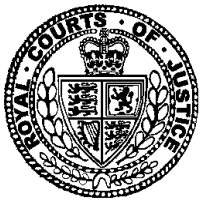

Neutral Citation Number: [2022] EWHC 866 (QB)

Case No: QA-2020-000222

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

On appeal from the Central London County Court
HHJ Baucher, E00YJ364

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2022

Before:

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between:

ABDUL MATEEN OMAR ALI **Appellant**

– and –

THE HOME OFFICE **Respondent**

- -
- -

Mr G Denholm (instructed by **Wilson Solicitors LLP**) for the **Appellant**
Mr B Seifert (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 15 March 2022

- -

Approved Judgment

Judgment Approved by the court for handing down

Mrs Justice Heather Williams:

Introduction

1. This is an appeal from the decision of HHJ Baucher ("the Judge") in an order dated 9 November 2020 dismissing the Appellant's claim for false imprisonment in respect of his immigration detention from 17 December 2014 – 24 March 2015, a period of 98 days. Permission to appeal was granted on consideration of the papers by Martin Spencer J on 16 December 2021.

2. In the judgment below and in the parties' submissions, the Appellant's detention was analysed by reference to four component periods, namely:

   i) 17 December 2014 – 9 January 2015: the period between when the Appellant was first detained pursuant to the Detained Fast Track ("DFT") system and the refusal of his claim for asylum ("Phase 1");

   ii) 9 January 2015 – 11 February 2015: the period from when the Appellant exercised rights of appeal to the First-tier Tribunal ("FTT"), until the point when he became appeal rights exhausted ("ARE") ("Phase 2");

   iii) 11 February 2015 – 28 February / 17 March 2015: the period subsequent to the fast track appeals process and before his further representations were received by the Respondent ("Phase 3"). There were two possible end dates for this period because of a dispute over when those representations were received. The Judge found that it was on the later date ("Phase 3");

   iv) 17 March 2015 – 24 March 2015: the period between receipt of the Appellant's further representations and his release on bail ("Phase 4").

3. In very broad terms, the Appellant's primary two contentions were: (a) his asylum claim was never a suitable one for the DFT; and (b) as the FTT's dismissal of his appeal on 26 January 2015 was subsequently set aside by the President of the FTT on 14 October 2015 ("the setting aside order"), this had the effect of rendering his detention during Phases 2 – 4 unlawful. When granting permission to appeal, Martin Spencer J observed that Ground 6 of the grounds of appeal raised a point of principle as to the impact of the setting aside order on the legality of the detention. The issue is characterised as follows in Mr Denholm's skeleton argument: "What is the impact of an order made by the FTT setting aside an earlier decision under Rule 32 of Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI No 2604) on the lawfulness of detention that has been authorised on the assumption that the earlier appeal decision was valid". On any view, this is a case that raised a number of difficult issues.

4. The claimant gave evidence at the trial, as did Mr Gardner, a Technical Specialist in Detained Asylum Casework (formerly DFT). Mr Gardner had not been involved in the Appellant's case, but he was very familiar with the DFT processes. The relevant events regarding the determination of the Appellant's asylum claim and his detention are largely documented and undisputed; as opposed to the inferences and conclusions that are to be drawn from them, which were and remain very much in issue.

5. After summarising the facts and circumstances, I will set out the legal framework, the grounds of appeal and then the material parts of the Judge's reasoning. In addressing the grounds of appeal my focus is upon whether the Judge fell into error in terms of her self-directions and/or her chain of reasoning. In terms of her assessment, I am conscious that she had the benefit of seeing and assessing the witnesses who gave evidence.

The material circumstances

6. The Appellant is a national of Afghanistan, born on 3 May 1981. On 29 November 2014 he entered the United Kingdom ("UK") lawfully on a business visitor visa, as part of a delegation to the London Afghanistan Conference held on 3 – 4 December 2014, which he attended. The visa was valid until 5 December 2014 but the Appellant overstayed this time limit. On 9 December 2014 he claimed asylum in person at the Asylum Screening Unit ("ASU") in Croydon. He was provided with asylum support accommodation and asked to return on 17 December 2014.

7. The Appellant duly returned to the ASU on 17 December 2014, when an Asylum Screening Interview took place. The Appellant indicated that he had come to the UK "to save my life" and that he had not claimed asylum on his entry to the UK as he was here for a government meeting. The following exchange of questions and answers then took place, as recorded at part 4.2 of the interview record:

> "Can you BRIEFLY explain why you cannot return to your home county?
>
> I was working in the social sector and because of that my life is in danger I was working with the youths in Afghanistan.
>
> If the response is not clear applicant should be asked to briefly answer:
>
> Who do you fear?
>
> Taliban and the intelligent services
>
> Why do you fear them?
>
> They tried to kill me but in response they killed my nephew 17/11/2014
>
> When did the problems begin?
>
> What do you fear will happen to you if you return to your home country?
>
> They will kill me"

8. In part 6 of the interview form, which asked whether the applicant had any documents or other evidence he wished to submit in support of his asylum application, the interviewing officer wrote "No". The Appellant had in fact provided a number of documents that day, some of which were in Pashtu and required translation. It does not

appear that he was asked any questions about the documents at that stage. The nature of the documents can be gleaned from his subsequent substantive asylum interview on 6 January 2015, when he was asked about them during the first part of the interview. In broad terms, the documents related to the work the Appellant had undertaken in or with civil society organisations in Afghanistan and to threats posed by the Taliban. In part 7 on the interview form, which inquired whether the applicant had been subject to any forced work or other form of exploitation, the interviewer wrote "Yes certificates". It is accepted that this entry was intended for part 6 but was mistakenly written in part 7. It is also accepted that "certificates" was not an accurate description of some of the materials supplied. In answer to the questions in part 8, the Appellant did not advance reasons as to why his claim might not be suitable for a decision in around 10 – 14 days or why he should not be detained for a quick decision to be made.

