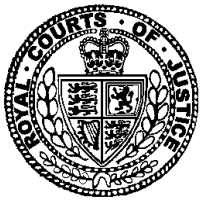

Neutral Citation Number: [2018] EWHC 3547 (Admin)

Case No: CO/1865/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2018

Before :

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

- -

Between :

THE QUEEN **on the Application of** **ALI ABUBAKAR MOHAMED**	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Grace Brown (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
Naomi Parsons (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 7 November 2018

- -

Judgment Approved

Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. The Claimant in this application for judicial review alleges:

   i) that there has been unlawful delay in determining his application made in 2005 for indefinite leave to remain ("***ILR***") and his asylum claim made in 2015 ("***Ground 1***"), and

   ii) that his detention since 22 January 2018 has been unlawful ("***Ground 2***").

2. The Claimant seeks:

   i) a mandatory order requiring the Defendant to determine the Claimant's ILR application and asylum claim within 28 days or such other period as the court considers reasonable;

   ii) a declaration that his continuing detention is unlawful by virtue of being in breach of common law, of the Defendant's published policies and of Article 5 of the ECHR;

   iii) damages for the manifestly excessive delay in determining his ILR application; and

   iv) damages for unlawful detention including aggravated and exemplary damages.

(B) GROUND 1: UNLAWFUL DELAY

(1) Facts

3. The Claimant states that he was born on 24 February 1996 in Yemen. While still very young, he was taken by his mother to live in Somalia, where he lived with her until he was about 3 years old. After this time, he says he remained in Somalia living with his maternal grandmother, but has had no further contact with his mother.

4. The Claimant says he arrived in the UK aged about 9 to join his father, Mr Habib Abubakar. His father was on 14 January 1999 granted indefinite leave to remain, and on 10 December 2002 was naturalised as a British citizen. Mr Habib Abubakar is married with seven children, the Claimant's half-siblings, all of whom are younger than the Claimant. The Claimant says he had not known his father until he arrived in the UK, as his father had left Yemen for Kenya prior to the Claimant's birth.

5. The Defendant's immigration history for the Claimant recorded that he entered the UK on 8 August 2002 with his mother and siblings. However, the Defendant now accepts that that was inaccurate. The Defendant does not know when the Claimant entered the UK, although he accepts that the Claimant was in the UK by the time of his application for indefinite leave to remain on 18 January 2005. It appears that the Defendant was for some time labouring under the misapprehension that the Claimant's immigration status was dependent on an asylum claim made by his mother.

6. On 18 January 2005, an ILR application was made on the Claimant's behalf as a dependent of his father. The Defendant's GCID notes of October 2005 state that the Claimant's case was placed in a "work in progress hold" due to the Defendant's workload. Cases were to be called from such holds as staff became available to deal with them. Letters of 6 July 2007 and 29 May 2008 to the Claimant's Member of Parliament, Harry Cohen MP, stated that the Claimant did not have valid leave to remain at the time of his entry into the UK, and that the number and complexity of "*cases of this type*" meant that the processing time could be longer. However, the 6 July 2007 letter also stated that the Claimant's application, whilst it had been forwarded to a casework unit, was still *"currently awaiting allocation to a caseworker"*.

7. The May 2008 letter said:

> "… It may be helpful if I explain that in fairness to all those with outstanding applications, cases are normally dealt with in turn unless there are compelling, compassionate or other exceptional reasons for doing otherwise… The UKBA do consider expediting applications if there are sufficient compassionate circumstances to warrant doing so, but the onus is on the applicant to provide documentary evidence to support such a request. In Master Mohamed's case, however, it was decided that there appeared to be insufficient grounds to take his application out of turn. It is noted that he is now at secondary school and would like his status to be the same as that of his school friends, however, he is not required to leave the United Kingdom whilst his application is under consideration and this is not considered to be a sufficient reason to treat his application exceptionally."

8. The ILR application remained outstanding at the date of the hearing before me.

9. On 28 February 2012 the Claimant, who had then just turned 16, was convicted of wounding with intent to cause grievous bodily harm (offence committed 18 October 2011) and sentenced to 4 years and 6 months in a young offenders institution. The sentencing judge remarked as follows:

> "you struck someone in the back with a blade between 9 and 12 inches long… that knife in the back of a young man could so easily have caused death… I am entirely satisfied that this is a Category 1 offence. Great harm was caused. As far as higher culpability is concerned, of course the use of that dreadful weapon is a huge aggravating factor. Its use in that way could only have risked death. You deliberately, by the choice of that weapon, caused more harm that was necessarily to be caused even by the use of an ordinary knife, and of course you did this when you were surrounded by others… If you were an adult, if you were 21 or 22, then this offence, following a full trial would justify a sentence… of 13 years' imprisonment".

10. The following day, 29 February 2012, the Claimant was convicted of two counts of burglary of a non-dwelling with intent to steal (offence committed 8 August 2011) and sentenced to a Detention and Training Order (eight months and six months, concurrent with the sentence passed the previous day).

11. Following these convictions the Claimant's case was transferred to the Defendant's Criminal Casework Directorate ("***CCD***") in February 2012.

12. Deportation was considered from February 2013, during which time there was no progress on the ILR application.

13. The Claimant was released on licence and on immigration bail on 17 January 2014.

14. In April 2014, the Defendant advised the Claimant's representative that "*Mr Mohamed's case is currently under consideration for deportation and his outstanding ILR application will form part of our consideration process*".

15. On 22 January 2015, the Claimant applied for asylum and his claim was accepted into the Defendant's Non-Detained Asylum process. He had a screening interview on 22 January 2015, and a substantive asylum interview was scheduled for 3 June 2015. The Claimant was by that stage in custody, having been arrested for the offences referred to below. There was, however, no evidence before me that that fact would have prevented an interview from proceeding, and it was submitted by counsel for the Claimant that asylum interviews are frequently conducted of persons in custody.

16. On 14 February 2015 the case was transferred to Op Nexus High Harm Team, and it was allocated to a particular case worker on 18 May 2015 to consider deportation on the basis of the Claimant's previous offending.

17. In May 2015 the Claimant was arrested for firearms offences. The deportation process was put on hold pending the determination of the asylum claim.

18. On 7 July 2015 the Claimant was convicted of two firearms offences: possession of a firearm and possession of ammunition, it having been a loaded firearm. On 16 July 2015 he was sentenced to 5 years' imprisonment. On the same occasion the Claimant was convicted of possession of a Class B drug (cannabis) but no separate penalty was imposed for that offence. With respect to the firearms offences, the sentencing judge's remarks included the following:

> "[The firearms offences] are … enormously serious offences. So much so that Parliament has decided that there should be a minimum sentence imposed upon a defendant… a sentence of five years… I am obviously concerned in your case that the firearm was of a professional military grade, that it had ammunition loaded within the firearm and there was further ammunition which was matched for use with that firearm. So that takes the offence up a notch. … I accept on your basis of plea, you were holding the firearm and ammunition for another in return for an ounce of cannabis, … you knew, or must have known, that it was either that you were holding cannabis or a firearm. But in the circumstances of this case the Crown very fairly have said the feel of it might well have been equally consistent with it being cannabis. So I take that into account as well.
>
> But I must look at your history and your past history is not good… You are aged only 19 now but you have a conviction for wounding with intent. … You are building a substantial criminal record and you now have a history of violence and couple with that a history now of having a firearm and ammunition. It is now an appalling record…"

19. On 22 February 2016 the Defendant issued a Notice of a Decision, signed on behalf of the Secretary of State, to deport the Claimant pursuant to the Immigration Act 1971 and the UK Borders Act 2007.

