in its entirety for the benefit of the detained person (i.e. should not necessarily be included in considering the length of the period); there is no automatic rule, regardless of the risks of absconding and/or re-offending, which would compel release if the appeals process lasted a very long time through no fault of the appellant; 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. Nevertheless more weight should be given to detention during a period when the detained person is pursuing a *meritorious* appeal. However, even if there is delay due to a meritorious appeal, that does not decide the case in favour of the detainee.

15. As regards Hardial Singh 3, the question is whether it is "apparent" that deportation will *not* be effected within a reasonable time. That does not cover the situation where the prospect of removal is "merely uncertain". There must be a "sufficient prospect" of removal to warrant continued detention and what is sufficient is a question of balance in each case. There can be a realistic prospect of removal without it being possible to specify or predict the day by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all: *R (Muqtaar) v Secretary of State for the Home Department* [2012] EWCA Civ 1270 at §§36-38.

Hardial Singh 4

16. As regards Hardial Singh 4, it is not enough that, in retrospect, some part of the statutory process is shown to have taken longer than it should have done. It is necessary to demonstrate unlawfulness going beyond mere administrative failing and to show a specific period during which, but for the failure, he would no longer have been detained: *R (Krasniqi) v Secretary of State for the Home Department* [2011] EWCA Civ 1549 at §12.

17. The question whether Hardial Singh 4 governs the conduct of the Secretary of State *prior* to any decision of detention and, in a case such as the present, during the currency of the custodial sentence, was considered by Macfarlane LJ in *R (JS) v Secretary of State for the Home Department* [2013] EWCA Civ 1378 at §§48 to 52 and, more recently, by Veronique Buehrlen QC sitting as a Deputy High Court Judge in *AYZ v The Home Office* [2018] EWHC 2914 (QB) at §§84 to 93. The Claimant, in reliance upon the former decision, contends that the duty to act with reasonable diligence and expedition does arise before detention. The Secretary of State, in reliance upon the latter decision, contends that Hardial Singh 4 cannot arise until there has been a decision to detain. Whilst there may a difference of emphasis in the two judgments, and conscious that *JS* is Court of Appeal authority, in my judgment the following propositions can be derived from the two cases:

    (1) There is no blanket positive obligation upon the Secretary of State to commence various procedures towards removal of a foreign criminal whilst serving a sentence, and prior to immigration detention. However on the facts of any particular case, it may be sensible for the Secretary of State to do so: *JS* §50 and *AYZ* §87.

    (2) Whether it was reasonable to start the process of removal earlier than the commencement of detention is a valid and relevant question for the court when considering the overall reasonableness of the period of detention under Hardial Singh 2 and 3 or whether Secretary of State has acted with reasonable diligence and expedition in effecting removal under Hardial Singh 4. Circumstances pre-dating detention may be relevant: *JS* §§50, 52 and *AYZ* §92.

Generally

18. Finally, it is for the court to determine whether the detention has breached the *Hardial Singh* principles (and not merely for the court to review the Secretary of State's decision on *Wednesbury* grounds), and to do so on the basis of the material available at the time. However, in so doing, the court may recognise that the Secretary of State is better placed than itself to decide incidental questions of fact and the court will take such account of the Secretary of State's views as may seem proper: *R(A) v Secretary of State* [2007] EWCA Civ 804 at §62.

19. As the period of detention gets longer, the greater the degree of certainty and proximity of the removal required to justify detention: *R (on the application of MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112 at §68(v).

Public Law Error and *Lumba*

20. In *Lumba* the Supreme Court went on to consider the position where a decision maker fails to follow a published policy or makes any other public law error. The position is as follows:

    (1) A decision maker must follow his published policy unless there are good reasons for not doing so: *Lumba* §26.

    (2) Breach of published policy or any other public law error will render detention unlawful only where the breach or error "bears upon" and is "relevant to" the

decision to detain. The error must be "capable of affecting" the decision to detain or not to detain": *Lumba* §68.

(3) Where detention has been vitiated by a public error, the claimant will be entitled to nominal damages only, if detention could and would have been maintained, in the absence of the public law error: *Lumba* §71. The court must consider whether, had the public law error not been made, (i) *could* the Secretary of State have lawfully detained the claimant and (ii) can the Secretary of State demonstrate, on the balance of probabilities, that she *would* have detained the claimant in any event: Element (i) falls to be determined on *Wednesbury* principles i.e. could a decision maker reasonably have detained the claimant. Element (ii) is a question to be determined on the facts, on the balance of probabilities. See *R (VC) v Secretary of State for the Home Department* [2018] 1 WLR 4781 at §62.

Relevant policies

21. In the present case, two of the Secretary of State's policies are relevant: the "Adult at Risk" policy and parts of the general EIG.

The Adult at Risk Policy

22. The Defendant's policy for Adults at Risk is contained in two distinct documents: first, an internal Home Office document published for Home Office staff on 6 December 2016 and entitled "Adult at risk in immigration detention Version v2.0" and, secondly, a published publication entitled "Immigration Act 2016: Guidance on adults at risk in immigration detention". I refer to the former as the "AAR Staff Policy" and to the latter as the "AAR Published Guidance". The contents of the two documents are, at places, expressed in somewhat differing terms.

The AAR Staff Policy

23. The AAR Staff Policy states, at the outset, that the guidance tells Home Office staff what to do to assess if a person, who is being considered for immigration detention, is an "adult at risk" in the terms of the Policy. It states, first, that an assessment must be made as to whether a potential detainee is an "adult at risk." One "indicator of risk" is a "mental health condition". Where an individual is suffering from a mental health condition, consideration should be given as to whether the condition can be managed within detention. Even if it can be so managed the individual must be treated as being "at risk" as defined by the policy.

24. Secondly (at pages 7 to 8), the AAR Staff Policy gives guidance on, amongst other things, assessing risk and the weight to be afforded to particular evidence in order "*to assess the likely risk of harm to the individual if he or she is detained* for the period necessary to effect removal". There are three levels of risk identified in the guidance. Level 1 involves a self-declaration by the individual of being an adult at risk, to which limited weight will be afforded if the issues raised cannot be readily confirmed. Level 2 involves professional evidence (for example from a medical practitioner, social worker or others) or documentary evidence which indicates that the person *"is or may be an adult at risk"*. The Policy says that this evidence should be given greater weight and normally accepted and consideration given to how this may impact upon the

detention. Level 3 involves professional evidence stating that an individual "*is at risk*" and that "*a period of detention would be likely to cause harm*", for example because it would increase the severity of the symptoms or the conditions leading to the individual being at risk. The Policy states that such evidence should be given significant weight. It should normally be accepted and any detention justified in the light of the evidence. The Policy then gives guidance on how the risk should be weighed against immigration factors such as how quickly removal is likely to be effected, the compliance history of the individual and any public protection concerns. It deals with questions relating to the length of time in detention and public protection issues and gives guidance on compliance issues identifying positive factors, such as having fully complied with conditions of leave, and negative factors.

25. Thirdly, at page 11, under the heading "balancing risk factors against immigration control factors", the Policy provides that in level 2 cases, where there is "*<u>no indication</u> that detention is <u>likely to lead to a significant risk of harm if the person is detained</u> for the period identified as necessary for removal*", detention should only be considered if one of a specified number of conditions are met. These include presenting a level of public protection concerns that would justify detention, including if they meet the criteria of foreign criminal as defined in the Immigration Act 2014 or the presence of negative indicators of non-compliance which indicate that the individual is highly likely not to be removable unless detained. In level 3 cases, (which at this point in the document are defined as where "*detention is <u>likely to lead to a risk of significant harm</u> from detention*"), the Policy says that detention should only be considered if removal has been set for a date in the immediate future and there are no barriers to removal or if there are "significant public protection concerns". It states that it is very unlikely that non-compliance issues on their own would justify detention. Finally, the Policy requires an "ongoing assessment of risk" made by the case owner throughout the period of detention.

The AAR Published Guidance

26. The AAR Published Guidance commences by stating that it sets out the matters to be taken into account in accordance with section 59 Immigration Act 2016. The intention is that the guidance will lead to a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal. It aims to introduce a more holistic approach to the consideration of individual circumstances, ensuring that genuine cases of vulnerability are consistently identified, in order to ensure that vulnerable people are not detained inappropriately. The clear presumption is that detention will not be appropriate if a person is considered to be "at risk". However it will not mean that no one at risk will ever be detained.

27. At paragraph 7, an individual will be regarded as an "adult at risk" if they are suffering from a condition "*likely to render them particularly vulnerable to harm if placed in detention*". The presumption is that an "adult at risk" will not be detained. At paragraph 9, the Guidance repeats largely verbatim the definitions in relation to evidence for the three levels as set out in the AAR Staff Policy. However in relation to level 2 the test is stated to be that there is evidence "*which indicates that the individual <u>is</u> an adult at risk*" (and does not include the test that he or she "*<u>may be</u> an adult at risk*"). At paragraph 11 it sets out a list of indicators of risk and includes, amongst the list of conditions "*which will indicate that a person may be particularly vulnerable to harm in detention*", those who suffer from a mental health condition.

28. In the present case, the distinction between AAR level 2 and AAR level 3 is important. I make the following observations on the AAR policy as contained in these two documents:

(1) As to what is meant by an adult being "at risk" (regardless of what level), whilst there is no clear definition in the AAR Staff Policy, there are "indicators of risk" and from those, it appears that where an individual suffers from a mental health condition, he is "at risk" even if the condition can be managed in detention and there is no evidence that he is at risk of harm from detention. On the other hand, the AAR Published Guidance defines an "adult at risk" as being a person suffering from a condition that is likely to render them (alternatively who "may be") particularly vulnerable to harm if placed in detention.

(2) As regards what is meant by level 2, the various levels identified are drafted on the assumption that it is assumed that the person in question is, in any event, an adult at risk. Yet level 2 under the AAR Staff Policy requires only that the individual "may be" an adult at risk.

(3) The description of what is meant by "level 3" is not entirely consistent. In the AAR Staff Policy, first, level 3 is defined by reference to whether detention "would be likely to cause harm"; on the other hand, later in that document, it is defined by reference to being "likely to lead to a risk of significant harm". What is more the implication, within the second definition (at page 11) of level 2 , is that level 3 is where detention is "likely to lead to a significant risk of harm" i.e. it is the risk which must be significant, rather than the "harm".

29. Doing my best to take account of these drafting differences, in my judgment, in order for an individual to be regarded as level 3 under the AAR policy there must be evidence to suggest that detention is likely to lead to a risk of harm, where either or both the risk is significant and the harm is significant. It is not necessary for the evidence to establish that the individual will or is likely to be harmed by detention; the risk is sufficient. On the other hand, level 2 covers the individual who is vulnerable (because of a particular condition), without there being evidence that his condition is at risk of being harmed by detention (or, at most, where there is a risk of harm from detention, which is not particularly significant).

EIG Chapter 55

30. Chapter 55 of the EIG provides as follows:

> *"55.1.1 general*
>
> *The power to detain must be retained in the interests of maintaining effective immigration control. However there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used… Detention is most usually appropriate:*
>
> *- to effect removal*
>
> …

> *...*
>
> *To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy.*
>
> *As well as the presumption in favour of temporary admission or release, special consideration must be given to family cases where it is proposed to detain one or more family member(s) and the family includes children under the age of 18...*
>
> *...*
>
> *Section 55 of the Borders, Citizenship and Immigration Act 2009 (S.55) requires certain Home Office functions to be carried out having regard to the need to safeguard and promote the welfare of children in the UK. Staff must therefore ensure they have regard to this need when taking decisions on detention involving or impacting on children under the age of 18 and must be able to demonstrate that this has happened, for example by recording the factors they have taken into account.*
>
> *...*
>
> *A properly evidenced and fully justified explanation of the reasoning behind the decision to detain must be retained on file in all cases."* *(emphasis added)*

31. Section 55.1.2 makes special provision for foreign national offenders ("FNOs") dealt with by Criminal Casework. It states that the general policy, including the presumption in favour of release and special consideration of children, applies to FNOs. Nevertheless where the criteria for deportation are met, the risk of re-offending and the risk of absconding need to be weighed against the presumption in favour of release. Section 55.1.3 addresses the use of detention in criminal casework cases. It states that in cases concerning FNOs i.e. those who had been sentenced to a term of one year or more, if detention is indicated it will *normally* be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale. However, in considering factors which might make detention unlawful, regard must be had, inter alia, to the AAR Policy.

32. Section 55.1.4.2 addresses Article 8 ECHR, and expressly requires consideration of the position of children and the need to promote the welfare of children. The impact of the separation must be considered carefully. Any relevant information concerning the children that is available or can reasonably be obtained must be considered.

33. Section 55.3A makes it clear that decisions to detain or maintain detention must comply with the AAR Policy. The caseworker must look at all relevant factors to the individual case and weigh them against the particular risks of re-offending and of absconding which the individual poses.

34. Section 55.8 addresses "Detention reviews" and provides as follows:

> *"Initial detention must be authorised by a CIO/HEO or inspector/SEO (but see section 55.5). In all cases of persons detained solely under Immigration Act powers, continued detention must as a minimum be reviewed at the point specified in the appropriate table below. At each review, robust and formally documented consideration should be given to the removability of the detainee. Furthermore, robust and formally documented consideration should be given to all other information relevant to the decision to detain.*
>
> *Monthly review should be conducted using the detention review template…"*
>
> (emphasis added)

Then Table 3 sets out the review of detention in criminal casework cases providing, inter-alia, that the first monthly review has to be authorised by SEO/inspector and, significantly, that the twelfth monthly review has to be authorised by the Director.

35. Section 55.10.1 sets out a number of criteria as to when it is appropriate for detention to be in prison rather than in an IRC. In particular, after setting out cases where the presumption is for detention in prison, the section goes on to identify individuals who may be unsuitable for transfer to an IRC. Such cases include first, behaviour during custody and, secondly, health grounds, namely where a detainee is undergoing in-patient medical care in a prison, transfer will only take place when an IRC healthcare bed becomes available. The section goes on to point out that those risk factors are not exhaustive and staff must identify whether other risks exist which make it inappropriate for the detainee to be held in an IRC rather than a prison. (In the present case, the Claimant was not undergoing in-patient medical care in prison and it is not clear that he was detained in prison because of his behaviour during custody. Rather the Claimant was detained in prison because of concerns about his mental health generally).

(2) Bail accommodation: section 4 Immigration and Asylum Act 1999

36. Section 4 of the Immigration and Asylum 1999 ("the 1999 Act"), headed "Accommodation" provides, so far as material to the present case, as follows:

> *"(1) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons –*
>
> …
>
> *(c) released on bail from detention under any provision of the Immigration Acts."*

I address the legal principles relevant to section 4 in the course of considering Issue (3)(b) at paragraphs 224 to 227 below.

(C) The evidence

37. In addition to substantial documentary evidence, there is evidence from the Claimant in the form of a written witness statement. The Secretary of State has adduced evidence from Ms Michele Louden. She gave evidence in two witness statements and oral evidence over two days, in the course of which she was cross-examined and re-examined. There has also been placed before me written expert evidence, to which I refer below, after setting out the detailed facts.

Ms Louden's evidence

38. Ms Louden is an assistant director in the Home Office, based at Lunar House in Croydon. She is responsible for Criminal Casework, Croydon Command. She now leads delivery of CC casework to ensure that requirements in respect of maximising removals of FNOs are met. She also is involved in liaison with prisons and the probation service. She also "manages detained cases, applying the law and policy defensibly and rationally to minimise the number of unlawful detention claims and costs". She joined Criminal Casework in 2019. She was not working in the department in 2017 and explained that she had no direct involvement in the Claimant's detention. Her evidence was based on having read the Claimant's detention reviews and, more recently, the Case Information Database ("CID") notes and key documents. Her witness statements comprised comment on the reasons for detention given by other caseworkers.

39. In the main, I found Ms Louden to be an honest and straightforward witness, and she was willing to assist the court and prepared to respond to questions in a way which did not necessarily assist the Secretary of State's case. Because of her lack of involvement at the time, some of her evidence was speculative. As I shall explain, on two aspects she was somewhat caught out by her lack of knowledge of the case: first in relation to whether Mr Walker was still at Home Office and secondly in relation to the twelfth detention review.

40. In cross-examination, she said she was astounded at the amount of costs being paid out as a result of unlawful detention claims. She had been brought in to minimise unlawful detention that led to claims and to improve training. The caseworker in the present case was not familiar with AAR or the Case Progression Panel at the time. She accepted that the relationship between Criminal Casework and prisons had improved a lot in the last two years.

41. In cross-examination, she accepted that others who were involved at the time still worked at the Home Office. As regards Mr Walker in particular, in both witness statements, she said that Mr Walker had now left the Home Office, but in cross-examination she said that she had been told that he is still in the Home Office. She then appeared to change her mind again, suggesting he "may" have left. She had no involvement in the case at the time and when the legal case arose she was told to be the witness. Whilst she could say what was happening with the AAR Policy, she could not get into the heads of the people who looked at the case at the time.

AAR and the Claimant's mental health

42. She accepted that there was no indication as at the second detention review in April 2017 nor in the General Casework Information Database ("GCID") records that detention would not be injurious to the Claimant's health. As regards Dr Maganty's report (see paragraph 56 below), which she had not seen, she said that if it had been sent in at the time, it would probably have made the Claimant AAR level 3. If the caseworker had been aware of the report, he could not have made a decision without looking at it and it would have been escalated to at least a HEO to comment. The caseworker would have relied upon the Sentencing Remarks (see paragraph 60 below). She would have liked to think that if they had known about the Maganty report, that would have been considered somewhere as well. But if they had not seen that report, it couldn't be included. She accepted that the caseworker relied upon the Sentencing Remarks which in turn was based on the Maganty report, but the caseworker never asked for or saw the report. She could not say why the caseworker did not ask for the report.

43. She was asked if the Claimant was not well enough to transfer to IRC, should that not have raised a question as to whether his health was such that it might have been harmed by detention. She said that she could see where the question was coming from, but that would not have put up a red flag. With any level of mental health problem, IRC would not want to take him. Prison has a lot better medical facilities than IRC. It would have flagged up that he was so ill that he could not be moved. However, she added that Prison healthcare was not saying that it was the detention which was having an adverse effect on his health. Nothing in the records indicates that his mental health condition was due to him being detained. She accepted that in prison there is no equivalent system to rule 34/rule 35 in an IRC, but the Claimant could have spoken to people including POP to point out his concerns. She agreed that in an ideal world it is important for the caseworker to have all information available, but here the caseworker had just taken what the prison nurse had said and not looked into it.

44. In re-examination she said that Prison healthcare staff do alert the Home Office that detention is affecting a detainee's mental health. The governor will bring it to their attention. If Prison healthcare had had concerns about the Claimant's mental health she would have expected them to have sent the medical records more quickly than they did and indeed, even without sending the records, to express concern.

Family and children

45. She accepted that not one of the detention reviews refers to the Claimant's two British children. She said that should have been something that Mr Walker should have been looking at. There was no consideration given to the impact of detention specifically, because a "family split" had already been done and this was a continuation of detention from prison. If he had got the authority of a family split, the case officer would assume that a senior case officer had considered it. He would not investigate further what effect detention would have on the children because he had assumed that he had got the family split document there.

