Neutral Citation Number: [2023] EWHC 510 (Admin)

Case No: CO/4440/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 March 2023

Before :

UPPER TRIBUNAL JUDGE ELIZABETH COOKE, SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

The King on the application of JXL	**Claimant**
- and –	
Secretary of State for the Home Department	**Defendant**

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- -

Hafsah Masood (instructed by **Freemans Law LLP**) for the **Claimant**
Rowan Pennington-Benton (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 1 March 2023

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Approved Judgment

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Upper Tribunal Judge Elizabeth Cooke sitting as a Deputy High Court Judge:

1. The Claimant is the subject of a deportation order made in 2018. He has now been in immigration detention for some 25 months. In this application for judicial review he seeks a declaration that his detention is unlawful, damages, and an order for his release. I am grateful to Ms Masood and Mr Pennington-Benton for their helpful arguments.

The factual background

2. The Claimant was born in 1977 and is a national of Jamaica. He entered the UK in July 2000 as a visitor with limited leave to enter until 15 January 2001. In January 2001 he applied for an extension of his stay as a student which was granted until 30 November 2001, when his leave expired. On 25 July 2002 he applied for leave to remain as a spouse of a British citizen; to jump ahead a little, that application was not determined until 2018, at the same time as the decision to deport the Claimant, by which time his marriage had been over for some years, since 2008 or 2009.

3. The Claimant was convicted of battery in 2005, for which he was sentenced to three months' imprisonment, of possession of drugs in 2006, for which he received an 18 months' conditional discharge, and again of possession of drugs in 2016, for which he was fined. He was also given cautions for four further offences of property damage, fare evasion and possession of drugs.

4. On 28 June 2017 the Claimant was convicted at Woolwich Crown Court of sexual assault and sentenced to 4 years imprisonment. He did not appeal his conviction or sentence. On 3 October 2017 the Defendant served the Claimant with a notice of her decision to deport him, and in January 2018 she served the Claimant with a deportation order signed on 16 January 2018. At the same time she rejected the 2002 visa application. On 31 January 2018, the Claimant appealed the decision to deport him on human rights grounds, claiming the protection of Article 8 of the European Convention on Human Rights.

5. On 31 May 2019 the Claimant was detained by the Defendant under immigration powers on the completion of his custodial sentence. His appeal against the deportation order was dismissed by the First-tier Tribunal on 19 August, and his appeal rights were exhausted on 3 September 2019. On 16 December 2019 removal directions were set for 1 January 2020.

6. On 18 December 2019 the Claimant made an asylum claim. He was released on or about 11 February 2020 (and therefore was now on licence from prison pursuant to his sentence in 2017). His detention from 31 May 2019 to 11 February 2020 is not under challenge in these proceedings.

7. On 8 January 2021, the Claimant was recalled under the terms of his licence for a fixed term of 28 days; the Claimant's instructions to Ms Masood are that he was recalled because he breached covid restrictions. At the end of that fixed term, on 4 February 2021, the Claimant was detained by the Defendant under immigration powers.

8. The Defendant has remained in immigration detention ever since, for over two years, and that is the period under challenge. It will be recalled that at the start of this period

of detention the Claimant's asylum claim made 14 months beforehand remained outstanding.

9. On 4 March 2021 the Claimant was granted bail in principle by the FTT to commence when the Defendant provided a suitable release address, and on 14 May 2021 the Defendant's Case Progression Panel recommended the Claimant's release on the grounds that removal was not going to take place within a reasonable timescale.

10. Nevertheless the Claimant was still in custody when on 14 July 2021 the Defendant's officials received a phone call from "Genesis Legal Advice", saying that the Claimant had stated that he no longer wanted to remain in the UK. On 10 August 2021 he signed a declaration withdrawing his asylum claim and stating that he wished to return to Jamaica and understood that arrangements would be made as soon as possible for his departure. He was still in detention on 1 December 2021 when he signed a disclaimer for the Facilitated Returns Scheme saying that he was content to be returned to Jamaica.

11. However, soon after that the Claimant began to express concern to detention staff about how his medical condition, glaucoma, would be managed in Jamaica. It proved impossible to send him there on a scheduled flight because he was no longer willing to go and the Defendant was constrained to wait until a charter flight was available. In December 2021 he instructed his current solicitors. On 4 January 2022 he said he did not want to go to Jamaica, and on 28 January 2022 he was served with notice that he had been withdrawn from the Facilitated Returns Scheme.