9. On 17 December 2014, a DFT Referral Pro Forma was submitted in respect of the Appellant. The form described the basis of the asylum claim as "Fear of Taliban". It indicated that he had no family ties to the UK, no health or behavioural issues and no allegation of torture had been made. The same day, the National Asylum Allocation Unit ("NAAU") confirmed that the Appellant's case had been accepted in the Harmondsworth DFT. The same pro forma was completed to indicate that "on the basis of the above" a quick decision could be made and that "no further inquiries will be necessary in order to decide" the Appellant's asylum claim.

10. As I have already indicated, the Appellant's substantive asylum interview took place on 6 January 2015. He was questioned about the documents he had provided. Two documents said to relate to threats from the Taliban had not been translated. The Appellant explained that the screening interview record (which he had not had the opportunity to check at the time) was incorrect in noting him as saying that he feared the intelligence services as well as the Taliban. He said he had told the interviewer that he feared the Taliban because of his role in civil societies and because he had worked for the intelligence services.

11. The Appellant was given until the following day, 7 January 2015 to submit further representations. None were received from his then solicitors. By letter dated 9 January 2015 the Appellant's asylum claim was rejected on the basis that he had not established a well-founded fear of persecution. The decision-maker did not accept that the Appellant had worked as the head of a civil society, as he had described, or that he had been recruited by the intelligence department and faced threats from the Taliban as a result. Various discrepancies in the Appellant's accounts were identified. The letter noted that his legal representatives had not submitted translated versions of the two threatening letters the Appellant said he had received from the Taliban and thus they added no weight to his claim (para 39).

12. From 13 January 2015 the Appellant's new solicitors began acting for him. The same day his appeal to the FTT was lodged. The appeal was heard on 22 January 2015 before Judge of the FTT Plumptre ("Judge Plumptre"). By a written decision dated 26 January 2015 she dismissed the appeal. Judge Plumptre had sight of the documents provided by the Appellant in December 2014, plus some additional material submitted on the Appellant's behalf including an expert report from Dr A Guistozzi (although she did not find the report helpful). Judge Plumptre concluded that the Appellant had never worked for the Afghan intelligence services. She was highly critical of his credibility, describing him as "vague, evasive and unwilling to answer straightforward questions";

and she highlighted various inconsistencies in his accounts. She also considered that some of the documents that had been produced undermined the Appellant's claim and that press articles about attendees at the London Afghanistan Conference claiming asylum had been fabricated. Judge Plumptre referred to the now translated letters said to contain threats from the Taliban; she referred to various inconsistencies in this respect and it appears that she did not consider that they assisted the Appellant's claim (para 41).

13. The FTT refused permission to appeal on 3 February 2015 and the Upper Tribunal refused permission to appeal on 11 February 2015. Hence the Appellant became ARE on the latter date.

14. On 27 February 2015 the Appellant's solicitors sent further representations to the Respondent, including 14 items of new evidence and a further witness statement from the Appellant. His case before the Judge was that there was proof of delivery indicating that the representations were received on 28 February 2015.

15. The Appellant's first detention review undertaken after he became ARE was dated 9 March 2015. It referred to him being an overstayer and it was said that in light of his propensity not to abide by UK immigration rules, it was considered unlikely that he would comply with any restrictions or conditions attached if he were released on bail. His detention was confirmed as appropriate to effect removal.

16. On 9 March 2015 a request for removal directions was made and a detention review on 11 March 2015 referred to the Appellant's case now being "with the removals team, removal directions would be concluded and served to him soon". The first reference in the Respondent's records to the 27 February 2015 representations was on 17 March 2015 when it was recorded as a fresh claim. An entry on 19 March indicated that the Appellant had been referred for a charter flight departing on 21 April 2015 and on 23 March 2015 his booking on this flight was confirmed.

17. On 23 March 2015 the Appellant was granted immigration bail by the FTT. He was released on the following day. On 26 March 2015 his booking on the 21 April 2015 charter flight was cancelled. On 25 April 2015 the Appellant was informed that all further representations must be submitted in person. The Appellant duly did this at an interview on 15 June 2015. On 24 August 2015 his further representations were rejected with no right of appeal.

18. On 6 September 2015 the Respondent wrote to the Appellant notifying him that he could apply to the FTT to have his appeal determination set aside pursuant to Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI No. 2604) ("the principal FTT Rules 2014"). As the letter stated, the fast track procedure under which the Appellant's appeal had proceeded, the Fast Track Rules 2014 ("FTR 2014") had been declared unlawful by Nicol J in *Detention Action v FTT (IAC) & Ors* [2015] EWHC 1689 (Admin) ("*DA5*") and this decision had been confirmed by the Court of Appeal in: *Lord Chancellor v Detention Action* [2015] EWCA Civ 840; [2015] 1 WLR 5341 ("*DA6*"). Following this, on 4 August 2015 in *Alvi v Secretary of State for the Home Department* DA/02456/2013, the President of the FTT had set aside appeal decisions made in eight cases decided under the FTR 2014, pursuant to Rule 32(2)(d) of the principal FTT Rules 2014 on the basis that there had been a procedural irregularity in that the earlier decisions had been made under

provisions which had now been declared ultra vires. The letter said: "The effect of those decisions is that each of those appeals remains undetermined and will be heard again under" the FTR 2014. The letter proposed that if the Appellant had made a judicial review claim on the basis that the FTR 2014 were ultra vires, he withdraw this as "the Secretary of State believes that the Rule 32 application provides an alternative remedy and renders judicial review proceedings inappropriate".

19. The Appellant duly applied to have the decision of Judge Plumptre set aside and on 14 October 2015 the President of the FTT made the setting aside order on the basis that there had been a procedural irregularity within the meaning of Rule 32(2)(d) and that it was in the interests of justice for the decision to be set aside (Rule 32(1)(a)). The order noted that the effect was that the Appellant's appeal against the immigration decision made in his case had not yet been determined.