Risk of absconding

46. In cross-examination, Ms Louden agreed that at the time of the first asylum claim the Claimant did not have bipolar or psychosis nor did he have a British partner or British children. However she did not agree that those factors indicated that the second claim

could not be pushed through quickly. She accepted that having community ties is relevant to the risk of absconding, and that there was nothing written down to show that the caseworker had considered the Claimant's partner or the children.

Section 4 accommodation

47. She indicated that she was not particularly familiar with section 4(1)(c). The Home Office had not put forward a witness with experience of section 4 because everyone else who had something to do with the Claimant's case had moved on or was on secondment in other areas. She agreed that the section 4 team has to consider the application one way or the other, and that the Home Office has a duty to consider any section 4 application rationally and fairly.

> *"Q: So the Claimant was in detention with mental health issues and could not apply for bail without an address. These failings are pretty poor aren't they?*
>
> *A: Yes it appears to be yes…"*

She sought to explain this by suggesting that the case owner was away or out of the office. (However the Secretary of State chose not to call the case owner: see paragraph 49 below).

Maintaining detention

48. In her witness statement she said that, if the caseworker had recognised the Claimant to be level 2 AAR, it would have not changed whether the Claimant was detained or released. This is apparent from the other detention reviews where he was assessed as Level 2 and detention was maintained. (She was not asked what would have happened if assessed as Level 3). In cross-examination, when asked about whether, absent the numerous errors, it would have made no difference, she said her opinion about what would have happened, limited to the Claimant being assessed at level 2 and, taking account of the Case Progression Panel only, was that would not have made a difference. In re-examination, she was asked to assume that she had personal responsibility and had the evidence that was available at the time, including evidence that Mr Walker had not seen, but which the Home Office did have; on that basis "*would you have detained the Claimant throughout the relevant period*?". She initially answered that she would have done "*without all the other bits*". Counsel then said asked what she would have done if she had had all that material available she answered "*if I'd had everything in front of me I would still have maintained detention*".

Availability of Home Office witnesses

49. From Ms Louden's evidence, it seems clear that there are individuals working within the Home Office (very possibly including Mr Walker) who were directly involved at the time. They have not been called to give evidence. In this regard, the judgment of Beatson LJ in *VC* supra, at §68, citing Sales J in *Das* at §21, is of particular relevance. Both those cases concerned detention of individuals with a mental health condition. In both those cases, the Secretary of State had not put forward any witness statements to explain how the decision to detain had been taken or what material had been to hand. The Court was simply referred to the contemporaneous records on the Secretary of

State's file (detention reviews, raw medical data and other documents) and was left to try to piece together what had happened in relation to complex issues. That is effectively the position in this case too. In such a case, as Sales J pointed out, the Secretary of State takes a substantial risk that the Court will draw adverse inferences of fact from the failure to call available witnesses, and the basis for drawing such inferences is particularly strong in judicial review proceedings because of a public body's duties of disclosure and candour. In assessing the facts in the present case, I bear this well in mind, in particular on, but not limited to, issues where the burden of proof is on the Secretary of State.

(D) <u>The Facts</u>

50. The Claimant entered the United Kingdom on 27 November 2007 as a minor and claimed asylum. On 23 April 2008 he was refused asylum, but was granted discretionary leave to remain as an unaccompanied minor until 22 April 2011. Subsequent applications for leave to remain failed and on 10 July 2012 he became appeal rights exhausted.

51. On 14 April 2009, aged 15, he was convicted of common assault and sentenced to a referral order. In 2011 date he formed a relationship with a woman, who became his partner. They have two children together, born on 3 April 2014 and 11 November 2015 respectively.

Failure to report

52. On 12 July 2012 the Claimant was notified by the Secretary of State to live at a specific address and to report weekly from 19 July 2012. He failed to report as required, and his solicitors were sent reminders. On 8 November 2012 Home Office officials visited his last known address to be told that the Claimant had left a few days before. At no time thereafter did the Claimant report as requested.

December 2015 – January 2016

53. On 16 December 2015, the Claimant was arrested in connection with damaging a car and possession of cannabis. He was severely unwell at the time. Three days later, at HMP Hewell, he was diagnosed by a doctor with stress disorder, but the doctor noted no thoughts of self harm or suicide. However three days later the Claimant was admitted to hospital under s. 2 Mental Health Act 1983 ("MHA"). Hospital records dated 1 January 2016 note that the Claimant smoked cannabis at every possible opportunity. On 7 January 2016 the Claimant was discharged from hospital to stay with his partner.

54. On 12 January 2016 the Claimant was arrested following an incident when he was abusive to his ex-partner, refused to leave, brandished a knife and caused damage to a car. He was remanded in custody. Upon examination at HMP Hewell the next day, it was recorded that he had used cannabis two days earlier. His medical records referred to a risk of self-harm.

55. On 21 January 2016 Dr Maganty, a consultant forensic psychiatrist examined the Claimant when his presentation was manic. On 4 February 2016, whilst the Claimant told Dr Kihara that his behaviour and mental state had been perturbed before as he had

smoked a spliff, there was improvement in his mental health. On 25 February 2016 Dr Kihara assessed the Claimant as having settled in well and was stable. Medical notes of the same date showed that he was exhibiting paranoid behaviour. On 8 March 2016 his medical notes show that the Claimant presented as psychotic and paranoid**.** On 10 March 2016 the Claimant completed Bio-Data information.

Dr Maganty's report: March 2016

56. On 20 March 2016, Dr Maganty produced a report for court, instructed by the Claimant's solicitors. The Claimant was diagnosed with bipolar disorder. The prognosis was good and he would require continued follow-up. He did not require in-patient treatment in hospital and could be cared for in the community. Dr Maganty considered that "there was a direct link between his mental disorder and the offences". The question of whether or not a defence of insanity would be available was finely balanced. Dr Maganty's report continued:

> *"A custodial sentence ... would be detrimental to his mental health. Though a custodial sentence would protect the public in the short term, in the medium to long term by worsening his mental disorder it would paradoxically increase his medium to long-term risk to others. Bipolar disorder is a relapsing illness if not treated appropriately and under those circumstances with each relapse the prognosis could worsen. Therefore future relapses and deterioration in a custodial setting are best avoided to manage his long term risk"*

He also concluded that his bipolar disorder had responded well to treatment in custody.

Conviction and sentence: April to June 2016

57. On 20 April 2016, the Claimant was convicted at Warwick Crown Court of offences of possessions of a bladed article, two counts of criminal damages, two counts of possession of a class B drug, a racially and religiously aggravated public order offence, dangerous driving and racially aggravated assault. Some of these offences arose out of the events on 12 January 2016, and others took place on 16 December 2015.

58. Medical notes in April and May 2016 showed that the Claimant was struggling with low mood, he was agitated and sleeping poorly. Concerns about deliberate self harm were noted.

The Pre-Sentence Report

59. In a Pre-Sentence Report (PSR) dated 24 June 2016, the Claimant was assessed as being a medium risk of re-offending and a medium risk of harm to the public, and a medium risk of harm to his "now ex-partner".

The Judge's Sentencing Remarks

60. On 30 June 2016 the Claimant was sentenced to 26 months imprisonment. In his sentencing remarks ("the Sentencing Remarks"), HH Judge Lockhart QC took account of the PSR and Dr Maganty's report. He pointed out that, based on Dr Maganty's report, "you were caused significant mental health difficulties by a bipolar disorder.

You were unable to stop your thoughts and this set of offences occurred." He recounted the facts of the various offences on 16 and 17 December 2015 and then on 11 January 2016, pointing out, amongst other things, that he was in possession of a very large machete which was being waved about and was used to strike the windscreen of a car.. He described the offences as "very dangerous". In mitigation he referred to his age, lack of previous convictions and use of drugs and to his mental health difficulties:

> *"You were in the course of a psychiatric episode at the time, which has now happily been controlled. Dr Maganty identifies bipolar disorder which caused severe disinhibition. He says that your offending was in part driven by that, and I must take that into account. It is to your great credit that there has been real progress and to the great credit of those assisting you in custody, with your mental health difficulties that you have got much better and there is hope for the future and your treatment must continue."*

The judge concluded by ordering that Dr Maganty's report should go to custody with him, in order that everybody there knew what the position was.

Deportation procedure – Stage 1: 19 July 2016

61. On or around 19 July 2016 the Secretary of State served upon the Claimant notice of decision to make a deportation order – i.e. stage 1 letter – based on the Claimant's conviction of the offences on 20 April 2016. The Claimant immediately confirmed his intention to respond.

62. On 31 July 2016 the Claimant's partner and her family wrote representations. His partner explained that they had been together for 5 years and had two beautiful children together. If he was deported it would destroy him and them, being away from his children and family and that he had provided great support for her mental health. She pointed out that he was, by that time, getting the right help with his medication. In cross-examination, Ms Louden agreed that these letters from the family show that in 2016 the Claimant had strong community ties.

63. On 9 August 2016, the Claimant responded to the stage 1 letter, by making a claim for asylum and under Article 8 ECHR, providing details of his partner and his two children with dates of birth. His main reason was "separation from family". He claimed that he was the main carer for his partner and children, and he could not bear to think about them growing up without a father. He was taking his medication and feeling fine in custody.

64. Medical notes in October 2016 record mood swings, nightmares and thoughts of self-harm (though he would not act upon them). On 9 December 2016 the Claimant reported suicidal thoughts. This was the first record of any psychotic episode since January/February 2016. His medical records stated that he had been seen by the doctor at HMP Featherstone and that he appeared distressed and anxious and had hallucinations. The plan was then to be seen by the mental health team regularly. On 12 December 2016 the medical records referred to continuing psychotic symptoms.

Lead up to detention: February 2017

65. On 1 February 2017 the Secretary of State sent to the prison a signed medical consent form to obtain the Claimant's medical records. On 2 February 2017 the GCID records state that Mr Majid, a case owner, completed a "family split" form and sent it to the HEO. Mr Dunlop suggested that this was the family split for detention, but the document is not available.

66. On 4 February 2017, the Secretary of State decided to detain the Claimant under immigration powers. By email of that date, the HEO Detention Gatekeeper stated that due to his convictions, the Claimant was assessed as a MAPPA level 2 and, as such, a high risk of serious harm to the public. She added that she expected that the asylum claim could be dealt with quickly, suggesting removal would be straightforward. He had provided no evidence of subsisting relationships. He was assessed as an Adult at Risk level 2 on the basis of the Sentencing Remarks. Referring to the psychiatrist's report, it was noted that he was bipolar, but that there was no mention in the Sentencing Remarks of detention being likely to lead to a risk of significant harm or detriment to the Claimant. There was no evidence that currently he was suffering from such physical or psychological injury as to make detention unreasonable or inappropriate.

Detention under immigration powers: 7 February 2017

67. On 7 February 2017 the Claimant was released on licence from his prison sentence under the supervision of his nominated probation officer and commenced detention under immigration powers. His licence required him to keep in touch with his officer and to reside at an address approved by Probation.

68. On 14 February 2017 the Claimant's case was given to a decision team to allocate a Stage 2 decision. A request was made for an EU letter – a process which, according to Ms Louden's evidence, is much quicker than an Emergency Travel Document (ETD). On 16 February 2017 the detainee detention history recorded that the Claimant had been risk assessed and would not be transferred to an IRC. There were identified health care needs requiring further investigation with HMP Featherstone. The Probation case notes stated "mental health issues". On 21 February 2017, the Secretary of State decided not to transfer the Claimant to an IRC until further notice due to an "identified mental health issue". The medical report had been received recording ongoing mental health issues requiring medication. On 1 March 2017 Mr Majid spoke to a nurse at HMP Hewell who said that the Claimant was on the waiting list for mental health assessment. He was on medication for bipolar. There were no concerns or worries that his physical or mental health was getting worse. In cross-examination, Ms Louden accepted that the nurse did not answer the question whether his mental health would be harmed in detention. The Secretary of State never chased the results of that mental health assessment. On around 5 March 2017 the Claimant underwent an ETD interview at which biodata and photos were obtained.

First Detention Review: 14 March 2017

69. The first detention review took place on 14 March 2017. It was carried out by Mr Majid. Mr Majid called and spoke to Prison healthcare who did not express concerns regarding his health. He was assessed at Level 2 AAR. The assessment followed closely the wording of the Detention Gatekeeper's email of 4 February (paragraph 66 above).

70. The outstanding barriers to deportation were identified as the asylum and article 8 claim, the EU letter and the stage 2 deportation decision. It was noted that further representations were a barrier to removal. It was also noted that his previous asylum claim was refused. The Claimant was assessed as a high risk of absconding, as he had failed to report in the past and absconded. In the absence of an OASys report, he was assessed as medium risk of re-offending and a *very high* risk of harm to the public due to his previous violent convictions. It was noted that he was subject to MAPPA level 2. Removal to Afghanistan could be done on a EUL and the process could take a month. An EUL had been requested.

71. Medical conditions and including mental health and risks of suicide were addressed in section 10 of the Detention Review, as follows:

> *"10. Risk indicators and risk level, according to the Adults at Risk policy (where relevant)*
>
> *In the Judge's Sentencing Remarks (JSR), the Judge states the psychiatric identified Mr [AO] with Bipolar. There is no mention in the JSR if detention is likely to lead to a risk of significant harm or detriment to Mr [AO]. Therefore, I have assessed the case as level 2"*

However, the Maganty report had said he would be at risk of harm in detention. The Claimant's case is that anyone who looks at the Sentencing Remarks would have had to look at the psychiatric report there referred to.

72. Then at section 14, the case officer made his recommendation. The heading to that section makes express reference to "including reference to children issues and ties to the UK".

> *"I have considered release under the Adults at Risk Policy, Mr [AO] does show indicator for being a vulnerable adult.*

After referring to the identification of bipolar contained in the Sentencing Remarks, he continued

> *"There is no mention in the JSR of detention is likely to lead to a risk of significant harm or detriment to Mr [AO]. There are no notes on CID to raise concern about Mr [AO]'s health and I called and spoke to Healthcare department at Hewell and they did not express any concern regarding his health. Therefore I have assessed the case as level 2 and consider detention is appropriate."*

He referred to the fact that the EUL had been requested and the process could take one month. He concluded as follows:

> *"... It is considered that detention remains appropriate as the prospect of removal is within a reasonable timescale when balanced with the offence committed. I have assessed this case in accordance with the current criteria and conclude that*

presumption to release is outweighed by the risks of absconding, re-offending and harm if released."

73. The authorising officer, A Cockell, agreed, stating as follows:

> *"He has committed a serious offence whilst in the UK and presents a significant risk of harm to the public. He has no leave in the UK and has made a last-minute application for asylum. I agree that his behaviours create doubt around his likely compliance with any release restrictions. I consider that the risk of harm and of absconding outweighs the presumption to release. I would expect the asylum representations to be refused before the next review is due."*

Then the detention review sets out a passage, purportedly from a previous review on 3 February 2017, which in fact is taken, practically verbatim, from the HEO Gatekeeper's' assessment on 4 February 2017 set out in paragraph 66 above.

74. On 23 March 2017 a letter under s.72 Nationality Immigrational and Asylum Act 2002 was served pursuant to which he was no longer entitled to international protection under the Refugee Convention. There was a need to wait 20 working days for a response.

Second Detention Review: 4 April 2017

75. The second detention review was dated 4 April 2017. This was the first review carried out by Mr Walker. In the summary box at the outset, he classified the risk of re-offending as "high" (rather than "medium" as per the first detention review). Under section 5 headed *"Known or claimed medical conditions (including mental health and/or self-harm issues…)* Mr Walker wrote:

> *"There are no known medical issues including mental health and/or self-harm issues that have been reported. On 01 February 2017, Mr [AO]'s medical records were requested"*

It is common ground that this statement was incorrect and inconsistent with the first detention review. The Claimant submits that this demonstrates that Mr Walker had not read the first detention review.

76. As regards the risk of re-offending, Mr Walker assessed it as "high", referring to his convictions for 12 offences between April 2009 and June 2016. *"It is considered he is likely to re-offend to support and sustain himself. As such in the absence of OASys report I have assessed that he runs a high risk of offending."* In fact the offences in that period included common assault in 2009 and a caution for shoplifting in 2012.

77. Under section 10, the heading of which drew express attention to the AAR policy, Mr Walker stated:

> *"Mr [AO] is considered suitable for detention. Therefore according to the Adults at Risk Policy, he is suitable for detention."*

This comment makes little or no sense. First it is circular; secondly Mr Walker has stated earlier in the review that there are no known mental health issues.

78. In section 14 the recommendation section (which includes reference to children issues), Mr Walker stated as follows:

> "*When considering whether Mr [AO] is suitable for release, I have weighed up the risk of absconding, re-offending and subsequent risk of harm to the public and believe that the risks he poses outweighs the presumption to release in favour of liberty*
>
> *Mr [AO] claimed asylum after being notified of his liability to deportation and it is believed the timing of his claim suggest that it is an attempt to frustrate the removal process given that he had ample opportunity to claim asylum at an earlier stage.*
>
> *In this light he is considered to pose a high risk of re-offending if he were to be released. Having considered all the available evidence it is considered that the risk of re-offending, absconding and risk of harm to the public outweighs the presumption in favour of release in accordance with chapter 55 of the EIG. I therefore propose Mr [AO] to be detained pending his deportation.*"

It is particularly noteworthy that this passage setting out Mr Walker's conclusions and recommendations was repeated, practically verbatim, in each of the following 9 detention reviews he carried out, all the way until the last review in December 2017.

79. There was no reference to AAR policy. In her witness statement, Ms Louden said she did not know why this error had been made, explaining that the caseworker (i.e. Mr Walker) has now left the Home Office altogether. In her oral evidence she corrected this (see paragraph 41 above).

The Claimant seeks accommodation for potential release on bail

80. On 19 April 2017, Bail for Immigration Detainees ("BID") on behalf of the Claimant chased Probation for an assessment of the address the Claimant had submitted for potential release on bail. Probation responded on 25 April 2017 that they were inclined to approve the address in Coventry, but required more information.

81. In a witness statement dated 25 April 2017, the Claimant's partner set out that she really struggled without the Claimant and it would make a massive difference if he came home. Most importantly the children were missing out on having their father in their lives. In her oral evidence, Ms Louden said that the case officer would not have seen that witness statement.

82. On 27 April 2017 (over two months after he was detained) Mr Walker wrote to the local authority children's services for their views on the impact of deportation on the claimant's two children. In re-examination, Ms Louden said that Mr Walker was contacting Coventry children's services for safeguarding reasons. She would expect

him to take into account any answer he got, when assessing detention. On 28 April 2017 Mr Walker requested an urgent medical update from Prison healthcare and notification of whether he was fit to fly.

Third Detention Review: 2 May 2017

83. The third detention review was dated 2 May 2017, completed by Mr Walker. There was no reference to AAR Policy and it was in broadly the same terms as the second detention review. When it came to the risk of absconding there was no reference to the historic failure to report, but only to the fact that the Claimant had been served with a stage 1 letter and would therefore have little incentive to remain in touch. Both section 10 and his conclusion at section 14 were in the same terms on the second detention review. In this case the authorising officer was different and commented that *"Mr [AO] is FAS and has no ties in the UK*." The authorising officer concluded that the risks of harm and of absconding outweighed the presumption to liberty. The Secretary of State accepts that this review was in breach of policy and thus unlawful. The Claimant points to the fact that in assessing the risk of absconding, there was no reference to the Claimant's family.

