Neutral Citation Number: [2019] EWHC 2606 (Admin)

Case No: CO/3054/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2019

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

R on the application of JULIEN BENCHAOUIR	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Alison Harvey (instructed by **Duncan Lewis**) for the **Claimant.**
Hasfah Masood (instructed by **Government Legal Department**) for the **Defendant.**

Hearing dates: 12 June and 24 July 2019

- -

Approved Judgment

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is a claim brought by way of judicial review for a declaration that the claimant's detention between 4 January 2018 and 4 September 2018 inclusive was unlawful and for damages for false imprisonment.

2. In brief, the claimant is an Algerian national. He was convicted of theft and served a sentence in prison. On the expiry of the custodial term, he was detained in an immigration detention centre pursuant to paragraph 2(2) of Schedule 3 to the Immigration Act 1971 ("the 1971 Act") pending deportation from the United Kingdom. He contends that the detention was, or became, unlawful because deportation was not imminent. He also contends that the detention breached relevant policy provisions as he was an adult at risk because of his mental health issues from 16 February 2018 and should not have been detained and because the defendant failed to send an allegedly defective report prepared pursuant to rule 35(3) of the Detention Centre Rules 2001 ("the 2001 Rules") back to the relevant doctor for further information about the effect of detention on him. He further contends that, by 13 July 2018, a clinical psychologist had identified that detention was detrimental to his mental health and so continued detention after that date was contrary to relevant guidance. The claimant also contends that the defendant failed to put in place a system ensuring vulnerable persons were not detained.

3. In addition, permission was given at the hearing to amend the grounds to enable the claimant to contend that the defendant had failed to act with all reasonable speed and expedition in seeking to obtain an emergency travel document from the Algerian authorities and had acted in reliance upon, but failed to follow, an unpublished policy governing detention reviews by internal case progression panels. The defendant contended that the detention remained lawful throughout the relevant period.

THE FACTS

4. The facts are critical in this case as they are in virtually all claims of unlawful detention. The defendant provided disclosure of the contemporaneous documentation but did not initially provide witness statements from those involved in the decisions to detain the claimant explaining their reasoning. After the first day of the substantive hearing, permission to amend was granted and the defendant subsequently produced witness statements from Richard Faulkner, an officer who, at times, authorised continuing detention, Richard Maddy, whose evidence dealt with the establishment of case progression panels to review detention, and Mairead Peronius whose evidence dealt with the attempts to obtain an emergency travel document for the claimant. All three witnesses made statements which gave honest explanations of what had happened and considerably assisted the court in considering the issues. I am grateful to them. The factual position, as appears from the contemporaneous documentation and those three witness statements, is as follows.

Background

5. The claimant is an Algerian national born on 1 July 1977. He entered the United Kingdom illegally and, consequently, there are no records of his precise date of

arrival in the United Kingdom. He has said that he arrived in this country in about March 2011.

6. He first came to the attention of the authorities in the United Kingdom when he was cautioned for theft on 8 May 2012. He was convicted of theft on 12 April 2013 and again on at least one occasion in about May 2013. The records indicate that he was in prison in May 2013. The medical notes record that the claimant arrived in prison with a suicide and self-harm warning note from court but further noted that his problems were more of a physical health deficiency and he appeared very stable. There was not thought to be any need to place him under observation because of any risk of suicide or self-harm.

7. The claimant was interviewed by an immigration officer in August 2013. He claimed to be a French national and claimed that he had lost his French passport. Investigations revealed that these details were false. The claimant accepted in interview that he had never been issued with a French passport. The defendant served him with a notice informing him that he was liable to be removed as an illegal immigrant. He was granted temporary admission subject to reporting conditions. He failed to comply with those reporting conditions.

8. Steps were also taken to prepare an application to the Algerian authorities to obtain an emergency travel documentation to enable him to be removed to Algeria. There is a document called "Returns logistics guide to travel documents for Algeria". That indicates that applications must be made by a particular Home Office team, the RL Country Liaison Team ("the RL Team"). The document indicates that interviews are not normally required by the Algerian authorities. It noted that there was no consistent timescale for obtaining an emergency travel document for Algeria. Ms Peronius, in her statement, confirms that an application may be sent to an official, a Migration Liaison Officer, in the British consulate in Algeria for review or investigation before the application is submitted to the Algerian authorities. That officer will provide a report of his or her findings (for example, providing local information such as family details or schools for the person concerned). That is then sent to the RL Team who may then submit an application to the Algerian authorities. If no response is made, the application is not submitted to the Algerian authorities.

9. An application for an emergency travel document for the claimant was prepared in August 2013 and sent to the Migration Liaison Officer. An e-mail dated 3 September 2013 records that he advised that the application was not good for submission as the given name for the applicant was a French not an Algerian name and the passport number could not be correct. There is no record of the application for an emergency travel document being submitted to the Algerian authorities in 2013.

10. On 25 September 2013 the claimant was convicted of possession of class B drugs. Again, an application for an emergency travel document was prepared and sent for verification to the Migration Liaison Officer in the British consulate in Algeria in January 2014. The documentation records that that the Liaison Officer returned the application saying that it contained a lot of spelling mistakes and asking that it be amended. Again, there is no record of the application for an emergency travel document actually being submitted to the Algerian authorities in 2014.

11. The claimant was released on condition that he report to an immigration centre at certain times. He again failed to comply with that reporting condition. Between February and June 2014, he was convicted of various offences of theft and also of failing to surrender to custody and breaching of an earlier order for conditional discharge. On release from prison in August 2014, he was required to report to immigration officers. He failed to do so. In April 2015, he was encountered by immigration officers when he was found to be working illegally. An interview with the claimant was conducted in April 2015 for the purpose of making an application for an emergency travel document. During the interview, the claimant gave his name as Rachid Hadjimi. An application form was completed for that purpose using the name of Rachid Hadjimi but noting that his alias was Julien Mahde Benchaouir. The notes record that no photographs were taken. As at 28 April 2015, the records indicated that photographs were still awaited and the matter would be monitored. There is no record of an application being submitted to the Algerian authorities. The claimant was granted temporary release subject to reporting conditions and again failed to report.

12. The claimant was convicted of theft in October 2016. In September 2017, he was convicted of theft and failure to comply with the community requirement of a suspended sentence order made in 2016. He was sentenced to 30 months imprisonment. He served his custodial term in HMP Pentonville. The medical records from the prison do not record any mental health issues.

Notice of Liability to Deportation

13. The claimant was served with a notice of liability to deportation on 3 October 2017. The claimant was a persistent offender, here illegally, and the defendant considered that his presence in the United Kingdom was not conducive to the public good. The records note that, on 16 November 2017, the claimant refused to complete the application forms for an emergency travel document. The notes also record that he said that he would be killed if he were returned to Algeria. The note goes on to state that he had not mentioned asylum at that stage.

The Application for an Emergency Travel Document

14. The defendant then began the process of preparing an application for an emergency travel document. A decision was taken to use old biometric data for the application. On 22 November 2017, an application pack containing a submission letter, biometric data, photos of the claimant and a copy of his fingerprints, and other documents, was sent to the RL Team in the Home Office. On 23 November 2017, they forwarded the pack to the Migration Liaison Officer in the British consulate in Algeria for him to carry out checks to verify the information prior to the submission of the application to the Algerian authorities.

15. On 12 March 2018, the RL Team contacted the Algerian consulate in the United Kingdom asking for an update on the claimant's case. On 13 March 2018, the Algerian consulate replied stating that they had not received any file regarding the claimant. As Ms Peronius fairly admits in her witness statement, the defendant accepts, having reviewed the records in as much detail as possible in the time available, that the emergency travel document application pack was never sent to the Algerian consulate and the request to them for an update was sent in error.

16. On 13 March 2018, a member of the RL Team sent an e-mail to the Migration Liaison Officer asking for an update. On 18 March 2018, the officer replied saying that there had been no progress so far and that was not surprising as the application was full of contradictions.

17. On 27 March 2018, the same member of the RL Team sent another e-mail to the Migration Liaison Officer asking for a list of outstanding cases before that officer left his post. The officer replied on 29 March 2018 with a long list of outstanding cases including the claimant's case. The officer left his post shortly afterwards at about the end of March 2018.

18. On 18 April 2018, the case worker dealing with the claimant's case asked the RL Team for an update on the emergency travel document. A reply was sent on 20 April 2018 stating that there was no update on the case, no consistent timescale for obtaining an emergency travel document and the RL Team was continuing to chase.

19. It seems that there was a meeting between members of the RL Team and officials from the Algerian embassy in June 2018 when the Algerian authorities informed the RL Team that they were not aware of any application for an emergency travel document having been submitted for the claimant. Following that meeting, the RL team decided that an application should be submitted to the Algerian Embassy. No application was in fact ever submitted to the Algerian authorities.

20. A new Migration Liaison Officer took up the role on about 4 July 2018. That officer, however, went on annual leave on 8 July 2018 for 4 weeks and did not return to work until about 6 August 2018. A member of the RL Team attempted to call her on 4 July but was unable to speak to her. There was an e-mail exchange about certain cases but not the claimant's case.

21. On 30 July 2018, the RL Team sent an e-mail to the Algerian embassy asking for an update on the cases of, amongst others, the claimant. The Algerian embassy replied on 2 August 2018 stating that they had received no file for the claimant, Julien Mahde Benchaouir. Nothing more appears to have been done until 11 October 2018 when a member of the RL Team placed a note on to the file asking that an application for an emergency travel document to be sent to the RL Team so that an application could be made.