20. The Appellant's further appeal to the FTT was heard by Judge of the FFT Hopkins ("Judge Hopkins") on 9 June 2016. His decision allowing the appeal was promulgated on 13 July 2016. Additional documentation had been submitted in support of the appeal by this stage. Judge Hopkins found that it was understandable that the Appellant applied for asylum at a later date rather than on arrival at the airport (para 42). He also found that the Appellant had provided "a substantial amount of evidence that he has worked for various NGOs. These appear to have been concerned in social work in the broad sense of seeking to bring about improvements in society. There is also evidence that he has been head of a youth organisation" (para 43). Judge Hopkins said he was "satisfied that the Appellant's employment history is as claimed by him and that he was the Director of YUECSA, a registered social organisation".

21. Judge Hopkins accepted that there was documentary evidence of the Appellant's role in the intelligence services, as he described at paras 25 – 26. This included a letter dated 18 February 2015 from someone who had worked in a senior position in the intelligence service, confirming that the Appellant was an undercover employee of the Directorate of National Security ("NDS") of Wardak Province from 2011 to 23 November 2014 and that a member of his family had died on 17 November 2014. Judge Hopkins recorded the Appellant's account that it took some persuasion before the author had been willing to provide the letter (para 26). A witness who gave evidence at the appeal hearing supported the proposition that the Appellant had worked for the NDS (para 28). Judge Hopkins concluded that in light of the evidence provided, the Appellant had demonstrated a reasonable likelihood that he was involved in the intelligence service (paras 45 – 46).

22. As regards threats from the Taliban, Judge Hopkins found the Appellant's account to be credible for the reasons he identified at paras 47 – 53. He accepted that his past role in the intelligence service "adds considerably to the risk that he would face from the Taliban" and that he would not be adequately protected against the risks he faced if he were to return to Afghanistan (paras 59 and 61).

23. Accordingly, the Appellant was granted asylum, with leave to remain for 5 years.

Policies

Detained Fast Track Processes (14 October 2014 version)

24. The DFT was a system for the quick processing of asylum claims. Individuals were kept in detention pending the determination by the SSHD of their claims and the determination by the FTT, or the Upper Tribunal, of their appeals: *DA6* at para 15.

25. The opening section of the Detained Fast Track Processes policy (the "DFT Policy") stated:

> "1.2 This instruction lays out the policy which must be strictly applied to determine case suitability for entry to, and continued management within, **Detained Fast Track Processes** (comprising the Detained Fast Track and Detained Non-Suspensive Appeals Process)." (Emphasis in original)

26. Section 2 of the DFT Policy addressed the criteria for entry into the DFT. As relevant, it included the following:

> "2.1 Detained Fast Track Processes Suitability Policy
>
> An applicant may enter into or remain in DFT/DNSA processes only if there is a power in immigration law to detain and only if on consideration of the known facts relating to the applicant and their case obtained at the asylum screening (and, where relevant, subsequently) it appears that a quick decision is possible and none of the Detained Fast Track Suitability Exclusion Criteria apply.
>
> ….
>
> 2.2 Quick Decisions
>
> The assessment of whether a quick decision is likely in a case must be based on the facts raised in each individual case. Cases where a quick decision may be possible may include (but are not limited to):
>
> - Where it appears likely that no further enquiries (by the Home Office or the applicant) are necessary in order to obtain clarification, complex legal advice or corroborative evidence, which is material to the consideration of the claim, or where it appears likely that any such enquiries can be concluded to allow a decision to take place within normal indicative timescales;
>
> - Where it appears likely that it will be possible to fully and properly consider the claim within normal indicative timescales;

> - Where it appears likely that no translations are required in respect of the documents presented by an applicant, which are material to the consideration of the claim; or where it appears likely that the necessary translations can be obtained to allow a decision to take place within normal indicative timescales…
>
> …
>
> 2.2.3 Timescales
>
> For DNSA cases, the indicative timescales from entry to the process…to decision service will be around 10 – 14 days. For DFT cases, the respective indicative timescales for decision service will usually be quicker. The timescales are not rigid and must be varied where fairness or case developments require it…"

27. It is not suggested that any of the exclusion criteria applied in the instant case.

28. Section 3 of the DFT Policy addressed the process. In relation to the screening interview the document included the following:

> - The applicant must be fully screened…and they must be asked if they have any documents, statements or other evidence relevant to their claim, family life or other personal circumstances that they wish to submit, whether at that instant or in the future. Where there are such documents held or to be submitted, the specific nature of the documents (including language) must be ascertained and recorded;
>
> - Follow up questions must be asked and documented where relevant to the Suitability Policy. It is vital to obtain and consider relevant information where it can reasonably be obtained in a screening setting (or, for information not available at that instant, to consider the likelihood of its later submission and its probable materiality)…"

29. Section 3 of the DFT Policy went on to say that all cases must be referred to NAAU after being screened. If the case is considered a possible DFT case, the referral must highlight the factors leading to this view and then NAAU would consider outline suitability of the referral in principle. If requested, referring officers were to send NAAU the screening interview form and any other documents of potential relevance to suitability. Section 4 of the DFT Policy stated that NAAU must request and receive the full screening interview and all relevant supporting documents and carefully consider the suitability of every referral against the suitability policy.