84. On or around 3 May 2017 the Claimant made further written representations to the Secretary of State. On 25 May 2017 BID wrote to Probation indicating that the Claimant would like to reside at the address of his friend, HMK. On the same date, the file was passed to the asylum expert to consider the Claimant's asylum claim.

Fourth Detention Review: 26 May 2017

85. The fourth detention review was dated 26 May 2017, carried out by Mr Walker. His recommendation in section 14 was in precisely the same words as in the previous review. This review is admitted to have been unlawful, although oddly the authorising officer made some reference to AAR level 2. The authorising officer, in his comments, stated the Claimant could be removed swiftly within 4-6 weeks upon conclusion of the late asylum representations. However the authorising officer stated that the Claimant had been noted as an Adult at Risk level 2, but was of the view that detention could be maintained for a *short timeframe* whilst asylum representations were concluded, given the risks under public protection. He authorised a further 28 days pending the resolution of the representations, which needed to be finalised within that timeframe and advised "*please monitor closely*".

86. On the same date, Mr Walker chased HMP Hewell for the Claimant's medical records. On 30 May 2017 Mr Walker received the medical records and passed them on to Mr Peter Gardiner, of the Defendant's asylum team, to consider the asylum claim.

87. As regards accommodation, on 1 June 2017, Probation responded to BID saying that they could not approve the different address which the Claimant had provided. At this stage the Claimant was still seeking probation approval for a private address.

The application for section 4 accommodation: 1 June 2017

88. On the same date BID on behalf of the Claimant applied formally for accommodation and support pursuant to section 4(1)(c) of the 1999 Act.

89. On 2 June 2017 Mr Gardiner considered the Claimant's *asylum* claims. His minute noted that the Claimant mainly relied on Article 8. It recorded that they had obtained the Claimant's medical records which indicated the medication that he was on. It also noted that his medical condition was not one which could be completely detached from the Claimant's protection claim. It further noted that there appeared to be no evidence to the effect that the Claimant's behaviour represented any difficulty in the detention regime. He concluded by recommending that the further representations should be rejected under rule 353 and that the claim had no prospect of success. He recommended a stage 2 letter be prepared. In oral evidence Ms Louden said that if Mr Gardner had had, at the time, serious concerns when looking through the medical reports, she would have expected him to flag them up to Criminal Casework and they would have been notified to Mr Walker.

90. On 7 June 2017, BID asked Probation to approve another private release address, being the address of the Claimant's cousin. On 10 June 2017 the Secretary of State's section 4 team referred the section 4 application to Mr Walker for completion of the standard form "section 4 Accommodation Information Pro - Forma ("the pro-forma"). This is a form which the section 4 team requires to be completed by the caseworker for the individual who has made a section 4 application (see further paragraph 224 below). On 12 June 2017, Mr Walker completed the pro-forma. In that pro-forma Mr Walker omitted any reference to the important offences for which he was convicted and sentenced to 26 months, and referred only to his very minor offences. The Claimant was assessed as being suitable for standard dispersal accommodation and in a shared room with shared facilities. He answered "No" to the question whether the applicant had any medical conditions. He appeared to suggest that NOMS approval was required for the address. However this pro-forma was not sent back to the section 4 team until 3 July 2017.

Fifth Detention Review: 26 June 2017

91. The fifth detention review was dated 26 June 2017, completed by Mr Walker. The body of the review and the recommendation in section 14 was in precisely the same words as before. There was no mention of AAR, even though by this time Mr Walker had received the Claimant's medical notes. Detention at this time is admitted to be unlawful. The authorising officer in his comments directed Mr Walker to ensure urgent attention was given to his outstanding stage 2 decision, as now the asylum claim was concluded. He noted that the Claimant would be given an in-country appeal. His removal would be within a reasonable timescale if the asylum claim was dismissed and he became appeal rights exhausted. He authorised continued detention.

The OASys assessment: 29 June 2017

92. On 29 June 2017 the Probation service produced its OASys assessment. However Mr Walker did not receive the OASys assessment until November 2017. In the OASys assessment, the Claimant was assessed as posing a 47% risk of re-offending within two years and a medium risk of harm to the public, staff, ex-partner and children. In further detail, however, he was in the "low" category for probability of re-offending and probability of violent re-offending. Only in probability of non-violent re-offending did his score fall within the "medium" category. Then in relation to likelihood of serious harm he was assessed as medium risk to children, public, known adults and staff. It was noted that the Claimant had put forward four addresses but none were regarded as

suitable by either the offender manager or the police. He had the option of a section 4 application, but that would mean that he could be placed anywhere in the UK which would not be ideal for his mental health.

93. On 30 June 2017 Probation informed BID that the cousin's address was unsuitable given the presence of young children. At that point it became clear that the Claimant might well need a section 4 address. On 3 July 2017 the section 4 pro forma completed by Mr Walker on 12 June 2017 was received by the section 4 team. The section 4 team then made a property request for level 2 dispersal accommodation and BID were informed that the section 4 team were endeavouring to source such an address. The section 4 team informed the Claimant that IA (immigration accommodation) was not suitable for him, so they would have to find a dispersal bail address.

Local Authority family assessment: 5 July 2017

94. On 5 July 2017, the local authority wrote to the Secretary of State. It had conducted a further assessment. Both parents would like to resume the relationship upon release. The children had had regular contact with their father in prison and he would not be returning to the family home once released. The partner had been advised that the children should not be left alone with their father "initially" until he had adjusted to being out of prison. The letter also noted that the Claimant was receiving support for his mental health, that he was taking medication which was reported to be effective and that he was no longer taking cannabis. On 10 July 2017 that response was loaded on to the GCID by Ms Vega. Ms Louden's evidence in re-examination was that that had been done so that everyone was clear of the circumstances of the children and those notes were available to staff authorising the detention and not just to the caseworker. She agreed that if the local authority had been saying that the Claimant not being at home was damaging the children, it would have said so.

Property proposal received and forward by the section 4 team: 5 to 12 July 2017

95. On 5 July 2017 a property proposal for section 4 accommodation in Sunderland was received by the section 4 team from the property provider. On 12 July 2017, the section 4 team wrote to the Claimant stating that a bail address had been found and had been forwarded to Probation for necessary checks to be carried out. It appears that they forwarded it to Mr Walker for him to pass it on to Probation. On the same date, the section 4 team emailed Mr Walker with the address of a shared property with no known women or children present. They sought his comments, and in particular any information which could be placed before the immigration judge when considering the Claimant's intended application for bail. On 16 July 2017, BID requested Probation to reconsider the private addresses and to check the section 4 address.

The Deportation order: 18 July 2017

96. On or around 18 July 2017 the Secretary of State made a deportation order in respect of the Claimant. At the same time, family split for the purpose of deportation and detention was authorised: the Claimant's children had been adequately cared for whilst he had been imprisoned and there was no reason to suggest that could not continue if he were deported. In her oral evidence, Ms Louden sought to explain. There were two documents: the initial family detention split dated 2 February 2017 and the family split for deportation and detention dated 18 July 2017. Family split is the authority to keep

someone detained and progressed into deportation, knowing they had family. However, the Claimant could not be served with the deportation decision as he had been locked in his cell for his own safety, having been assaulted by three other prisoners. (In fact, the Claimant was subjected to violence whilst in prison on a number of other occasions).

Transfer to Hull: 23 July 2017

97. On or around 23 July 2017 the Claimant was transferred from HMP Hewell to HMP Hull. Upon arrival he was assessed by a nurse. He appeared fit and well and mentally stable and reported no health concerns.

98. On 2 August 2017, BID wrote to Probation stating that they preferred private accommodation, in the light of a new social services report. They also pointed out that a section 4 address had been sourced on 12 July and that Probation should have received that information from Mr Walker. Probation responded that they had not been asked to approve a section 4 address and had not been contacted by Mr Walker. BID then gave the probation officer Mr Walker's details and also contacted the section 4 team to inform them of the failure to request probation approval. On 4 August 2017 the section 4 team replied to BID saying that the address had been sent to Mr Walker on 12 July, and then sent it to Mr Walker again, asking that he pass it on to Probation for checks. On the same day the section 4 team noted internally, and somewhat oddly, that the caseworker had not received the Probation "request".

Sixth Detention Review: 3 August 2017

99. Meanwhile, on 3 August 2017, the sixth detention review was carried out by Mr Walker. It was in precisely the same terms as the previous reviews. The authorising officer's comments were in similar terms. They should wait to see if the Claimant lodged an appeal within the time allowed. There was no reference at all either to family ties or to AAR policy.

Deportation order and appeal: 3 and 7 August 2017

100. On 3 August 2017 the deportation order had been served on the Claimant and on 7 August 2017, the Claimant lodged an appeal.

101. On 7 August 2017 the Secretary of State's Case Progression Panel concluded that the Claimant's detention was appropriate, justified and proportionate. The Case Progression Panel was unaware of the Claimant's mental health condition or that he was AAR level 2.

102. On the same date the POP saw the Claimant at HMP Hull, given the circumstances of his transfer. The Claimant disclosed that he was struggling mentally and had been diagnosed as bipolar. He was feeling depressed, having suicidal thoughts and not sleeping. He had applied to see the mental health team. Ultimately he said he was doing ok, but being away from the family was having a huge impact on him and his partner mentally. This was recorded by POP in the GCID case record on 10 August. In cross-examination, Ms Louden considered that what was there recorded suggested that the Claimant was at level 2 Adult at Risk, as he was feeling all right at that time.

103. On 9 August 2017 Probation informed BID that they had still not received any request to check a section 4 address. BID then wrote to Mr Walker indicating that the section 4 team had told them on 12 July that an address had been sourced and that the section 4 team had contacted him, for him to forward the address to Probation. However the Claimant's probation officer had not received any address for approval. She had tried to contact Mr Walker but had not managed to speak to him. They therefore requested Mr Walker to forward the address to the probation officer. On the next day, Probation informed BID that they had now received information regarding the section 4 address and would look into it.

104. On 10 August 2017, the Claimant's partner's GP wrote a letter explaining that the Claimant's possible deportation was resulting in a deterioration in her mental health and asked for that to be taken into consideration.

105. On 16 August 2017, in light of what POP had recorded on 10 August, Mr Walker chased Prison healthcare for an urgent medical update. He stated that this would enable them to fully consider both detention and deportation. He asked them to advise whether the Claimant "has any history of mental health problems and whether he was receiving any ongoing support". In my judgment, it is surprising, to say the least, that Mr Walker appears to have had no knowledge of the Claimant's mental health condition after 6 months of detention and 4 months after he became involved, and given the evidence of that condition, including the local authority letter of 5 July 2017.

Seventh Detention Review: 24 August 2017

106. The seventh detention review was dated 24 August 2017, again carried out by Mr Walker. On this occasion in section 5 Mr Walker stated that the CID notes of 10 August stated that the Claimant claims that he had been diagnosed in 2016 as bipolar, and at section 10 it was noted that the Claimant's medical records had been requested and "therefore according to the Adults at Risk policy, he is likely to be considered as level 2. There is no indication at this point that detention is injurious to his health". In this way, Mr Walker recognised that the medical records were relevant to the AAR assessment.

107. Nevertheless despite the fact that Mr Walker had now noted, for the first time, that the Claimant was AAR level 2 and despite the fact that he now had an in-country right of appeal, there was no change at all to the wording of either Mr Walker's assessment of risk of absconding nor to his final recommendation in section 14 of the review.

108. The authorising officer agreed with the recommendation to maintain detention, noting that the Claimant had lodged an appeal. He added that the Claimant had been assessed as AAR level 2. "*However healthcare have not stated that continued detention would be injurious to health*". Detention remained proportionate but if the appeal process was prolonged it might need to be reviewed. At this stage, the medical updates had not been provided.

109. On 24 August 2017, the Claimant's probation officer notified Mr Walker that the section 4 release address was not suitable. On the next day, Mr Walker sent an email to the section 4 team (copied to the probation officer) to confirm the unsuitability of the address**.** On 29 August 2017, BID wrote to the section 4 team and informed them that

Probation had not approved the section 4 address and asked if another address had been requested from the accommodation provider. The section 4 team did not respond.

110. Meanwhile, on 25 August 2017 Mr Walker chased Prison healthcare for the urgent medical update, previously requested. On 31 August 2017 Mr Walker received an update from Prison healthcare, stating that the Claimant had an appointment for a broken hand and that he was on medication; but he was fit to fly. In cross-examination, Ms Louden said that if Prison healthcare had had concerns about the Claimant's mental health being damaged by detention, she would have expected them to mention it in that 31 August update.

111. On 6 September 2017, BID contacted the section 4 team for an update, who told them that Probation approval of the address sourced on 5 July 2017 was still being awaited. This is despite the fact that, two weeks earlier, on 24 August 2017 Probation had confirmed to Mr Walker (and that Mr Walker had then informed the section 4 team) that the address was *not* approved. On the same day BID faxed Mr Walker urging him to confirm that the section 4 team had been informed of the unsuitability of the address. The notes of the section 4 team have no record of Mr Walker's communication to it, passing on Probation's message of 24 August.

112. On 6 September 2017 notice of the case management hearing for the Claimant's appeal was given, to take place on 28 September 2017.

113. On 7 September 2017 Mr Walker contacted the section 4 team requesting a second address to be sourced. On the same date BID called the section 4 team who finally confirmed that they would request a further suitable address from the accommodation provider. On 8 September 2017 BID made a formal complaint about delay in providing the Claimant with accommodation, setting out a detailed history of events; no progress had been made for a period of more than 6 weeks due to the lack of diligence of the section 4 bail team and of Mr Walker.

114. On 15 September 2017 BID requested that the Claimant be transferred to an IRC, on grounds of his mental health which had deteriorated in prison.

115. On 16 September 2017 Probation rejected proposed accommodation as not suitable. On the same day, Mr Walker emailed the section 4 team asking them to find another suitable address since Probation had stated that the original address was not suitable. The section 4 team then made a further property request to the property provider and informed BID of this. In cross-examination, Ms Louden agreed that the second request for accommodation made to the property provider on 16 September was a repeat of the first request and did not take account of the reasons for the first accommodation being rejected as unsuitable.

Eighth Detention Review: 19 September 2017

116. The eighth detention review was dated 19 September 2017, carried out by Mr Walker. It was noted that the case management hearing was scheduled to take place on 28 September 2017 and that an update had been received from Prison healthcare. His recommendation in section 14 was in precisely the same terms as before. The authorising officer agreed that detention was warranted. There was no reference to his

children. Removal would be within a reasonable timescale, if the appeal was dismissed.

Bail applications

117. On 22 September 2017 the Claimant made his first application for bail. On 25 September 2017, it appears that the Claimant referred himself to mental health services in the prison. There is conflicting evidence as to the exact state of his mental health at that time. The case management review took place on 28 September 2017.

118. The first bail application was withdrawn on 3 October 2017. In a letter written the next day to Mr Walker, complaining about the delay in sourcing the section 4 address, BID reported that the immigration judge would have granted bail if an address had been available and that the judge was outraged that between the section 4 team and the Probation service a suitable bail address had not been sourced and approved. He also expressed the view that the Claimant was now being kept in detention simply because of an accommodation shortage. In cross-examination, Ms Louden agreed that, given what was reported as said by the immigration judge on 3 October 2017, there should have been some chasing to find an address. On 5 October 2017 BID sent a pre-action protocol letter challenging the delay in providing the Claimant with bail accommodation. On 11 October 2017 the Claimant made a second application for bail.

Ninth Detention Review: 16 October 2017

119. The ninth detention review was dated 16 October 2017, carried out by Mr Walker. He noted that a bail application had been made and withdrawn. Again Mr Walker's recommendation was in precisely the same terms. The authorising officer noted that the Claimant could be removed on an EUL and the only barrier was the appeal against deportation. The authorising officer further noted "*Please monitor closely and if a hearing date is not within a reasonable timescale then we should look to alternatives to detention*". He noted that the Claimant was AAR level 2 and if there were to be a prolonged period of detention due to appeal timescales, then they would need to seriously consider release. He authorised detention for a further 28 days, for a robust release plan to be compiled pending the appeal hearing date becoming known. This was the first time that the detention reviews mentioned the need for release.

120. On 19 October 2017 the Secretary of State decided not to transfer the Claimant to an IRC until further notice due to an "identified mental health issue". There was a medical report referring to his mental health issues. On 23 October 2017 it was recorded that a medical update had been requested from Prison healthcare. Meanwhile on 20 October 2017 Probation had declined to approve the fifth private address suggested, because children were present.

The second bail application: 23 October 2017

121. On 23 October 2017, the Claimant's second bail application was refused by an immigration judge on the basis that an appropriate address was not available. BID counsel made detailed written submissions, but did not argue that the Claimant was AAR level 3 and no reliance was placed on Dr Maganty's report. Rather it was stated that the Secretary of State had produced a risk assessment recognising the Claimant's

ongoing medication and medical condition and had recognised that the Claimant was level 2 AAR.

Case Progression Panel recommendation: 24 October 2017

122. On 24 October 2017 the Case Progression Panel recommended the Claimant's release ("the CPP recommendation"). It concluded that the evidence suggested that removal within a reasonable timeframe "may not be possible". On this occasion, it expressly noted, in more than one place, that the Claimant was AAR level 2, and that this was the first of the factors that weighed in favour of release. Nevertheless, despite the CPP recommendation, the Secretary of State decided to maintain detention. In cross-examination, Ms Louden agreed that, by the time of the second Case Progression Panel, the fact that he was acknowledged as an Adult at Risk was a big difference from its previous recommendation. She agreed that the caseworker had a duty to agree with the Case Progression Panel or at least give reasons for not following the recommendations. *"You're right, the caseworker does need to justify."* She thought that he was not released at the time because there was no accommodation for him.

123. On 25 October 2017 BID repeated their request that the Claimant be transferred to an IRC, preferably to one near Coventry. On 31 October 2017 Mr Walker acknowledged, by reference to the CPP recommendation, that the Claimant should be released and that he had emailed HMP Hull to request a proposed release. It appears therefore that, at this stage, Mr Walker was suggesting release subject to accommodation being available.

124. On 10 November 2017 Mr Walker reported that the OASys report had been emailed for his attention. This appears to be the first time that Mr Walker had seen that report. On 13 November 2017 the Claimant submitted his third bail application.

Tenth Detention Review: 14 November 2017

125. The tenth detention review was dated 14 November 2017, carried out by Mr Walker. His assessment of re-offending and of risk of harm to the public remained in precisely the same terms as in all his previous reviews, reiterating in each case that there was no OASys report. This is despite the fact that by that time Mr Walker had the OASys report in his possession. In evidence, Ms Louden could not explain why Mr Walker had said this. That report does not endorse a high risk of harm. Mr Walker's final recommendation was again in precisely the same terms as before despite the fact that by then the Case Progression Panel had recommended release and despite what Mr Walker had said on 31 October 2017. The authorising officer noted that the only barrier was the appeal and that there was a need to monitor when the appeal would take place. If the appeal was unduly delayed, then they must consider potential release.