12. On 10 March 2022 the Defendant was advised by her removals desk that the Claimant would not be able to return on a scheduled flight, since the relevant companies were not prepared to take unwilling returns; the Claimant's return would have to await the next charter flight in May.

13. In April the Claimant made a bail application to the FTT; it was withdrawn at the hearing because his solicitors had not appreciated until that point that the asylum claim had been withdrawn the previous August and needed to take instructions.

14. On 05 May 2022, the Claimant was served with removal directions for his removal to Jamaica on a charter flight scheduled for 18 May 2022. The Claimant's representatives wrote to the Defendant pointing out that he had an unresolved asylum claim, to which the response was that that had been abandoned in August 2021. On 16 May 2022, two days before departure, the Claimant made a further asylum claim and removal directions were cancelled.

15. The Claimant's detention was then reviewed. On 15 July 2022 the Case Progression Panel recommended his release on the basis that there was no prospect of imminent removal. On 23 August the Defendant's officer authorised another 28 days detention so that release could be arranged.

16. On 5 September 2022 the Claimant provided a further letter stating that he did want to return to Jamaica voluntarily; then again on 7 September he said he no longer wished to return voluntarily. In October 2022 the Case Progression Panel again recommended release.

17. Shortly after that on 2 November 2022 the Claimant's asylum claim was rejected. The Claimant filed an appeal in the FTT. The FTT on 17 November 2022 refused bail. The FTT held a case management conference on 30 November 2022 and the appeal was listed for hearing on 24 February 2023.

18. Meanwhile after pre-action correspondence the present proceedings were commenced.

19. On 8 February 2023 the Claimant withdrew his asylum claim. He remains in detention.

The law

20. Woolf J's judgment in *Hardial Singh* [1984] 1 WLR 704 is the cornerstone of the law on immigration detention. In *R (I) v Secretary of State for the Home Department* [2003] EWCA Civ 888 it was distilled into four principles:

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

21. At the heart of the Claimant's case is the claim that his detention offended the second and third of those principles.

22. As to the third principle, in *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112 Richards LJ said at paragraph 64:

> " there must be a "sufficient prospect" of removal to warrant continued detention, having regard to all the other circumstances of the case .. What is sufficient will necessarily depend on the weight of the other factors: it is a question of balance in each case.
>
> 65… if a finite time[for removal] can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to

> whether and when removal can be effected will affect the balancing exercise. …
>
> 68. As the period of detention gets longer, the greater the degree of certainty and proximity of removal I would expect to be required in order to justify continued detention.

23. Four further principles are important in the present case.

24. One is that in any case where it becomes apparent that removal will not be possible within a reasonable period, release need not be instantaneous. There is a "period of grace" during which arrangements can be made: *AC (Algeria) v SSHD* [2020] EWCA Civ 36. The Court of Appeal noted that such periods have usually been short, often only a few days, but sometimes running up to a month.

25. Second, the Court has to make its own assessment of the facts, including the risk of re-offending and of absconding – both factors said to have been reasons for detention in this case - and can take into account the facts known to the Defendant at the relevant time but without the benefit of hindsight: *AXDv Home Office* [2016] EWHC 1133(QB) at 176 , *R(Fardous) v SSHD* [2015] EWCA Civ 931. The views of FTT judges when granting or refusing bail are not determinative (*R(Abdollahi) v SSHD* [2013] EWCA Civ 366, paragraph 50). No single factor, and no combination of factors, trumps the rest or makes detention automatically lawful. In particular as regards the risks of re-offending and of absconding, Lord Dyson said in *Lumba* at paragraph 144:

> "There must come a time when, however grave the risk of absconding and however grave the risk of serious offending, it ceases to be lawful to detain a person pending deportation."

26. Third, in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 the Court of Appeal rejected the argument that time taken to resolve legal challenges brought by an individual against deportation should generally be left out of account when considering whether a reasonable period of detention has elapsed. But at paragraph 120 Lord Dyson said:

> "Time taken in pursuit of hopeless challenges should be given minimal weight in the computation of a reasonable period of detention."

27. Finally, in *R(A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 at paragraph 54 Toulson LJ said:

> "I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention… The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss

of liberty involved in the individual's continued detention is a product of his own making."