30. Under the heading "Acceptance" in section 4, the DFT Policy included the following:

> "If the case satisfies the Suitability Policy and Operational Considerations such that a decision is taken to enter the case into DFT/DNSA processes, the referring officer must be informed, and the reasons for selection must be clearly documented. NAAU must
>
> - In cases where there is no information weighing against a quick decision…update CID Notes concisely confirming reasons for suitability…
>
> - In all cases where there is information relevant to the speed of decision...update CID Notes in sufficient detail to demonstrate NAAU's meaningful consideration of the key facts in the case at the time of referral. This note will need to address each key point of material significance to the speed of decision and suitability criteria relevant in the case, and state that a quick decision can reasonably be expected. The more detailed points of consideration will depend upon the facts of the case, but may include (for example):…documents held /expected, the language of the documents, and whether or not they can reasonably be explored further within DFT…"

Chapter 55, Enforcement Instructions and Guidance

31. At the material time decisions to detain in non-DFT immigration cases were the subject of policy guidance contained in Chapter 55 of the Respondent's Enforcement Instructions and Guidance ("EIG 55"). The Appellant highlights the following aspects:

    i) That "detention must be used sparingly and for the shortest period necessary" (para 55.1.33);

    ii) "A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable" (para 55.1.33);

    iii) There is "a presumption in favour of temporary admission or temporary release" and "there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified" (para 55.3); and

    iv) All reasonable alternatives have to be considered before detention is authorised (para 55.3).

The legal framework

Test on appeal

32. The appeal is by way of a review, rather than a re-hearing: CPR 52.21(1). The appeal court can only overturn a finding of fact made by the court below if it concludes that it was wrong: CPR 52.21(3). An appeal court will only interfere with a trial judge's

finding of fact where it determines that the finding is unsupported by the evidence or where the decision is one which no reasonable judge could have reached: see the authorities cited in the notes at para 52.21.5 of the White Book. Where the Judge's *evaluation* of the facts is challenged, the appeal court does not carry out the balancing task afresh but must ask whether the decision was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion": *Prescott v Potamianos* [2019] EWCA Civ 932 at para 76.

Immigration detention and false imprisonment

33. The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it: "All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so: Lord Dyson JSC in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] AC 245 ("*Lumba*") at paras 64 - 65.

34. As the Judge recorded, the Appellant accepted that the Respondent had the power to detain him as a person liable to removal from the UK pursuant to Schedule 2, para 16(2) of the Immigration Act 1971.

35. The exercise of the power to detain under the Immigration Acts is constrained by the principles identified by Woolf J (as he then was) in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] WLR 704 ("the *Hardial Singh* principles"). In *Lumba* at para 22, Lord Dyson summarised them as follows:

> "(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within 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."

36. In *Lumba* the Supreme Court addressed the relationship between a public law error and the legality of detention, concluding that not every breach of public law would give rise to a cause of action in false imprisonment; the breach of public law "must bear on and be relevant to the decision to detain" in the sense of being "capable of affecting the decision to detain or not to detain" (Lord Dyson: para 68). Lord Dyson also explained that if a decision to detain was tainted by public law error in this sense, it was not a *defence* for a defendant to show that a decision to detain free from error could and would have been made (para 88). However, in terms of whether a claimant has suffered any loss and thus was entitled to more than nominal damages:

> "95. …If the power to detain had been exercised by the application of lawful policies, and on the assumption that the *Hardial Singh* principles had been properly applied…it is

> inevitable that the Appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages."

Suitability for the DFT

37. In *R (JB (Jamaica) v Secretary of State for the Home Department* [2013] EWCA Civ 666; [2014] 1 WLR 836 ("*JB (Jamaica*)") the Court of Appeal found that the exercise of the power to detain had not complied with the Home Secretary's DFT policy as the claim had not been capable of "a fair and sustainable decision" within the short timescale of about two weeks contemplated by the policy and the claimant had not been allowed sufficient time to present his evidence (para 29). In relation to the standard screening interview form then in use Moore-Bick LJ said:

> "28 …it does not direct the interviewing officer's attention to the need to investigate the nature and circumstances of the claim in a way that would enable an informed assessment to be made of the likelihood of being able to make a fair and sustainable decision within about two weeks. In this case the interviewing officer made no attempt by means of supplementary questions to ensure that the kind of detailed assessment required by the policy was carried out, as a result I do not think that in this case the Secretary of State complied with her own policy."

38. In *R (Zafar) v Secretary of State for the Home Department* [2016] EWHC 1217 (Admin) Andrews J (as she then was) described one of the classes of cases that was inappropriate for the DFT as follows:

> "59. …claims for asylum or humanitarian protection which, by reason of their nature or complexity, could not be dealt with fairly in the fast-track process which was designed for straightforward and simple claims which could be assessed and disposed of fairly within a short timescale of around 1 – 2 weeks. This class will include cases where it was foreseeable that further inquiries were necessary to obtain clarificatory or corroborative evidence without which a fair and sustainable decision could not be made, and where it was not possible to foresee that those inquiries could be completed within about two weeks…"

39. Following the Court of Appeal's decision in *JB (Jamaica)*, the interview screening form was amended to add the questions at part 6 regarding documentation: *R (Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) ("*DA1")* at para 98. Subsequently, the form was further amended to add the questions in part 8.

Appeals under the DFT: validity of the appeal rules and legality of detention

40. The DFT detention policy also applied to the appeal stage of the process: *DA1* at para 60.

41. Section 82 of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014, section 15) ("the 2002 Act") gives a right of appeal to the FTT against a refusal of an asylum claim. At the time when the Appellant instituted his appeal, the procedure for appealing in a DFT case was governed by the FTR 2014. The FTR 2014 were contained in a Schedule to the principal FTT Rules 2014. The FTR 2014 provided for an accelerated procedure for the preparation and hearing of the appeal. As I have mentioned earlier, in *DA5* (confirmed by the Court of Appeal in *DA6*) the FTR 2014 were held to be unlawful. This was because of the risk of unfairness that flowed from the very short timescales that applied, rendering the system "structurally unfair and unjust. The scheme does not adequately taken account of the complexity and difficulty of many asylum appeals…": per Lord Dyson MR at para 45, *DA6*. However, this litigation did not determine the consequences for individual appeals brought under the FTR 2014 regime, nor the legality of of the detention of those detained whilst pursuing fast track appeals or whilst awaiting removal after their appeal had been rejected.