126. On 15 November 2017 the Secretary of State internally referred the Claimant for release on contact management (as recorded in the eleventh detention review: see paragraph 130 below).

Third bail application: 24 November 2017

127. On 24 November 2017 the third bail application was refused by an immigration judge at the FTT. The judge stated:

> *"there are substantial grounds for believing that the Claimant would abscond, given his failure to report on a number of occasions in 2012, his absconsion for 3 ½ years (which the 2 previous judges were unaware of) and his failure to notify the Respondent of his change of address. ... I accept that the Offender Manager has not approved any address he has put forward as being suitable is for good reason, - namely the risk his offending behaviour and mental health causes to children. I do not accept that the failure of the Respondent to provide a s4 address means that he should be bailed as in his circumstances s4 is discretionary. I am not satisfied that the imposition of conditions will reduce the risk of absconding in any material way given his history and the very limited surety money offered. His mental health problems can be treated in custody as they are now. His partner is getting treatment and support she is entitled to. Removal can be effected sufficiently imminently given the background once his appeal is heard"*

However, I note that the bail summary provided for earlier bail applications clearly had explained the Claimant's failures to report in 2012. Moreover section 4 accommodation is not purely "discretionary": see paragraph 225 below.

128. On the same day, Ian Davies of Detention and Escorting Services wrote to Mr Walker that DEPMU had assessed the Claimant on 16 February 2017 as unsuitable for transfer to an IRC, due to the Claimant suffering from mental health problems. They had received information that his mental health issues were ongoing and that he was susceptible to psychotic episodes and that was currently managed by the prison under the Care Programme Approach. On 5 December 2017 BID chased up its previous requests for the Claimant to be transferred to an IRC.

129. On 7 December 2017 Mr Walker emailed the Claimant's offender manager to ask if she could provide a suitable address for him due to his mental health difficulties. On 8 December 2017 the Claimant's offender manager replied that Probation could not supply an address because the Claimant was not entitled to public funds and his "level of risk" meant he was unlikely to qualify for approved premises (i.e. his risk was not high enough). On 15 December 2017 Mr Walker was told by the HEO to ask the section 4 team to email a "best available address letter" to Probation (see paragraph 227 below).

Eleventh Detention Review: 12 December 2017

130. The eleventh detention review was dated 12 December 2017. By this time the format of the detention review document had changed. Mr Walker noted that the substantive appeal hearing was due to take place on 23 February 2018. His assessment of the risk of absconding and risks of harm and of re-offending remained in similar terms. There was no reference to children and Mr Walker maintained his position that there was no OASys report. In section 7 asking about issues of family, children issues or ties in the UK, Mr Walker entered "N/K". This is despite the fact that at by that stage the Claimant had put in a fully detailed appeal, referring, inter alia, to the issues relating to his children. In the section "Case Progression Actions", Mr Walker noted that bail had been refused and referred to the fact that on 15 November 2017 he had sent a recommendation for release on conditions in a "Contact Management Referral". As

regards action plan going forward, Mr Walker recommended liaison with the section 4 team to ascertain if they were able to provide an approved bail address.

131. Despite all the intervening developments, Mr Walker's final recommendation was that detention should be maintained in precisely the same three-paragraph wording as in his original detention review (set out at paragraph 78 above). The authorising officer again noted his appeal was the current barrier to removal and that was "due to be heard in February". He further noted the risk assessments and agreed that the Claimant was *not* a strong candidate for contact management. He agreed that removal remained a realistic prospect within a reasonable timescale and authorised a further 28 days detention. He also asked for an up to date medical assessment of how his bipolar was being managed in detention. There is no mention of the CPP recommendation nor of Mr Walker's proposal for release.

132. On 22 December 2017 Dr Pick, a consultant psychiatrist, instructed by the Claimant's solicitors produced a medico-legal report, diagnosing bipolar affective disorder, currently in remission and PTSD. Separation from his partner and children was putting him under significant strain. He reported three suicide attempts.

133. On 27 December 2017 Mr Walker emailed the section 4 team to see if they could find a suitable address. On 28 December 2017, the Claimant's probation officer said that, because the Claimant had no recourse to public funds, she could not refer the Claimant to supported housing and that he was not suitable for approved premises "as he is not assessed as high risk". She would check any further address that the Claimant wishes to provide.

134. In a witness statement dated 3 January 2018, the Claimant's partner explained that the Claimant's imprisonment had led to a deterioration in her mental health. In her evidence, Ms Louden said that, if the caseworker had seen that witness statement, it should have been taken into account by him.

Twelfth Detention Review: January 2018

135. On 9 January 2018 the twelfth detention review was due to take place. It did not take place. Mr Walker's entries made at the time in the CID calendar events records state that it was cancelled. No further explanation has been given for why it did not take place. The Secretary of State now accepts that this was a public law error.

136. Ms Louden gave evidence about the twelfth detention review. In her witness statement she had said that "we can infer that the detention review was carried out". She was then cross-examined about this and the basis upon which she had drawn that inference. Her evidence on this was confused and unconvincing. She explained at first that because someone had gone and uploaded the wrong review, she had assumed that a review had in fact been done. She said that "*it wouldn't take much time to do a new review. If you're going to take the time to upload the wrong one you might as well have done it correctly*". She then corrected herself: she wasn't saying that it wouldn't take long; rather it wouldn't take much longer to do it correctly. She accepted that she had not looked at the CID to see if there was any record of the twelfth detention review having been done. She was then shown the CID record confirming that the twelfth detention review had been cancelled. She accepted that that showed that no detention review had taken place in January 2018. She agreed that she did not know what the case owner

was assessing at the time. When it was put to her that the case owner should know all the facts, she replied "*absolutely I'd much rather case owner was sent here than me.*" She accepted that she had not been sufficiently on top of the papers to know what had happened.

Bail granted and release from detention: 25 January 2018

137. On 19 January 2018 the Claimant made his fourth bail application. On 25 January 2018 the Claimant was granted bail by the FTT with a condition of reporting. No residence condition was imposed. Nevertheless there is evidence to suggest that at the hearing the immigration judge granted bail in the expectation that the Secretary of State would be imposing a condition of residence to a section 4 bail address. On the same date, the Claimant attended at UK Visas and Immigration in Leeds and reported with the address he was staying at. Probation reported that the address where he was staying was not suitable because it did not pass checks and had asked for details of the section 4 address when available. He went to stay with a friend and stayed there until March. Probation said that they were happy for the Claimant to be released, because it had been so long, and for him to go into private accommodation, pending provision by the Secretary of State of section 4 accommodation.

138. On 29 January 2018, the Secretary of State wrote to the Claimant, noting that the Claimant had been granted bail by the FTT. As no residence condition was imposed in the grant of bail, the Claimant's application for section 4(1)(c) accommodation had now been closed, as the Claimant no longer required an address to be released to. It is now accepted that this was wrong as a matter of law. The section 4 application was still pending and the residence condition was irrelevant to that application. In cross-examination, Ms Louden agreed that as at 29 January 2018, his section 4 application of June 2017 was still outstanding and it should have been considered.

Events after release from detention: February 2018 onwards

139. On 2 February 2018, the probation officer wrote to Mr Walker explaining that she was confused that the section 4 application had been closed. She had understood that it had been agreed before the immigration judge that the Secretary of State would secure section 4 accommodation. She reported that the Claimant was currently residing at a friend's flat on a temporary basis. She therefore requested that section 4 accommodation was sought for the Claimant, as agreed at the hearing.

140. On 13 February 2018 the Claimant's representatives sent a letter before action challenging the continuing failure to provide the Claimant with section 4 accommodation. The Claimant provided a witness statement saying that he was living at a friend's house and was visiting his partner and children every day. On 27 February 2018, the Secretary of State responded to the pre-action letter, stating that the closure of the application was in accordance with the new legislation. On 9 March 2018, the Claimant's licence expired. On 15 March 2018 the Claimant submitted an application for accommodation under s.95 of the 1999 Act. His probation officer wrote that "it was imperative for [his] mental health and progression forward that he secures permanent accommodation." On the same date the person with whom the Claimant had been staying since release explained that he had given the Claimant three days notice for him to find a place. Thereafter, as the Claimant explained in his witness statement, he was

"sofa surfing" at friends' houses for a few nights at a time and "sometimes I had nowhere to go and had to spend the night in a park".

141. On 24 April 2018 the Claimant's representatives submitted a letter from Dr Maumi, a consultant psychiatrist. stating that the Claimant would benefit from permanent accommodation which would promote stability in his mental health, and reporting that the Claimant said he was sofa surfing.

142. On 9 May 2018 the Secretary of State decided to offer s.95 support. On 17 May 2018 the Secretary of State cancelled a proposed dispersal to London and requested dispersal to property in Coventry. On 1 June 2018 the Claimant moved into an address in Coventry.

143. On 12 July 2018 the Claimant was admitted to hospital under the MHA. Prior to his admission, he was living with his partner. He had assaulted members of the public with a knuckle duster and assaulted a police officer, a fellow patient and attempted assault on member of staff. He reported smoking a joint every day. On 28 July 2018 the Claimant had an altercation with another patient. On 29 August 2018 the Claimant was discharged from hospital.

144. On 3 October 2018 the Claimant's appeal against refusal of asylum was finally heard by the FTT in Bradford. On 17 April 2019 his appeal was allowed on humanitarian grounds i.e. that on return to Afghanistan he would face a real risk of serious harm. On 8 October 2018 the Claimant sent a pre-action protocol letter challenging his false imprisonment. Further such letters were sent. On 30 April 2019 the Secretary of State accepted liability for false imprisonment for the period 4 April to 24 August 2017 due to lack of appropriate reviews, but maintained that damages would be nominal. On 14 May 2019 the claim form was filed. On 3 July 2019 the Upper Tribunal refused the Secretary of State's application for permission to appeal. On 18 September 2019 the Claimant was granted 5 years leave to remain. On 26 January 2020 the Claimant was sectioned under s.2 MHA after periods of heavy drinking and cannabis use, and on 27 March 2020 the Claimant was sectioned under s.3 MHA.

(E) <u>Expert psychiatric evidence</u>

145. Expert evidence from a consultant psychiatrist was submitted by each party: Dr Hillen, instructed by the Claimant and Professor Greenberg instructed by the Defendant. Together they prepared a joint statement dated June 2020 ("the Joint Statement"). This evidence is of some, albeit limited relevance, where the assessment is made largely on the basis of evidence available at the time of the detention. I refer to the following aspects of the Joint Statement.

146. Asked whether the mental health condition(s) and/or trauma rendered the Claimant particularly vulnerable to harm in detention, the two experts agreed that the Claimant was more vulnerable to harm in detention than the average member of the general public because of his mental health history and his previous self-reported exposure to significant adversity both in Afghanistan and during his transit to Europe. Professor Greenberg observed that similar levels of vulnerability are quite common amongst the prison population. Dr Hillen emphasised the importance of the Claimant's previous experience of imprisonment by the Taliban which in his opinion made it particularly difficult for the Claimant to cope with immigration detention. They agreed that the

ongoing and indefinite nature of the detention represented a stressor which was likely to have affected the Claimant's sense of safety, agency and certainty which would have been likely to have a negative impact on his mental state. Professor Greenberg noted that the Claimant had spoken about fears of being deported to healthcare staff when he was detained in custody.

147. In answer to the question "was the Claimant unsuitable for detention in an immigration removal centre because of his mental health condition(s)?", Dr Hillen felt that because of his mental health difficulties, by February 2017 he should have been released to the community because he was clearly psychologically vulnerable and was not suitable to be detained in an IRC. Professor Greenberg noted that on 7 February 2017 there was no evidence which suggested to prison staff that his mental health needs could *not* be managed in custody. Indeed in Professor Greenberg's view, the care he received during the period of immigration detention in prison was generally successful in preventing the Claimant from suffering a severe psychotic relapse, whereas since he has been released into the community, he had been detained in hospital under MHA on multiple occasions. In Professor Greenberg's view there is no reason that the Claimant would not have been suitable for detention in an IRC.

148. The experts were asked whether the Claimant suffered any additional symptoms as a consequence of his lack of accommodation. Both experts were of the view that not having any accommodation was likely to be a considerable stressor and would have contributed to his poor state of mental health. However, Professor Greenberg noted that the medical entries during that period did not comment specifically on the negative impact of a lack of accommodation on the Claimant's mental health. Dr Hillen noted that the clinical team had written a letter emphasising the Claimant's vulnerability and need for stable accommodation which demonstrated that they were acutely concerned about how the homelessness increased the Claimant's risk of further psychotic episodes. Asked whether the lack of accommodation caused and/or contributed to a worsening of his mental health condition, they stated that, whilst lack of accommodation would have been an additional stressor for the Claimant, there is no specific evidence that it caused or contributed to a worsening of his mental health condition. Professor Greenberg noted that he was not admitted to hospital for care during this period, whilst he was admitted to hospital twice subsequently.

(F) Analysis

General

149. Before turning to the seven issues, I make some observations on the course of the Claimant's detention between February 2017 and January 2018. Over that period, there were a substantial number of failings in the management of his detention, and in particular on the part of Mr Walker. First, from the outset Mr Walker failed to notice that the Claimant had been assessed in February and March 2017 at AAR level 2; he either did not read, or ignored, the content of the first detention review. In fact he appears to have had no awareness of the Claimant's mental health condition until August 2017, despite the content of that review and despite the terms of the local authority letter of 5 July. Further, there is no reference, in the detention review, to the Claimant's family ties. Large parts of the detention reviews are simply repeats of what he had said in the second detention review; he appears to have merely "cut and paste" from that review; most particular his recommendation in section 14. Little or no proper

assessment of the actual position appears to have been made in each detention review. This is exemplified by his express statements that there was no OASys report, at times when it was in Mr Walker's possession. In relation to the section 4 application, the pro-forma completed by Mr Walker contained a number of errors; he repeated the error about known medical conditions and failed to refer to the principal offences.

150. I conclude that consideration of the Claimant's detention, in the detention reviews and generally has failed, by some margin, to be "robust and formally documented" as required by section 55.8 EIG. I infer from the fact that Mr Walker has not been called to give evidence that there is no adequate explanation for these failings. Nevertheless, the questions still remain as to whether, as a result of these failings or otherwise, the Claimant's detention was unlawful. I turn to that question now.

Issue (1): Hardial Singh

151. Issue (1) was addressed by reference to two sub-issues:

(a) Breach of Hardial Singh 2 and 3 - detention for more than reasonable period and no prospect of removal within a reasonable period; and

(b) Breach of Hardial Singh 4 - failure to act with reasonable diligence and expedition to effect a removal.

Given a degree of overlap between the issues, I consider, first, the parties submissions on the two sub-issues, and then turn to my analysis on each.

The Parties' submissions

The Claimant's case

(a) Hardial Singh 2 and 3

152. The Claimant submits that, by reason of breach of Hardial Singh 2 and 3, his detention was unlawful from 21 August 2017, alternatively from 13 November 2017. From the specified date there was no realistic prospect of deporting the Claimant within a reasonable period, having regard to all relevant considerations.

153. In summary, the Secretary of State overestimated the risk of absconding, and also the risk of harm from re-offending, whilst at the same time underestimating the harmful impact upon his mental health of continuing detention. The Claimant was highly vulnerable. He was detained in prison rather than in IRC. His removal was never likely.

154. As regards the risk of absconding, this was not remotely as high as the Secretary of State considered. At most the Claimant was a medium risk of absconding. That risk could have been managed by a series of conditions upon release including being put on a tag, a curfew and reporting. As regards the risk of harm from re-offending, this again was overstated by the Secretary of State. It was at most a medium risk. As regards the length of detention, a period of one year is a long period for anyone. By August 2017 he had been detained for 6 months. As regards obstacles to removal, at all times he had an outstanding submission and outstanding appeal. The appeal was "meritorious" and was not likely to be resolved quickly. Further, the Secretary of State had not acted with

all due diligence speed and effectiveness in proceeding with the deportation: (see further Claimant's submissions at paragraphs 156 and 157 below). Detention had a significant impact upon both the Claimant and upon his family.

155. The reasonable period for removal expired on 7 August 2017 by which time he had been transferred to HMP Hull for his own safety, but away from his family. Taking account of a grace period of 14 days, the detention became unlawful as at 21 August 2017. Alternatively, the reasonable period expired on 30 October 2017, by which time no bail address had been found after four months chasing and after the caseworker and the Case Progression Panel had recommended release. Again taking account of a grace period of 14 days, the detention became unlawful as at 13 November 2017.

(b) Hardial Singh 4

156. The Claimant submits that in breach of Hardial Singh 4, his detention was unlawful because the Secretary of State failed to act with reasonable diligence. The Secretary of State should have acted much earlier including before detention. The Secretary of State did nothing to advance consideration of his claim for a period of 6 months, and, upon receipt of the Claimant's letter of 9 August 2016, she could and should have progressed consideration of, at least, the Article 8 claim. Further the Secretary of State was dilatory in addressing the position in relation to the Claimant's children and medical reports. She could and should have written to the local authority in August 2016. The overall chronology of events cannot be described as diligent. The Claimant was kept in prison out of sight and the delays were a reflection of very poor case working.

157. With reasonable diligence, the deportation decision could have been made by about 7 March 2017. Even allowing for aspects of mere administrative failing, the Claimant submits that a period of 2 months was incompatible with Hardial Singh 4. The Claimant accepts that, if he succeeds under Hardial Singh 2 and/or 3 for a period of 2 months or more (i.e. detention unlawful by 25 November 2017), there is no need to address Hardial Singh 4, because that would involve double counting. On the other hand, if the Claimant's claim under Hardial Singh 2 and 3 fails, then in any event on the basis of breach of Hardial Singh 4, the Claimant should have been released in November 2017, rather than in January 2018.

The Secretary of State's case

(a) Hardial Singh 2 and 3

158. The Secretary of State submits that the period of detention was at no time unreasonable. Moreover at no time, and in particular at no time from 7 August 2017, was it apparent that the Claimant could not be removed within a reasonable time. The risk of absconding and the risk of harm from re-offending are very important considerations, upon which the Court must take a view.

159. The risk of absconding in the present case was high at all material times. The Secretary of State has special knowledge about that risk, as do the courts considering bail applications. Substantial weight should be accorded to the only bail decision which gave detailed reasons, pointing to the high risk of absconding. As at the time of that decision, there could be no breach of Hardial Singh 2 and 3. The high risk of absconding in the present case is established by the fact that the Claimant never reported

between 2012 and 2015. As regards community ties, the Claimant had multiple addresses to go to, which would make it hard for him to be found. Where there is a high risk of absconding, then the impact of detention upon family life is unlikely to be a decisive factor.

160. As regards the risk of harm, the Secretary of State relied upon the Sentencing Remarks and the fact that the Claimant was MAPPA level 2. The OASys report was not available until November 2017. There is no evidence that the PSR was ever before the Secretary of State.

161. From August 2017 the only obstacle to removal was the Claimant's appeal. In general it is reasonable to detain someone where there is a high risk of absconding and a substantial risk of harm from re-offending, pending an asylum appeal if that appeal is the only obstacle to removal and where there is no reason to assume that the appeal will take an exceptionally long time. Going through each of the detention reviews, at no point was it apparent that the Claimant could not be removed within a reasonable time.