22. There was no further contact between the RL Team and the Migration Liaison Officer in the British consulate in Algeria between 4 July 2018 and 15 May 2019. There is no explanation for that state of affairs. The RL Team re-sent the emergency travel document application pack to the Migration Liaison Office at the British consulate in Algeria on 15 May 2019.

23. On the evidence provided, therefore, it is clear that no substantive response was received by the RL Team from the Migration Liaison Officer on the verification checks that the officer was to carry out to enable an application for an emergency travel document to be submitted to the Algerian authorities. No application for an emergency travel document was ever submitted to the Algerian authorities during the entire time that the claimant was in detention from 4 January 2018 – or indeed, at any time up to and including the substantive hearing of his claim.

The Detention of the Claimant

24. The custodial element of the claimant's September 2017 sentence for theft was due to expire on 4 January 2018. On 2 January 2018, the defendant decided that he would exercise his powers under paragraph 2(2) of schedule 3 to the 1971 Act to detain the claimant from 4 January 2018. A minute of that decision notes that the claimant had been assessed as presenting a high risk of absconding, a medium risk of re-offending and a low risk of harm. The minute recorded his immigration and offending history. In response to the question of when officials expected relevant travel documentation to be issued, the minute records that "On 22 November 2017 Document squad submitted an ETD pack". That must be a reference to the sending of the application pack for an emergency travel document to the RL Team – see paragraph 14 above. The minute noted that it was expected that the emergency travel document would be issued within 3 to 6 months.

25. The contemporaneous documentation includes a notice to detain and reasons for detention dated 2 January 2018 (known as a form IS91R). That gives two reasons for detention, namely that the claimant was likely to abscond if given temporary admission or release and his release was not considered conducive to the public good. The notice lists a number of factors as being the factors on which the decision to detain was based. Four are ticked in this case: the claimant did not have enough close ties to make it likely that he would remain in one place, he had previously failed to comply with conditions of temporary admission, he had previously absconded, and he had not produced satisfactory evidence of his identity, nationality, or lawful basis to be in the United Kingdom.

26. On 3 January 2018, the claimant was served at HM Prison Pentonville with the notice to detain. The notes record that the claimant asked if the officials had received a letter that he had sent the previous month about his reasons for not wanting to return to Algeria. He said that he was a refugee. The official understood him to mean that he may want to claim asylum. The official e-mailed the relevant person to notify the person of a potential asylum claim.

27. On 4 January 2018, the claimant was detained pursuant to powers conferred by the 1971 Act. He initially applied for bail but that application was subsequently withdrawn.

28. On 22 January 2018, the claimant was interviewed in connection with his asylum claim. The initial contact and asylum registration form states that he said that he had no medical conditions, was not taking medication and there was nothing he wished to tell officials about his physical or mental health. He is recorded as saying that he could not return to Algeria as people wanted to kill him but he did not know the reasons why they wanted to do this. He said the people were after him from 1997 until 2003 and he had hidden inside for 2 months and that had caused him trauma. He said that he had gone to the police and they had tried to investigate but they did not know who the people were. There is a record of an asylum interview where the claimant again said that people would kill him if he returned to Algeria. He gave examples of when he said attempts to kill him were made. He said that he had gone with his father and his brother to the police station. He said the police just asked him questions and then said he could go home and they would let him know if they had any news but he heard nothing after that. At one stage in the interview, he was asked about the trauma

that he had mentioned in his initial, or screening, interview. He said that when he slept he had nightmares and talked in his sleep and screamed and that this started in 1997. He again said that he had no medical issues.

The First Detention Review

29. Between 26 January and 2 February 2018, the detention was reviewed. The records of that review referred to the fact that the claimant had said in his interview that he had no medical issues. The review records that there was no knowledge of any vulnerability issues. The review records that on 23 November 2017 an emergency travel document pack was sent to the Migration Liaison Officer in Algeria. It notes that if the claimant's asylum claim were refused the only barrier to removal would be the need for an emergency travel document and that was being progressed. The recommendation from the reviewing officer noted that the claimant was an illegal entrant and the defendant intended to deport him. It noted the absence of any ties in the United Kingdom, the claimant's long criminal history and the high risk of absconding as a result of this and his previous non-compliance with reporting restrictions. It noted that an emergency travel document had been applied for (in fact, that application had not been made: the documents had been sent to the Migration Liaison Officer in the British consulate in Algeria for review). The reviewing officer noted that if the asylum claim were refused and the emergency travel document obtained, deportation could be effected. The reviewing officer signed the document on 26 January 2018.

30. On 2 February 2018, the authorising officer made his comments. He agreed that detention was warranted. He noted that, absent a claim that removal would breach Article 8 of the European Convention on Human Rights ("ECHR"), the only barriers to deportation were the asylum claim and the emergency travel document. He noted that the asylum interview had been completed and suggested seeing if the consideration of the claim could be expedited. He said that, "Thereafter we need to document Mr Benchaouir for which an application was submitted on 22 November 2017 to the Algerian authorities and await an outcome". In fact, as is now clear, the application for an emergency travel document was sent on 22 November 2017 to the RL team in London and sent the next day to the British consulate in Algeria. It had not been submitted to the Algerian authorities. The authorising officer's comments continue in the following terms:

> "The risks associated with release have been fully considered and do outweigh the presumption to liberty. There are no adult at risk factors given no medical or vulnerable indicators, although he noted an operation on his lung in 2012, there is no current issues or medication as an ongoing theme.
>
> "Detention in this instance is a proportionate and justifiable measure in line with the principles of Hardial Singh an we should continue to act in an expeditious manner seeking updates on both matters to ensure that this is concluded at the earliest opportunity".

The Rule 35 Report and Further Detention Reviews

31. On 16 February 2018, Doctor Arsiwalla completed a report under rule 35(3) of the Detention Centre Rules 2005 ("the 2005 Rules"). That sub-rule requires a medical practitioner at a detention centre to make a report on the case of any detained person if

the medical practitioner is concerned that the person may have been the victim of torture. The report noted that the claimant had claimed that he was tortured in Algeria in 1993 and again in 1997. He had claimed that he was 16 years old at the time. He had said that he was tortured by the police to give information about terrorists. He had said he had had his hands tied behind him and he was waterboarded. The report noted an injury to the claimant's left thumb (which the claimant said was broken by being tied up) and to the right wrist (which the claimant said had been broken). The report concludes:

> "He claims to be tortured by Police in Algeria for information on terrorist activity.
>
> His narrative appears consistent with his injuries in my opinion as a GP. He has no acute physical disability in the detention centre that I am aware of which impacts him being in the centre. However, he does have mental distress from this episode and he will be referred to the Mental Health Team as per protocol to be assessed by them.
>
> I would be grateful if you would this further and investigate as you feel necessary."

32. That report was received by the defendant on 19 February 2018. The claimant's detention was reviewed as appears from a minute dated 20 February 2018. The minute noted that it was accepted that the claimant fell within the level 2 category of the Adults at Risk guidance as he had been referred to the mental health team in connection with mental distress. The minute noted that the medical practitioner had not indicated that a period of detention was likely to cause him harm. The minute set out the claimant's immigration and offending history. It noted that the claimant had said he was tortured by police but on two occasions in his interviews he had said that he had gone to the police to report the individuals whom he believed were threatening him. Given the inconsistencies, the official considered that the credibility of his claims had been damaged and considered it doubtful that the claimant had been a victim of torture as alleged. The minute records that there was a high risk that he may try to evade removal in an attempt to frustrate future arrangements to re-detain him for removal. The minute noted that the offending was largely for offences of theft and was considered to be motivated by financial gain. It was considered that there was a significant public protection risk if he were released into the community. The minute said:

> "A primary consideration when detaining any individual under immigration powers is the imminence of removal. The only subsisting barrier to your removal is your asylum claim and obtaining a travel document. We have submitted an application to the Algerian authorities and await verification and agreement to issue Travel document and in the interim you have been interviewed in relation to your asylum claim and a decision will be reached within 8 -12 weeks. Given the inconsistencies and the timing of your claim it is considered that there is a likelihood that this might not succeed. In the event of your asylum claim being refused then a deportation decision will be made and should receive an in country right of appeal, this can be concluded within 3 months dependant on challenge, however a substantive hearing would be expected within 1 month. As such there is a reasonable

> prospect of concluding your case within 5 months which is considered to be proportionate in this particular instance.
>
> "Conclusion
>
> It is acknowledged that you are an Adult at Risk but it is considered that your removal can be enforced within a reasonable timescale.
>
> Therefore when balancing the indications of vulnerability against the public protection factors, the negative immigration factors and the timescale of your removal, it is considered that the negative factors outweigh the risk in your particular circumstances. Therefore a decision had been made to maintain your detention."