42. In *TN (Vietnam) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin); [2017] 1 WLR 2595, Ouseley J held that the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 ("the FTR 2005") were ultra vires, essentially for the same reasons as had been identified in *DA6* in relation to the FTR 2014. However, he held that it did not follow simply from this conclusion that particular appeal decisions made under the FTR 2005 were themselves ultra vires and nullities, as the FTT's jurisdiction was not derived from the FTR 2005. Accordingly, applications would have to be made to the FTT in individual cases for appeal decisions to be set aside on the grounds they had been unfair. (Subsequently the FTT held that it had no jurisdiction to entertain such applications, a decision upheld by the Divisional Court in *R (TN (Vietnam) v First-tier Tribunal (Immigration and Asylum Chamber)* [2018] EWHC 3546 (Admin); [2019] 1 WLR 2675, due to the absence of an equivalent to Rule 32 of the principal FTT Rules 2014 in the earlier version of the principal rules).

43. The Court of Appeal in *R (TN (Vietnam)) v Secretary of State for the Home Department* [2018] EWCA Civ 2838; [2019] 1 WLR 2647 ("*TN (Vietnam) CA*") and subsequently the Supreme Court in *R (TN (Vietnam) v Secretary of State for the Home Department* [2021] UKSC 41; [2021] 1 WLR 4902 ("*TN (Vietnam) SC*") upheld Ouseley J's conclusion that appeal decisions made by the FTT under the FTR 2005 were not automatically ultra vires. The Secretary of State did not appeal Ouseley J's conclusion that the rules themselves were ultra vires. Accordingly, the appellate courts were concerned with the effect of that position upon individual cases. The hearing below in the present case took place between the decisions in *TN (Vietnam) CA* and *TN (Vietnam) SC*.

44. The Judge cited extensively from the Court of Appeal's decision, where the leading judgment was given by Singh LJ. Having reviewed the authorities at paras 68 – 81, Singh LJ explained that there was a conceptual distinction between holding that the procedural rules were ultra vires and the question whether the procedure in an individual appeal was unfair (para 83). It did not follow from the basis upon which the rules had been found to be ultra vires (the unacceptable risk of unfairness) that each and every case decided pursuant to those rules was itself procedurally unfair (para 85). Furthermore, the FTT's jurisdiction to determine the appeals was derived from the primary legislation, namely the 2002 Act, so that a finding that the FTR 2005 were a

nullity did not deprive it of its jurisdiction (para 86). Accordingly, "there has to be shown to be procedural unfairness on the facts of the individual case" (para 87). In conclusion on this point Singh LJ said:

> "90. …It follows that it is necessary, if an application is made to set aside an earlier appeal decision, to assess whether there was procedural unfairness on the particular facts of the case…It is not enough to say that the 2005 Rules were ultra vires."

45. Lord Justice Singh then addressed when an appeal under the FTR 2005 would be considered unfair. He said:

> "103. For the future I would recommend that a court which has to consider an application to set aside an earlier appeal decision made under the 2005 Rules should approach its task having regard to the following:
>
> (1) A high degree of fairness is required in this context.
>
> (2) What the Court of Appeal said in *DA6*…should be borne in mind: that the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases.
>
> (3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there is a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.
>
> (4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was after the appeal decision was taken before any complaint was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on…and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.
>
> 104. The above should not be regarded as an exhaustive checklist. At the end of the day, there can be no substitute for asking the only question which has to be determined: was the procedure unfair in the particular case? That has to be determined by reference to all the facts of the individual case."

46. Applying this approach, Singh LJ found that there was no causal link between the invalid FTR 2005 and what happened in TN's case (para 150).

47. In *TN (Vietnam) SC*, Lady Arden JSC, giving the leading judgment, agreed with Singh LJ that the fact that the FTR 2005 were held to be structurally unfair did not mean that the hearing was unfair when the rules were applied to a particular case (paras 53 – 57). She emphasised the well-established principle that a court order is valid and binding until it is set aside (para 57); and she adopted the reasoning in the concurring judgment of Lord Sales JSC at paras 80 – 85 that because the FTT hearing could still be fair even though the FTR 2005 were ultra vires, the FTT nonetheless had jurisdiction in such a case as its jurisdiction derived from the 2002 Act (paras 55 – 56). Lady Arden also agreed with Singh LJ as to the need to analyse whether or not there was unfairness in relation to a particular hearing (paras 66 – 72). She concluded by observing that if "the court or tribunal is satisfied that the hearing of an appeal was fair to the Appellant, it is its duty to say so and dismiss the application to set aside the determination of any appeal" (para 72).

48. The principle that a court order is valid and binding unless and until it is set aside was also recently re-affirmed by the Supreme Court in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46; [2021] 3 WLR 1075 at paras 43 – 56.

49. *R (PN (Uganda)) v Secretary of State for the Home Department* [2020] EWCA Civ 1213 ("*PN (Uganda)*") concerned an appeal by the Secretary of State from the decision of Lewis J (as he then was) that the claimant's FTT appeal under the FTR 2005 had been unfair and should be quashed; and that her detention was unlawful during her appeal to the FTT and until she was ARE ("the second period"). The court also heard the claimant's appeal against the rejection of her claim in respect of an earlier period of detention under the DFT ("the first period") and in respect of the later period after she was ARE, during which she remained in detention pending her removal to Uganda ("the third period"). Mr Justice Lewis had found that the second period of detention was unlawful on the basis of the decision in *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1643 ("*DA4*"), which concerned an issue not raised in the present case. Accordingly, the finding in respect of the second period - which was upheld by the Court of Appeal - is not relevant for present purposes. Although Mr Denholm contended at one point that Lewis J's decision in respect of the second period was made on a wider basis, it is plain from paras 119 – 124 of the judgment at [2019] EWHC 1616 (Admin) that it was squarely based on *DA4*.