20. In June 2017 the Claimant was convicted of assault committed whilst in custody at HMP Aylesbury serving his firearms sentence, having kicked and head-butted a prison officer.

21. The Claimant was released on licence on 22 January 2018 (licence expiring 19 June 2020) and detained under immigration powers.

22. The Claimant's detention was reviewed on 20 February 2018. It was considered that the Claimant could be removed in a reasonable time notwithstanding his ILR and asylum claims.

23. On 21 March 2018 the Defendant requested from the probation officer copies of the Claimant's OASYS report, licence expiry date and risk assessment.

24. Further detention reviews took place on 21 March 2018, 26 April 2018 and 18 May 2018, as well as monthly thereafter.

25. The Claimant had a further screening interview by CCD on 20 April 2018, and was due to have a substantive asylum interview on 11 May 2018 by the Detained Asylum Casework ("***DAC***") team. It appears that the DAC team had not taken over conduct of the case but were to conduct the interview to ensure there was no further delay, the CCD apparently having insufficient resources to deal with immigration enforcement claims.

26. On 10 May 2018 the Claimant filed the present claim and an application for interim relief. King J on the same date granted interim relief restraining the Defendant from processing or determining the Claimant's asylum claim, including by interviewing him on 11 May 2018, in the DAC team. The interview was cancelled and re-scheduled to be considered by the CCD team. It was arranged for and took place on 31 July 2018.

27. On 16 July 2018 HHJ McKenna (sitting as a judge of the High Court) granted permission to proceed on the grounds now pursued.

(2) Law and Policies

28. It is convenient to begin with Defendant's policy for dealing with asylum claims. Paragraph 333A of HC 395 states:

> "The Secretary of State shall ensure that a decision is taken on each application for asylum as soon as possible, without prejudice to an adequate and complete examination.
>
> Where a decision on an application for asylum cannot be taken within six months of the date it was recorded the Secretary of State shall either:
>
> (a) inform the Applicant of the delay; or
>
> (b) if the Applicant has made a specific written request for it, provide information on the timeframe within which the decision on their application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time-frame."

29. The Defendant's policy *'Claim Asylum in the UK - part 7: Get a decision'* so far as material states:

> "Your application will usually be decided within 6 months. It may take longer if it's complicated, for example:
>
> - your supporting documents need to be verified
> - you need to attend more interviews
> - your personal circumstances need to be checked, for example because you have a criminal conviction or you're currently being prosecuted."

30. Previous cases have considered the question of delay in the processing of asylum claims.

31. The Court of Appeal in *SSHD v R(S)* [2007] EWCA Civ 546 stated:

> "The Act does not lay down specific time-limits for the handling of asylum applications. Delay may work in different ways for different groups: advantageous for some, disadvantageous for

> others. No doubt it is implicit in the statute that applications should be dealt with within "a reasonable time". That says little in itself. It is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But (as was recognised by the White Paper) in resolving such competing demands fairness and consistency are also vital considerations."

32. In *R (FH & Ors)* [2007] EWHC 1571 (Admin), counsel for the Secretary of State accepted that there was "*an implicit obligation on the defendant to decide the applications within a reasonable time*" (§ 6). Collins J stated that the requirement in ECHR Article 5(4) for a speedy review before an independent Tribunal of any detention was not applicable in cases such as those before him, but that there was nonetheless an obligation to give effect to Convention rights (§§ 6-7). Further:

> [i] "This must mean that it is incumbent on the defendant to ensure that one who claims to be a refugee must have his claim dealt with within a reasonable time so that, if it is established, his Convention rights can be exercised. This was recognised by the Court of Appeal in *Secretary of State for the Home Department v S* [2007] EWCA Civ. 546" (§ 7). Collins J quoted the passage from that case set out in § 31 above.
>
> [ii] "The point being made is that what is reasonable will depend on the circumstances. It is not possible for the court to say that a particular period of time should be the limit of what is reasonable. In *MM v Secretary of State for the Home Department* [2005] UKIAT 00763, the Asylum and Immigration Tribunal was faced with a not particularly unusual case where a claimant who had fled Kosovo in 1998 had not had his asylum claim dealt with until 2005. At paragraph 7, the Tribunal through Mr Freeman said:—
>
> > "The reasonable time-limits for a decision on an asylum claim has been taken in a number of cases by the Tribunal as 12 months."
>
> The appeal related to an initial claim to asylum but, even so, I do not think that 12 months should be regarded as any sort of bench mark. No doubt, delays of 12 months or more in dealing with an initial claim to asylum may well need an explanation, but, provided the approach of the defendant was based on a policy which was fair and applied consistently, such delays could not be regarded as unlawful." (§ 8)
>
> [iii] "Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the Wednesbury test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the

> approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible." (§ 11)
>
> [iv] "…claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court." (§ 30)

33. In *EB (Kosovo)* [2008] UKHL 41 Lord Bingham acknowledged that delay in the decision-making process may have particular relevance if, during the period, a claimant develops closer personal ties and/or establishes deeper roots. He stated at §§ 14-16 that this could happen in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. Secondly, a relationship when entered into may well be imbued with a sense of impermanence, but if years go by then this sense of impermanence may fade and the expectation grow that if the authorities had intended to remove the applicant they would have taken steps to do so. Thirdly, delay might be relevant in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control.

34. In *R (oao TM (a minor)) v SSHD* [2018] UKUT 00299 (IAC), the delay between the applicant's claim for asylum and his substantive interview was 7 months, and at the time of the applicant's claim for judicial review he had been awaiting a decision on his claim for some 9 months. At the date of the applicant's asylum application, he was 15 years old. In making a declaration that the defendant's delay in making a decision on the asylum claim was unlawful, the tribunal stated:

> "… In my judgment, when all the facts of the case and the context in which the delay arises are considered in the round, it

> can properly be said that there has been an unlawful delay. I have assessed this by applying the high threshold required for Wednesbury unreasonableness. ...
>
> In making this finding I have borne in mind the warning from Collins J in *FH* at [30] that claims such as the ones he was dealing with are unlikely, save in exceptional circumstances, to succeed. However, as observed by Wyn Williams J in *MJ* at [34], the judgment of Collins J is specific to the type of claims which he was considering. Collins J made it clear in his judgment that a distinction is to be drawn between incomplete asylum claims and initial claims. Further, none of the claims before Collins J obviously involved unaccompanied minors. In any event I am satisfied that the delay is so excessive as to be regarded as manifestly and *Wednesbury* unreasonable when the following are considered together: (i) there has been prima facie delay that can properly be described as lengthy or excessive; (ii) the Applicant has been as at the date of his application and continues to be a minor; (iii) his best interests ought to have been treated as a primary consideration when making the decision to place his case on "hold" and the Respondent has been unable to point to any evidence that this has been done at any stage; (iv) there is no evidence to support the submission that the Applicant's case gives rise to complexities and on the contrary it appears to me to be a straightforward asylum claim; (v) the explanations provided by the Respondent for the delay have been deficient and in so far as the Respondent relies upon resources and the large number of applicants to consider, he has failed to provide any evidence to show that the manner in which he has decided to deal with the asylum claims of the "Purnia family children" i.e. by placing them on "hold" and the resources put into the exercise, are reasonable; (vi) there is no evidence that the Respondent has made any meaningful attempt to act upon his own internal timeframes and / or communicate a timeframe for the determination of his asylum claim to the Applicant; (vii) the impact of delay on this Applicant. …" (§§ 61-62)

35. The cases referred to above concern asylum claims, whereas the present Claimant's claims relate not only to his 2015 asylum claim but also to his 2005 ILR claim. In relation to both claims, the Defendant accepts that there is an implicit obligation on the Defendant to determine applications within a reasonable time, adding that a delay will only be unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions that can be regarded as irrational. In the light of that concession, it is probably unnecessary to explore its precise legal basis, as applied to the ILR claim, in more detail. However, I consider that in principle the concession was rightly made. Even if one leaves aside particular considerations that may arise in the context of the Refugee Convention or the ECHR, excessive delay in making a decision is likely to be contrary to ordinary public law principles, either as an aspect of irrationality or possibly as an abdication of discretion.