33. The detention was reviewed on 28 March 2018. The section on travel documents notes that an emergency travel document pack had been sent to the RL Team on 22 November 2017 and sent to the "MLO" (i.e. the Migration Liaison Officer in the British consulate) for checks. The reviewing officer again said it was highly likely that the claimant would abscond as he had no family ties in the UK, no release address, a long criminal history and previous non-compliance with reporting conditions on several occasions. He noted that an emergency travel document had been applied for (presumably that is a reference back to the fact that the emergency travel document had been sent to the Migration Liaison Officer in the British consulate in Algeria as set out in the rest of the document). The reviewing officer noted that if the asylum claim were refused and an emergency travel document issued deportation could be effected. If the asylum claim were refused and certified as clearly unfounded, the sole barrier to deportation would be the need for an emergency travel document. The reviewing officer also referred to the rule 35 report and the decision to maintain the detention. The authorising officer approved the review on 29 March 2018 but made no comments (as appears from the record of a later review)

34. On 5 April 2018, an internal body known as a case progression panel recommended that the claimant be released. The records noted that the factors in favour of detention were persistent re-offending (the panel did not refer to the high risk of absconding). The factors in favour of release were principally the outstanding asylum claim with the fact that the claimant would be afforded an in-country right of appeal. No emergency travel document had been agreed and the offending involved low-level criminality. The notes record the following:

> "Reasons for Balance: The panel have recommended a release in this case, as the prospect of imminent removal is low. The barriers are the ETD and an asylum claim, for which the sub wold be afforded an in-country right of appeal. Given the likely timescales for resolving these barriers, and the relatively low level criminality involved, the panel agreed that continued detention was no longer appropriate The panel acknowledge the sub's propensity towards re-offending, however have recommended the sub be released with appropriate measures in place to mitigate this potential risk. Restrictions such as reporting are to be imposed.
>
> Panel decision: Recommend release."

35. There is no formal response included within the documents. There was, however, a review of the detention in April 2018. The record of the review notes that an e-mail was sent on 18 April 2018 to the RL Team asking for an update on the emergency travel document. The reviewing officer recommended continued detention on 18 April 2018. The authorising officer agreed on 26 April 2019 and his comments are in the following terms:

> "I agree that detention is warranted in this case.
>
> "The Asylum claim is clearly being considered and dependant on the outcome, which we have sought an update on, we could potential certify the Article 8 and thereafter there may be no right of appeal in country. As such the update from RL would be welcome in respect of what we can do to expediate the documentation process upon conclusion of the Asylum claim. I note we applied for a document in November 2017 so we need to ensure that this is being appropriately escalated and if this will be a prolonged process, then we may wish to look at release pending conclusion given the low risk of harm assessment. He does however have a clear risk of reconviction and abscond which will outweigh the presumption to liberty at this time. If he does get afforded an in country right of appeal or the documentation process will be prolonged, then we should review this stance.
>
> "In light of the above, detention is a proportionate measure in-line with the principle of Hardial Singh at this time and I authorise a further 28 days detention pending clarity on the above matters and progression with the Asylum claim."

36. The authorising officer, Mr Faulkner, has made a witness statement. He accepts that, due to oversight, he did not refer to the case progression panel's recommendation in his comments. However, he confirms that he took the panel's recommendation into account during his consideration of whether to authorise continued detention. Having reviewed the case, he noted that (as appears below) it had been decided that the asylum claim was to be refused and certified as clearly unfounded. The case worker had expressed the view on 18 April 2018 that any claim relating to Article 8 ECHR may be certified as clearly unfounded and the case had been referred back to check that there were no Article 8 ECHR issues. Mr Faulkner therefore concluded that, in fact, an in-country right of appeal may not be available to the claimant (contrary to the assumption of the panel). That influenced his assessment of the likely timescales for this case to be brought to a conclusion and if the emergency travel document application was progressed, deportation could be completed within a reasonable time

37. A further review was carried out in May 2018. The review records note that the application for the emergency travel document had been chased a few times with the RL Team but no outcome had been received. The authorising officer approved continuing detention on 23 May 2018 and made the following comments:

> "Continued detention is authorised on the following basis:
>
> -Subject is an Algerian national who illegally entered in the UK
>
> - Risk of absconding is high as he has failed to comply with previous reporting restrictions and illegal entry
>
> -Rule 35 was responded to on 21/02/18 and detention was maintained
>
> -AAR policy not engaged

-No compassionate circumstances

-Asylum claim was certified as being clearly unfounded on 23/04/18

-ETD only barrier to removal- this is being chased

-Stage 2 decision ready to be served once approved

Presumption of release is outweighed by risks involved of absconding

Action:

-Continue to pursue the progress of the ETD. If not forthcoming, consider release

- Serve stage 2 decision on the subject once approved"

38. A further review was carried out in June 2018. The authorising officer authorised continued detention on 21 June 2018 and made the following comments:

> "Continued detention is authorised for the same reasons as in the 5-month review and note that we have made progress with the Stage 2. This has been sent to a SCW for checking. As we are considering certification this will be checked by a second pair of eyes (SPOE). It is hoped this will be completed and served shortly.
>
> "In relation to the ETD, there has been no progress with RL. We need to ensure we chase this. If efforts are not rewarded we may have to consider release.
>
> "Actions:
>
> "-Ensure the Stage 2 is checked by a SCW/SPOE and served
>
> "-Continue to chase the ETD with RL"

Rejection of the Asylum Claim and the Making of the Deportation Order

39. By 20 April 2018, a decision was reached internally by the Home Office to reject the claimant's asylum claim and to certify it as clearly unfounded. The draft decision letter was sent to the case worker to be finalised and for consideration of whether there were any factors indicating that removal would not be compatible with the claimant's right to private and family life under Article 8 ECHR. It was, it seems, anticipated that there would be none and that that claim would be certified as clearly unfounded. On 16 May 2018, a decision was reached internally to refuse the Article 8 ECHR claim and certify it as unfounded. Further amendments to the draft decision letter were made on about 11 and 14 June 2018. The draft was sent to a senior case worker on about 21 June 2018 for checking.

40. The decision itself is set out in a letter dated 29 June 2018. The defendant dismissed the claimant's claim for asylum, his claim that returning him to Algeria would breach his rights under Article 2 or 3 ECHR and his claim for humanitarian protection. The defendant decided that the removal of the claimant to Algeria would not be incompatible with his rights under Article 8 ECHR. The defendant certified the claimant's asylum and human rights claims as ones that were clearly unfounded, pursuant to section 94 of the 2002 Act. As a result, the claimant could appeal but only from outside the United Kingdom. The claimant has never sought to challenge the

lawfulness of the decisions to certify the claims as clearly unfounded. On 29 June 2018, the defendant also made a deportation order requiring the claimant to leave the United Kingdom and authorised the detention of the claimant until he was removed. The letter, and the deportation order, were served on the claimant on 3 July 2018.

The Second Case Progression Panel Review

41. The notes (and the evidence of Mr Maddy) indicate that a case progression panel had again met and considered the claimant's case on 19 June 2018. The minutes record that the factors in favour of maintaining detention included the fact that the asylum claim had been refused and certified as manifestly unfounded, an emergency travel document had been applied for and there was a high absconding risk. The factors recorded as favouring release were the need to re-submit the application for an emergency travel document and that there was a timescale of 130 days for this, that an asylum decision had been taken but had not yet been served on the claimant, and the offending was low level theft with a low harm risk. The notes continued:

> "Reasons for Balance: The panel have recommended a release in this case as there is no prospect of imminent removal. There are barriers in place which frustrate imminent removal. The barriers are no ETD, due to the timescales of this the panel have recommended a release. To mitigate any risk upon the release the panel have recommended appropriate measures be in place to restrict the risk factors, such as reporting, curfews, approved accommodation or tagging. As at current there is no prospect of removal the panel have recommended a release".

42. The recommendation was not forwarded to those considering detention or included on the central records until 30 July 2018.

Subsequent Events

43. On 2 July 2018, the First-tier Tribunal refused an application by the claimant for bail. The immigration judge, in his reasons, indicated that the claimant had been in detention since January 2018 and he regarded that as a long time. He considered that the defendant had taken an unacceptable time to progress his asylum claim. The immigration judge also looked at his history of criminal offending and his immigration. He considered that matters were progressing as a decision had been taken at the end of June on the asylum claim and the claims had been certified as clearly unfounded meaning that the claimant could not appeal while in the United Kingdom. He noted that the presenting officer had assured him that the defendant was actively pursuing documentation via the Algerian embassy. He noted that if there were a challenge by way of judicial review to the certification decision or if the defendant failed to progress the question of documentation expeditiously, there were likely to be changes of circumstances justifying a further application.

44. On 13 July 2018, Ms Lucy Fitton, a clinical psychologist assessed the claimant. She completed a form that day raising concerns about the claimant's mental state. Ms Fitton wrote:

> "Mr Benchaouir presented with symptoms of Posttraumatic Stress Disorder (PTSD). He reported that these symptoms started shortly after he was tortured in Algeria in 1993 (for which he has a Rule 35 as a victim of torture). He described experiencing a number of PTSD symptoms including intrusive distressing memories, nightmares, hyperarousal,

> avoidance behaviours, sleeplessness, and negative beliefs about the world and other. He reported high levels of distress associated with detention and cited triggers from PTSD in the detention environment including the officers.
>
> "In my opinion detention is detrimental to his mental health. Mr Benchaouir has self-harmed since being detained (and has been managed under ACDT for this). His mental state is unlikely to improve whilst in detention as it is not possible to treat PTSD satisfactorily in this environment. "

45. That form was sent to the case worker responsible for the claimant's case on 13 July 2018. An e-mail was sent by that case worker to the detention centre on 17 July 2018 asking for the name of the doctor who had diagnosed post traumatic stress disorder. The e-mail said that if it were believed that the claimant was unsuitable for detention a report under Rule 35 of the Rules needed to be submitted demonstrating that he had been assessed as an adult at risk level 3 on the basis that detention would be detrimental to his health and providing reasons why that was believed to be the case.