(b) Hardial Singh 4

162. First, there is no basis for the proposition that the Secretary of State should have acted before the Claimant was detained: see paragraph 17 above. In May 2017 the Claimant made further representations. In any event the Secretary of State progressed matters with reasonable expedition. It took 6 months from the start of detention to serve a final decision. That was not an unreasonable period of time for such a complex decision covering a number of different strands of law. Of those 6 months, 4 ½ were due to factors outside the Secretary of State's control, namely Prison healthcare being slow to send the records. Once the medical records had been obtained, the Secretary of State was prompt in considering the Article 8 and asylum claims. Secondly, and in any event any failures were mere administrative failing, falling short of the high threshold for a breach of Hardial Singh 4. Thirdly, even if the delay was serious, it was not causative of detention. The Secretary of State could not make a deportation decision until all three elements of the Claimant's claim had been determined, namely Article 8, asylum and Article 3 medical claim. Any delay made no difference because the Article 3 claim could not be determined until the Secretary of State had received the medical notes. Finally, even if the asylum claim had been determined earlier, there is no evidence that he would have been released any earlier, because of the appeal.

Discussion and analysis

(a) Hardial Singh 2 and 3

163. There are two essential questions when assessing, at any particular point in time, whether detention remains lawful: first, is the period already spent in detention unreasonable; and secondly, if not, is there a sufficient prospect of removal within a reasonable time? The Claimant accepts that, prior to August 2017, detention was lawful under *Hardial Singh* principles, on a balance of the relevant considerations. The question is whether that position changed at any time thereafter. I deal with the main factors to be weighed in the *Hardial Singh* balance in turn. I do so on the basis of the information held by the Secretary of State at the time. I first consider the relevant factors in general, regardless of those particular dates. I then turn to consider three specific dates, and whether, taking account of the generality of factors, there were

particular developments which altered the balance. As time went on, and the period of detention to date extended, the balance of factors necessarily changed.

Risk of absconding

164. In my judgment, the Claimant did present a reasonably high risk of absconding. In 2012, he had persistently failed to report and thereafter for 3 years, until he was arrested he remained at large. Notably, in his witness statement, the Claimant offered no explanation for this continued failure over this period. I accept that, by 2017, there were other factors which attenuated the risk of absconding: he had not left the area, but had remained in Coventry; he was five years older; he had significant ties with his partner and his children; he had been released from his prison sentence on licence and was subject to supervision by Probation. On the other hand, he was not, and would not, be living with his partner. Whilst the risk was not as high as assessed by the Secretary of State in the detention reviews, nevertheless as at the date of detention in February 2017 I consider that the risk of absconding remained high.

Re-offending and the risk of harm to the public

165. In my judgment, the Claimant presented, at all material times, no more than a medium risk of harm from re-offending. The level of risk was overstated by the Secretary of State and her assessment was not sufficiently based on evidence. From the outset in the detention reviews, the Claimant was assessed as posing a "very high risk of harm" to the public due to his previous convictions for violent offences. The basis for this conclusion is not clear: the OASys report was not available to Mr Walker until November 2017 and it is not clear that the PSR was available to him. It appears to have been based merely on the fact that his offences meant he was categorised as MAPPA level 2. That was a generic assessment. Moreover, the suggestion that he needed to commit crime to support himself and that he was not entitled to support was mistaken. He was eligible for section 4 support and subsequently granted section 95 support. In my judgment, the Secretary of State's continual assessment of a high risk of harm was erroneous. Whilst not minimising the offences committed in January 2016, his offending was not of the most serious type. The PSR in fact identified the risk as medium; the later OASys report classified the risk as "medium" at the highest, and "low" for the probability of violent re-offending. In any event, from November 2017, when the OASys report was available, the risk could not have been any more than medium. That the risk of harm was not particularly high is borne out by the fact that he did not qualify for level 3 "approved premises" under the regime for section 4 accommodation. (see paragraph 224 below).

Obstacles to removal – claim and appeal

166. The only relevant obstacle to removal was the Claimant's challenge to deportation i.e. his claims for asylum and under Article 8 and Article 3 ECHR, and his subsequent appeal. At all times the Secretary of State took the view that these could be resolved quickly. I approach this issue on the basis that the Claimant's challenge was not "hopeless" and had some merit, but without the benefit of the hindsight provided by the subsequent success of the appeal. Once an appeal had been lodged, his claims were not going to be resolved in anything less than a matter of months. Applying the approach indicated in paragraph 14 above, some weight, in the Claimant's favour, is to be placed on the likely length of the period of his appeal. Nevertheless I accept the Secretary of

State's submission that, where an appeal is the only obstacle, this has to be balanced against the particular risk of absconding and of harm from re-offending.

Diligence speed and effectiveness in surmounting obstacles

167. There is overlap here with considerations arising under Hardial Singh 4. Since I conclude below, in any event, that in this case, those Hardial Singh 4 considerations make no difference to the overall *Hardial Singh* assessment, I deal with the issue here. The question here relates to the Secretary of State's conduct in dealing with the Claimant's challenge to deportation.

168. Whilst there was no specific *Hardial Singh* obligation to act speedily before February 2017 (see paragraph 17 above), given the fact that the Claimant had made his challenge to deportation on 9 August 2016, some 6 months before the decision to detain, once the Claimant had been detained in February 2017, it was incumbent upon the Secretary of State thereafter to act particularly promptly and with all due diligence. However it took the Secretary of State a further 5 months to make the deportation decision. Once medical reports were received at the end of May, Mr Gardiner proceeded promptly to deal with the asylum claim. However, in my judgment, the Secretary of State did not act with sufficient speed or diligence in resolving the challenge to deportation, and in particular either in relation to ascertaining the position relating to his partner and children (when she had notice of that claim in August 2016), nor in obtaining medical information from Prison healthcare.

169. The sequence of event in relation to medical reports was as follows: At the outset of detention, on 1 February 2017, the medical consent form was sent to the prison. It was not until 28 April 2017 (almost 3 months later) that Mr Walker chased for an urgent medical update. On 26 May 2017 Mr Walker chased again for medical records. In the event it was not until 30 May 2017, almost 4 months later after the initial request, that Mr Walker received the medical records from prison. There had been a substantial delay in obtaining these records. Whilst that delay appears to have been on the part of Prison healthcare, the Secretary of State, and Mr Walker in particular could and should have done more to chase up the prison. Further on 16 August 2017, Mr Walker chased Prison healthcare for an urgent medical update and this was chased again on 25 August 2017. Whilst an update was received on 31 August 2017, on 12 December 2017, the authorising officer was again asking for an up to date medical assessment. There appears to have been a period of 3 months when nothing at all was done in this regard.

170. The sequence of events in relation to the Claimant's partner and children was as follows. At the end of July and beginning of August 2016, the Claimant's partner and family put forward written representations setting out the family position and the impact of deportation upon them. On 9 August 2016, the Claimant put forward his challenge to the stage 1 letter, placing specific reliance upon his family situation. The Secretary of State understood this to be an Article 8 claim. Yet at the time of detention in February 2017, there was no reference at all to any family ties or concerns. On 25 April 2017, the Claimant's partner provided a witness statement explaining the impact of the absence of the Claimant upon the children. It was not until, almost three months after being detained, on 27 April 2017, that Mr Walker wrote to the local authority for their views on the effect of deportation upon the children. The response from the local authority was received on 5 July 2017. On 10 August 2017 the partner's GP wrote explaining the impact of deportation upon her mental health. In my judgment, the

Secretary of State could and should have written to the local authority about the position in advance of February 2017 and perhaps as early as in August 2016. Regardless of the position on deportation, that information was highly relevant to any decision to detain the Claimant when released from his custodial term. Accordingly, the Secretary of State did not act with all due diligence speed and effectiveness in surmounting the obstacles to removal.

Impact of detention upon the Claimant and upon family

171. The Claimant was, at the very least, AAR level 2. He had a serious mental health condition. This was clear from the Sentencing Remarks and was information which was either known or at least available to the Secretary of State at the time. Regardless of the issue of whether he was or ought to have been categorised as level 3, it was a highly material circumstance, in assessing the reasonableness of the period of detention. He was kept in prison, and there is evidence that he was victimised by others and from time to time struggled with his mental health in prison. Detention for an unknown period must have had a more serious effect upon a person in his condition than upon detainees with no such mental health condition: see paragraph 146 above. As regards his partner and children, there was substantial evidence that they suffered from the separation arising from his detention. Whilst this is a relevant factor in the overall balance, I accept Mr Dunlop's submission that the risk of absconding and the risk of harm from re-offending have significant "counter" weight in the balance.

Assessment over time

(a) 7 August 2017

172. By 7 August 2017, the Claimant had been detained for over 6 months. There had been two recent significant changes in his circumstances. First, the Claimant had been moved from HMP Hewell to HMP Hull, a significant distance away from his partner and children who were not able to visit him as frequently. The adverse impact of detention upon both the Claimant's mental health and upon his family was thereby exacerbated. Despite this, there was no recognition of the Claimant's mental health condition in the fifth and sixth detention reviews. Mr Walker was still chasing medical information from the Prison. Secondly, the deportation order had been made and the Claimant had lodged his appeal. Inevitably this would mean further delay in the resolution of the challenge to deportation and the prospective date of removal would necessarily be put back in time.

173. Nevertheless, even taking account of the overall and continuing lack of diligence, I consider that these two factors alone were not sufficient at that time to conclude that the balance of considerations had altered, such that it was apparent that removal could not be effected within a reasonable time. At that stage the section 4 application was only two months old. As regards the impact of detention, this was not significantly worse than it had been in the previous months. It was not clear at that point when the appeal hearing would take place and there was no particular reason to believe that the appeal would not take place within a reasonable time.

(b) 31 October 2017

174. By 31 October 2017, the Claimant had been detained for almost 9 months. There had been the following further changes in the circumstances: the authorising officer's observation in the ninth detention review that alternatives should be looked at if a hearing date for the appeal was not within a reasonable timescale; the CPP recommendation for release; the significant delays in obtaining bail accommodation; and the two refusals of bail for that reason; and Mr Walker's recommendation for a release address. Further the case management hearing had taken place. It does not appear that the date of the appeal hearing was known.

175. In summary, as at that date, there was a recommendation for release and Mr Walker acknowledged that the Claimant should be released, but subject to the availability of accommodation. However, as a matter of fact, such accommodation was not available. (Whether it should have been is another question and whether detention was unlawful by that time for other reasons is considered under Issue (2) and (3) below). In my judgment, however, these factors did not render continued detention unlawful under *Hardial Singh* principles. There remained the highly relevant risk of absconding. That risk would have been attenuated by release into approved accommodation, as indicated by the immigration judges' view that, without it, bail should not be granted. But accommodation was not available and so that, in the balance of considerations, the risk of absconding remained the same. I conclude that at this point it was not apparent that removal could not be effected within a reasonable period.

(c) 12 December 2017

176. By 12 December 2017, the date of the eleventh detention review, the Claimant had been detained for over 10 months. There had been the following further changes in the circumstances: the date of the substantive appeal hearing had been set for 23 February 2018; the CPP recommendation had been made and the Secretary of State's position in relation to it was wholly confused. In the eleventh detention review, Mr Walker appeared, first, to recommend release on conditions, then he recommended continued detention and finally the authorising officer recommended detention. The Secretary of State submitted that this can be interpreted as meaning authorising detention whilst looking for accommodation to enable release. If this is the case, then the position appears to be that he would have been released, if accommodation had been available. Mr Walker appeared still to be recommending release, and the evidence as to why he was not released is entirely confused.

177. I recognise that on 24 November 2017, the immigration judge refused bail and thus that his view as at that date was that detention did not breach *Hardial Singh* principles. However I must exercise my own judgment now. Contrary to his view, the two previous judges considering bail had been aware of the Claimant's previous failures to report, and thus had taken the risk of absconding into account. Moreover, the judge's reliance of section 4 accommodation being discretionary was somewhat misplaced. Further, by 12 December it was almost a further three weeks since that refusal of bail.

178. In my judgment, by this point in time the balance of the relevant considerations (taking account also of the previous developments since August) had tipped against continued detention. Most particularly, against a background of 10 months detention, a further period of *at least* 3 months detention was not a reasonable period in all the circumstances; it was therefore apparent that the Claimant could not be removed within a reasonable period and continued detention was in breach of Hardial Singh 3.

Allowing a period of 14 days grace (and assuming no public law error), I find that detention from 26 December 2017 was unlawful on *Hardial Singh* principles.

(b) Hardial Singh 4

179. In my judgment, regardless of my conclusion on Hardial Singh 2 and 3, and even if the Secretary of State failed to act with reasonable diligence in breach of Hardial Singh 4, this has no material impact upon the lawfulness of the Claimant's detention.

180. I have found detention under Hardial Singh 2 and 3 to have been unlawful only from 26 December 2017. The question is whether, if the deportation decision had been taken two months earlier, in May 2017, detention would have become unlawful at any earlier date, because of Hardial Singh 4. In my judgment, detention could not have become unlawful earlier. From my decision under Hardial Singh 2 and 3, it follows that detention *prior to* 26 December 2017 remained lawful under Hardial Singh 2 and 3 i.e. just under 10 months detention was reasonable and a further period of detention until the hearing of the appeal was not unreasonable. Even if the deportation decision could have been taken two months earlier, the Claimant would in any event have appealed. Even if it is then assumed that, the timetable up to the hearing of the appeal would have been brought forward by 2 months (as contended), this would not have rendered detention unlawful at any date before 26 December 2017. On this hypothesis, the period of detention to date would have been shorter, and the combined period of actual and prospective detention would have been reduced to the same extent. Having found that as at 25 December a total period of about 13 months not to be unreasonable, any shorter period, consequent upon an earlier deportation decision, could not be unreasonable under Hardial Singh 2 and 3.

Conclusion on *Hardial Singh* principles

181. For these reasons, I find that detention was unlawful under *Hardial Singh* principles from 26 December 2017 onwards.

Issue (2): Breach of policy

182. Issue (2) breaks down into two sub-issues:

(a) Breach of AAR Policy;

(b) Breach of EIG 55 – (i) generally and (ii) in relation to family and children.

Issue (2)(a): Breach of AAR Policy

The Parties' submissions

The Claimant's case

183. The Claimant submits that the Secretary of State was in breach of the Adults at Risk policy. First, she failed to recognise that the Claimant was an Adult at Risk at all between April and August 2017. Secondly, at all material times, the Claimant was an Adult at Risk level 3. Level 3 is not about actual harm to mental health from detention but the risk of harm from detention. Thirdly, the Secretary of State was under a duty

to make greater enquiry about the risk of harm to the Claimant from detention. (This issue also arises under Issue (3)(a)). Under the AAR policy the Secretary of State must determine whether a person is "at risk of harm": she was thus under a duty to ask the question whether the Claimant's mental health would or might deteriorate as a result of detention. In this case, that question was never asked. It was not sufficient to rely on what she was being told by Prison healthcare. Fourthly, being a level 3 detainee, none of the grounds justifying detention under the AAR Staff Policy applied to the Claimant.

184. There is a fundamental inconsistency in the Secretary of State's position. On the one hand the Secretary of State maintained that the Claimant was detained in prison (rather than in an IRC) because of his mental health condition. On the other hand, the Secretary of State maintained that the Claimant's mental health was not so bad as amount to a risk of being harmed in detention nor to warrant an enquiry as to whether he might be harmed by continued detention.

The Secretary of State's case

185. Whilst accepting that the Secretary of State breached the AAR policy between April and August 2017 and that the detention was unlawful for that period, for other periods there was no breach of AAR policy. At all material times the Claimant was no more than AAR level 2; at no point was he AAR level 3. Level 3 is a subset of the people who are at risk of harm; namely where they are "likely" to suffer harm. Level 3 is not just the risk of harm but the likelihood of suffering harm; or at least, where there is a high degree of risk.

186. As at 7 February 2017 (the date of detention) there was no current evidence before the Secretary of State that a further period of detention of several months would be likely to lead to a risk of harm as required by level 3 policy. There was no evidence that the Claimant's mental health could not be managed in custody. Dr Maganty's report was not available to the Secretary of State at the time. Even if it had been, it was not evidence of level 3 risk at the time. The report was old and out of date. The Secretary of State relies upon Professor Greenberg's view (at paragraphs 147 above) to the effect that detention was effective in protecting the Claimant from relapses which he later suffered in the community and that was partly because of the high level of care he was provided with.

187. On the basis of level 2 the Claimant could properly be detained under the policy because of the "level of public protection concerns" and because he met the criteria of being a foreign criminal. Even if the Claimant was AAR level 3, then detention was justified because the Claimant presented "significant public protection concerns" within the meaning of the AAR Staff Policy.

188. Further, there is no duty under the AAR policy upon the Secretary of State to ask specific questions, although it is accepted that the policy requires the Secretary of State to ask herself whether detainees may be at risk of harm. The Secretary of State asked that question by recognising that the Claimant was level 2 and by asking Prison healthcare and the Claimant himself about his health. No further questions needed to be asked. There was no tension in the Secretary of State's position between, on the one hand, the Claimant being so unwell that he was kept in prison and, on the other hand, his condition not being made worse, or not being at risk of being made worse, by detention.

Discussion and analysis

189. It is admitted that detention for the period between 4 April and 24 August 2017 was in breach of AAR policy and consequently unlawful. As regards the remaining periods, this ground turns on whether or not the Claimant should at the time have been classified as AAR level 3, rather than level 2. The question is whether it was *Wednesbury* unreasonable for the Secretary of State to classify as level 2 and not to classify as level 3, on the basis of the information which the Secretary of State had at the time.

190. Whilst the AAR policy documents are not entirely clear, for the reasons set out in paragraph 29 above, I consider that under level 3 AAR the relevant question is "is there *a risk* that detention will make the Claimant's mental health condition significantly worse"? I consider further that under the policy the Secretary of State was required to consider that question. But I do not consider that the policy itself required the Secretary of State to go beyond the information which was before her or available to her without further inquiry.

191. At the relevant time Dr Maganty's report (referring to a risk of deterioration resulting from detention) was not before the Secretary of State. I accept that Mr Walker's initial approach to the issue of the Claimant's mental health was poor, to say the least – ignoring what was in the first detention review, and being dilatory in chasing inquiries of Prison healthcare. Nevertheless I have concluded that on the evidence which was available at the time, the decision to classify the Claimant as AAR level 2 at the time was not irrational. This is supported by Professor Greenberg's view. There was no direct evidence of his condition being harmed by detention. That it was not irrational is borne out by the fact that, when making its bail application on the Claimant's behalf, BID concurred in the assessment at level 2, (rather than level 3): see paragraph 121 above. On that basis, continued detention was justified under the terms of the Policy: the Claimant met the criteria of a foreign criminal and there were non-compliance indicators. To this extent, the Secretary of State did not breach the AAR policy and this part of the challenge fails.

192. I should add that, if, contrary to the foregoing, the Claimant fell properly to be assessed at level 3, then under the terms of the Policy, continued detention would not have been justified; I do not consider that the Claimant presented "a significant public protection concern" (as that term is defined in the AAR Staff Policy).