36. A further and distinct issue is the circumstances in which delay in dealing with a claim gives rise to a cause of action for damages. The only case cited by the parties on this point was *SSHD v Said & Ors* [2018] EWCA Civ 627. The judgment in that case recorded that:

> "106. Ms Anderson [counsel for the Secretary of State] accepted before us that the question of "liability" in cases of this type could properly be framed as it was by Collins J in *R (FH & ors.) v SSHD* [2007] EWHC 1571 (Admin) at [30] and would turn upon whether *"... the delay [was] so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate..."*. Both *Anufrijeva* and *FH* were quoted by the parties in their pleadings/skeleton arguments before the judge."

37. Later, the court said:

> "131. I turn to the wider element of this ground of appeal, namely that maladministration alone does not found a claim to substantial damages.
>
> 132. I have already noted Ms Anderson's acknowledgement before us that "manifestly excessive" delay and/or delay causing "particular detriment" to the victim can properly give rise to such a claim, as was also accepted in paragraph 16b. of the grounds of appeal."

38. If the acknowledgement referred to here was that recorded in § 106 of *Said*, quoted above, then – depending on what was meant by "*liability*" – it is not clear that the acknowledgment related to the question of entitlement to damages as opposed to the question of whether the delay was unlawful. In the case cited in *Said* § 106, *FH*, the claim was not for damages but only for an "*order that the applications be considered forthwith and ... declarations ... that the delay was unlawful*." (*FH* § 1)

39. The damages claim in *Said* was based on the Human Rights Act 1998, and specifically a breach of Article 8, applying the principles set out in *Anufrijeva v Southwark LBC* [2004] QC 1124 and *FH* (see *Said* §§ 67e, 105, 122, 131, 134 and 153). The court in *Said* referred to §§ 57-62 and 74-78 of *Anufrijeva*, which it summarised as establishing that:

> "(1) The approach to awarding damages for breach of Article 8 rights should be no less liberal than those applied by the ECtHR;
>
> (2) The applicant should be put, so far as possible, in the same position as if his rights had not been infringed;
>
> (3) There is a disinclination to recognise that maladministration resulting in delay engages article 8 at all, "unless this has led to serious consequences";

> (4) Awards of damages in tort indicated by the Judicial Studies Board (as it then was) and by the Criminal Injuries Compensation Board and the Ombudsman may provide "rough guidance";
>
> (5) There are good reasons why, where breach arises from maladministration, damages should be modest;
>
> (6) However, awards should not be minimal as this would undermine the respect for Convention rights, but a "restrained or moderate approach to quantum would provide the necessary degree of encouragement to public authorities…"" (§ 134)

40. On that basis, the Court of Appeal in *Said* concluded that:

> "138. In my judgment, without needing to endorse every finding of the judge as to what would have been the consequences of an earlier resolution of the respondents' 2004 applications, it seems to me that the judge was fully entitled to find that what happened in this case crossed the threshold of "mere" maladministration and into "manifestly excessive" delay and that a trial of the causation and other damages issues might give rise to an award of significantly more than "nominal" compensation. I make no decision whether that would be the result or not; I find that the judge was right to make the finding of "liability" and to direct a further trial of the compensation claims."

41. I do not read these passages as meaning that a finding of "manifestly excessive" delay necessary results in an entitlement to substantive damages. Rather, the latter question depends on whether, in the light of *Anufrijeva* and the ECtHR case law considered in it, the Article 8 threshold has been crossed and an award of substantive damages is called for.

42. In *Anufrijeva* itself, the Court of Appeal referred at § 62 to the ECtHR's *"disinclination to recognise that maladministration resulting in delay engages article 8 at all, unless this has led to serious consequences"*. The court noted that that disinclination did not apply to Article 5(5) cases, since Article 5(5) expressly requires that anyone who has been the victim of arrest or detention in contravention of Article 5 shall have an enforceable right to compensation. Outside of that context, however:

> "especially at first instance, courts dealing with claims for damages for maladministration should adopt a broad-brush approach. Where there is no pecuniary loss involved, the question whether the other remedies that have been granted to a successful complainant are sufficient to vindicate the right that has been infringed, taking into account the complainant's own responsibility for what has occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts. In many cases the seriousness of the maladministration and whether there is a need for damages should be capable of being ascertained by an

examination of the correspondence and the witness statements"
(§ 65)

43. The court in *Anufrijeva* added that:

i) the scale and manner of violation can be taken into account (citing Scorey & Eicke, *Human Rights Damages, Principles and Practice*, para A2-041 and *Aksoy v Turkey* (1996) 23 EHRR 553, where the applicant had been detained, tortured and finally released without charge); and

ii) the manner in which the violation took place has in some cases been considered sufficiently serious to lead the ECtHR to award damages (e.g. in *Halford v United Kingdom* (1997) 24 EHRR 523 § 76, where the ECtHR considered the police force's surveillances of the applicant's telephone, to obtain information regarding a sex discrimination claim she was pursuing in the employment tribunal, to be a serious infringement of her rights particularly in the light of the improper use to which the police wished to put the material obtained).

(3) Application to the present case

44. The Claimant submits that the Defendant's delay of over 13½ years in dealing with his 2005 ILR application is manifestly excessive, and was significant for the Claimant because:

i) it commenced when the Claimant was a child, about 9 years old;

ii) during the period of the delay the Claimant has developed close ties and bonds with his family including his siblings and stepmother;

iii) following his release from prison on 17 January 2014, the Claimant was made subject to a restriction on employment and on claiming state benefit, and committed the most recent offence – although the commission of that offence cannot be excused – through an attempt to obtain funds and support himself. The Claimant in his witness statement dated 4 May 2018 explains that the uncertainty about his immigration status meant he could not take holidays abroad with his family, and affected his relationship with his girlfriend; he says he *"stayed home alone and got wrong companies and got involved with unacceptable activities and these resulted [in] criminal convictions"*; and

iv) whilst delay of itself is 'no basis' for obtaining leave to remain (*SH (Iran))*, the court is entitled to conclude on the balance of probabilities that but for the delay the Claimant would have been granted ILR in line with his father.

45. In response, the Defendant makes the following points:

i) A decision on the Claimant's ILR claim is imminent.

ii) The delay from 2005 to 2008 arose as a result of the high volume of casework experienced by the Defendant, as indicated earlier and as explained to Harry Cohen MP.

iii) The Claimant's claim was lodged at a time when there were a large number of applications. Absent any compassionate circumstances, the Claimant's claim fell to be considered in turn.

iv) Further delays arose as a result of the Claimant's offending, which in turn led to deportation proceedings. Deportation was considered from February 2013, during which time there was no separate progress on the ILR application. The ILR application could not be processed independently of or in isolation to the deportation proceedings; at the very least, the Claimant's offending made the ILR application significantly more complicated.