46. On about 18 and 19 July 2019, there was a review of the claimant's detention. The records note that concerns had been raised and clarification sought on the advice of the relevant officer. The reviewing officer noted that the asylum and human rights claims had been certified as clearly unfounded and the deportation order served and the claimant could only appeal once he had left the United Kingdom. The note said: "His sole barrier would be his ETD which is being chased through RL". The authorising officer's comments are dated 19 July 2018 and say this:

> "The only barrier is the ETD and this has been referred to Algeria for checks. We must continue to chase RL and establish an estimated timescale for this. Mr Benchaouir has a history of offending and failure to report in the past remaining illegally in the UK. At this stage, I will authorise detention. However if there are further delays we must consider potential release under contact management."

The Claimant's Mental Health

47. On 9 August 2018, a report was submitted pursuant to Rule 35(1) of the Rules. It was signed by Dr Ali but the report noted that it had been approved by the mental health team. It recorded that the claimant had post traumatic stress disorder. Dr Ali's report said that:

> "In the opinion of the mental health team, including consultant psychiatrist Dr Hillier, detention is detrimental to his mental health. I concur with this view. Mr Benchaouir has self-harmed since being detained (and has been managed under ACDT for this). His mental state is unlikely to improve while in detention as it is not possible to treat PTSD satisfactorily in this environment."

48. Dr Ali's report also referred to the impact of detention as "Adversely affecting [the claimant's] mental wellbeing. He is on antidepressant medication. He has self-harmed multiple times". He gave further details of the claimant's condition. The report was sent to the case worker responsible for the claimant's case on 10 August 2018.

The Claimant's Release from Detention

49. On 16 August 2018, the defendant accepted that the claimant was to be assessed as at level 3 risk under the Adults at Risk guidance and decided to release him. A letter was sent to the claimant to that effect on that date. A letter dated 16 August 2018 was also sent to the solicitors for the claimant informing them that a decision had been taken to release the claimant. The letter noted that the claimant could apply for support under section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"). The letter noted that the detention should cease at the earliest possible time and asked the solicitors to confirm whether there were any alternative means of accommodation available to the claimant or whether he was content to be released with no fixed abode. The letter said that the claimant would be released on that day, 16 August 2018, with no fixed abode, unless a response was received by 15.30 p.m.

50. A fax dated 17 August 2018 was sent to the claimant's solicitor noting that the claimant had refused to leave the immigration centre because he had no accommodation. There was correspondence over who was responsible for applying for accommodation although the claimant's solicitors did in fact make an application. By letter dated 22 August 2018, the defendant stated that support, including accommodation, would be provided. By letter dated 30 August 2018, the defendant informed the claimant that arrangements had been made for accommodation in Glasgow to be made available from the 5 September 2018.

51. The claimant had issued judicial review proceedings on 1 August 2018 challenging the decision to maintain detention. Interim relief was sought. By an order dated 30 August 2018, the court ordered that the claimant be released from immigration detention no later than 12 noon on Tuesday 4 September 2018 to accommodation provided by the defendant under section 4(2) of the 1999 Act. Following that order, the date of the provision of accommodation was brought forward to 4 September 2018.

52. Permission to apply for judicial review was granted on 29 January 2019. The hearing began on 12 June 2019. At that hearing, permission was granted to amend the grounds of claim to add two new grounds, namely that the defendant had failed to act with all reasonable speed and expedition, and had acted in reliance on an unpublished policy establishing internal detention progression panels but failed follow that policy. A judgment giving detailed reasons for permitting the amendment was given on that day. The defendant requested a period of 21 days to file evidence and amended detailed grounds of defence to respond to those two new grounds. The hearing was then completed on 24 July 2019. I am grateful for the helpful and focussed submissions of Ms Harvey, for the claimant, and Ms Masood, for the defendant, and their clear presentation of the material relevant to this claim.

THE LEGAL FRAMEWORK

Deportation and Detention

53. Section 3(5) of the 1971 Act provides that:

> "(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –

> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported."

54. Paragraphs (2) and (3) of paragraph 2 to Schedule 3 to the 1971 Act provide that:

> "(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> "(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on immigration bail under Schedule 10 to the Immigration Act 2016."

55. There is case law governing the exercise of the power to detain including, most notably, the principles established in *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704 and *R (I) v Secretary of State for the Home Department* [2003] INLR 196, and approved in *R (Lumba) Secretary of State for the Home Department (Justice Intervening)* [2012] 1 AC 245. In summary, these principles require that (1) the defendant must intend to remove the person and can only use the power to detain for the purposes of removing a person (2) the person may only be detained for a period that is reasonable in all the circumstances, (3) if, before the expiry of that period, it becomes apparent that the Secretary of State will not be able to effect removal within a reasonable period, he should not seek to exercise the power to detain a person and (4) the Secretary of State should act with reasonable diligence and expedition to effect removal. Those principles, and the case law, is considered further below.

56. There are also policies governing the exercise of the power to detain. An individual can generally expect to have his case dealt with in accordance with a relevant policy unless there are good reasons for departing from the policy. One relevant policy document in force at the material time was contained in chapter 55 of a document called "Enforcement Instructions and Guidance" ("the EIG"). That policy makes it clear that there is a presumption in favour of temporary admission or release and, whenever possible, alternatives to detention are to be used. It notes that detention is most usually appropriate:

> " to effect removal
>
> initially establish a person's identity or the basis of claim, or
>
> where there are good reason to believe that a person will fail to comply with any conditions attached to a grant of immigration bail".

57 The EIG also deals with deportation. It provides that detention must be used sparingly and for the shortest period necessary. It notes that it may be better if detention is

effected later in the deportation process, for example when rights of appeal have been exhausted. It notes that "All other things being equal" a person may have more incentive to comply with restrictions imposed if released if the person has an appeal pending or representations outstanding. It notes that the risk of re-offending or absconding should be weighed against the presumption in favour of immigration bail where the deportation criteria are met. Later in the document, the EIG notes that detention in deportation cases can only lawfully be used where there is a realistic prospect of removal within a reasonable period. The EIG sets out relevant factors to be taken into account when considering the need for initial or continued detention. These include the likelihood of the person being removed and if so in what timescale, evidence of previous absconding or a previous failure to comply with conditions of temporary admission, a previous history of failing to comply with the requirements of immigration control, the person's ties with the United Kingdom (including the presence of relatives, or having a settled address or employment), and factors relating to the individual's expectations about the outcome of the case (such as an outstanding appeal or application or representations which afford an incentive to keep in touch).

58 Paragraph 55.3.1 of the EIG, dealing with criminal casework cases, provides that in all cases caseworkers should consider whether removal is imminent. As a guide, it says that removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place within the next four weeks.

59 The EIG also provides:

> "Risk of absconding
>
> "55.3.2.5 If removal is not imminent, the caseworker should consider the risk of absconding. Where the person has been convicted of a more serious offence, then this may indicate a high risk of absconding. An assessment of the risk of absconding will also include consideration of previous failures to comply with immigration bail. Individuals with a long history of failing to comply with immigration control or who have made a determined attempt to breach the UK's immigration laws would normally be assessed as being unlikely to comply with the conditions of immigration bail.
>
> "Examples of this would include multiple attempts to abscond or the breach of Enforcement Instructions and Guidance previous conditions, and attempts to frustrate removal (not including the exercise of appeal rights). Also relevant is where the person's behaviour in prison or immigration removal centre (IRC)(if known) has given cause for concern. The person's family ties in the UK and their expectations about the outcome of the case should also be considered and attention paid to the requirement to have regard to the need to safeguard and promote the welfare of any children involved. The greater the risk of absconding, the more likely it is that detention or continued detention will be appropriate. Where the individual has complied with attempts to re-document them but

> difficulties remain due to the country concerned, this should not be viewed as non-compliance by the individual."

60 There are provisions in the EIG dealing with the assessment of the risk of harm to the public

Medical and Mental Health Issues

61 In view of some of the submissions relating to the mental health of the claimant, it is necessary to refer to statutory and policy material relating to the detention of persons with potential mental health issues.

62 Every detention centre is required to have a medical practitioner who has trained as a general practitioner. Every detained person must be given a physical and mental examination by the medical practitioner within 24 hours of admission to the detention centre. See rules 33 and 34 of the 2001 Rules. Rule 35 is in the following terms:

> "35.— Special illnesses and conditions (including torture claims)
>
> (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
>
> (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.
>
> (6) For the purposes of paragraph (3), *"torture"* means any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in a situation in which—
>
> (a) the perpetrator has control (whether mental or physical) over the victim, and
>
> (b) as a result of that control, the victim is powerless to resist."

63 Section 59 of the Immigration Act 2016 also imposes a duty on the defendant to issue guidance on the detention of vulnerable persons. It provides so far as material that:

> "59 Guidance on detention of vulnerable persons
>
> (1) The Secretary of State must issue guidance specifying matters to be taken into account by a person to whom the guidance is addressed in determining—

(a) whether a person ("P") would be particularly vulnerable to harm if P were to be detained or to remain in detention, and

(b) if P is identified as being particularly vulnerable to harm in those circumstances, whether P should be detained or remain in detention.

(2) In subsection (1) *"detained"* means detained under—

(a) the Immigration Act 1971

…..,

and *"detention"* is to be construed accordingly.

(3) A person to whom guidance under this section is addressed must take the guidance into account.