The arguments

28. The detention in issue here has continued for over two years. Counsel for both parties have sliced up that period in various ways according to the Claimant's expressed state of mind as regards returning to Jamaica and according to whether he did or did not have an asylum claim on foot. Mr Pennington-Benton regarded the latter as crucially important and it may be helpful to regard the detention as comprising four periods:

    i) From February 2021 to August 2021, during which time the asylum claim made in December 2019 remained live.

    ii) Late August 2021 to 16 May 2022 during which there was no asylum claim in progress.

    iii) 16 May 2022 to 8 February 2023, from when the second asylum claim was made to when it was withdrawn.

    iv) 8 February 2023 to date, when there is no legal obstacle to the Claimant's removal.

29. The Claimant says his detention was unlawful at the outset and remains unlawful, being in breach of the second and third *Hardial Singh* principles; he says that he should at all times during the detention have been released because it was apparent that the Defendant would not be able to effect deportation within a reasonable period.

30. The main plank of Mr Pennington-Benton's argument is that the hopelessness of the Claimant's asylum claim, together with the fact that he was assessed as being at significant risk of absconding and of re-offending, justifies without more the periods of detention when he had an asylum claim pending, and that during the period from August 2021 to May 2022 when there was no such claim the Defendant acted expeditiously to remove him.

31. Ms Masood pointed out that it is not possible to say that two facts taken together automatically trump all other considerations, and that of course is right; but it is also right that the Supreme Court has said that time spent in detention in pursuit of hopeless challenges should carry minimal weight (see paragraph 26 above). In view of the emphasis Mr Pennington-Benton places on what he says was the hopeless nature of the asylum claim, and on the importance of the risk of absconding and re-offending, I am going to examine and make findings about those two factors before going on to consider individually the four periods of detention that I identified at paragraph 28 above.

The strength of Claimant's asylum claim

32. The Claimant first made an asylum claim in December 2019. The court does not have a copy of his asylum interviews, but the substance of what he said in the Asylum Screening Interview dated 20 January 2020 and Asylum Interview dated 6 February 2020 is summarised in the Defendant's decision in November 2022. That is because the

claim made in May 2022 was treated as further submissions in the same claim (and so in the discussion that follows I refer to the Claimant's "claim" in the singular).

33. It appears from that summary that the Claimant said that he was in fear of a named gang in Jamaica, with one of whose members he had had an altercation in the UK many years ago; that he was afraid that he was going to be a target for gangs because of his offence in the UK; that he feared indiscriminate violence; and that he was concerned that medical treatment would not be available to him. He explained that he made his claim at the last minute because of information he had received about levels of violence in Jamaica.

34. The Defendant says that this was a hopeless claim, not only extremely weak but also spurious, being made purely to put off deportation.

35. It is said first that the claim can be seen from its substance to have been weak: the claim in December 2019 was made only on the basis of concern about medical treatment, and the basis for the Claimant's later claim that he was afraid of violence was generalised and he could not point to any reason why he would be the target of violence nor to any instance of violence against him in the past. Second, it is said that the claim was spurious because of its lack of substance, because it was abandoned not once but twice, because the later claim on the basis of violence was inconsistent with the earlier one, because on each occasion it was made when removal directions had just been set, and because the appeal was abandoned in February 2023 just before the Claimant was going to have to give evidence before the First-tier Tribunal and be cross-examined.

36. For those reasons Mr Pennington-Benton says that the claim was spurious and that therefore on the authority of *R(A) v SSHD* [2007] EWCA Civ 804 the Claimant simply cannot complain of detention where he is refusing for no good reason to leave the country; the loss of liberty was of his own making (see paragraph 27 above). Even if it was not spurious, he says, the claim was so weak as to fall within the principle expressed in *Lumba* at paragraph 120, quoted above at paragraph 26, so that little weight should be attached to periods spent in detention while the claim was being processed.

37. In response Ms Masood pointed to the evidence surrounding the Claimant's withdrawal of the asylum claim. She pointed to an email dated 13 December 2022 sent to the Claimant's solicitors by a caseworker at Genesis Legal Advice, in which it was said that in July 2021 the Claimant felt that he had been detained too long and he wanted to be released and to be deported back to Jamaica. On 17 February 2023 the Claimant made a written statement in which he said:

> "I no longer wish to remain in the UK if it means that I will continue to be detained. I have been detained for a very long time and all the applications I made for my release were refused. … I feel like I am wasting my life now, I am not feeling well, and I want to be a free man. It feel like I will die in detention so I rather be a free man in Jamaica. I have not been in Jamaica for many years, and I do not know what life would be like there but I a willing to take that chance".