46. The Defendant accepts that the delay is on its face excessive, but submits that it was not unlawful; alternatively, it does not justify an award of damages given the absence of any detriment (apart from uncertainty), and the appropriate remedy (if any) would be some form of mandatory order for the prompt determination of the application.

47. I do not consider that the Defendant's submissions come close to explaining the 13½-year failure since 2005 to make any decision on the Claimant's ILR application:

i) there is no evidence in support of the submissions made about case volumes from 2005 to 2008;

ii) there is no apparent reason to have regarded the Claimant's case as complex, at least prior to his first conviction in 2012 (by when the application had been outstanding for 7 years), other than the Defendant's own error referred to in §5 above, which cannot amount to a justification for delay;

iii) the Defendant offers no explanation at all for the lack of activity from 2008 to 2012 (when the Claimant first offended): a period of four years, which even by itself might well be regarded as amounting to an unlawful delay;

iv) there is no evidence to explain how the fact that deportation was under consideration after the Claimant's convictions in 2012 and 2015 meant that the ILR decision had still not been taken by November 2018; and

v) the overall period of more than 13 years since the application was made, in the absence of compelling explanations (which have not been provided) must be regarded as an excessive delay amounting to an unlawful failure to deal with the Claimant's application.

48. I therefore conclude that the failure to deal with the Claimant's ILR application for the thirteen years from 2005 to 2018 meant that it was not dealt with within a reasonable time, and was unlawful.

49. However, I am not persuaded that there is an arguable case that the Claimant is therefore entitled to substantive damages.

i) It was common ground that even if the Claimant had obtained ILR in or shortly after 2005, he would still have been liable to deportation after the offences he committed in 2012 and 2015. Indeed, under section 5(1) of the Immigration Act 1971 a deportation order against a person invalidates any leave to enter or

remain in the United Kingdom granted given him before the deportation order is made or while it is in force.

ii) Even if there were some possible causal link between the delay in dealing with the ILR application and the Claimant's offending in 2011/12 and 2015, the proximate cause of his convictions was his own decisions about how to respond to the situation in which he found himself. It would be unrealistic to envisage the Defendant being held liable in damages on that basis.

iii) The failure to deal with ILR application over such a long period may have affected the Claimant's wellbeing and family/social relationships, and his evidence is that it did. However, those effects do not arguably rise to the level of severity necessary to found a damages claim for breach of Article 8.

iv) It was not suggested that the rules in relation to eligibility for ILR have in any way changed adversely to the Claimant during the period for which his application has been outstanding.

v) There is no reason to believe that the Defendant deliberately set out to infringe the Claimant's rights.

vi) In all the circumstances, the delay cannot be said to have had sufficiently severe consequences, or to have occurred in such a way, as to give rise to an arguable case for damages.

50. Turning to the Claimant's 2015 asylum claim, he submits that the Defendant's delay is unlawful as being inconsistent with the Defendant's policy set out in paragraph 333A of HC 395 (see § 28 above) and in *'Claim Asylum in the UK - part 7: Get a decision'* (§ 29 above). He says he was not informed of the delay, as required under paragraph 333A, and that the Defendant failed to communicate the reasons why the Claimant's claim was 'complicated', thus requiring more than the anticipated 6 months to resolve and, to date, over 3 years to resolve.

51. The Defendant submits that:

i) The Claimant's case was allocated to a case worker in May 2015 to consider deportation on the basis of the Claimant's previous offending, but the deportation process was put on hold pending the determination of the asylum claim.

ii) After the screening interview on 22 January 2015, an asylum interview was scheduled for 3 June 2015 but did not proceed as the Claimant was by then in custody following his arrest for firearms offences.

iii) Following the Claimant's release on 22 January 2018 into immigration detention, matters moved reasonably swiftly, in that a further screening interview took place on 20 April 2018, and the substantive asylum interview scheduled for 11 May 2018 was rescheduled only as a result of the Claimant's interim relief application.

iv) The substantive interview took place on 31 July 2018.

v) A decision was (at the date of the hearing before me) imminent.

vi) As with the ILR application, the Defendant accepts that the overall delay is on its face excessive but submits that in the circumstances it was not unlawful, and in any event does not justify an award of damages.

52. The case law referred to in §§ 31-34 above indicates that the Defendant has a duty to determine applications within a reasonable time, but that there is no set time limit: what is a reasonable time depends on the circumstances, including the needs of different groups of asylum seekers (including those who are minors), the complexity of their claims, the volume of cases, resources, and whether the Defendant has made a meaningful attempt to act on his policy and/or to communicate a timeframe to the applicant.

53. In the present case, the Claimant's asylum claim has been outstanding for some 3½ years, which is well in excess of the periods set out in the Defendant's policy documents referred to above: and based on the approach taken by Collins J in *FH* it falls clearly into the category (delays of 12 months or more) where an explanation is called for. I do not consider that any adequate explanation has been provided for the delay of three years between January 2015 and January 2018. The Defendant has made the point in submissions that the Claimant's convictions in 2015, and resulting custody, intervened. However, it is not self-evident that those events meant that no progress could be made on the Claimant's asylum claim until his release from criminal custody three years later. It is possible that the Claimant's imprisonment did create difficulties in progressing the asylum claim, or perhaps resulted in a legitimate alteration of priorities as between the Claimant and other asylum seekers. However, no evidence or explanation was provided to the court on any such matters, and I do not consider it would be right for the court simply to assume that the imprisonment justified placing the asylum claim on hold for three years. In all the circumstances, I conclude that the Defendant has not complied with his acknowledged duty to determine the Claimant's asylum claim within a reasonable time, and that the delay from January 2015 to January 2018 was unlawful.

54. However, I do not consider it arguable that the Claimant is entitled to an award of damages in respect of the delay in dealing with his asylum claim. He was in prison for most of the relevant period, with the result that the delay in processing that claim is unlikely to have affected his private or family life. He was unable to point to any particular prejudice it had caused him, and certainly none of sufficient seriousness to give rise to an arguable damages claim under Article 8. Nor is there any reason to believe that the Defendant deliberately infringed the Claimant's rights.

(C) GROUND 2: UNLAWFUL DETENTION

55. The Claimant was detained in immigration detention following his release from custody on 22 January 2018. As of the hearing on 7 November 2018, he had been in detention for 9 months and 16 days. He says that detention was and is unlawful because:

i) there was no lawful basis for detention;

ii) the Defendant failed to provide the Claimant with monthly detention reports;

iii) the Defendant's assessment that the Claimant posed a high risk of harm to the public was irrational;

iv) the Defendant's assessment that the Claimant's 'character, conduct or associations' was a basis for continued detention was irrational;

v) the Defendant failed to apply relevant policy (EIG §§ 5.3.A and 55.3.1); and

vi) the Defendant made no attempt to obtain an Emergency Travel Document.

(1) Legal context

56. Article 5 of the ECHR so far as material provides that:

> "1. Everyone has the right to liberty and security of person.
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

57. Section 36(1) of the UK Borders Act 2007 provides:

> "Detention
>
> A person who has served a period of imprisonment may be detained under the authority of the Secretary of State–
>
> (a) while the Secretary of State considers whether section 32(5) applies, and
>
> (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order."