…..:"

64 The defendant has published guidance entitled "Adults at risk in immigration detention". That gives guidance on, amongst other things, assessing risk and the weight to be afforded to particular evidence in order to assess the likely risk of harm to the individual if he or she is detained for the period necessary to effect removal. There are three levels of risk identified in the guidance. Level 1 involves a self-declaration by the individual of being an adult at risk to which limited weight will be afforded if the issues raised cannot be readily confirmed. Level 2 involves professional evidence (for example from a medical practitioner, social worker or others) or documentary evidence which indicates that the person is or may be an adult at risk. The guidance says that this evidence should be given greater weight and normally accepted and consideration given to how this may impact upon the detention. Level 3 involves professional evidence stating that an individual is at risk and that a period of detention would be likely to cause harm, for example because it would increase the severity of the symptoms or the conditions leading to the individual being at risk. The guidance say that such evidence should be given significant weight. It should normally be accepted and any detention justified in the light of the evidence. The Adults at Risk guidance then gives guidance on how the risk should be weighed against immigration factors such as how quickly removal is likely to be effected, the compliance history of the individual and any public protection concerns. It deals with questions relating to the length of time in detention and public protection issues. It gives guidance on compliance issues identifying positive factors, such as having fully complied with conditions of leave, and negative factors.

65 The Adults at Risk guidance provides that in level 2 cases, where there is no indication that detention is likely to lead to a significant risk of harm if the person is detained for the period identified as necessary for removal, detention should only be considered if one of a specified number of conditions are met. These include the presence of negative indicators of non-compliance which indicate that the individual is highly likely not to be removable unless detained. In level 3 cases, the guidance says that detention should only be considered if removal has been set for a date in the immediate future and there are no barriers to removal or if there are significant public

protection concerns. It states that it is very unlikely that non-compliance issues on their own would justify detention.

False Imprisonment

66 The claimant contends that the entire period he spent in immigration detention was unlawful and seeks a declaration to that effect and also damages for false imprisonment. At common law, false imprisonment is a tort, that is, it is a civil wrong giving rise to a claim for damages. The tort "has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it" (per Lord Bridge of Harwich in *R v Deputy Governor of Parkhurst Prison ex p. Hague* [1992] A.C. 58 at 162CD and see *R (Lumba) v Secretary of State for the Home Department* [2012] A.C. 245 at paragraph 65.

67 It is for the claimant to demonstrate that he was directly and intentionally imprisoned by the defendant. Once the claimant had done so, the burden then shifts to the defendant to show that there was lawful justification for the defendant. If the defendant cannot do so, the claimant will have been falsely imprisoned and the claimant will then be entitled to damages for the tort of false imprisonment.

68 In certain circumstances, even if the detention were unlawful, the claimant will only receive nominal damages. That will occur if the defendant can demonstrate, on a balance of probabilities, that the claimant would have been subjected to the detention not merely that the claimant could have been subjected to such detention. The burden is on the defendant to show that the claimant would have been detained. That involves, in essence, two questions. The defendant must establish that there is a power which, used lawfully, permitted the detention. The defendant must show, on the balance or probabilities, that the power would, not could, have been used and that the claimant would have been detained.

THE ISSUES

69 The claimant contends that the entire period of detention from 4 January 2018 until 4 September 2018 (which is when the claim form alleges that the detention ended) was unlawful. Having regard to the amended grounds of claim and the written and oral submissions of the parties, the issues that arise are these:

(1) on what date did the claimant cease to be detained pursuant to paragraph 2 of Schedule 3 to the 1971 Act?

(2) was detention ever reasonable because deportation was not imminent or because removal to Algeria was not possible?

(3) was the actual period of detention reasonable and/or did it become apparent that the deportation could not be effected within a reasonable period and if so when did that occur?

(4) did the detention become unlawful from 16 February 2018 when a report under rule 35(3) of the 2001 Rules was made and/or was that report defective so that the defendant acted in breach of his policy by failing to refer the report back and continuing to detain the claimant?

(5) was the detention unlawful because the defendant operated an unpublished policy providing for the establishment of case progression panels and/or because the defendant did not implement recommendations for release made in April and June 2018?

(6) did the detention become unlawful, and if so when, following the identification by the clinical psychologist, Ms Fitton, that detention was having a significant detrimental impact on the claimant?

(7) did the defendant use all reasonable speed and expedition to effect removal, in particular, in relation to the steps taken to obtain an emergency travel document?

(8) has the defendant failed to comply with a duty to put in place a system allowing for consideration of individual circumstances and the identification of vulnerability?

THE FIRST ISSUE – THE DATE WHEN DETENTION CEASED

70 The first issue concerns the period of detention. It began on 4 January 2018 when the custodial element of the claimant's sentence for theft came to an end and he was detained pursuant to powers conferred by the 1971 Act. The claim form contended that the detention only came to an end when the claimant left the immigration detention centre on 4 September 2018.

Discussion

71 It is for the claimant to demonstrate that he was being detained and then for the defendant to justify the detention. Detention is the imposition of a constraint upon a person's freedom of movement from a particular place: see the cases reviewed recently by the Court of Appeal in *R (Jollah) v Secretary of State for the Home Department* [2018 EWCA Civ 1260, [2019] 1 WLR 394. In the present context, it involves the exercise of power by the defendant under paragraph 2(2) of Schedule 3 to the 1971 Act to detain an individual.

72 On the evidence before the court, the defendant ceased to exercise his powers to detain the claimant on 16 August 2018. The defendant wrote on that day to say that the claimant had been assessed as an adult at level 3 risk and a decision had been taken to release him. The defendant wrote to the claimant's solicitors indicating that the claimant may be eligible under certain statutory provisions for support which would include accommodation if an application were made. The letter asked if there were any alternative means of accommodation for the claimant or whether he was content to be released with no fixed abode. The letter indicated that if a response was not received by 15.30 on 16 August 2018 the claimant would be released to no fixed abode. The claimant did not physically leave the detention centre on that date. A minute dated 17 August 2018 notes that the claimant was sent a release referral document and a notice of bail on 16 August 2018 but he had declined the leave the detention centre as he had no accommodation. There then followed a dispute about the provision of alternative accommodation which was resolved by the grant of interim relief requiring the defendant to provide accommodation on 4 September 2018 and on that date the claimant physically left the centre.

73 In my judgment, the claimant ceased to be detained pursuant to paragraph 2 of Schedule 3 to the 1971 Act on 16 August 2018. He was no longer required or compelled to be in the detention centre and could have left the centre. There were separate issues surrounding the obligation of the defendant to provide alternative accommodation. The fact that the dispute was not resolved until later did not mean that the claimant was detained in the detention centre. He remained in the centre whilst those issues were resolved but he was not legally compelled or required to be there.

THE SECOND ISSUE - WAS DETENTION EVER REASONABLE

74 The second issue concerns the question of the reasonableness of *any* period of detention. Ms Harvey for the claimant submits that the removal of the claimant was not imminent. Ms Harvey contends that there was never any prospect at any stage during detention that the claimant would be removed to Algeria in a timely manner or at all (ground 1a of the claim form). Ms Masood for the defendant contended that detention was lawful.

Discussion

75 The decision to detain the claimant here did comply with the first principle in *Hardial Singh* namely that the defendant intended to deport the claimant and used the power for that purpose. There was a statutory power to detain pursuant to paragraph 2(2) of Schedule 3 to the 1971 Act. The claimant had been served with a notice of an intention to deport as the defendant considered that deportation was conducive to the public good given that the claimant was a persistent offender. The defendant decided to detain the claimant, and did detain him on 4 January 2018, for a purpose permitted by statute, namely to effect his deportation. The claimant could not be deported immediately for two reasons. First, he claimed asylum on 3 January 2018 and secondly, the defendant needed to obtain an emergency travel document for the claimant from the Algerian authorities.

76 The decision to detain the claimant also complied with the applicable policy. The relevant provisions of the EIG indicate that detention will be appropriate if removal is imminent as defined in the policy (see paragraph 54 above). That, however, is not the only situation when detention will accord with the policy. The presumption in favour of bail will also be rebutted where there are good reasons to believe that a person would fail to comply with any conditions attached to a grant of immigration bail. In relation, specifically, to deportation the EIG notes that if removal is not imminent, the risk of absconding needs to be considered. It notes that an individual who had a long history of failing to comply with immigration control would normally be assessed as being likely to fail to comply with the conditions of immigration control. The claimant was such an individual and the defendant was entitled, and justified, in concluding that detention was in accordance with that policy.

77 The claimant relied upon the fact that earlier applications for an emergency travel document had not resulted in the grant of the relevant document in 2013, 2014, and 2015. Ms Harvey submitted that that showed that the Algerian authorities were never going to grant an emergency travel document for this claimant. The relevant Home Office guidance indicated that there was no consistent timescale for obtaining such a

document. She therefore submitted that the entire period of detention was unlawful as deportation was not, and could not be, imminent or effected.

78 On the facts, the defendant has demonstrated that the earlier applications had not, in fact, been submitted to the Algerian authorities. They had not previously been asked to grant an emergency travel document and no inference could be drawn from the fact that emergency travel documents had not been granted in 2013, 2014 or 2015. Rather, the position is that there was nothing, in principle, to cast doubt upon the fact that the Algerian authorities would grant a properly completed application for an emergency travel document for an Algerian national. The Home Office document on returns to Algeria clearly envisages that such documents will be granted although it noted that there was no consistent timetable for dealing with such applications. It notes that interviews (which, I was told, is often a source of delay in obtaining emergency travel documents) were not generally required. In all the circumstances, the defendant was entitled to assume that an emergency travel document would be provided within a reasonable timescale.