50. The Court of Appeal rejected PN's appeal in relation to her first period of detention but allowed the appeal in respect of the third period. Dingemans LJ gave the leading judgment, with which Henderson and McCombe LJJ agreed. As he did below, Mr Denholm placed particular reliance upon Dingemans LJ's reasoning in respect of the third period. The claimant had submitted that as the FTR 2005 were unlawful and had led to unfair FTT proceedings which had been quashed in this case, the public law illegality was relevant to and bore on the decision to detain (para 85). Lord Justice Dingemans' conclusion was as follows:

> "86. In my judgment the public law failures in this case, being the unlawful 2005 DFT Rules and the unfair FTT proceedings which were quashed by the judge, were relevant to and bore upon the decision to detain PN after 10 September

> 2013. This was because PN was being detained following the conclusion of the FTT proceedings which have been quashed. In those circumstances the detention… [for the third period] was unlawful because, properly analysed, there had been no determination in the FTT and it would not be possible to complete such a determination within a reasonable period of time. Further, there is no basis for finding that absent the public law error PN would have been detained, so issues of nominal damages do not arise in relation to the period of detention."

51. It is apparent from this passage that Dingemans LJ held that the claimant's detention in the third period was unlawful because the earlier, now quashed appeal bore on her detention; she had been detained for deportation following the rejection of her appeal, but absent a determination of that appeal having been made it would not be possible to decide the appeal (and thus deport her) within a reasonable period.

The grounds of appeal

52. It is convenient to identify the grounds of appeal before turning to the Judge's decision. There are seven grounds. The first three relate to the Judge's conclusion that the Appellant was lawfully placed in the DFT during Phase 1. Ground 4 relates to the alternative conclusion that the Appellant could in any event have been lawfully detained under EIG 55 if not in the DFT and thus would only be entitled to nominal damages. Grounds 5 and 6 relate to detention in Phase 2 onwards and the impact of the setting aside order. Ground 7 relates to the Judge's conclusion regarding when the further representations were received by the Respondent.

53. The Notice of Appeal also took issue with the Judge's alternative finding as to the quantum of the award she would have made, had she found for the Appellant on liability and had she rejected the nominal damages contention. Counsel agreed that I did not need to address that issue at this juncture (and it was not, strictly speaking, a ground of appeal, as it had not formed part of the Judge's order).

54. Counsel both agreed with my suggestion that if I allowed any of the grounds of appeal, then they should have the opportunity to make written submissions on the appropriate consequential orders. Given the range of possible conclusions that I might reach, it was difficult for them to make meaningful submissions on this topic in the abstract at the hearing.

55. **Ground 1** contends that the Judge erred in concluding at paras 42 – 43 that the Respondent had made sufficient enquiries regarding the suitability of the Appellant's asylum claim for the DFT. The Appellant alleges that the reasons for his fear of the Taliban were not "self-evident" from the information elicited, as the Judge observed; and it was not open to her to conclude that sufficient enquiries had been made and/or she failed to give adequate reasons for her conclusion.

56. **Ground 2** alleges that the Judge erred in concluding at paras 44 – 45 that the Respondent's failure to comply with the DFT Policy as regards ascertaining and recording the specific nature of the documents relied on at the asylum screening

interview did not render the Appellant's detention unlawful. Additionally, that her analysis was marred by factual error insofar as she proceeded on the basis that the documents the Appellant provided had been translated by the time of his interview on 6 January 2015 and the decision on 9 January 2015.

57. **Ground 3** contends that the Judge erred in deciding that it was open to the Respondent to conclude that the Appellant's asylum claim was suitable for the DFT (paras 51 – 54).

58. **Ground 4** challenges the Judge's alternative conclusion at her para 57 that the Respondent "would have been entitled" to detain the Appellant in any event pursuant to EIG 55. Mr Denholm submits that the Judge failed to find that the Respondent *would* (as opposed to could) have detained the Appellant under EIG 55; failed to identify for how long, on her analysis, the detention would have remained lawful; failed to consider the prospective length of detention on the basis that the asylum claim would be considered on a non-expedited basis; and failed to consider whether detention on this basis would have been lawful under the *Hardial Singh* principles.

59. **Ground 5** contends that the Judge erred in concluding that the Appellant's appeal under the FTR 2014 was not marred by unfairness (paras 75 – 77).

60. **Ground 6** alleges that the Judge erred in concluding that it did not follow as a matter of law that the setting aside order retrospectively vitiated the legality of the Appellant's detention from the date of the appeal decision / when he initiated the appeal (paras 67 – 71). The Appellant submits that as the setting aside order nullified the earlier appeal determination, it followed that detention predicated upon the outcome of that appeal was necessarily unlawful.

61. **Ground 7** asserts that the Judge's conclusion that the further representations of 27 February 2015 were not received by the Respondent until 17 March 2015 was not open to her on the evidence. This in turn impacted upon her conclusion that detention post the DFT process was lawful under the *Hardial Singh* principles, as she should have found that the representations were received on 28 February 2015 and that accordingly there was a barrier to the Appellant's removal from that date.

The Judge's decision

Phase 1

62. The Judge noted the evidence of Mr Gardner that he was satisfied that the interviewing officer had sufficient material to reach his decision; and that the category of the documents provided by the Appellant should have been recorded, along with the language used in the documents (para 28). At paras 37 – 38 she emphasised the context of the screening interview which was not, as the screening form made clear, to consider the details, let alone the substantive merits of the asylum claim; and she also emphasised that the interviewer had asked follow-up questions, as shown by part 4.2 of the form.