58. The Claimant emphasises that the power of administrative detention without charge or trial is one of the most draconian powers exercised by the state over the individual: *R v Home Secretary ex parte Khawaja* [1984] AC 74 §§ 122E-F per Lord Bridge. In *R (Lumba) v SSHD* [2012] 1 AC 245 § 341 Lord Brown endorsed Lord Bingham's well known statement that *"Freedom from executive detention is arguably the most fundamental right of all"*. The right to be free from arbitrary deprivation of liberty ranks high in the hierarchy of rights under the ECHR: *A v SSHD* [2005] 2 AC 68 § 36. The court is under a correspondingly high duty to *"regard with extreme jealousy any claim by the executive to imprison a citizen without trial"*: *Khawaja* and *Wasif Mahmod* [1995] Imm AR 311 § 314.

59. It is common ground that the Secretary of State's power to detain must be exercised in accordance with the principles derived from *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704. It is also subject to wider public law constraints, as Lord Dyson explained in *Lumba*:

> "… The requirements of the 1971 Act and the Hardial Singh principles are not the only applicable "law". Indeed, as Mr Fordham QC points out, the *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 b-d) and reasonably in the *Wednesbury* sense: *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. But they are not exhaustive. If they were exhaustive, there could be no room for the public law duty of adherence to published policy, which was rightly acknowledged by the Court of Appeal at paras 51, 52 and 58 of their judgment. …" (§ 30)
>
> "…A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity. …" (§ 66)
>
> "…It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain a person under conditions different from those described in the policy. Errors of this kind do not bear on the decision to detain. They are not capable of affecting the decision to detain or not to detain." (§ 68)
>
> "To summarise, therefore, in cases such as these, all that the claimant has to do is to prove that he was detained. The Secretary of State must prove that the detention was justified in law. She cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described,

> a decision to detain free from error could and would have been made." (§ 88)[1]

60. Detention is unlawful if it results from a public law error that "*bears directly*" on the discretionary power to detain: *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 (SC).

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

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

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

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

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

---

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

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

64. There is no tariff or maximum period of detention: each case will depend on its facts: see, e.g., *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at §§ 37-39:

> "37 The Secretary of State acting through his officials has to determine whether the period of detention is reasonable when deciding whether or not to continue the detention, subject to the right of any detainee to apply for bail. It is a judgment which has to be made on the evidence and in the circumstances as appear to the officials in each case.
>
> 38 There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.
>
> 39 McFarlane LJ said in R (JS (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 1378 at paragraphs 50-51 that fixing a temporal yardstick might cause the courts to accept periods of detention that could not be justified on the facts of a particular case. In R (NAB) v Secretary of State for the Home Department [2010] EWHC 3137 (Admin) Irwin J made clear at paragraphs 77-80 that a tariff would be repugnant and wrong. He added:
>
> "It would be wise for those preparing legally for such cases to abandon the attempt to ask the courts to set such a tariff by a review of the different periods established in different cases""

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

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

66. Lord Dyson dealt in more detail with risk of reoffending at §§ 107-109 of *Lumba*:

"107 … It seems to me that it is possible to construe the power to detain either (more narrowly) as a power which may only be exercised to further the object of facilitating a deportation, or (more broadly) as a power which may also be exercised to further the object which it is sought to achieve by a deportation, namely, in the present case, that of removing an offender whose presence is not conducive to the public good. The distinction between these two objects was clearly drawn by the Court of Appeal in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804. Toulson LJ said, at para 55:

> "A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

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

108 I acknowledge that the principle that statutory powers should be interpreted in a way which is least restrictive of liberty if that is possible would tend to support the narrower interpretation. But I think that the Court of Appeal was right in A's case to adopt the interpretation which gives effect to the purpose underlying the power to deport and which the power to detain is intended to facilitate. Perhaps a simpler way of reaching the same conclusion is to say, as Simon Brown LJ said in *I's* case at para 29, that the period which is reasonable will depend on the circumstances of the particular case and the likelihood or otherwise of the detainee reoffending is "an obviously relevant circumstance".

109 But the risk of reoffending is a relevant factor even if the appellants are right in saying that it is relevant only when there is also a risk of absconding. As Lord Rodger of Earlsferry JSC pointed out in argument, if a person re-offends there is a risk that he will abscond so as to evade arrest or if he is arrested that he will be prosecuted and receive a custodial sentence. Either way, his reoffending will impede his deportation."

67. The burden is on the Defendant to prove the legality of detention throughout the period: *Lumba* § 42. The Defendant must show that the power to detain was validly and lawfully exercised throughout the relevant period. It is for the court to determine the legality of detention, reviewing it as a primary decision-maker; *Lumba* § 66. The Defendant is required to provide *"substantial, fact-based justification"* for the interference with the fundamental right of liberty: *R (Detention Action) v Secretary of State for the Home Department [2014] EWCA Civ 1634* § 94 citing *R (Aguilar Quila) v Secretary of State for the Home Department; R (Bibi) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621. The justification must relate to the basis on which the detainer has purported to act, and not on grounds wholly different to the actual reason for detaining: *Lumba* § 242.

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

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

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

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

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

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

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

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

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

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

(2) Policy

73. Rule 9(1) of the Detention Centre Rules 2001 so far as material states:

> **"Detention reviews and up-date of claim**
>
> Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly."

74. The Defendant's *Enforcement and Instructions Guidance* ("***EIG***") Chapter 55 deals with detention. The policy states that there is a presumption in favour of immigration bail (55.1.1). This presumption applies to all cases, including foreign national offenders (chapter 55.1.2), albeit with the need to pay "*special attention*" to their circumstances. Chapter 55.1.2 states:

> "55.1.2 **Criminal casework cases**
>
> …
>
> In any case in which the criteria for considering deportation action (the 'deportation criteria') are met, the risk of re-offending and the particular risk of absconding should be weighed against the presumption in favour of immigration bail. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the

> deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of immigration bail is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding."

75. As to the use of detention, Chapter 55.1.3 sets out relevant factors when considering criminal case work cases:

> "**Criminal casework cases**
>
> "In looking at the types of factors which might make further detention unlawful, case owners should have regard to 55.1.4, 55.3.1, 55.9 and 55.10. Substantial weight should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does reoffend, must be considered. Where the offence which has triggered deportation is more serious, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of granting immigration bail."

76. Chapter 55.3.1 of the EIG sets the factors influencing a decision to detain, including risk of offending or harm to the public (the likelihood of harm and the seriousness of the harm):

> **"Factors influencing a decision to detain**
>
> All relevant factors must be taken into account when considering the need for initial or continued detention, including:
>
> - What is the likelihood of the person being removed and, if so, after what timescale?
> - Is there any evidence of previous absconding?
> - Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
> - Has the subject taken part in a determined attempt to breach the immigration laws? (For example, entry in breach of a deportation order, attempted or actual clandestine entry).
> - Is there a previous history of complying with the requirements of immigration control? (For example, by applying for a visa or further leave).

> - What are the person's ties with the UK? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
>
> - What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which might afford more incentive to keep in touch than if such factors were not present? (See also 55.14).
>
> - Is there a risk of offending or harm to the public (this requires consideration of the likelihood of harm and the seriousness of the harm if the person does offend)?"