Issue (2)(b): Breach of EIG Policy

The Parties' submissions

The Claimant's case

193. The Claimant submits, first, that there were breaches of general policy. The Secretary of State failed to carry out the January 2018 monthly review (as now admitted). Further the Secretary of State failed to apply the presumption of release, did not consider all reasonable alternatives and detention was not for the shortest period. Secondly, more particularly the Secretary of State was in clear breach of the provisions of EIG 55 relating to children. There is no evidence to show that the Claimant's children were ever considered in relation to his detention.

The Secretary of State's case

194. First, the presumption in favour of release was expressly considered in the detention reviews. Reasonable alternatives were considered and detention was for the shortest period. Reviews were conducted with the frequency required by EIG 55 (with the exception of the admitted breach of policy in relation to the January 2018 detention review). Secondly, the Secretary of State was under no duty to conduct particular investigations into the impact of detention upon the Claimant's children. Thirdly, in any event, the EIG policy was complied with. The Secretary of State did consider the impact when considering the family split authorisation. She wrote to the local authority asking for evidence, and learned that the Claimant was not allowed to be alone with his children due to risks from previous offending. There was no evidence that the Claimant and the partner were planning to live together. Whilst the Secretary of State accepted there was evidence that deportation would be harmful to the children, that could not be taken at face value, until the local authority report, which suggested that the children were not being harmed by the Claimant's detention.

Discussion and analysis

195. As regards EIG in general, and apart from the failure to conduct a detention review in January 2018, the assessments made by Mr Walker in the detention reviews were formulaic and showed little consideration of the detail of the Claimant's position. There are certain provisions relating to the approach to be adopted to FNOs which appear not to have been observed. Nevertheless I do not consider that there was any breach of the general provisions of the EIG which materially adds to consideration of the *Hardial Singh* principles. (I should add that there may have been a breach of policy in relation to detention in prison, rather than in an IRC (see paragraph 35 above). However the Claimant did not advance this as a distinct public law error bearing upon detention. This is understandable, since it is hard to see how any such error was material to the decision to detain the Claimant).

196. However as regards the position of the Claimant's children, I consider that, for at least some time within the period of detention, the Secretary of State did not comply with the detailed and mandatory provisions in the EIG concerning the position of a detainee's children – contained within paragraphs 55.1.1, 55.1.2, 55.1.3 and 55.1.4.2 (referred to in paragraphs 30 to 32 above) She did not give "special consideration" to what was a "family case" and did not have regard to the need to safeguard and promote the welfare of the Claimant's two children, when taking her decision to detain the Claimant. From as early as 31 July 2016 and 9 August 2016, the Secretary of State had notice of the Claimant's family (see paragraph 62 and 63 above). Yet until 27 April 2017, there is little evidence that Mr Walker considered the impact of detention upon the children at all. There was "no properly evidenced or fully justified explanation of the reasoning behind the decision to detain", taking account of the position of the children. Until that date, Mr Walker did not consider the impact of separation upon the two children. Nor did Mr Walker obtain information concerning the children which could reasonably have been obtained. He made no inquiries until 27 April 2017 and did not chase up the local authority, before a response was received on 5 July 2017. What is more there is no proper record of any consideration given to the children. Even though the standard form draws the issue to the writer's attention, there is no reference at all, in *any* of the detention reviews (including those after 5 July 2017) or in any decision to detain, to the position of the Claimant's children. As late as December 2017, Mr Walker noted that

the position was "N/K". Even if the position had been considered in the family split documents, there was no record of the factors taken into account, nor of careful consideration of the needs of those children. The reviews did not consider proportionality with regard to each individual. The enquiries made of the local authority were slow and cursory: see paragraph 170 above.

197. Further, in my judgment, the breach of policy in relation to the children "bore upon" the decision to detain. It was capable of affecting the decisions to detain taken from time to time. For this reason, this breach of policy rendered the detention unlawful from the outset and, at least, up until 5 July 2017. I consider, at paragraph 273 below under issue (7), whether the Claimant is entitled to substantial damages for this breach.

Issue (3): Other public law errors

198. Issue (3) breaks down into the following sub-issues:

(a) Breach of the *Tameside* duty to inquire both in relation to (i) the Maganty report and (ii) further inquiries about mental health and AAR Policy;

(b) Breach of duty to determine the application for section 4 accommodation;

(c) Failure to inform the Case Progression Panel of the Claimant's mental health and AAR risk level; and

(d) Failure to follow the CPP recommendation to release, made in October 2017.

Issue (3)(a): Failure to inquire about mental health

The Parties' submissions

The Claimant's case

199. The Claimant submits that the Secretary of State, in breach of her duty to determine whether the Claimant's health might be harmed by conditions in detention, failed to inquire whether the Claimant should have been treated as AAR level 3. The Secretary of State breached her *Tameside* duty to make reasonable inquiries in two ways: first by failing to obtain the Maganty report, and secondly, by failing more generally to investigate the Claimant's mental health.

200. The Secretary of State could not reasonably rely just on the Sentencing Remarks. First, the Remarks did not say that the Claimant would not be harmed by detention. Secondly, they identified "significant mental health difficulties"; that raised the possibility of harm from detention. Thirdly the Secretary of State was aware that the Maganty report was available. Not only did the Secretary of State rely on the Sentencing Remarks as reason for classifying as AAR level 2, but relied on the reference therein to the Maganty report. If the Secretary of State had looked at the Sentencing Remarks, she would have seen the fact that the Claimant was bipolar and psychotic, and on that basis she needed to look at the report, before deciding the level of risk under the AAR.

201. There was a tension in the Secretary of State position. On the one hand maintaining that the Maganty report was out of date; yet on the other hand relying upon a summary of

that report within the Sentencing Remarks, and indeed relying upon the Sentencing Remarks (which were equally out of date). Ms Louden accepted that if the Secretary of State had considered the Maganty report, then the Claimant would have been assessed as level 3.

202. Prison healthcare were never asked whether continued detention would be injurious to the Claimant's mental health. In any event it was not sufficient just to rely upon Prison healthcare. The experts agree that ongoing detention was likely to have had an impact upon the Claimant's mental health.

203. As regards medical records, the Secretary of State failed to obtain them and failed to chase them. The Secretary of State also failed to look at the medical records once they were received.

The Secretary of State's case

204. In summary, there was no obligation upon the Secretary of State either to obtain the Maganty report nor to commission their own report nor to make general enquiries into general harm.

205. First, the duty to investigate was only breached if the Secretary of State had been *Wednesbury* unreasonable in her lack of investigation. This is a very high threshold. Secondly there was no duty to investigate the Claimant's mental health nor to commission a report whilst the Claimant was in prison. Thirdly there was no evidence that the Claimant could not be managed in custody. Fourthly, the Secretary of State in fact took reasonable steps to enquire into the Claimant's health. Fifthly, as regards the Maganty report, it was not *Wednesbury* unreasonable for the Secretary of State not to seek this historic report. In any event the Secretary of State was not relying simply on the Sentencing Remarks which were out of date. It was reasonable not to seek out an old report, but to get up-to-date evidence.

Discussion and analysis

(a) The legal principles

206. In *R (on the application of DK) v Secretary of State for the Home Department* [2014] EWHC 3257 (Admin), Haddon-Cave J considered a claim for substantial damages for unlawful immigration detention on grounds of the detainee's mental health in the context of the then AAR policy. One of the grounds of challenge was that the Secretary of State failed to make sufficient inquiries into the claimant's condition. At §167, the judge set out the "classic Tameside principles", citing in *R (Plantagenet Alliance Limited) v. Secretary of State for Justice* [2014] EWHC 1662 (Admin) at §99 to 100, as follows (with case citations removed):

> *"99. A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, where he said (at page 1065B): "The question for the court is, did the Secretary of State ask himself the*

right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

100. The following principles can be gleaned from the authorities:

(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

(2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken.

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.

(4) The court should establish <u>what material was before the authority</u> and should only strike down a decision by the authority not to make further inquiries if no reasonable council <u>possessed of that material</u> could suppose that the inquiries they had made were sufficient.

(5) The principle that the decision-maker <u>must call his own attention to considerations</u> relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's <u>duty so to inform himself as to arrive at a rational conclusion</u>.

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it."

(<u>emphasis</u> added)

Further, he held (at §§175 to 179) that there is no specific and stricter *Tameside* test in the context of Ch 55.10 (AAR policy). The duty to make reasonable inquiries only arises where the decision maker was put on reasonable inquiry in the first place. The decision maker only has to take such steps to inform himself or herself as are reasonable in the particular circumstances of the case at the time. There is no general duty to generate fresh psychiatric reports. At §181 Haddon-Cave J said:

> *"Tameside requires the decision-maker to make only reasonable inquiries as to the potential detainees physical and mental health (See Beatson LJ in Das at [70]). In many cases, the question of the possibility of the application of 55.10 EIG will be capable of early and easy resolution without resort to wasteful and unnecessary archaeology into all the detainee's medical records or procuring full-blown medical reports. Each case depends on its own facts. I repeat that Tameside only requires the scope of inquiries to be reasonable and proportionate, i.e. tailored to the instant case and question. The duty to inquire is not at large or not open-ended."*

207. In *R (on the application of MR (Pakistan)) v Secretary of State for Justice and SSHD and others* [2019] EWHC 3567 (Admin) [2020] 4 WLR 39, Supperstone J dealt with the position of an individual with a mental health condition serving a prison sentence who is subsequently detained under immigration legislation but within the prison estate. In particular at §94, he pointed out that, prior to the end of the custodial sentence, application of the AAR policy will involve consideration of medical evidence, and that, if not available, the Secretary of State should request *up to date* medical evidence from Prison healthcare. (The Court of Appeal very recently handed down judgment in the appeal from Supperstone J's decision ([2021] EWCA Civ 541), but did not disagree with this aspect).

(b) Application to the facts

208. Whilst the arguments here are finely balanced, I have come to the conclusion that the Secretary of State's conduct in relation to inquiries concerning the impact of detention upon the Claimant's mental health did not breach the high threshold imposed by the *Tameside* duty of inquiry, as applied in *DK* in the context of detention of those with a mental health condition.

209. First, as regards the Maganty report, it was not *Wednesbury* unreasonable for the Secretary of State to focus on the current situation and not to chase for a historic report. The Judge had read the Maganty report. Despite a single sentence, and taking account of all material before him and external to Maganty report, and including fact that Maganty was a bit out of date, the judge did not himself conclude that the Claimant's mental health would be harmed by custody. The Sentencing Remarks did not suggest that that report provided evidence of harm; on the contrary, the judge did not say that the Claimant had mental health difficulties at the time of sentencing, (as opposed to referring to a past psychotic episode) and indicated that the Claimant was positively improving due to treatment in prison. The fears identified by Dr Maganty had not by then materialised and did not materialise thereafter. There were no relapses in detention. In any event the Secretary of State was not relying simply on the Sentencing Remarks which were out of date but, as set out below, had sought from February onwards up-to-date medical records from Prison healthcare. Whilst the Sentencing Remarks pointed out that the Maganty report would be available, they did not suggest that it would contain anything contrary to the Sentencing Remarks themselves.

210. Secondly, there was no duty upon the Secretary of State herself further to investigate the Claimant's mental health nor to commission a report whilst the Claimant was in prison. The Secretary of State was entitled to rely upon Prison healthcare and the

Claimant's representatives to identify any particular concern and to provide the necessary medical evidence. The Secretary of State was entitled to assume that the Claimant's health was being satisfactory managed in prison unless informed to the contrary.

211. Thirdly, there was no evidence that the Claimant could not be managed in custody nor that detention was having a harmful effect on the Claimant. The Secretary of State was informed by the Claimant of his mental health issues and (eventually) proceeded to apply the AAR policy accordingly.

212. Fourthly, the Secretary of State in fact took reasonable steps to enquire into the Claimant's health. She looked at the Sentencing Remarks. She sought medical records from Prison healthcare before detention and chased for those records. She called the nurse for an update and was told that there were no concerns. After receiving the medical records, she sought updates. Whilst somewhat dilatory, there was no direct evidence of harm from detention. The Secretary of State was told that there was to be a mental health assessment and could expect that she would have been told if there had been any concerns raised. The Secretary of State went to visit the Claimant. Updates were received but there was no sign of harm.

213. Finally, I add that, even if I had found a breach of the *Tameside* duty in not obtaining the Maganty report, I would have concluded that that breach did not "bear upon" the decision to detain. Despite Ms Louden's evidence (see paragraph 42 above) I do not consider that, if the Secretary of State had seen the Maganty report at the time, the Claimant would necessarily have been assessed at AAR level 3. It is likely that in that event the Secretary of State would have obtained up to date information as at February/March 2017 and on the basis of the medical evidence subsequently obtained by the Secretary of State, that information would have shown that the Claimant's mental health condition had not been exacerbated by detention. Indeed the Maganty report itself indicated that his condition has responded well to treatment in custody. In that event, the Claimant would have remained assessed at Level 2, and the failure to obtain the Maganty report would not have any further material impact upon detention, beyond the admitted assessment at level 2.

Issue (3)(b): Breach of section 4 duty in relation to accommodation

The Parties' submissions

The Claimant's case

214. The Claimant submits that the Secretary of State failed to consider his application for accommodation pursuant to section 4 of the 1999 Act within a reasonable time. Her duty was to determine that application in a fair and rational way and within a reasonable time. The duty to determine the application was a duty make a decision i.e. to grant or not grant; and failure to consider means failure to decide or determine.

215. The public law error in failing to determine the application "bore upon" the decision to detain – not just on the FTT's bail decisions but also the Secretary of State's own decisions. The Claimant invites the Court to concentrate upon the Secretary of State's decision. Alternatively, where an immigration judge (here on 3 and 23 October) wanted to release a detainee but could not do so because a lack of address and that address is

unavailable because of a failure to determine the section 4 application within a reasonable period, then that is a public law error which bears on detention.

216. As regards the failure to determine within a reasonable time, the application had been outstanding for 238 days when it was closed on 29 January 2018. The Secretary of State's conduct prior to September 2017 was characterised by extraordinary error and delay. Thereafter from 16 September 2017 the Secretary of State did nothing until the application was closed. There is no evidence to support the suggestion that the section 4 team was waiting for Probation to approve a private address. In her evidence, Ms Louden accepted that the progress to 16 September was inadequate and there was no progress thereafter. The delay was not Probation's fault. They were shown only one address and they turned it around within 14 days.

217. As regards the impact upon the decisions of the Secretary of State, it is plain on the facts that the Claimant would have been released if suitable accommodation had been found. The Case Progression Panel had recommended release. A release referral had been made internally on 15 November. The Secretary of State has adduced no evidence to show that the Claimant would not have been released even if accommodation had been made available. The suggestion made by the Secretary of State in argument that it could be inferred that there was a reasoned decision in November not to release, despite the position on accommodation is not supported by any evidence. It is highly unlikely that the lack of accommodation was immaterial. The Secretary of State's own caseworker, Mr Walker, was still asking Probation for a release address on 7 December 2017. The breach of the section 4 duty does vitiate the detainer's decision, because the Claimant would or might have been released by the Secretary of State. The reasonable period for considering the section 4 application expired by the time of the CPP recommendation or by the time of Mr Walker's referral for release on 31 October 2017.

218. As regards the position in relation to bail applications to the immigration judge, the Claimant would have been granted bail if he had had an address, as established by the immigration judges' indications on 3 October and 23 October 2017. The reasonable period within which to determine the section 4 application had therefore expired by 3 October, or at the very latest 23 October. Four months of being unable to bring a meaningful bail application is longer than a reasonable period.

The Secretary of State's case

219. In summary the Secretary of State submits:

(1) The Secretary of State considered the section 4 application within a reasonable time.

(2) In any event any public law error in this regard did not bear upon and was not material to any decision by the Secretary of State to detain the Claimant.

(3) Even if the FTT would have released the Claimant on bail but for the absence of accommodation, the grant of bail does not imply that the detention itself is unlawful.

220. As regards the first submission, the allegation is that the Secretary of State failed to "consider" the application and not that she failed to provide accommodation. There is

no set period in which accommodation must be found. Here the Secretary of State did consider the application. There was a short delay of about a month in providing the application to Probation. That does not amount to an unlawful failure to consider: *R (AC (Algeria)) v Secretary for State for the Home Department* [2019] EWHC 118 §31 and 116. The Claimant cannot allege a failure to provide because the matter was not within the Secretary of State's control.

221. As regards the second submission, it is not sufficient that the public law error bears upon a decision by another body, such as, in this case the FTT. The detention is only unlawful where it is the decision of the person detaining (here at the Secretary of State) which is tainted or capable of being affected by the public law error of that person. If the authorising officer detains for another reason, the section 4 error of law does not "bear upon" the decision to detain: see *MR Pakistan* at §166 and 167. In a further note, Mr Dunlop submitted that to make out a claim that the detention was vitiated by a failure to determine a section 4 application it is necessary to establish three things:

(1) There was a particular date by which the Secretary of State had to determine the application, either by refusing it or by offering a best available address. In the present case, taking account of case authority, that date was around 9 months after the making of the application (in June 2017). That period was not breached in the present case.

(2) There was a second date where the claimant could have been provided with an address if the application had been determined by that particular date. The second date would be the expiry of the period in which the FTT could have allowed an appeal and ordered an address to be provided.

(3) There was a decision taken after the second date where *the Secretary of State* maintained detention because the claimant did not have suitable accommodation to be released to. In the present case the Claimant has not identified any decision by any officials within the Home Office which relied upon the Claimant not having suitable accommodation as the reason for him being detained.

Discussion and analysis

222. Two questions fall to be decided:

(1) Was the Secretary of State in breach of a legal duty in relation to the section 4 application?

(2) If so, did that breach of duty "bear upon" or vitiate the Claimant's detention?

223. I start by addressing the legal principles relevant to these two issues. I then summarise the relevant chronology in the present case, before, finally, answering, in turn, the two questions.

The relevant legal principles

The section 4 duty

224. In *R (Sathananthām) v Secretary of State for the Home Department* [2016] 4 WLR 128 Edis J conducted a detailed examination of the operation of the provision of bail accommodation under section 4(1)(c). There were three claimants. At §§14, 15 and 21, Edis J set out a careful and detailed description of the section 4 regime and the procedure for its application. He referred to the fact that the Home Office offers three levels of accommodation: level 1, Initial Accommodation (IA) for all bail applicants except those who pose a high risk (which includes those assessed at MAPPA category 2); for high risk, level 2, standard dispersal accommodation, which is provided by third party contractors to the Secretary of State - that may be shared accommodation and unsuitable for those who present a particular level of risk; and level 3, for those exceptionally unsuitable for standard dispersal accommodation. At §15 he described the process undertaken on a section 4 application, involving the section 4 bail team, the caseworker and Probation and the completion by the caseworker of the pro-forma. At §21 he referred to FTT practice on bail applications which is that, for high risk offenders (levels 2 and 3), no bail application without an address has a realistic prospect of success.

225. At §§68, 69, 87 and 88 Edis J analysed the legal nature of the powers and duties in relation to section 4(1)(c). From that analysis I derive the following propositions:

(1) Section 4(1)(c) does not impose a duty upon the Secretary of State to provide accommodation.