THE THIRD ISSUE – THE SECOND AND THIRD *HARDIAL SINGH* PRINCIPLES

79 Ms Harvey for the claimant contended that the period of detention was not reasonable. She submitted that it was unreasonable after the 20 April 2018 when an internal decision on the asylum claim was taken and when a further two months and a ½ were taken prior to the decision and the deportation order being served on the claimant on 3 July. Further, or alternatively, she submitted that the period of detention was unreasonable, or it became apparent that detention could not be effected within a reasonable period, at the end of March 2018 when the Migration Liaison Officer had not been able to provide relevant information to enable an application for an emergency travel document to be made, or at the end of April, May or at the latest early July 2018, when it was clear that the information from the Migration Liaison Officer would not be forthcoming until August at the earliest and no application would be made before that date. There was no consistent timescale for the grant of an emergency travel document and, in all the circumstances, detention after the end of March (or April, May, or June 2018) involved a breach of the second or third of the *Hardial Singh* principles.

80 Ms Masood for the defendant submitted that the period of detention was reasonable in the circumstances. In relation to the third principle in *Hardial Singh*, the question was whether it had become apparent to the defendant that he would not be able to effect deportation within a reasonable period. In the present case, what was reasonable had to take account of the high risk of the claimant absconding and re-offending, the length of the period of detention, the nature of the obstacles, and the nature and effects of detention. Here, there was an internal decision to reject the asylum claim and certify it as clearly unfounded and the letter to that effect was finalised on 29 June 2018 and served on 3 July 2018 with the deportation order. There were attempts to chase the information necessary to make an application for an emergency travel document and, whilst there was no Migration Liaison Officer in post from March to July, and the officer then went on leave on 8 July 2018 for four weeks, there was nothing to suggest that it was apparent that deportation could not be effected within a reasonable time or, as it is expressed in some cases, that there was no sufficient prospect of removal within a reasonable period (see *R (A) v Secretary of State for the Home Department* [20107] EWCA Civ 804 at para. 45). Further, there was no

requirement that the defendant be able to identify a specific time or period by which removal would be effected, relying on *R (Muqtaar) v Secretary of State for the Home Department* [2013] 1 WLR 649, and *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112.

Discussion

81 For convenience, it is appropriate, to set out again the relevant principles identified in *Hardial Singh* as encapsulated in *R (I) Secretary of State for the Home Department* [2003] INLR 2006 (and see the judgment of Lord Dyson in *Lumba* [2012] 1 SC 212 at para. 22). They are:

> "(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 a 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. "

82 As Lord Dyson observed at paragraph 103 of his judgment in *Lumba*, there may be situations where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State may not be able to deport the detained person within a period that is reasonable having regard in particular to the time already spent in prison. Factors relevant to that include those set out at paragraph 104 of his judgment where Lord Dyson approved his earlier judgment in *R (I) v Secretary of State for the Home Department* where he said:

> "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."

83 Further guidance is given on the importance of the risk of absconding and re-offending. In addition, I accept that it is not necessary for the defendant to be able to identify a finite time by which, or period of time within which, deportation will be effected.

84 Against that background, the principal relevant factors in the present case are as follows. First, there was a very high risk of the claimant absconding if he were released rather than detained. He had failed to comply with requirements that he report to immigration officers on a number of occasions. He had no family or close ties indicating that he would be likely to remain in a single, known location.

85 Secondly, there was a high risk of the claimant re-offending. He had been convicted on a number of occasions. Whilst there was a high risk of re-offending, it is right to note that the offences were mainly ones of theft (although they were serious and, on one occasion, resulted in a sentence of 30 months' imprisonment). It is right to note, however, that the offences were not ones that involved violence or sexual abuse and the claimant was not a dangerous offender.

86 Thirdly, the two barriers to removal were the fact that the claimant claimed asylum and the need to obtain an emergency travel document from Algeria. The asylum claim was made on 3 January 2018. The claimant was detained on 4 January 2018. By the end of January 2018, the relevant asylum interviews had been conducted. By 20 April 2018, an internal decision had been taken to refuse the asylum claim and certify it as clearly unfounded. The draft letter had to be checked, and the question of whether there were any factors indicating that return was not compatible with Article 8 ECHR addressed. By 16 May 2018, an internal decision had been taken that return would be compatible with Article 8 and to certify that claim as clearly unfounded. The letter was approved on 29 June 2018 and served on 3 July 2018, together with the deportation order. The period taken to make an initial decision on the asylum claim, that is a period of just under 4 months, between 4 January 2018 and late April 2108, was reasonable. There was a further period of two months when the decision letter was drafted, amended, checked, and then served. That is a little long but, given the importance and significance of the decision, it was appropriate for the defendant to check matters carefully and ensure the decision letter was properly drafted and legally sound.

87 The second barrier was the need to obtain an emergency travel document. That would require verification of certain facts relating to the claimant by the Migration Liaison Officer in the British consulate in Algeria. The defendant began the process early – in late November 2017, whilst the claimant was in prison. Officials in the RL Team of the Home Office did follow up the matter in March 2018 and were told that not much progress had been made with the checks as the application was full of contradictions. The Migration Liaison Officer left at about the end of March 2018 and the post was vacant until about 4 July 2018 and the newly-appointed officer then went on leave on 8 July 2018 for four weeks.

88 Given, in particular, the high risk of absconding and of the commission of further offences of theft, and given that the defendant had to obtain information from the Migration Officer before making an application to the Algerian authorities for an emergency travel document, it was reasonable to detain the claimant pending the new Migration Liaison Officer taking up her post and whilst she was on leave. The period of detention was not unreasonable. It would not have been apparent then that detention could not have been effected within a reasonable period. The defendant's evidence is that they had consistently expected the process of obtaining an emergency travel document from the Algerian authorities to take 3 to 6 months. Assuming that the Migration Liaison Officer obtained the necessary information relatively quickly after her return from annual leave in early August 2018, the claimant would be detained until between some time in November 2018 and some time in January 2019. That would result in a period of between about 10 to 13 months detention from 4 January 2018. In all the circumstances, that would not have been an unreasonable period of detention. I deal below with the specific factors which are said to have

rendered detention unlawful at an earlier period, or during February or July 2018, and the fourth *Hardial Singh* principle. In the circumstances, however, the defendant has demonstrated that there was no breach of the second and third *Hardial Singh* principles.

THE FOURTH ISSUE - THE FEBRUARY RULE 35(3) REPORT

89 I have considered the significance of the report from Dr Arsiwalla made on pursuant to rule 35(3) of the 2001 Rules. Ms Harvey made essentially two submission in relation to this report. First, Ms Harvey submits that the claimant was recognised as being a person who was an adult at risk level 2 under the Adults at Risk guidance on 16 February 2018 and continued detention thereafter did not accord with that policy. Secondly, Ms Harvey submits that the report was defective as it did not comply with the template for rule 35(3) reports which required the doctor to set out a reasoned assessment of the impact that detention is having on the detainee. The defendant, she submits, should have referred the report back to the doctor to provide this information. That would then have enabled the defendant to assess whether in fact the claimant should have been recognised as being at level 3 under the Adults at Risk guidance. Ms Masood for the defendant submits that the continued detention after receipt of the rule 35(3) report was in accordance with policy and the report was not defective. A report under rule 35(3) does not, she submits, have to provide the information that the claimant says is required, namely the likely impact on the detainee of detention. That information is required in relation to other reports, namely those under rule 35(1) or (2) of the 2001 Rules, but not those submitted under rule 35(3).

Discussion

90 The report of Dr Arsiwalla noted that the claimant had claimed to be tortured and his account appeared to be consistent with his injuries (to his left thumb and right wrist). The doctor noted that the claimant was suffering mental distress as a result and would be referred to the mental health team and asked that the matter be reviewed and investigated as considered necessary. The defendant did consider that report within 3 days and reviewed the claimant's detention. The defendant accepted that the claimant was at level 2 in the Adults at Risks guidance but noted that the doctor had not indicated that detention would cause the claimant harm. The defendant noted that there was a high risk of the claimant absconding and considered that the asylum claim (and any appeal) could be considered within a reasonable time (estimated at 5 months). The defendant, therefore, decided to maintain the detention.

91 The Adults at Risk guidance recognises that where a person has been identified as a level 2 risk that person may continue to be detained but only in certain specified circumstances. One of those is where there are "negative indicators of non-compliance which suggest that the individual is highly likely not to be removed unless detained". There are seven negative indicators listed and, as Ms Masood submitted, the claimant meets a number of them, including having failed to comply with reporting restrictions, having made an asylum claim only after being served with a negative immigration decision (here the notice of intention to deport), and having engaged in nationality swapping (when saying he had been issued with a French passport). The defendant considered the likely timescale for removal. He noted, correctly, that the doctor had not indicated that detention would cause harm (although

given the claimant's mental distress, he recommended that the claimant be referred to the mental health team). The defendant has justified his decision of 20 February 2019 to continue detention of the claimant following Dr Arsiwalla's rule 35(3) report. The continued detention of the claimant in the circumstances was consistent with the Adults at Risk guidance.