77. Chapter 55.3.2 addresses these factors in the context of criminal casework cases:

> **55.3.2 Further guidance on deciding to detain in criminal casework cases**
>
> 55.3.2.1 This section provides further guidance on assessing whether detention is or continues to be within a reasonable period in criminal casework cases where the individual has completed their custodial sentence and is detained following a court recommendation or decision to deport, pending deportation, or under the automatic deportation provisions of the UK Borders Act 2007. It should be read in conjunction with the guidance in 55.3.1 above, with **substantial weight** being given to the risk of further offending and the risk of harm to the public."

78. As to the assessment of risk of further offending and harm to the public, the EIG includes the following guidance:

> "55.3.2.6 Risk of harm to the public will be assessed by the National Offender Management Service (NOMS) unless there is no Offender Assessment System (OASYS) or pre-sentence report available.
>
> …
>
> 55.3.2.8 Where NOMS are unable to produce a risk assessment and the offender manager advises that this is the case, case owners will need to make a judgement on the risk of harm based on the information available to them.

> 55.3.2.9 Where possible the NOMS assessment will be based on OASYS and will consist of two parts as follows:
>
> I. A risk of harm on release assessed as low, medium, high or very high (that is, the seriousness of harm if the person offends on release).
>
> II. The likelihood of re-offending, assessed as low, medium or high.
>
> A marking of high or very high in either of these areas should be treated as an assessment of a high risk of harm to the public.
>
> In cases involving more serious offences, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences."

79. Chapter 55.3.A of EIG states:

> **"Decision to detain – criminal casework cases**
>
> … Where a foreign national offender meets the criteria for consideration of deportation, the presumption in favour of granting immigration bail may well be outweighed by the risk to the public of harm from re-offending or the risk of absconding, evidenced by a past history of lack of respect for the law. However, detention will not be lawful where it would exceed the period reasonably necessary for the purpose of removal or where the interference with family life could be shown to be disproportionate. …
>
> In assessing what is reasonably necessary and proportionate in any individual case, the caseworker must look at all relevant factors to that case and weigh them against the particular risks of re-offending and of absconding which the individual poses. In balancing the factors to make that assessment of what is reasonably necessary, the Home Office distinguishes between more and less serious offences."

80. Chapter 55.8 states;

> **"Detention reviews**
>
> … In all cases of persons detained solely under Immigration Act powers, continued detention must as a minimum be reviewed at the points 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 reviews should be conducted using the detention review template (ICD3469 or criminal casework equivalent). Additional reviews may also be necessary on an ad hoc basis, for example, where there is a change in circumstances relevant to the reasons for detention. …
>
> Rule 9 of the Detention Centre Rules 2001 sets out the statutory requirement for detainees to be provided with written reasons for detention at the time of initial detention, and thereafter monthly (in this context, monthly means every 28 days). The written reasons for continued detention at the one month point and beyond should be based on the outcome of the review of detention.
>
> …
>
> Detention reviews are necessary in all cases to ensure that detention remains lawful and in line with stated detention policy at all times. Detention reviews must be carried out at prescribed points throughout the period a person remains detained under Immigration Act powers, whether the person is held in the immigration detention estate or elsewhere, for example, secure hospital or prison."

(3) Legal basis of detention

81. On 22 February 2016, the Defendant issued a Notice of Decision to make a deportation order pursuant to section 32(5) of the UK Borders Act 2007 and section 3(5) of the Immigration Act 1971.

82. The Claimant was subject to deportation because:

    i) section 32(5) of the UKBA 2007 provides that a deportation order is mandatory where a foreign national offender is sentenced to a period of imprisonment of at least 12 months; and

    ii) section 3(5)(a) of the Immigration Act 1971 provides that a person who is not a British Citizen is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good. In this case, the Claimant's previous convictions led the Defendant to conclude the Claimant's presence in the UK was not conducive to the public good.

83. On 22 January 2018, the Claimant was released from custody and detained pursuant to Immigration Act 1971 Schedule 3 § 2(2):

> **"Detention or control pending deportation**
>
> (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."

84. This power was stated as the basis for the Claimant's detention in the *"Minute of a decision to detain a person under immigration powers"* dated 19 January 2018, and in detention reviews in March, April, May, June and July 2018. Those documents would not, however, have been provided to the Claimant.

85. The "*Notice to Detainee – Reasons for Detention and Immigration Bail Rights*" in form IS.91R would in the ordinary course be given to a detainee, and the Defendant's GCID – Case Record Sheet indicates that it was served on the Claimant here, albeit it was unsigned. It stated at § 1:

> "I am ordering your detention under powers contained in the Immigration Act 1971, the Nationality, Immigration and Asylum Act 2002, the UK Borders Act 2007 or the Immigration (EEA) Regulations 2016."

and at the end included these notes:

> "**Notes**:
>
> **DETENTION POWERS**
>
> …
>
> (3) A person served with a Notice of Decision to make a deportation order, whose detention has been authorised by the Secretary of State – Paragraph 2(2) of Schedule 3 to the 1971 Act.
>
> …"

86. The detention review of 20 February 2018 stated that the Claimant was detained pursuant to Immigration Act 1971 Schedule 2 § 16(2), which provides that a person may be detained pending a decision to remove, or pending removal, if there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under paragraphs 8 to 10A or 12 to 14 of that Schedule. It is relevant to administrative removal as distinct from deportation.

87. The monthly reviews provided to Claimant dated 20 February, 21 March and 26 April 2018 stated that he was detained under paragraph 32 (1) of the Immigration (European Economic Area) Regulations 2016, which concerns the detention of EEA nationals suspected to be subject to removal under those regulations, and did not apply to the Claimant.

88. The Claimant submits that he was entitled to be told the basis for his detention, and that these references to inapplicable powers, and lack of reference to the correct power, in

the monthly reviews meant that his detention up to 9 July 2018 (when the correct basis for detention was stated in a monthly report) was unlawful.

89. I agree that the Claimant was entitled to be given an accurate statement of the reasons for his detention. Article 5(2) of the Human Rights Convention states that *"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."*, and that requirement has been held to apply not only in criminal cases but other types of detention including psychiatric confinement permitted by Article 5(1)(e): *Van der Leer v Netherlands* (1990) 12 EHRR 567 §§ 27-29. As the ECtHR stated there, *"[a]ny person who is entitled [pursuant to Article 5(4)] to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty"*.

90. The same would also in my view be the case at common law. Further, rule 9(1) of the Detention Centre Rules 2001 (SI 2001/238) provides that "*Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly*".

91. It does not necessarily follow that a failure to comply with these requirements renders detention itself unlawful. In *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131 Lord Slynn stated:

> "48 It is agreed that the forms served on the claimants here were inappropriate. It was, to say the least, unfortunate but without going as far as Collins J in his criticism of the Immigration Service, I agree with him that even on his approach the failure to give the right reason for detention and the giving of no or wrong reasons did not in the end affect the legality of the detention." (§ 48)

92. The ECtHR in *Saadi* (*Saadi v United Kingdom* (2007) 44 E.H.R.R. 50 (13229/03)) concluded that a 76-hour delay in providing the real reason for the detention to the applicant was a breach of Article 5(2), though it concluded that in the circumstances the finding of a breach provided sufficient just satisfaction.