38. For the claimant Ms Masood says that his asylum claim was genuine, and that it was withdrawn because of the Claimant's despair at his apparently indefinite administrative detention.

39. What the Claimant said in his statement of 17 February 2023 is certainly consistent with that; they are also consistent with an asylum claim that is not very strong (so that the Claimant is willing to take his chance in Jamaica) but I am not prepared to infer from the withdrawal of the claims that they were spurious.

40. As to whether the substance of the claim indicates that it was spurious, I can begin by correcting a factual point: it can be seen from the Defendant's decision of 2 November 2022 that the fear of violence was something the Claimant was relying on when he first made his claim. He spoke about it in his interviews. He is said to have explained that he made his claim when he did because of information about the violence in Jamaica. So the first claim was not made only on medical grounds and there is no inconsistency to indicate that the claim for protection was spurious. Nor can I infer that the claim was spurious on the basis of the time when it was made, particularly since it appears that until around March 2022 the Claimant's solicitors did not realise that his asylum claim had been withdrawn. They were trying to catch up with the situation and to press on with the asylum claim, the setting of removal directions made that urgent, and they managed to get the further representations in before it was too late. That does not in itself mean that the claim was spurious.

41. I reject the Defendant's argument that the asylum claim was spurious, made insincerely just to avoid removal.

42. But was it so weak as to carry little weight, as Lord Dyson said in *Lumba*? I accept that it was not strong. Ms Masood points out that where a claim is regarded as hopeless the Defendant has two ways of ensuring that once refused it does not carry a right of appeal. If it relies upon a matter that could have been raised earlier it can certify the claim under section 96 of the Nationality, Immigration and Asylum Act 2916, and section 94(1) provides that the Defendant can certify an asylum or human rights claim as "clearly unfounded". The claim was not so certified in the November 2022 decision. Ms Masood points also to the Defendant's guidance on the certification of protection and human rights claims under section 94, which states (at page 5) that:

> "… cases that are clearly unfounded should be certified unless an exception applies."

43. There is no suggestion that an exception applies.

44. In response Mr Pennington-Benton argued that there might be many reasons for not certifying an unfounded claim, and speculated that the Defendant might not do so for fear of delay arising from a judicial review claim. There is no factual basis for that speculation and I give it no weight. I take it that the Defendant will have followed her guidance, and if she took the view that the claim was clearly unfounded she would have so certified it.

45. A reason why the claim was not certified is found in the Defendant's GCID records; notes made on 2 November 2022 say this:

> "Although [the Claimant's] protection claim is without merit or foundation, due to the current situation and particularly high levels of violence in his home country it is accepted that his protection claim should be considered to be an arguable claim."

46. So the Defendant's own officer regarded the claim as "arguable", and accepted that there were "particularly high levels of violence" in Jamaica.

47. In light of the absence of a certification of the claim as clearly unfounded, and the Defendant's own assessment of the situation in Jamaica and acceptance that the claim was arguable, it is not possible to regard the claim as "hopeless", so as to be given "minimal weight" in assessing the lawfulness of detention. It was not a strong claim, but it was not hopeless. .

The risks of absconding and re-offending

The importance of the risk assessments

48. At the hearing Mr Pennington-Benton said that unless the Claimant can challenge the risk assessments made by the Defendant, he cannot win so far as concerns the periods when he had an asylum claim on foot. That was said on the basis that where there is a hopeless asylum claim and any appreciable risk of absconding or re-offending then detention is justified. That is not the law. In any event, even if it were, the submission could not succeed in light of my decision that the asylum claim was, as the Defendant's officer put it, "arguable", and therefore not hopeless. However, the risk of absconding or re-offending is relevant at all stages in the analysis required in this case and I give it careful scrutiny.

49. I am not going to give any detailed consideration to the assessment of the risk of harm; the role of that assessment is to identify the level of harm that would be caused if the risk of re-offending were to eventuate. I accept that if the Claimant did re-offend, in light of his most recent offence he might cause considerable harm. But the crucial question is how likely it is that he would re-offend, or indeed abscond.

The court is to make its own assessment of the risks

50. There was some discussion at the hearing about the basis on which the court is to assess the risks of absconding and re-offending. It is not in dispute that these are matters that the court has to decide for itself; it is not a matter of reviewing the Defendant's assessment. As Richards LJ put it in *R(A) v SSHD* [2007] EWCA Civ 804 at paragraph 72:

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

51. That said, the Defendant's officers have skills and experience that judges do not have. In the same case Toulson LJ said:

> "There may be incidental questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself. And the court will not doubt take such account of the Home Secretary's views as may seem proper."