(2) Section 4(1)(c) confers a power coupled with a duty. There is a duty to determine applications for accommodation "fairly and rationally". "Determine" means either offer accommodation or refuse the application.

(3) Within that duty, there is a duty to determine a section 4(1)(c) application within a reasonable time.

226. Edis J went on at §91 to point out that lack of vigour or simple overlooking by the Secretary of State would not necessarily amount to anything more than maladministration, but where the delay is so significant, that will amount to a breach of the duty to act within a reasonable time. On the facts, in each case the process took so long that it amounted to a breach of the duty to deal with the applications fairly or rationally. However at §§94 and 95, he was not prepared to find that an approved address would ever have been offered or that, even if it had, or if there had been a decision not to provide accommodation, the FTT would have granted bail. He could not determine whether any claimant was detained because of the failure of the Secretary of State to operate her policy fairly or rationally. He left that matter to be determined subsequently.

227. In *AC (Algeria)* supra, accommodation had not been found for a period of over 6 months. Mr Jeremy Johnson QC (as he then was) found on the facts (at §116) that the Secretary of State had taken reasonable steps to secure such accommodation, making requests of two separate providers and chasing them up. The delay had been due to the inability of the accommodation providers to identify sufficient suitable accommodation and due to the assessment of the probation officer that the accommodation identified was not suitable and, possibly, an unhelpful attitude on the part of the probation officer. Nevertheless (at §117) he said that the duty to act fairly and rationally is fact sensitive. Where the system has not been able to provide what is required after a lengthy period,

the time must come where either the Secretary of State must take matters into his own hands or where some other "least worst" option must be adopted. That time will take account of the length of the period over which the individual has been detained.

The relationship between breach of the duty and detention

228. The question here is whether a failure to provide accommodation within a reasonable time is such as to "vitiate" the Claimant's detention. On this issue, there was significant dispute as to the relevant legal principles. In particular the parties disagreed on the interrelationship of, on the one hand, the cases of *Qarani* and *Humnyntskyi* and, on the other hand, *MR Pakistan*.

229. In *R (on the application of Qarani) v SSHD* [2017] EWHC 507 (Admin) the claimant relied upon delay in offering accommodation under section 4 as a ground for unlawfulness of detention. The Secretary of State contended that in any event the non-availability of accommodation would not have prolonged the detention. The judge held that in any event detention over the relevant period was unlawful under *Hardial Singh* principles, and so this ground was academic. However at §74 the judge seemed to reject the Secretary of State's argument and to suggest that where the FTT had approved bail in principle, but no accommodation was provided to allow actual release, the failure to provide accommodation in breach of section 4 would have rendered the period of detention unlawful. This suggested that the impact of the breach upon the FTT's bail decision and thus upon detention, would be sufficient to render the detention unlawful.

230. In *MR (Pakistan)* the second claimant, AO, alleged that the time taken to find him approved premises following the grant of bail in principle by the FTT, rendered his detention unlawful. The delay was 3 months. The claim was brought not only against the Secretary of State for the Home Department but also against the Secretary of State for Justice. Two questions arose: whether there had been an unreasonable delay in the provision of bail accommodation; and, secondly, if there had, whether any such delay/public law error bore upon and/or was material to the Home Office's decision to detain. As regards the second question, the claimant contended that the delay amounted to a public law error which bore upon and was relevant to the continued detention. Supperstone J rejected this argument as follows.

> *"161. Mr Tam submits that the Lumba unlawful detention claim is unmeritorious. In Lumba and Kambadzi the focus was on* <u>*the decision to detain*</u> *(or the decision to continue detention). However, in AO's case the detention review noted that no suitable bail accommodation had been located* <u>*so the FTT's grant of bail in principle could not be put into effect*</u>*. There was no public law error in any of the decisions made* <u>*in those detention reviews*</u>*, and none, as I understand it, has been alleged.*
>
> *162. Mr Tam and Mr Southey made detailed submissions on the differences of view within the majority in Lumba about the threshold that had to be surmounted to permit a claim for damages. However, I agree with Mr Tam it is unnecessary to decide which of these tests is correct as it is clear from all of them that* <u>*the flaw in question must be a flaw in the*</u>

decision to detain. Lord Dyson's formulation (with which Lady Hale agreed), which has generally been adopted as a correct statement of the law, is that the breach of public law "must bear on and be relevant to the decision to detain" (para 68). However, AO's complaint is not of the decisions to detain or decisions on detention reviews, but of the compendious failure by the Defendants to provide accommodation timeously.

163. *The recent Supreme Court decision in R (Hemmati) v Home Secretary [2019] UKSC 56, in respect of which I received further short written submissions from the parties on 4 December 2019, provides, in my view, no support for what I consider to be an attempt by AO to extend the Lumba principle to embrace legal errors in decisions other than the decision to detain.*

164. *Having set out the evidence and the arguments fully, I will endeavour to express my conclusions on Ground A reasonably shortly.*

165. *I am entirely satisfied from the evidence of Ms Mainwaring and Ms Hutchinson, that there was no public law error in relation to the provision of bail accommodation. The allegation that the delay was unreasonable and unlawful is, in my view, not made out. I accept Mr Tam's submission that AO's offending history and his risk profile made the identification of suitable accommodation particularly difficult. In addition, the complexity was added to by the need to safeguard AO from other criminals placed in bail accommodation who might pose a risk to him. There was no delay beyond a reasonable timeframe.*

166. *Further, the Lumba claim for damages for unlawful detention must, in my view, in any event fail. I accept Mr Tam's submission that even if collaterally there was some breach of either Defendant's duties in relation to bail accommodation there was no public law error that was material to AO's continued detention in that it bore upon and was relevant to continued detention.*

167. *There was at all times a lawful justification for AO's detention. The decision to detain was that of the SSHD. Any public law error by the SSJ could not undermine and render nugatory the lawful decision by the SSHD to detain AO. Accordingly, the Lumba claim for damages fails."*

(emphasis added)

(AO's claim in this regard was not part of the recent appeal to the Court of Appeal).

231. In *R (on the application of Humnyntskyi) v Secretary of State for the Home Department* [2020] EWHC 1912 (Admin) Jeremy Johnson J found that the Secretary of State had unlawfully denied Schedule 10 accommodation. At §169 he went on to consider whether that rendered his detention unlawful. After citing the relevant test from *Lumba* he said (at §172):

> "*Here, there can be no doubt that the decision to refuse Mr Humnyntskyi Schedule 10 accommodation bore upon and was relevant to the decision to detain him. He had the benefit of a grant of bail, subject only to the provision of accommodation. The provision of Schedule 10 accommodation was capable of affecting the question of* <u>*whether he would be detained*</u> *(indeed, on the facts, it did affect that question - the more exacting test of causation is satisfied). Accordingly Mr Humnyntskyi 's detention was unlawful."* (<u>*emphasis*</u> added*)*

MR Pakistan was not referred to in his judgment, although I understand that it was cited, tangentially, in argument. He then went on to consider the precise moment in time at which the detention became unlawful: the relevant question is when is the earliest date by which the accommodation could (or should) have been provided. That is determined by what would have been reasonable: §§176 and 177. I was also referred to *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7 at §§17 and 18. However I do not consider that this takes the matter further, given the direct and inextricable link in that case between the unlawful deportation order and the detention.

232. I have not found this disputed issue easy to resolve. On the facts of this case, and in the light of my conclusions below, the issue has some limited impact i.e. as to the period of detention i.e. between the first bail decision on 3 October 2017 and the Secretary of State's decision to maintain detention on 14 November 2017. Nevertheless I conclude that the breach of duty must bear upon the decision of the *Secretary of State* to detain.

233. *Humnyntskyi* (and implicitly *Sathanantham* at §94 and 95) support the proposition that where a failure to provide accommodation in breach of the section 4 duty means that an FTT judge will not release, the breach bears on the detention and the detention will be unlawful. However I prefer the analysis of Supperstone J in *MR Pakistan*. In referring (at §172) to "the question of whether he would be detained", Jeremy Johnson J does not identify clearly the person who determined that question. It is clear from *Lumba* that what is to be vitiated is the "decision" to detain. As pointed out by Supperstone J, in the case where bail has been granted in principle, the relevant decision to detain remains that made in the detention review. The decision must be the decision of the Secretary of State. That is the decision which is subject to challenge in the proceedings and that is the decision which is said to be unlawful. I agree with Mr Dunlop QC that if, by the above quoted phrase, Jeremy Johnson J intended that detention could be rendered unlawful, if the Secretary of State made public law errors which were material to the decision of another body, i.e. the FTT not to release, then that is inconsistent with *MR Pakistan* and *Lumba*. Detention will only be unlawful where it is the decision of the person detaining that is capable of being affected by that person's public law error. Importantly, this conclusion is supported by Mr Dunlop's third submission that, as a matter of principle, the release of a detainee, pursuant to bail granted by the FTT does not, of itself, render the Secretary of State's decision to detain

unlawful, such that even if the FTT judge would have released the Claimant on bail, but for the absence of accommodation, that would not be the basis for a conclusion that the detention was unlawful.

The Facts here

The chronology

234. The full chronology of relevant events between June 2017 and January 2018 is set out in section (D) above. For ease of reference I summarise here the salient course of events. From before April 2017 until June 2017 the Claimant was seeking approval for private accommodation for potential release on bail. On 1 June 2017 the Claimant applied formally for section 4 accommodation. On 10 June 2017 the section 4 team referred the application to Mr Walker for him to complete the standard pro-forma, which Mr Walker completed on 12 June 2017. It appears that Mr Walker did not send that form back to the section 4 team, or at least the section 4 team did not receive it, until 3 July 2017, some three weeks later. On that day, the section 4 team then requested level 2 dispersal accommodation. On 5 July 2017 the section 4 team received a property proposal from the property provider. It was not until 12 July 2017 that the section 4 team forwarded the proposal to Mr Walker asking him to forward it to Probation for approval.

235. On 2 August 2017, Probation informed BID that they had not been asked to approve a section 4 address and had not been contacted by Mr Walker. BID immediately gave Mr Walker's details to the probation officer and contacted the section 4 team to inform them of the failure to request probation approval. On 4 August 2017 the section 4 team sent the address again to Mr Walker, asking him to pass it on to Probation. On 9 August 2017 Probation informed BID that they had still not received any request to check a section 4 address. BID wrote to Mr Walker telling him what they had been told by the section 4 team on 12 July and requested Mr Walker to forward the address to Probation. On the next day Probation confirmed that they had now received the information about the section 4 address. In this way no progress at all had been made for a period of 4 weeks between 12 July and 10 August.

236. On 24 August 2017 Probation notified Mr Walker that the address was not suitable. On the next day Mr Walker informed the section 4 team of this. On 6 September 2017 BID chased section 4 team for an update. The section 4 team told them, wrongly, that Probation approval of the original address was still awaited. BID urged Mr Walker to confirm that the section 4 team had now been informed of the unsuitability of the first address. The section 4 team's notes have no record of any Mr Walker's communication to them on 25 August 2017. On 7 September 2017 Mr Walker sought a second address. On the same date the section 4 team confirmed to BID that it would request a further address.

237. On 16 September 2017 Probation rejected the proposed accommodation as not suitable. Mr Walker then requested the section 4 team to find another suitable address. It appears that the second request for accommodation made to the property provider on 16 September was a simple repeat of the first request.

238. On 3 October 2017 the immigration judge indicated that he would have granted bail if an address had been available. On 23 October 2017 the second bail application was

refused on the basis that an appropriate address was not available. On 31 October 2017 Mr Walker acknowledged that the Claimant should be released and that he had emailed HMP Hull to request a proposed release address. On 15 November 2017 the Secretary of State referred the Claimant for release on contact management. On 7 December 2017 Mr Walker emailed Probation to ask if they could provide a suitable address for him. On 15 December 2017 Mr Walker was told to ask the section 4 team to email a "best available address letter". In the eleventh detention review of 12 December 2017 Mr Walker recommended liaison with the section 4 team to see if they were able to provide an address. On 27 December 2017 Mr Walker chased the section 4 team. On 25 January 2018 the Claimant was granted bail without a residence condition. On 29 January 2018 the Secretary of State closed the application for section 4 accommodation, on a mistaken understanding of the law. Finally on 9 May 2018 the Secretary of State offered the Claimant accommodation under section 95.

Breach of duty in the present case

239. In my judgment, the Secretary of State's consideration, through the section 4 team and through Mr Walker, of the Claimant's application for section 4 accommodation was characterised by repeated error and unreasonable delay. First, there was a delay of 3 weeks (12 June to 3 July) when the pro-forma was not returned to the section 4 team. Secondly, there was a further delay of over 4 weeks (12 July to 10 August) arising from the apparent failure of the section 4 team and/or Mr Walker to forward the proposed property to Probation. Thirdly there was a delay of almost 2 weeks of inaction between receipt of Probation's non-approval of the first address (24 August) and a request for a second address being made to the property provider (7 September). Fourthly it appears that the second request was in precisely the same terms and resulted in the same property being proposed. Fifthly, and subsequently, the Secretary of State erroneously closed the application. Overall by the end of January 2018 when bail was granted, the application for accommodation had been outstanding for 238 days. In evidence, Ms Louden accepted that the failings were "pretty poor": see paragraph 47 above.

240. In my judgment the decisions in *AC Algeria* and *MR Pakistan* (finding no breach) can be distinguished on the facts. In *AC Algeria* the Secretary of State made far greater efforts to secure accommodation and the delay could not be laid at the Secretary of State's door: see paragraph 227 above. By contrast in the present case, Probation at all times acted promptly in responding. In *MR Pakistan*, a delay of 3 months was held not to be unreasonable; there the claimant's risk profile meant that approved premises (level 3) were required and as such finding accommodation was particularly difficult; moreover additional complexity arose on his particular facts. In the present case the Claimant only required level 2 accommodation and it took only days to find the first address. Probation responded to the single request they received within a fortnight. In these circumstances, I find that the Secretary of State failed to determine the section 4 application within a reasonable time. I further find, if the Secretary of State had complied with her duty and not delayed so significantly, accommodation could, or at least should, have been provided much earlier and certainly by the end of September 2017.

Did that breach vitiate the Claimant's detention?

241. As to whether the breach of duty "bore upon" any decision of the *Secretary of State* in my judgment the failure to obtain accommodation within a reasonable time was

certainly, at least, "capable of" affecting the Secretary of State's decisions whether or not to detain the Claimant, and in particular as at 30 October 2017 when Mr Walker acknowledged that the Claimant should be released, in line with the CPP recommendation, at least if accommodation was available. If accommodation had been made available by that date, then the decision to detain taken on 14 November 2017 might very well have been different. I therefore find that the decision to detain taken in the tenth detention review was vitiated by the breach of duty and detention was therefore unlawful from that date. (No question of a period of grace arises in these circumstances, where I have found that accommodation should have been available by 14 November 2017). (For the reasons given in paragraph 232 above, I do not consider that the bail decisions of 3 and 23 October 2017 are relevant in this context). Whether, despite this, the Secretary of State would have nevertheless maintained detention, even if accommodation had been available, falls for determination under Issue (7) (see paragraph 275 below).

Issue (3)(c) and (d): Case Progression Panel

242. Issues (3)(c) and (d) concern the role of the Case Progression Panel and I address them together.

The Parties' submissions

The Claimant's case

243. First, the Claimant submits that the Case Progression Panel ("CPP") which considered the case in August 2017 was not informed that the Claimant had mental health issues. Secondly, the Secretary of State ignored the CPP recommendation of 24 October 2017 or failed to give reasons for not following that recommendation. The Secretary of State's failures in this regard constituted public law error.

The Secretary of State's case

244. As regards the position in August 2017, first it is not clear that the CPP was not informed of the Claimant's mental health concerns. Secondly, there was no published policy on what information needs to be provided to the CPP and any failure to provide the information is not a public law error. Thirdly, the absence of information about the Claimant's mental health did not bear upon the decision to detain since the decision at that time did not rely at all upon the CPP's view in August 2017.

245. As regards the CPP recommendation, first, there was no obligation upon the Secretary of State to follow the recommendation and no public law duty to give reasons for departing from it. A complete failure to have regard to such a recommendation could be a public law error which bears upon or is material to detention. Secondly, and in any event, it was not ignored. It was recorded in the GCID notes. Mr Walker noted it and made a renewed attempt to find accommodation. The CPP's reasoning was very scant and did not deal with the risk of absconding and did not consider the position in relation to bail accommodation. The fact that the recommendation was not recorded in the detention review does not prove that it was not taken into account.

246. Mr Walker's proposal for release was not accepted. As at 12 December 2017 and the eleventh detention review, Mr Walker was no longer recommending release. By that date he had changed his mind from the recommendation he had made in November. In any event it is what the authorising officer thought which is relevant. Whilst there was no contemporaneous evidence as to why the CPP recommendation was not accepted, the Court can draw the inference from the terms of the eleventh detention review that the most likely reason why the authorising officer did not agree to Mr Walker's referral was that he thought that the risk of absconding was too high. That was what every authorising officer had relied upon at around that time and further the Claimant was refused bail on that ground shortly after the CPP recommendation. In summary, the evidence does not indicate that the refusal to release was because of lack of accommodation as opposed to a high risk of absconding.

Discussion and analysis

The legal principles

247. In *R (Benchaouir) v Secretary of State for the Home Department* [2019] EWHC 2606 (Admin), there was a claim for unlawful detention, based on a number of grounds, including breach of the AAR policy and an allegation of failure to implement Case Progression Panel recommendations for release. The question arose as to whether those responsible for the detention reviews took account of those recommendations. Significantly, in that case, one of the officers who authorised detention gave evidence by witness statement. At §§98-100, Lewis J (as he then was) found, on the facts, that the authorising officer did consider the recommendations, although he did not refer to them in the detention review. There was no failure to have regard to the recommendation; rather there was a considered and justified departure from it. There was no obligation to record the reasons for not following the recommendation. In my judgment, it is implicit in Lewis J's judgment that there is a public law obligation upon those deciding whether to maintain detention to *consider* a CPP recommendation for release and to justify any departure from that recommendation. Ms Louden's evidence (paragraph 122 above) supports this conclusion.

Application to the facts

248. As regards the recommendation in August 2017, I do not accept the Claimant's submissions. Whilst it might have been good practice to do, I am not satisfied that there was a public law duty upon those involved in the Claimant's detention to provide the mental health information to the CPP.

249. However as regards the CPP recommendation, whilst it appears that on 31 October 2017 Mr Walker took account of it, I am not satisfied that in subsequent consideration in November and December, the Secretary of State had proper regard to it. In any event, I am satisfied that the Secretary of State did not give, and has not given, reasons to justify departing from the recommendation. Critically, unlike the position in *Benchaouir*, the Secretary of State has produced no evidence from either Mr Walker or from the authorising officer explaining how the CPP recommendation was considered and why it was not followed.

250. The Secretary of State's case is that the most likely reason as to why the authorising officer in the December detention review did not agree with Mr Walker's referral for

release was that he thought that the risk of absconding was too high. That is speculation and unsupported by evidence. Moreover as regards Mr Walker, there is an inconsistency in his position: on the one hand, it might appear from the eleventh detention review that, after recommending release on 15 November, by 12 December, he was no longer recommending release; on the other hand, he continued to ask Probation to provide a release address on 7 December, and on 27 December he was still asking for a bail address. At that point he was looking to release the Claimant. However, there is no evidence from Mr Walker to explain his position and what in fact happened.