93. In *Kambadzi* Lord Hope (speaking for the majority of the Supreme Court) stated:

> "45 In *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131, which was concerned with the lawfulness of detention under paragraphs 2(1) and 16(1) of Schedule 2 to the 1971 Act, Lord Slynn of Hadley said, at para 48, that the Secretary of State's giving of no or wrong reasons did not affect the legality of the detention. Mr Tam said that no hint was given in that case that this failure gave rise to a problem as to its legality. But Collins J said that it was not argued in that case that the muddle about reasons rendered the decision to detain unlawful: [2002] 1 WLR 356, para 16. Nor was the effect of a failure to review in issue."

However, the point was not taken any further.

94. Macdonald's *Immigration Law and Practice* (9th ed) § 18.28, after discussing *Kambadzi* and *Saadi*, states: *"Nevertheless, Saadi is authority for holding detention in the fast track to be lawful even if the reasons given are not the real reasons for detention"*.

95. In the light of the ECtHR's decision in *Saadi*, it is not clear that this proposition can be stated with confidence: it depends on whether a detention where there has been a breach of Article 5(2) can nonetheless be described as lawful.

96. However, in the present case the notice given to the Claimant when he was detained, referred to in § 85 above, did correctly state the legal basis for his detention, as did monthly reports from July 2018 onwards. I doubt that the errors in the earlier monthly reports gave rise to a breach of Article 5(2), but even if it did I do not consider that any such breach was such as to make it just and appropriate to award substantive damages to the Claimant.

(4) Provision of monthly reports

97. The Claimant alleges that, in breach of rule 9(1) of the Detention Centre Rules 2001 (also reflected in the Defendant's policy at EIG Chapter 55.8), the Claimant was not provided with monthly progress reports in March or April 2018. He states in his witness statement that he received a monthly progress report dated 20 February 2018 while in prison, received the report dated 21 March 2018 only on 28 May 2018, and received reports dated 11 June, 25 August and 3 September 2018.

98. The Defendant's records indicate that the Claimant's detention was reviewed on (among other dates) 21 March 2018 and 26 April 2018. The records also include copies of letters bearing those dates from the Home Office to The Governor/Director of Brook House IRC, where the Claimant was detained by that stage. Each letter asked the addressee to pass on "*the following documents*" to the Claimant, and indicated that it enclosed "*IS.151F CCD*", which is the form of "*Monthly Progress Report to Detainees*". The records also include copies of what appear to be the monthly progress reports themselves, dated 21 March and 26 April 2018, albeit unsigned.

99. Counsel for the Defendant indicated that the usual process would have been for these letters with their enclosures to be sent by post, email or fax to the immigration removal centre, who would serve it on the detainee in person or by putting through the cell door.

100. Based on the evidence of the contents of the Defendant's records, I conclude on the balance of probabilities that these monthly progress reports were provided to the Claimant at or around the dates they bear.

101. The Defendant submits that even if the reports had not been served on the Claimant, that would not render his detention unlawful. As to whether a breach of policy will render subsequent detention unlawful, *EO v SSHD* [2013] EWHC 1236 (Admin) § 21 distilled the principle from *Lumba* in the following terms:

> "A breach of public law duties when exercising a discretionary power to detain renders the subsequent detention unlawful (i.e. amounts to the tort of false imprisonment) if the breach bears on and is relevant to the decision to detain."

102. If the Claimant's detention had not been reviewed monthly at all, then that would be likely to be a breach bearing on the decision to detain. However, the evidence indicates that reviews did take place: the issue was whether or not some of the monthly reports were provided to the Claimant.

103. Insofar as one purpose of monthly reports is to restate the basis on which a person is being detained, the considerations discussed under subheading (3) above apply. The Claimant had been told the correct basis for his detention at the outset in February 2018 by the notice in form IS.91R. If the monthly reports for March and April had not been given to him, he would still have had the information from the February notice about the basis for his detention.

104. Finally, in so far as monthly reports also provide other information to a detainee, including the up to date factual basis for his/her continued detention, they undoubtedly serve an important purpose. I would not necessarily conclude, though, that a failure to provide them – at least accidentally – would render the subsequent detention unlawful. It is the regular review itself, rather than the resulting report to the detainee, which in my view bears on the decision to detain for *Lumba* purposes. However, in the present case it is unnecessary to reach a concluded view on that point, because I have found on the balance of probabilities that the reports were in fact provided to the Claimant.

(5) Risk of reoffending and risk of harm to the public

105. A key reason for the Claimant's continued detention has been the Defendant's assessment that he would present a high risk of harm and of reoffending if released. To take one example, the fifth detention review, dated 11 June 2018, included the following assessments:

> [Harm]
>
> "High – Given the fact that [the Claimant's] latest conviction was possess a controlled drug of Class B – Cannabis/cannabis resin as well as possession of a firearm, illustrating his pernicious capabilities of having easy access to such deadly weaponry, it would be logical to conclude that [the Claimant's] interaction with the public would be highly risky."
>
> [Reoffending]
>
> "High – Given the fact that [the Claimant] has committed over 7 offences in the space of five years ranging from Drug offences to possessing Firearms to assaulting a constable. It is very likely that [the Claimant] would reoffend if he were to be released."

106. The reviewer and the authorising officer concluded that the Claimant should remain in detention notwithstanding that, as the review noted, the Claimant had an outstanding asylum claim which may be subject to an in-country right of appeal. Whether such a right would arise might depend on whether or not any refusal were certified on the "*clearly unfounded*" ground (which a GCID entry dated 23 July 2018 suggested it probably would not be). However, that is not an issue I need to consider, Counsel for the Claimant having made clear that it was not part of the Claimant's case on the present

claim that the possibility of such an appeal meant that the *Hardial Singh* criteria were not satisfied here: which would have been a new and unpleaded point.

107. The Claimant makes the point that the Defendant's assessment that the Claimant's release would carry a high risk of public harm is not based on any evidence, e.g. an OASYS or probation report, though the documents indicate that an OASYS report was requested on 21 March 2018.

108. In addition, the Claimant notes that two of his offences were committed (on 8 August 2011 and 18 October 2011) when he was a child, when he was less able to exercise proper control over his actions.

109. A psychological report prepared in November 2011 by Dr Simon Claridge states that a test using the Gudjonnson Suggestibility Scales indicated that the Claimant was *"significantly less able to recall information, more compliant and more suggestible than would be ordinarily expected when compared to the general population or to juveniles",* and *"highly vulnerable to being compliant to other's requests and demands"*.

110. A pre-sentence report of Krishna Ridley-Lee, prepared for the hearing of 24 February 2012, expressed the view that the Claimant's actions were a result of his lacking in maturity and craving acceptance from his peers, that he was something of a "*follower*" and influenced by more domineering characters, and that he *"fully acknowledges that his association with known offenders has resulted in him becoming further entrenched in the Criminal Justice System*". She assessed him as having a medium risk of re-offending and medium risk to the community, bearing in mind among other things that, whilst the Claimant had (at the time) no previous convictions for violence, *"[t]here is also an indication within the CPS papers that had the victim not disarmed [the Claimant] he would have continued his pursuit"*.

111. The Claimant also referred to:

    i) a statement from his stepmother, confirming that he regretted having got involved with the wrong people, and

    ii) a GCID Case Record Sheet indicating that a panel in July 2018 had envisaged detaining the Claimant for interview but then releasing him thereafter.

112. At the outset of the Claimant's detention, in January 2018, the "*Minute of a Decision to Detain a Person under Immigration Powers*" assessed the Claimant's risk of re-offending as "high" (the Claimant having committed seven offences in five years) and the risk of harm to the public as "high" (having regard to easy access to such deadly weaponry). The case owner considered the risk of harm and re-offending outweighed the presumption of release, even taking into account the fact that the Claimant had an outstanding asylum claim.