52. At paragraph 176 in *AXD v SSHD* [2016] EWHC 1133 Jay J said "in my judgment the Defendant knows more than judges sitting in this jurisdiction about the absconding risk of immigration detainees." I agree, and where the Defendant's officials have made a reasoned decision on the basis of the relevant facts then that is a significant matter to be considered in my judgment of the risks of absconding and re-offending.

The risks of the Claimant absconding or re-offending

53. With that in mind, in assessing the risks in the Claimant's case I begin with the Defendant's own assessments. She has assessed the risks of the Claimant re-offending and of absconding as medium or high (with no reasoning to justify which level is chosen and on one occasion with the box ticked for "high" and the narrative stating "medium"). But none of those decisions considers either of two conspicuous facts. One is that in February 2020 the risks of re-offending and of absconding did not prevent release. The other is that while the Claimant was at liberty for 11 months he neither absconded nor re-offended. In none of the Defendant's decision-making is there any acknowledgement of those facts nor any explanation either of why the decision to release him in February 2020 was wrong or of what had changed to make it too risky in February 2021 or beyond. The Defendant's Summary Grounds of Defence say that the Claimant was assessed at all times as being at medium risk of absconding in light of his knowledge of the Defendant's intention to deport him and his "last-minute attempts to thwart removal once removal directions were set in December [2019]." In light of what I have just said that cannot justify the Claimant's detention in February 2021 or at any point thereafter if it did not justify his detention in February 2020.

54. Nor, as Ms Masood pointed out, was any consideration given to the possibility of managing the risk of absconding or re-offending by electronic tagging, which is mandatory for someone in the Claimant's position (unless an exception applies, which it does not: Schedule 10 to the Immigration Act 2016, paragraph (2)). Mr Pennington-Benton's response to that was to say that tagging does not work. I do not think that that is an answer to the point.

55. So I am unimpressed by the decision-making of the Defendant's officials and I cannot give their assessment much weight.

56. I accept that where a serious offence has been committed, there may well be a risk of re-offending. And I accept that where someone is subject to a deportation order and does not want to leave, as has been the case for a large proportion of the time when the Claimant has been in custody, the risk of absconding cannot be assessed as nil or negligible. There is a risk. But it was clearly not regarded as so high as to prevent his release in February 2020. As Lord Dyson said in *Lumba* at paragraph 123:

> "… a refusal to return voluntarily is relevant to an assessment of what is a reasonable period of detention if a risk of absconding can properly be inferred from the refusal. But I would warn against the danger of drawing an inference of risk of absconding in every case. It is always necessary to have regard to the history and particular circumstances of the detained person".

57. Here the circumstances, and in particular the Claimant's clean record during the period from February 2020 to January 2021, point towards a low risk. The Claimant is an entirely different type of offender from the Claimant in *R(Muqtaar) v SSHD* [2012]

EWCA 1270 who was described as a "chaotic recidivist" and extensive long criminal record included three instances of failure to surrender to custody. Mr Pennington-Benton suggested that the Claimant had no incentive to abscond while he was at liberty because no removal directions were in place. But they were not in place at any point after February 2021, save for a short period in May 2022. Leaving that short period aside I do not accept that the risks of the Claimant either absconding or re-offending were sufficiently serious to carry more than minimal weight in a decision whether or not to detain him from February 2021 onwards, save perhaps for the short period in May 2022 when removal directions were in place which I consider below.

The first period: February 2021 to August 2021

58. I can now turn to the four periods of detention that I identified at paragraph 28 above.

59. In doing so I remind myself, following the focus in the paragraphs above on what counsel called "sub-facts" relating to the asylum claim and the risk assessment, of the principles in *Hardial Singh* and of the need to focus on the prospect of removal: the Secretary of State has power to detain only in order to effect removal, and must act with reasonable expedition in effecting removal; detention can only be for a reasonable time and if before the expiry of a reasonable time it is clear that removal is not going to happen with a reasonable period the detainee should be released.

60. That is what happened, rightly, in February 2020 when the asylum claim stood as a barrier to removal. Mr Pennington-Benton made the startling suggestion that there was no need for the Claimant to have been released at that point. I disagree; there was an obvious need for release because there was then no prospect of removal within a reasonable time and the Defendant did not regard the risk of re-offending or absconding as sufficiently serious or unmanageable to prevent release.