63. For the purposes of Ground 1 the following was the Judge's key reasoning:

> "42. I am not persuaded that on the facts of this case the screening officer was required to go further. This case is not analogous to *JB*. It was not a case where homosexuality played

> any part and more importantly where it was clear on its face that further enquiries were necessary. I also bear in mind that *JB* is a decision in respect of an earlier DFT form without the same detail. The claimant in this case had provided specific information about the threat, who it was from and provided the date when his nephew had been murdered. He had also stated that his nephew had been killed instead of him. Whilst I appreciate the claimant would not have been au fait with the asylum process he was an educated man…I consider that had he felt that more time was needed for his asylum claim to be reviewed he would have said so when asked in section 8.
>
> 43. Mr Denholm argued that the screening officer should have asked why the claimant was in fear of the Taliban, what evidence might be available and what further enquiries might be necessary to obtain corroborative evidence…I do not consider that given the extent of the questioning the screening officer was required to descend into the detail that Mr Denholm suggests. It was self-evident on the answers elicited why the claimant feared the Taliban. He had already told the officer they had killed his nephew by mistake. This was not like *JB* where the officer was required to ask for further supporting material or where further enquiries were necessary. However, as is often the case a balance had to be struck. The screening officer would have been mindful of the need to ensure that the claimant was protected from saying too much, in the absence of legal advice, when that could be used against the claimant in a more formal interview."

64. In para 44 the Judge accepted that the documents produced by the Appellant should have been listed, rather than simply and inaccurately described as "certificates". However, she said she was not satisfied that this failure rendered the decision to use the DFT unlawful. She observed that the DFT Policy allowed for translation of documents if they could be done within "normal indicative timescales" and that the documents had been considered in the substantive interview on 6 January 2015 and in the decision letter refusing the asylum claim. She referred to the conclusions arrived at in the letter of 9 January 2015, rejecting the asylum claim and the conclusions of Judge Plumptre that the documents did not support, and in some cases undermined, the claim for asylum (paras 45 and 46). Accordingly, she said she was satisfied that the inaccurate recording and bundling together of the documents "had no material bearing" (para 47). She repeated the point that by the interview on 6 January 2015 there was no problem with the translation of any of the documents. She then said:

> "48. I am satisfied that the screening officer could obtain sufficient information upon which to base a decision. He was not required to drill down any further based on the information he had already elicited. A large number of documents had been provided to substantiate the asylum claim and whilst inaccurately recorded that had no material bearing. No documents which were unable to be translated within the fast track timeframe have been identified. Thus, I find that the

> decision to detain based on those enquiries was a reasonable one that the defendant was entitled to reach."

65. In rejecting Mr Denholm's submission that it was not open to the Respondent to conclude that the Appellant's claim was suitable for the DFT she concluded:

> "51. …I am not persuaded that the initial decision to refer into the DFT should be considered in the light of the material which was subsequently before FTTJ Hopkins…I consider it would be speculative for this court to find that had the claimant not been detained under the DFT that material would have been produced. If the claimant had not been detained under the DFT I do not consider how the case was ultimately advanced affords a proper basis for considering what material would have been provided if the claimant had not been put in the DFT scheme. It is arguable the claimant may not have advanced his claim with the same material which FTTJ Hopkins ultimately considered. I find the proper course is for this court to consider the material before the screening officer and consider whether the claimant was suitable for admission to the DFT scheme. It is not for this court to look at the decision through the prism of hindsight.
>
> 52. I reject the proposition no reasonable properly self-directing screening officer could have concluded that this case was suitable for DFT. I found Mr Gardner to be an impressive witness…He was clear and unequivocal that it was not every case where a threat of the Taliban was raised that was suitable for DFT but on the facts of this particular case the clamant was a suitable candidate. I accept that evidence and I concur with his view. There was more than enough material to warrant the screening officer to apply the scheme and I do not consider the officer was required to ask any further questions…"

66. In light of her finding that the Appellant's detention under the DFT was lawful, the Judge dealt quite briefly with the Respondent's argument that in any event his detention outside of the DFT would have been lawful pursuant to EIG 55, describing it as "an artificial exercise to consider in any detail" (para 54). She referred to Mr Gardner's evidence that the Appellant would have met the criteria for detention under EIG 55 given: he had overstayed his visa; he did not have close ties in the UK making it likely he would stay in one place; and it was considered that his application could be considered in a short period of time. She then set out her conclusion that:

> "57. …I am persuaded that the claimant could have properly been detained under the Chapter 55 policy. I accept that the claimant had not entered the UK by clandestine means but he had not made his asylum claim at the earliest opportunity and he had gone to Solihull before presenting at Croydon. Standing back objectively I am satisfied that the defendant would have been entitled to apply the Policy and detain the claimant."

Phase 2

67. Between her paras 64 – 71 the Judge discussed whether the effect of the setting aside order was that the Appellant's detention was unlawful during the appeals process. She found that it was not. She cited paras 84, 85, 89 and 90 of Singh LJ's judgment in *TN (Vietnam) CA* (para 44 above) and noted that at para 34 of *PN (Uganda)*, Dingemans LJ had summarised the effect of *TN (Vietnam) CA* as being that in order to invalidate an appeal decision it was necessary to show that it had been influenced by the ultra vires rules, which required an assessment of whether there had been unfairness in the particular case. In response to Mr Denholm's submission that the very fact of setting aside the appeal decision rendered the detention unlawful and his reliance on para 86 of Dingemans LJ's judgment in *PN (Uganda)*, the Judge said:

> "67. …I reject that submission. I do not consider that paragraph 86 and the words "properly analysed, there had been no determination in the FTT" when read in context is supportive of Mr Denholm's submission. Dingemans LJ had already endorsed the decision of the Court of Appeal in *TN* in paragraphs 34 and 35 of his judgment. Further, in reaching his decision in relation to the last period of detention in paragraph 86 Dingemans LJ made it clear that his decision was predicated on the unlawful 2005 Rules and the unfair FTT proceedings. I do not consider that at paragraph 86 Dingemans LJ was saying a non-determination was sufficient to render the decision to detain unlawful. It is evident Dingemans LJ was referring to both the unlawfulness of the Rules and whether or not the proceedings before the FTT were unfair."