113. EIG § 55.3.2.6, quoted above, envisages that risk of harm will normally be assessed by NOMS unless no OASYS or pre-sentence report is available. In the present case, it appears that an OASYS report had been requested, but none had found its way to those considering the Claimant's detention. I have already referred to a pre-sentence report

prepared in 2011, but there is no indication that any such report was available in respect of the Claimant's 2015 convictions.

114. In these circumstances, the relevant decision-makers had to form a view on, among other things, risk of reoffending and risk of harm based on the materials that were available to them. Counsel for the Defendant told me (and counsel for the Claimant did not demur) that these could be expected to include the police national computer records of the Claimant's convictions and sentences. It is clear from the GCID records for August 2015 that the decision-maker would also have had access to the full sentencing remarks relating to the Claimant's 2015 firearms conviction quoted in § 18 above. It is not clear whether the decision-maker would also have had access to pre-sentence reports or to the sentencing remarks quoted in § 9 above in respect of the 2012 wounding conviction. However, the length of the sentence passed on that occasion underlines the gravity of the offence.

115. Ultimately it is for the court itself, applying the *Hardial Singh* principles and the guidance in *Lumba*, and based on the information available to the Defendant at the relevant time, to form its own view on the lawfulness of the detention. The nature of the Claimant's previous offending in my judgment indicates that the Claimant would present a significant risk of reoffending and a significant risk of harm to the public. I do not consider that the evidence referred to earlier concerning his suggestibility mitigates these factors. On the contrary, the sentencing remarks from the 2015 offence tend to suggest that even at the age of 19, the Claimant may have been willing to undertake the dangerous and unlawful task of holding a loaded firearm at the request of another person, and was certainly found in fact to have been in actual possession of such a firearm himself. Such suggestibility if anything tends to increase the concerns that may reasonably be held about the risks the Claimant presents to the public, in terms of both risk of reoffending and risk of harm.

116. I do not accept the Claimant's submission that the Defendant's error about his having assaulted a police constable renders his detention unlawful. The actual position was that in June 2017 the Claimant was convicted of assaulting not a police constable but a prison officer, having kicked and head-butted the officer while in custody at HMP Aylesbury serving his firearms sentence. That incident was no less significant in terms of risk of reoffending and harm than a conviction for assaulting a police officer would have been.

117. The Claimant had as at the date of the hearing before me been detained for 9 months and 16 days pending a deportation order. The evidence indicates that the Claimant's conduct during that period has on some occasions been described as disruptive or uncooperative (in particular, a GCID entry dated 30 May 2018 referring to the Claimant having to be restrained due to the degree of resistance he put up to a transfer to Morton Hall). Behaviour in detention is a legitimate factor to weigh in the balance of what constitutes a reasonable period (see Guidance 55.3.2.5; *Kamara v SSHD* [2013] EWHC 959 (Admin).) The Claimant objected that these events were not relied on in the Defendant's summary or detailed grounds, and that he might have provided a further witness statement had the Defendant done so. I would accept that this reduces the extent to which I should draw conclusions from these matters, though on the face of the documents there was at least one incident of disruption to which it is proper to give some limited weight as tending to confirm the conclusions I reach at § 116 above.

(6) The Claimant's 'character, conduct or associations'

118. The Claimant submits that there is no evidence that his 'character, conduct or associations' are a ground, or a reasonable ground, for the Claimant's continuing detention, particularly given that the last offence for which the Claimant was convicted of was 3 years ago.

119. However, I do not consider that the lapse of time since the Claimant's last conviction significantly alters the position, bearing in mind that (i) he has a prior history of offending including some serious offences, (ii) he has spent the last three years in custody and (iii) he has in fact offended during the last three years, having been convicted in June 2017 of assaulting a prison officer.

(7) Alleged failure to apply policy: EIG paras 5.3.A and 55.3.1

120. The Claimant submits that the Defendant failed to apply relevant policy, in particular EIG sections 55.3.A and 55.3.1, given the lack of factors favouring detention and "*the Claimant's established and significant Article 8 ECHR family and private life in the UK*". The Claimant in his second witness statement elaborates on his ties in the UK with his half siblings and stepmother in particular. The Claimant says the failure to comply with this policy renders the decision to detain unlawful.

121. The Defendant was aware of the Claimant's family connections, as indicated by the fact that each detention review records his next of kin as his father, recorded as living at an address in London. Detention reviews also considered whether the Claimant's family circumstances were relevant to detention, for example the 11 June 2018 review which stated *"[The Claimant] moved to the UK at the age of 8. He claims all of his family members are in the UK, and therefore has no family members left in Somalia"*. Such ties must, however, be seen in the context of the Claimant's offending history, and the fact that his continuing detention has been based primarily on risk of harm/reoffending rather than risk of absconsion (to which family ties might be regarded as particularly germane). I do not consider there to have been a failure, or a material failure, to apply the Defendant's policy.

(8) Emergency Travel Document

122. The Claimant contends that the Defendant has made no attempt to obtain an emergency travel document for the Claimant throughout the period of his detention, even though detention reviews have suggested that the Defendant was in the process of obtaining one.

123. The detention review of 20 February 2018 stated that the Defendant was "*in the process of trying to obtain an ETD*", but also indicated (in apparent contradiction) that an ETD would need to be obtained once the decision letters regarding the Claimant's asylum and ILR claims had been served.

124. More generally, the evidence indicates that the Defendant has acted with reasonable diligence and expedition. On 6 April 2018 the caseworker referred the Claimant's asylum claim to the DAC team to conduct an interview on behalf of the CCD (since this could be scheduled sooner), and on 3 May 2018 an asylum interview was booked for 11 May 2018. This was cancelled pursuant to the Order of King J on 10 May 2018

prohibiting the Defendant from processing and determining the Claimant's protection claim, including interviewing him, in the DAC. The Claimant was subsequently interviewed on 31 July 2018, and as at the date of the hearing before me a decision was said to be imminent. In all the circumstances, I do not consider the lack of steps to obtain an ETD renders the Claimant's detention unlawful.

(9) Conclusion on Ground 2

125. For the reasons given above, I do not accept any of the grounds put forward by the Claimant for concluding that his detention to date has been unlawful. The Claimant has been assessed, rightly in my judgment, as presenting a high risk of reoffending and high risk of harm to the public. Those are significant matters to be taken into account pursuant to the case law and policy documents to which I have referred. I am also satisfied that the Claimant has been told, at the outset and more recently, the legal basis for his detention notwithstanding errors in some of the monthly progress reports, and that the requisite monthly reports have been sent to him. I do not consider that the points the Claimant has made about family ties or the Emergency Travel Document render his detention unlawful. The Claimant has not argued that there is no realistic prospect of his removal in what would, in the circumstances, be a reasonable time. I therefore do not accept the Claimant's case under Ground 2.

(D) OVERALL CONCLUSIONS

126. For the reasons given above:

i) the Claimant's claim that there has been unlawful delay in dealing with his indefinite leave to remain and asylum claims succeeds, though not his claim to be entitled to recover substantive damages as a result; and

ii) the Claimant's claim to have been unlawfully detained does not succeed.

127. I shall hear counsel on the appropriate relief in the light of my findings, and in the light of any further developments in recent weeks.

128. I am grateful to both parties' counsel for their clear and measured exposition of the facts, principles and arguments.