92 For completeness, I note that records of subsequent detention reviews do not refer to the claimant as being at level 2 risk under the Adults at Risk Guidance but tick the box marked N/K. It is clear from the records that the officers knew of the rule 35 report dealing with the claim that the claimant had been tortured and that the defendant had decided to continue detention. The error in ticking the wrong box is not, therefore, one of substance and does not demonstrate any material error on the part of those who subsequently reviewed the detention. Further, the report did not indicate that detention was harming the claimant. On occasions, however, the detention review records express this more positively by, for example, recording the doctor as saying that detention could continue. Despite the differences in wording, this does not alter the fact that the doctor's report did not indicate at that stage that detention was having a harmful effect on the claimant. Continued detention was, consequently, not inconsistent with the relevant guidance. Ms Harvey also referred to the warning note that came with the claimant from court to prison referring to suicide or self-harming. That note came in May 2013. The medical notes at the time record that the matter was considered and the problems were physical health, that the claimant was stable and there was nothing to suggest the need for special observation. The note of May 2013 does not begin to suggest that the claimant was, or should have been identified, as a level 2 or level 3 risk when detained.

93 Furthermore, I do not accept the submission that the report prepared by Dr Arsiwalla was defective. It is clear from rule 35 that there are three situations in which a report may need to be prepared. The first, under rule 35(1), deals with a situation where the medical practitioner considers that a detained person's health is likely to be injuriously affected by detention and the second, under rule 35(2) concerns people at risk of suicide. Annex A to the Detention Services Order 09/2016 ("the Order") provides template reports for use in those two cases. That template provides for the medical practitioner to state why the detained person's heath is being affected and to give an assessment of the impact of that detention.

94 The report prepared by Dr Arsiwalla was prepared under rule 35(3). It was not prepared under rule 35(1) and, consequently, the template for reports prepared under that latter sub-rule was not the template that the Order contemplated would be used for Dr Arsiwalla's report. That report recorded the concerns that the claimant may have been the victim of torture. The report did conform with the template required for such reports and did provide the information required by that template and by the guidance on completing reports for preparing and submitting a report where there are concerns the detainee may have been a victim of torture. The report was not defective and there was no failure to comply with the relevant policy guidance.

THE FIFTH ISSUE - THE CASE PROGRESSION PANEL

95 The amended grounds of appeal contended that the defendant operated an unpublished policy providing for the establishment of case progression panels and the defendant failed to implement recommendations in April and June 2018 that the

claimant should be released. Since permission to amend was granted, the defendant has, helpfully, put in a witness statement from Mr Maddy explaining how the panels came to be established and from Mr Faulkner who was the authorising officer in April 2918 who authorised continued detention.

96 First, there was a concern that the situation may be one where the defendant was operating an unpublished policy governing the exercise of a statutory power. Such a situation arose in *R (Lumba) v Secretary of State for the Home Department (Justice intervening)* [2012] 1 A.C. 245. There Lord Dyson observed at paragraph 35 of his judgment that an individual had a right to be treated in accordance with the applicable policy in force at the time and a correlative right to know what that currently existing policy is. Taking decisions in the exercise of a statutory power in accordance with guidance contained in an unpublished policy may in appropriate circumstances lead to an unlawful decision: see, e.g. *R (Lupepe) v Secretary of State for the Home Department* [2017] EWHC 2690 (Admin) at paragraphs 61 to 66.

97 The present case, however, is different. Here, the defendant was reacting to recommendations made in 2016 on a "Review into the Welfare in Detention of Vulnerable Persons" by Stephen Shaw. As Mr Maddy explains in his witness statement, the recommendation was that the Home Office consider if and in what way an independent element could be established in detention reviews. In response, the defendant established case progression panels which came into operation in February 2017. They were an additional, internal, measure intended to secure a degree of involvement by independent person. The panels would review detentions on a three-monthly basis. That is what happened in the present case. The case progression panel did review the claimant's detention and made recommendations. The defendant was not, in truth, exercising statutory powers by reference to unpublished criteria and the absence of published guidance on the use of the panels after they were created did not amount to a material error affecting the lawfulness of the detention.

98 Secondly, there is the question of whether those dealing with reviews of continued detention did take into account the recommendations of the case progression panel in this case. It is clear from the evidence of Mr Faulkner, which I accept, that he did consider the case progression panel's recommendation for release when he reviewed continued detention in April 2018 although, by oversight, he did not specifically refer to that in his comments in the detention review. He took a different view from the panel as the panel considered that an in-country right of appeal would be available to the claimant if his claim for asylum was refused whereas Mr Faulkner, on the information that he had, considered that the claimant would not be given an in-country right of appeal. That would result in a different, shorter time scale before the case could be concluded and that, in Mr Faulkner's view, meant that the likely period of detention was reasonable. His view was a justified one. There was, therefore, no failure in the April 2018 review, to have regard to the recommendation of the case progression panel. Rather there was a considered and justified departure from the recommendation. The fact that Mr Faulkner did not record the reasons for not following the recommendation was not a material error affecting the lawfulness of the detention (see *Lumba* at para. 68).

99 Thirdly, the recommendation made by the case progression panel on about 19 June 2018 was not recorded or sent to those responsible for the case until 30 July 2018. Those reviewing the claimant's detention on 21 June 2018, or on 19 July 2018, would

not, therefore, have been aware of the recommendation. Those carrying out the detention review on 21 June and 19 April 2018 cannot be said to have failed to have regard to a relevant consideration when the recommendation of the case progression panel was not drawn to their attention.

100 In summary, therefore, there was no error of law in relation to the way in which case progression panels were established. The defendant did not fail to have regard to the case progression panel recommendation in April 2018 but departed from it for justifiable reasons. The recommendation made on 19 June 2018 was not drawn to the reviewing officers' attention in June or July 2018. The way in which case progression panels were established and their recommendations dealt with did not affect the lawfulness of the detention in this case.

THE SIXTH ISSUE – THE RESPONSE TO THE REPORT BY THE CLINICAL PSYCHOLOGIST

101 Ms Harvey submits that a clinical psychologist, Lucy Fitton, identified on 13 July 2018 that detention was detrimental to the claimant's mental health and he should have been assessed under the Adults at Risk guidance as a level 3 risk. The defendant did accept that on 16 August 2018 and, Ms Harvey sumbits, that must be a clear acceptance that detention was unlawful from the 13 July. Ms Masood submits that a request was made for clarification on 17 July 2018 and once a rule 35(1) report was received a decision was taken.

Discussion

102 The real question is whether continued detention was consistent with the Adults at Risk guidance. That guidance deals, firstly, with the question of classification of risk. The guidance provides that professional evidence that a period of detention is likely to cause harm to a detained person "should normally be accepted and any detention reviewed in the light of the accepted evidence". It then deals with how to approach that evidence.

103 On the first issue, Ms Fitton's assessment was sent to the case worker responsible for the claimant's case on 13 July 2018. By an e-mail sent on 17 July 2018 in response to that assessment, the case worker sought the name of the doctor who determined that the claimant had symptoms of post traumatic stress disorder and said that if the claimant was believed to be unsuitable for detention as an adult at risk level 3, a rule 35 report must be raised. First, it should be borne in mind that it is not correct that under the Adults at Risk guidance a rule 35 report from the medical practitioner pursuant to rule 35 must be provided. That is often a way, possibly the most frequent way, in which such concerns will come to light but it is not the only way. It is clear from the Adults at Risk guidance that evidence may be provided by other professionals and that would include a clinical psychologist. Secondly, however, the Adults at Risk guidance is to be interpreted as permitting those involved in detention to obtain further information about the diagnosis or basis of the opinion or other relevant matters. That is implicit in the words "should normally accept". There may be cases where further information can reasonably be required. If the guidance is to be read as permitting further inquiries, it is also to be read as requiring those inquiries to be carried out with reasonable speed. The context is the potential harm that detention

may be causing to detainees and the need to review detention in the light of the receipt of professional evidence to that effect which should, according to the guidance itself, normally be accepted. In those circumstances, if the guidance permits of further inquiries in relation to the professional evidence, it is implicit that those inquiries should be carried out with reasonable speed.

104 On the second issue, how to approach the review of detention, given that the professional evidence will normally be accepted, the guidance provides, broadly, that continued detention is only appropriate if removal has been fixed for a date in the immediate future and there are no barriers to removal, or there is a significant public protection risk. It is said that non-compliance issues would be unlikely, on their own, to justify continued detentions of adults within the level 3 risk category. I note also that, in the case of reports made pursuant to rule 35(1), the relevant official must review the detention and respond within 2 working days.

105 In the present case, the concerns of the clinical psychologist were sent to the case worker on Friday 13 July 2018. The request for the name of the doctor and a rule 35 report was made on Tuesday 17 July 2018. Where a case worker reasonably has concerns that the information provided by the clinical psychologist was not adequate, the case worker should normally take immediate steps, i.e. within two or possibly three working days, to obtain the necessary further information. In the present case, seeking information on 17 July 2018, within 3 working days of receiving the assessment from the clinical psychologist, was not unreasonable or unlawful and did not involve a breach of the Adults at Risk guidance.

106 The position was considered when detention was reviewed on 19 July 2018. By that stage, as the review records note, concerns had been raised and clarification sought. At that stage, the report from the doctor was awaited. In the circumstances, those reviewing the detention on 19 July 2018 were entitled to await the report from the doctor and, for the reasons they gave, to continue detention.