61. What then changed in February 2021, apart from the fact that the Claimant had spent 28 days in prison for breach of a licence condition (obviously not sufficiently serious for the Defendant to keep any record of what it was, but according to the Claimant a breach of lockdown rules)? Mr Pennington-Benton in his skeleton argument said: "At the end of the recall period, 4 February 2021, C was released from prison but immediately detained by D. Given the seriousness of his offending, spurious prior asylum claim, and his inability to comply with licence conditions, this is hardly surprising."

62. Whether or not the detention was surprising, those reasons cannot possibly have justified the detention, either alone or in combination. The Defendant's power to detain cannot be used to punish a criminal offence; as Jay J put it in *AXD v SSHD* at paragraph 182 "past offending cannot be any justification for implementing or extending time in immigration detention." The asylum claim was regarded by the Defendant as "arguable" and was not certified as "clearly unfounded" and I have discounted the suggestion that it was spurious. And it is incorrect to say that the Claimant was unable to comply with licence conditions; he was eventually recalled for a short period because of an infraction, but he had managed satisfactorily up until that point.

63. The GCID case record made on 4 February 2021 justified the Claimant's detention by his past offending and his non-compliance with licence conditions, but stated that "should case progression become protracted and extend beyond what is considered

reasonable" release was to be considered. No view was expressed on that occasion as to the likelihood of the asylum claim being progressed in a reasonable time, which of course should have been the primary focus of the authorising officer's reasoning.

64. In March 2021 the Claimant's detention was authorised on the basis that it was thought that his asylum claim would be determined within 6 weeks. Nothing is referred to as a basis for that optimism. In the GCID record on 6 March 2021 it was noted that the asylum claim had not been referred to an officer for a decision, and that the Claimant's screening and asylum interviews had been requested because they were not in the correct scanned documents folder. In other words nothing had been done since the screening and asylum interviews in January 2020.

65. The absence of any action at all on the asylum claim for the previous 12 months meant that in February 2021 there was no prospect of a decision on the Claimant's asylum claim within a reasonable period – especially as it was, as we have seen, not able to be certified as clearly unfounded and therefore would attract an in-country right of appeal. The detention was unlawful from the outset. That became even more abundantly clear in March when it was found that his records were not in the right place, and again in May 2021 when the Case Progression Panel recommended release.

66. The Defendant seeks to pass the blame to the Claimant for his detention in this period, first because he did not return a section 72 letter. That is a letter requiring him to explain why the presumption that he was excluded from the Refugee Convention should not apply to him. He was sent one on 20 February 2020 and did not reply. But that is no barrier to action on the Defendant's part, and indeed the letter itself states that if no reply is received the claim will be determined without one. Second, the Defendant could not release the Claimant unless suitable accommodation was available, and for the lack of that she seeks to place responsibility on the Claimant. It is true that the address he suggested (I think his sister's) was unsuitable. But it was not until July 2021- long after any "period of grace" for the arranging of accommodation must have expired - that the Defendant's officials recalled that he had been granted accommodation the Home Office in September 2020, and that that grant remained available to him.

67. Noting that happened between 4 February 2021 and the Claimant's withdrawal of his asylum claim on 16 August 2021 rendered his detention lawful. It was initially unlawful and it remained unlawful throughout that period.

The second period: August 2021 to 16 May 2022

68. The situation changed on 16 August 2021; the Claimant no longer maintained his asylum claim and expressed willingness to go to Jamaica. Mr Pennington-Benton says in his skeleton argument: "Unsurprisingly, on 11 August 2021 C's detention was maintained, … [as] there could be no reason not to give effect to the deportation order." If the deportation order had indeed been given effect by the Defendant's taking swift action within, say, the two or three weeks after the C's declaration then I would agree. But, surprisingly, that is not what happened.

69. The Defendant Summary Grounds of Defence says that the "administrative pre-requisites" were progressed, such as obtaining his biodata, and finding out which airport he wished to be removed to. It is difficult to see why that took longer than days, but it took until December, and on 8 December 2021 the Claimant was moved to Yarl's Wood

in preparation for his removal. It was at this time that he started expressing unwillingness to leave and so I pause there to say that between August and December there was clearly no realistic prospect of the Claimant's removal within a reasonable time. Exactly how much had to be done before removal directions could be set is not known, but whatever it was took four months and it will have been apparent to the Defendant's official, in light of their experience, that after 16 August 2021 it was going to take more than days, probably more than weeks as indeed it did, to take all the necessary steps. The Claimant's withdrawal of his asylum claim on 16 August 2021 made no difference to the legality of his detention since there was still no prospect of his removal within a reasonable period.