251. Further, in my judgment this failure properly to take account of the CPP recommendation as a breach of duty "bore upon" and was material to, the continuing decisions to detain and that the Claimant's detention was unlawful on this ground from 14 November 2017 (assuming a breach of the section 4 duty under Issue 3(a) above).

Issue (4): Article 5 ECHR

252. In the course of argument, the Secretary of State submitted, and the Claimant accepted that the Claimant's case under Article 5 ECHR was co-extensive with its case under issue (1) *Hardial Singh:* see *Lumba* at §30. In the present case the Claimant did not identify any way in which the Article 5 adds to the *Hardial Singh* principles. In these circumstances, in view of my conclusions on Issue (1)(a) and (b), the Claimant's case under Article 5 succeeds to the same extent as I have found under Issue (1) and the Claimant's detention amounted to a breach of Article 5 for the period from 26 December 2017 until 25 January 2018.

Issue (5): Article 3 ECHR

The Parties' submissions

The Claimant's case

253. By the close of argument, the Claimant's case was confined to the allegation of street homelessness, following release from detention. The Claimant submits that the Secretary of State's failure to make a decision on his section 4 application and her subsequent closing of that application on 29 January 2018 rendered the Claimant street homeless and thereby amounted to a breach of Article 3 ECHR. From 15 March 2018, the Claimant became street homeless when he left the accommodation with his friend. Thereafter he was sofa surfing and sleeping rough. This had a clear impact upon the Claimant's mental health. He ended up homeless because of the unlawful closure by the Secretary of State of the section 4 application. That closure constituted the "treatment" for the purposes of Article 3, even though the damage did not arise until two months later when he left the friend's accommodation. Taking account of his mental health, the sofa surfing and sometimes rough sleeping, this amounted to inhuman and degrading treatment within Article 3.

The Secretary of State's case

254. The Secretary of State submits, first, that the threshold for establishing a breach of Article 3 is very high; and secondly, on the facts here, the claim of release to street homelessness is misconceived. The Claimant was not released in January to street

homelessness. The position might have been different if the Claimant was seeking a declaration of breach of section 4 or a misreading of the transitional provisions. But any public law errors in construing the guidance at the time have no relevance to a claim made under Article 3 which is concerned with what happened in substance.

Discussion and analysis

255. This issue relates to post-detention matters and is a self-standing claim for damages.

The legal principles

256. Article 3 ECHR provides as follows:

> *"No one shall be subjected to torture or to inhuman or buying degrading treatment or punishment."*

257. I have been referred to three cases in particular. Two were cases of street homelessness: *R(Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 at §§7 and 9 which concerned three claimant asylum seekers, who had been refused s.95 support and who had no means of obtaining money to buy food other than through charity, who had been sleeping in the open or were faced with the immediate prospect of having to do so; and *Humnyntskyi*, supra, at §§199 to 211, where claimant A was street homeless for 10 months, had no family support, was unable to wash clothes, and suffered persistent infections and at one point was sleeping in a ditch and thought he was going to die. The third case is *R (ASK) v Secretary of State for the Home Department* [2019] EWCA Civ 1239 at §§66-72 and 118 to 119 (a case of immigration detention of a detainee with mental health conditions). From these authorities, I derive the following propositions:

(1) Inhuman or degrading treatment within Article 3 involves a high level of suffering, usually actual bodily harm or intense physical or mental suffering. Treatment is inhuman or degrading if, to a serious detrimental extent, it denies the most basic needs of any human being. The treatment must achieve a minimum standard of severity: *Limbuela* §7 and *Humnyntskyi* §202.

(2) Other than in the case of actual injuries, the burden is on the complainant to demonstrate a breach of Article 3 and it is a very high hurdle: *ASK* §72 and *Limbuela* §7.

(3) Article 8 and Article 3 are very different: an Article 3 claim is not an alternative to Article 8 with the latter simply being a lower threshold: *ASK* §75.

(4) Article 3 may be breached in a case of street homelessness. In the context of a statutory duty to provide accommodation, where a person is at real and immediate risk of suffering inhuman and degrading treatment for want of accommodation, it may well be unlawful not to provide accommodation. *Humnyntskyi* §201.

(5) A general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3. But the threshold may be crossed where the applicant with no means of support is denied shelter, food or the most

basic necessities of life. There is no simple test applicable in all cases. The threshold would ordinarily be crossed where the applicant is obliged to sleep in the street, *save perhaps for a short and foreseeably finite period*, or was seriously hungry or unable to satisfy the most basic requirements of hygiene: *Limbuela* §§7 and 9.

Application to the facts

258. The facts here are that on 25 January 2018, the day of his release from detention, the Claimant provided an address where he was staying. Between that date and 15 March 2018 he stayed with a friend. On that latter date, the friend asked him to leave. There was a period of two months where the Claimant did not have a section 4/section 95 address. His evidence was of sofa surfing and spending the occasional night in a park. In any event he did not use the address given to him by the Secretary of State.

259. Applying the above principles to these facts, I find that there was no breach of Article 3. First, the Claimant was not "released" in January to street homelessness. At that point he had an address. He did not apply for section 95 accommodation until 15 March, two months after release. Thereafter the Secretary of State acted reasonably promptly. He was offered support on 9 May. Secondly, in any event the facts as attested to by the Claimant do not amount to sufficiently serious conduct to fall within Article 3, either in terms of the treatment by the Secretary of State or the consequences of that treatment for the Claimant. There is no reliable evidence that in fact the Claimant was ever "street homeless". He was sofa surfing. Even if the Claimant spent the night occasionally in a park that did not meet the high threshold to establish breach of Article 3. There is no evidence that he ever spent anything more than "a short and foreseeably finite time" without somewhere to stay. As explained above, the facts here bear no resemblance in seriousness to those in *Humnyntskyi* or even in *Limbuela*.

<u>Issue (6): Article 8 ECHR</u>

The Parties' submissions

The Claimant's case

260. The Claimant submits that the decision to detain him was an interference with his Article 8 family life with his partner and children on the following basis. First, the Secretary of State failed to give consideration to her policy in respect of separation of families. Secondly, the Secretary of State carried out no investigation as to whether the Claimant and his family would be adversely affected by detention. Thirdly, the Claimant and his family were in fact adversely affected by the detention. Fourthly, the Secretary of State failed to give any consideration to the Claimant's children's best interests when deciding whether to detain him. Fifthly the Claimant was suffering significantly in detention.

The Secretary of State's case

261. The Secretary of State submits that the first two, and fourth, aspects of the Claimant's case relate to the Secretary of State's decision-making process. As such, they do not give rise to a breach of Article 8. The adverse effect on the family was limited, as the Claimant was not living with them and was not allowed to be alone with the children

and there were many visits. Even if there was a breach of Hardial Singh 2 and 3 and of EIG in relation to the family, that does not amount to a breach of Article 8 if the impact on the family was proportionate. As regards the final aspect, the Claimant's suffering in prison was not so great as to require release under the AAR policy and was thus not a breach of Article 8. Further if it is not a breach of Article 3, it is hard to see that it could be a breach of Article 8, taking account of proportionality.

Discussion and analysis

262. Conduct is either a breach of substantive rights under the ECHR or it is not. The question on judicial review, for the Court, is not whether the decision-maker has properly considered whether a party's Convention rights would be violated; rather the question is whether there has been an actual violation of those rights: *Belfast City Council v Miss Behavin Ltd* [2007] 1 WLR 1420 per Lord Hoffmann at §§12-14. The fact that the decision-maker makes no reference to those Convention rights in reaching its decision does not vitiate the decision. Thus the allegations of failures by the Secretary of State to "to consider" and "to investigate" do not fall to be considered under this issue. In any event, these matters have been considered under Hardial Singh 2 and 3 and under issue (2)(b). Similarly as regards the substantive impact of detention upon the Claimant's partner and children, the claim under Article 8 in my judgment, does not materially add to the claims made under Hardial Singh 2 and 3 and also under issue (2)(b)). As regards the effect upon the Claimant himself in detention, his Article 3 claim of inhuman treatment in detention was not pursued. Having further found that the impact of detention upon his health was not such as to amount to a breach of the AAR policy, in my judgment it cannot amount to a disproportionate infringement of his own private life under Article 8. For these reasons, the claimed breach of Article 8 is not made out.

Issue (7): whether public law errors "caused" detention

263. This issue arises only in respect of the allegations of public law errors, rather than the claims of breach of the *Hardial Singh* principles. I have found that in any event detention was unlawful under those principles from 26 December 2017 until 25 January 2018 and the Claimant is entitled to substantial damages in respect of this period. Nevertheless I consider the present issue, both in respect of the earlier periods where I have found detention was vitiated by public law error and (for completeness) in respect of the other *alleged* public law errors.

The Parties' submissions

The Claimant's case

264. The Claimant submits that, but for the various public law errors (arising on issues (2) and (3)), the Claimant could not or would not have been detained and thus would and should have been released.

265. As regards the question of what "would" have happened, the burden of proof is on the Secretary of State and the Secretary of State has not produced any of the relevant people involved with the Claimant's case at the time. The Court cannot be satisfied on the balance of probabilities that the Secretary of State would have detained the Claimant, if the public law errors had not been made.

266. As regards Issue (2)(a), if, as he should have been, the Claimant had been assessed as level 3 AAR, then, under the AAR policy, he could not, and would not have been detained at all. As regards Issue (2)(b), if the Secretary of State had made proper enquiries in relation to the Claimant's children and followed her policy in relation to children in the EIG, the Claimant would not have been detained at all and could not reasonably have been detained from 8 August onwards by which time he had been moved to HMP Hull.

267. As regards Issue (3)(a) - *Tameside* – if the Secretary of State had obtained the Maganty report and made proper enquiries in relation to his mental health, then he would have been assessed as level 3 AAR and he would therefore not have been detained, and could not reasonably have been detained at all. As regards Issue (3)(b), if the Secretary of State had complied with her duty and provided accommodation within a reasonable period the Claimant would have been released by 14 November 2018 by the Secretary of State (alternatively by the FTT judge considering bail on 3 October 2017 alternatively on 23 October 2017) As regards Issue (3)(d), if the Secretary of State had not breached her duty in relation to the CPP recommendation, the Secretary of State could not, and would not, have detained the Claimant from 24 October 2017 onwards.

The Secretary of State's case

268. The Secretary of State submits that, on the facts here, notwithstanding any public law errors, the Claimant would still have been detained. That was the evidence of Ms Louden. None of the public law errors would have led to the Claimant's earlier release. As to the "could" question, it would have been *Wednesbury* reasonable for the Secretary of State to maintain detention even if she had applied all her policies correctly. Further,

(1) The Claimant would not have been released in those periods when he was not recognised as level 2 AAR.

(2) As to Issue (2)(a) and (3)(a), detention could and would have been maintained. Obtaining the Maganty report would not have led to the Claimant being assessed as level 3 AAR or his release, given the fears of relapse had not materialised and the up-to-date evidence suggested there was no harm to his health arising from detention. If, in fact, the Claimant had been assessed as level 3 AAR, or would have been, had proper enquiries be made, then the Claimant could still have been detained because it would have been *Wednesbury* reasonable for the Secretary of State to agree with the Claimant's own representations made on the bail applications that the Claimant was level 2 and further to rely upon the grounds of "significant public protection".

(3) As to Issue (2)(b), taking account of the letters from the family would not have resulted in the Claimant's release to an address, given the terms of the local authority's letter and the risk to the public.

(4) As to Issue (3)(b), even if the Secretary of State should have refused the section 4 application earlier because of the absence of accommodation, thus triggering a right of appeal, that would not have led to accommodation being found any earlier than the eventual release. There is nothing to suggest that Probation would have approved a section 4 address any earlier than its January decision to approve release to a friend. By that time in 2018, the Probation's position on

accommodation changed because it had been so long. If accommodation had not taken so long, Probation would not have approved the release address and therefore the Claimant would not have been released. Ms Louden said that the Secretary of State would not release without approved premises.

(5) As regards the CPP recommendation, that would not have led to release in the absence of an approved probation address, given the high risk of absconding.

269. As regards the period between April and August 2017 which the Secretary of State has accepted was unlawful by dint of admitted public law errors, it is likely that in any event the Claimant would have been detained, given the fact that once it was recognised that he was level 2 AAR, detention was still maintained. As regards the failure to carry out the January 2018 detention review, it is highly likely that the Secretary of State would have done the same thing, pending the outcome of the appeal.

Discussion and analysis

270. This issue concerns entitlement to substantial, rather than nominal, damages. The relevant legal principles are set out in paragraph 20(3) above. The Secretary of State must establish that detention both could and would have been maintained, in the absence of each of the public law errors. In the present case, in my judgment it is highly significant that there is no evidence from any individual within the Home Office who was involved in the Claimant's detention. Ms Louden fairly accepted that she was not involved at the time and that her knowledge of the facts surrounding the Claimant's detention is taken from consideration of the document file on the case. In my judgment, Ms Louden's evidence as to what *would* have happened at the time was opinion based on that consideration alone and does not carry much weight. Further, in light of the absence of evidence from those at the time, I am entitled to draw the adverse inference that the Claimant would not, or might well not, have been detained. I turn to deal with each of the public law errors (both as found and as alleged).

Issue (2)(a): AAR policy

271. As regards failure to assess at AAR level 2 and the admitted period of unlawful detention (between 4 April and 24 August 2017), I conclude that, even absent the public law error, the Secretary of State both reasonably could, and would, have maintained detention. This is established by the fact that, once the Claimant was assessed at level 2 on 24 August 2017 detention was in fact maintained and no separate case is made that for those subsequent periods, he should not have been detained, on that level of risk.

272. As regards failure to assess at AAR level 3, in view of my finding at paragraph 191 above that there was no breach of policy in that regard, this issue does not arise. However, if the Claimant *had been* assessed at AAR level 3, then given the terms of the AAR policy, I would not have been satisfied that the Secretary of State either could reasonably, or would, have maintained detention. I find that the Claimant's circumstances did not fall into the "significant public protection" exception set out in the AAR Staff Policy.

Issue (2)(b): EIG and children

273. As to Issue (2)(b), I consider that, even if Mr Walker had properly made enquiries and taken into account the position of the partner and the children, nevertheless detention would have been detained. This is borne out by the fact that subsequently when this information was obtained, detention was maintained. This is supported by Ms Louden's evidence. I conclude that the Claimant is entitled only to nominal damages arising from this breach of policy.

Issue (3)(a): Tameside duty

274. Having found that detention was not unlawful by reference to any breach of the *Tameside* duty, this issue does not arise. However if I had found that detention was unlawful from the outset by reason of breach of the *Tameside* duty, then *only* if I had found that, as a result, he would have been classified at AAR level 3, and in the absence of any evidence of "significant public protection concerns", I would have concluded that, on the basis of the AAR policy, the Secretary of State *could not* reasonably have detained the Claimant from the outset, and regardless of what the Secretary of State *would* have done. Only on that basis, would the Claimant have been entitled to substantial damages for the entire period of his detention.

Issue (3)(b): section 4 bail accommodation

275. Having found that detention was unlawful by reference to breach of the section 4 duty from 14 November 2017, the burden is on the Secretary of State to establish that the decision to detain on 14 November detention review would have been the same, even if accommodation had been available by then. However the Secretary of State has adduced no evidence from a contemporaneous witness – Mr Walker or the authorising officer - as to what would have happened. Ms Louden's evidence that detention would have been maintained was somewhat uncertain, and was merely opinion based on historic review of the files. In my judgment, the Secretary of State has not discharged the burden to establish that detention would have been maintained, if accommodation had been available. Rather the contemporaneous documents suggest strongly that detention would not have been maintained in such circumstances. I therefore conclude that the Claimant is entitled to substantial damages for the period of detention from 14 November 2017 until release.

Issue (3)(c) and (d): Case Progression Panel

276. As regards failure to follow the CPP recommendation, the position is very similar to that arising on the failure to determine the section 4 application, the date upon which detention became unlawful was the date of the tenth detention review, i.e. 14 November 2017. Had the Secretary of State followed the CPP recommendation, then, assuming accommodation had been available i.e. assuming breach of section 4 duty, the Secretary of State could not reasonably have maintained detention. Further there is no sufficient evidence that in these circumstances the Secretary of State *would* have maintained detention, on the overriding ground of risk of absconding. I therefore conclude on this basis too, that the Claimant is entitled to substantial damages for the period of detention from 14 November 2017 until release.

January detention review

277. As explained above, the Secretary of State admits that the Claimant's detention between 4 and 25 January 2018 was unlawful, by reasons of the breach of policy in failing to conduct the twelfth detention review. In my judgment, no additional claim for damages arises from this breach of policy. Whether the Claimant is entitled to substantial damages on this ground stands or falls with whether detention was lawful or not under *Hardial Singh* principles.

278. I have found in any event that detention in this period was unlawful under *Hardial Singh* principles. On the other hand, if I had found no breach of *Hardial Singh* principles, and thus (leaving out of account any other public law error) detention had remained justified throughout, then in my judgment it is more likely than not that had the detention review been carried out, the decision would have remained as it was in the eleventh detention review and detention would have been maintained pending the outcome of the appeal.

(G) <u>Conclusions</u>

279. My conclusions are as follows:

(1) As admitted by the Secretary of State, the Claimant's detention between 4 April 2017 and 24 August 2017 and between 4 and 25 January 2018 was unlawful, by reason of breach of policy constituting public law error.

(2) The Claimant's detention was unlawful by reason of breach of *Hardial Singh* principles from 26 December 2017 to 25 January 2018 (paragraph 181 above).

(3) The Claimant's detention was unlawful by reason of breach of EIG policy in relation to children from outset until, at least, 5 July 2017 (paragraph 197 above).

(4) The Claimant's detention was unlawful by reason of breach of duty under section 4 of the 1999 Act from 14 November 2017 until 25 January 2018 (paragraph 241 above).

(5) The Claimant's detention was unlawful by reason of failure to follow (or to justify departure from) the CPP recommendation from 14 November 2017 until 25 January 2018 (paragraph 251 above).

(6) Save as set out in paragraph (1) above, the Secretary of State did not breach the AAR policy and detention was not unlawful on that basis (paragraphs 191 above).

(7) The Secretary of State did not breach the *Tameside* duty of inquiry and detention was not unlawful on that basis (paragraphs 208 to 212 above).

(8) The unlawful detention identified in paragraphs (1) and (3) give rise to a right to nominal damages only (paragraphs 271 and 273 above).

(9) The claims for breach of Article 3 and Article 8 ECHR fail (paragraphs 259 and 262 above).

(10) The unlawful detention identified in paragraphs (2), (4) and (5) above give rise to a right to substantial damages. Accordingly the Claimant is entitled to substantial damages in respect of his detention between 14 November 2017 and 25 January 2018 (paragraphs 275 and 276 (and 263) above).

280. Finally I am most grateful to counsel and solicitors both for the high quality of the presentation of the evidence and argument and for the helpful manner in which this case has been conducted, not least in the circumstances of the Covid-19 pandemic.