107 The rule 35(1) report was not prepared until 9 August 2018. The evidence before me does not explain why a period of approximately 23 days (from the reference by the case work on 17 July 2018 to 9 August 2018) was needed. However, as the report itself indicates that a team of mental health professionals were involved, I infer that this was the time needed to assess the claimant's mental health and I would not find the detention unlawful because of the time taken by the health professionals in preparing the report.

108 The rule 35(1) report was provided on Friday 10 August 2018 but a decision was not taken until 16 August 2018. The Adults at Risk guidance requires that the caseworker concerned review the detention in the light of the information and respond to the detention centre within 2 working days of receipt. The report was received at some time on Friday 10 August 2018. Assuming that the report was received too late on Friday to enable meaningful consideration of it, the decision should have been taken by the end of the working day on Tuesday 14 August 2018. Thereafter, the claimant's detention from 14 August to 16 August 2018 (a period of two days) was unlawful as he was not detained in accordance with the requirements of the Adults at Risk guidance.

109 For completeness, it may be that those responsible for the guidance may wish to consider whether the guidance needs to be reviewed to provide greater clarity on the process, and the timescale, within which decisions on continued detention are taken when professional evidence (other than a rule 35(1) report) states that continued detention will have a significant adverse effect on the mental health of a detainee. The current guidance is relatively clear when a rule 35(1) report is received but less so in other cases.

THE SEVENTH ISSUE – THE FOURTH *HARDIAL SINGH* PRINCIPLE

110 The next issue concerns the question of whether the defendant acted with reasonable diligence and expedition to effect removal. Ms Harvey submits that the defendant did not as he did not chase the Migration Liaison Officer for information until 13 March 2018, there was no officer in place from the end of March or beginning of April 2018 until 4 July 2018 and then the officer went on leave on 8 July 2018 for 4 weeks. Further, the defendant took no steps after the Migration Liaison Officer returned to her post on 6 August 2018 to obtain further information. Ms Masood submits that the defendant did act with reasonable expedition.

Discussion

111 The detailed chronology is set out at paragraphs 14 to 23 above. The defendant, through the RL Team, did take early and prudent steps to prepare for making an application for a travel document. It sent a copy of the pack of documents which would comprise any application to the British consul in Algeria on 23 November 2017 for comment prior to submission to the Algerian authorities. That was in advance of the claimant's detention beginning.

112 The defendant did request an update on 13 March 2018 and received an e-mail on 18 March 2018 saying there was no progress so far and that was not surprising as there were a lot of contradictions in the application. The claimant's name also appeared on a list of outstanding cases provided on 29 March 2018. It is unfortunate that the Migration Liaison Officer's post was unfilled for approximately 3 months from the beginning of April 2018 to 4 July 2018. However, the defendant could not fairly be said to be acting without reasonable diligence when, in fact, there was no person in post able to provide the necessary information. The defendant did attempt to contact the new office holder on 4 July 2018 but the telephone system did not enable contact to be made. It is again unfortunate that the officer went on leave almost immediately for four weeks but, again, the defendant could not fairly be said to be acting without reasonable diligence when the person he needed to contact for information was on leave.

113 The defendant did not, however, take any steps to contact the Migration Liaison Officer when she returned to her post on, it seems, 6 August 2018. Indeed, the defendant took no steps to contact the officer until 15 May 2019. No explanation for that failure has been provided.

114 In my judgment, the defendant should have taken steps early in August to contact the Migration Liaison Officer. The asylum claim had been rejected and certified as clearly unfounded and the relevant documents served on the claimant by 3 July 2018. The only barrier to removal was the lack of an emergency travel document. The

defendant knew, or ought to have known, that no progress could be made in obtaining the information necessary to make an application between the end of March and the beginning of August 2018. The defendant was in detention and had been for about 7 months by the start of August 2018. In those circumstances, the defendant should have contacted the Migration Liaison Officer within a week or so of 6 August 2018 to seek to establish what information was necessary and whether that could be obtained within a reasonable time scale. There had been no contact, or attempts to contact, the Migration Liaison Officer by 14 August 2018. From 14 August 2018, the defendant has not established that he acted with reasonable diligence and expedition as required by the fourth principle in *Hardial Singh*. For that separate reason, the claimant's detention from 14 August 2018 was unlawful.

THE EIGHTH ISSUE – PUTTING AN APPROPRIATE SYSTEM IN PLACE

115 Ms Harvey contends that the defendant is under a duty to put in place a system allowing for consideration of individual circumstances and the identification of vulnerable individuals and failed to do so.

116 It is not necessary in this judgment to consider the nature and extent of the duty that the claimant says exists. The fact is that, on the evidence in this case, the defendant has put in place a system for identifying vulnerable adults and there is no sufficient evidence of any systemic failures on the part of that system.

117 In terms of the system, the 2005 Rules require immigration detention centres to have a medical practitioner present. A medical examination must be carried out within 24 hours of a detainee arriving in a detention centre. There are obligations on the medical practitioner to report on any case where detention is likely to affect the health of the detained person, where the detained person has suicidal tendencies or may be the victim of torture. Section 59 of the 2016 Act requires the defendant (he "must issue") guidance on determining whether a person would be particularly vulnerable to harm if he were to be detained or remain in detention and, if so, to determine whether he should be detained. The defendant has issued the Adults at Risk guidance. There is, therefore, a system in place specifically for identifying vulnerable persons and considering whether they should be detained.

118 There is no sufficient evidence before this court to suggest that the system, as a whole, is failing, Ms Harvey relied upon paragraph 133 in the judgment of Ouseley J. in *R ((Detention Action) v Secretary of State for the Home Office* [2014] EWHC 2245 where he said.

> "133. But, in my judgment, the evidence as a whole does show that Rule 35(3) reports are not the effective safeguard they are supposed to be. The contrast with releases on the obtaining of an appointment with the Foundations is a strong indicator that Rule 35(3) cannot be regarded as removing from the DFT at least some of whom one would expect to be removed. Anecdotal evidence backs that judgment. The ineffectiveness of this safeguard may be caused by the quality of the reports, the quality of the response as to whether they amount to independent evidence of torture, and in particular whether the continued suitability of the case for fair determination in the DFT is also fully considered. I recognise the limitations of this evidence, and the efforts made to monitor and improve the system, which may yet bear greater fruit. But I am persuaded that Rule 35(3) reports do not work as intended, either by themselves or with Rule 34 to remove from the DFT those with independent evidence of

> torture, or whose case is no longer suitable for fair determination on the quick DFT timetable, as a result of evidence of torture"

119 First, Ouseley J. was dealing with a specific issue – whether the use of fast track procedures was unlawful because they gave rise to unfairness. He was dealing with rule 35(3) reports dealing with torture (not rule 35(1) and (2) reports dealing with whether detention was placing a person's mental health at risk or whether a person had suicidal intentions). He considered that the reports dealing with the possibility that the person may have been the victim of torture were not proving as effective as they should be in ensuring that such a person's case was removed from the fast track process because it was not appropriate for quick consideration. He was not addressing the wider issue of whether the defendant had put in place a system for identifying whether individuals were vulnerable and should not be detained. Secondly, these remarks were made in July 2014, two years before the enactment of section 59 of the 2016 and the giving of specific guidance on the question of detention of potentially vulnerable adults. The observations of Ouseley J. in a different context almost 5 years ago do not begin to justify a conclusion that the current system is failing.

120 Ms Harvey also cited in her skeleton argument extracts from a report prepared by Mr Stephen Shaw for the Home Office. That report is not in evidence before me. It is not appropriate, or feasible, to conclude on the basis of 4 paragraphs from an apparently length report, cited in a skeleton argument, that a system is failing.

121 Ms Harvey relies on what she says are the failures in the present case. First, in relation to the report from Dr Arsiwalla in February 2018, that report was not in fact defective. It was considered and detention reviewed in accordance with the relevant Adults at Risk guidance and detention was continued and that detention was lawful. I have found that the defendant did not process the section 35(1) report provided on 10 in August 2018 within the required two working days. That was because those involved review did not follow the system. It cannot possibly be said that one failure to follow the relevant policy is sufficient evidence to establish that the system as a whole is failing.

122 Ms Harvey also submitted that there was evidence that the case progression panel system was not operating properly as Mr Faulkner did not record the reasons for not following the April 2018 recommendation. Further, she relied on the evidence of Mr Maddy which indicated that, at least in the early period when the panels were being set up, there were some constraints on resources. The establishment of the case progression panels in 2017 were intended as a further, additional check on detention to ensure an independent element in the process. The time taken in ensuring that that additional measures worked effectively does not, in my judgment, begin to suggest that there was any failure to establish an appropriate system for identifying vulnerable persons and reviewing their detention.

123 The claimant has not, therefore, established that the defendant failed to put in place a system for identifying vulnerable persons and assessing whether they should be detained. The defendant has put such a system in place. The claimant has not begun to demonstrate that the system is not working. This ground of claim must therefore be dismissed.

CONCLUSION

124 On the evidence produced in this case, the claimant was lawfully detained from 4 January 2018 up to and including 13 August 2018. The claimant was unlawfully detained from late afternoon on 14 August 2018 until he ceased to be detained in the afternoon of 16 August 2018, that is, for a period of two days. The detention was unlawful for that period as he was not detained in accordance with the requirements of the Adult at Risk guidance and, separately, because the defendant failed to act with reasonable diligence and expedition to ensure his removal from that date. I will hear submissions from the parties as to the appropriate procedure for assessing the amount of damages payable for the two days of unlawful detention.