70. That remained the position until 4 January 2021 when the Claimant informed the Defendant that he no longer wished to return.

71. That changed the situation in that it was no longer possible to put him on a scheduled flight and inevitably he was going to have to wait for a charter flight, which was not going to be available until May 2022, although it appears that that fact was not appreciated by the Defendant until 10 March 2022 when the removals desk advised her that there were no enforced returns to Jamaica and that the next charter flight was in May 2022.

72. Was the Claimant's position now the same as that of the detainee in *R(A) v SSHD* [2007] EWCA Civ 804 where there was no legal barrier to removal but the detainee was not willing to leave and so had to wait for a charter flight? In *R(A)* it was held that the situation was of his own making and his detention was lawful (see paragraph 27 above).

73. I have given careful consideration to whether that was now the position for the Claimant and I do not accept that it was. The Claimant in *R(A) v SSHD* was a predatory and entirely unrepentant sex offender who expressed a willingness to re-offend and was manifestly a serious danger to the public. The Claimant was not in that category. The risk of re-offending was low enough for him to be released in February 2020, and that decision was vindicated by his not re-offending; nothing has changed as regards his risk of offending since. It might be thought that he was now at a higher risk of absconding, but that inference as we have seen should not be lightly drawn. Could the risk of absconding outweigh the fact that in January 2022 he had already been pointlessly and unlawfully detained for 11 months? And could it outweigh the fact that the Defendant was not taking expeditious action but apparently did nothing until March 2022? I think not. The Claimant's detention in January 2022 did not facilitate his removal and was as pointless as it had ever been.

74. On 5 May 2022 the Claimant was served with removal directions. At some point therefore action was taken and the wheels were properly put in motion. At some point before then it will have become the case that removal was foreseeable within a reasonable time and it became lawful to detain the Claimant. In the absence of any information as to how matters were progressing behind the scenes I find that the Claimant's detention was lawful from 5 May 2022 until his asylum claim was revived by his further representations on 16 May 2022.

The third period: 16 May 2022 to 8 February 2023

75. The Claimant's situation from 16 May 2022 onwards was very similar indeed to his situation in February 2020; he had a live asylum claim and there was no prospect of removal within a reasonable period because the claim would take time to determine and because it could not be certified as clearly unfounded and so would attract an in-country right of appeal, as the Defendant's officers were aware from the start (as is seen in the GCID record 24 May 2022). For all the reasons given above in connection with the earlier periods there was still no reason to detain him. Indeed the Defendant did eventually make a decision to that effect herself; on 23 August 2022 it was decided that the Claimant could be released and detention was authorised for 28 days to enable action to be taken. In the detention review on 31 October 2022 said that his release was a priority.

76. Allowing the Defendant a short period to re-assess matters after the further representations were received, I find that the detention was unlawful from 1 June 2022 until the Claimant withdrew his appeal on 8 February 2023.

The Claimant's detention from 8 February 2023 to date

77. The Claimant has now abandoned his appeal. There is no legal barrier to his removal. There is no suggestion that any steps have been since 8 February 2023 to effect his removal; one might have expected that the Defendant would take such steps but she has chosen not to do so to date and it is not known when she will do so. The administrative machinery required to effect removal in the autumn of 2021, the last time there was no legal barrier to removal, took months, so there is no prospect of the Claimant being removed within a reasonable period. That is because, as we have seen, a reasonable period may sometimes extend to weeks rather than days but it is not months, and it is also because what is reasonable at this point is far shorter than it was in February 2021 when detention commenced because the Claimant has now been detained, without good reason, for two years and the longer the detention the shorter a reasonable period becomes. There is no evidence that the risk of the Claimant's re-offending or absconding is any higher than it was in February 2020, and indeed he has now expressed the wish to go back to Jamaica (in his statement of 17 February 2023; see paragraph 37 above). I do not see any reason why it is now lawful to detain him, and I order his release to suitable accommodation within 14 days of the date this judgment is handed down (therefore by 23 March 2023) unless by that time removal directions have been set.