68. The crux of the Judge's reasoning on this issue then appeared in the following passage:

> "69. I find the approach adopted by the President was one of administrative convenience. I do not consider that the decision made by the President rendered the decision to detain unlawful without more. I am not persuaded that some tortuous distinction should be made between cases where there has or has not been a fact sensitive approach in respect of the setting aside of the decision of the FTT. In my view such a finding would fly in the face of the principal authorities and equate to a decision that as the procedural rules were ultra vires then so was the detention if the original decision was set aside as a matter of procedure. I consider the same approach should be adopted.
>
> 70. If it is not sufficient for a claimant to simply refer to the invalidity of the rules it cannot be right that where, as a matter of administrative convenience, a decision is made, that the detention is thereby rendered unlawful. I find the President did not make a determination which equates to an analysis of the procedure. It therefore follows that the defendant is entitled to ask this court to review whether the proceedings were in fact unfair.."

69. Having decided that the question of whether the Appellant's detention was unlawful depended upon whether the first FTT appeal was in fact unfair, the Judge then proceeded to conclude that the procedure was not unfair in the Appellant's case (para 77). In terms of her reasoning, the Judge cited the list of factors relevant to the fairness of the appeal identified by Singh LJ in paras 103-104 of *TN (Vietnam) CA* (para 45 above). She then referred to the negative findings that Judge Plumptre had made as to the Appellant's credibility and about his documents, saying:

> "76. …It is therefore evident that it was not the absence of documents and lack of time to prepare that caused the claimant's appeal to fail but the fact that he was not found to be a credible witness, he produced material that undermined his own position and some of those documents were found to be fabricated. Mr Denholm did not identify any aspect of the application of the Rules which he was able to identify made the procedure unfair; he simply submitted that further material relied on by the claimant later showed the unfairness. I reject that submission. I find the further material was needed to counter the damning findings made by the FTT judge. In short it is the very 'further steps' that Singh LJ identified under item 4 of the 'check list'. That further information had nothing to do with the speed of the process or the application of the Rules. Indeed that the claimant had had time to prepare for the hearing before Judge Plumptre is shown, in my view, by the claimant's ability in the timeframe, not only to instruct an expert, but secure a report from him. The fact that the claimant submitted further evidence later does not per se equate to unfairness. Mr Denholm failed to identify any other factor beyond the filing of additional evidence for the second hearing to substantiate his submissions that the procedure was unfair…I am satisfied there is no causal link between the risk of unfairness and what happened in this case."

Phases 3 and 4

70. The Judge explained that her conclusion that the setting aside order did not render the Appellant's detention unlawful applied to these periods as well, so that the only question was whether detention during this time breached the *Hardial Singh* principles. The Judge found that the representations sent on 27 February 2015 were not received by the Respondent until 17 March 2015 and that accordingly Phase 3 spanned 11 February – 17 March 2015. Her reasoning was as follows:

> "84. …The signature and identity have not been formally linked to the defendant and I consider there is force in Mr Gardener's [sic] evidence that a Recorded Delivery signature is not a guarantee that the letter was actually received by the defendant. It could have been delivered and signed for elsewhere. My view is fortified by the fact that the defendant's bail summary on the 16th March made no reference to the document…I am satisfied that had the representations been received on an earlier date they would have been recorded on the case file.."

71. Consistent with her finding as to when the representations were received, the Judge found that there was no legal barrier to the Appellant's removal during Phase 3 and that the Respondent was able to effect his deportation within a reasonable period. She concluded that in light of the fact that he was an overstayer who was deemed an absconder risk, the Respondent was entitled to detain him during this period (para 86).

72. As regards Phase 4, the Judge accepted that there was a legal obstacle to the Appellant's removal once the Respondent was in receipt of the representations. She said she was satisfied that if the Appellant had remained in detention, the requirement to submit further representations in person would have been waived and the process expedited (para 89). She considered that the seven day period between 17 – 24 March 2015 was not excessive and that therefore the detention was also lawful during this time (paras 90 – 91).

Discussion and conclusions

Grounds 1 - 3

73. Mr Denholm submitted that the screening interviewer had failed to elicit the information necessary for the NAAU to rationally determine whether the case was suitable for the DFT. He said that it was necessary to know *why* the Appellant was in fear of the Taliban; and the Judge was in error in observing that this was self-evident. The interview record indicated that his nephew had been killed, but not the Taliban's reasons for so acting. He contended that as the Judge had found that the DFT policy had not been followed in relation to the documents, this should have led her to conclude that the detention was unlawful, as this had a material bearing on the decision to place the asylum claim in the DFT. He also said that the Judge erred in focusing on the outcomes of the asylum claim and the first appeal, rather than on the impact that a correct appreciation of the situation with the documents would have had on the assessment of suitability for the DFT. He also submitted that the errors which he identified in respect of Grounds 1 and 2 infected the Judge's overall conclusion that the case was a suitable one for the DFT and that she was wrong not to consider the additional documents provided by the time of the 2016 FTT appeal, which underscored that this was not an appropriate case for the DFT.

74. Mr Seifert contended that the Judge had considered the evidence fully and carefully and that her assessment was one that she was entitled to make. He reminded me that she had heard Mr Gardner's evidence and considered him to be an impressive witness. He said that the decision-maker had been entitled to conclude that the Appellant would be able to expand upon his fear of the Taliban in the substantive asylum interview. As regards Ground 2, he emphasised the Judge's observation at para 47 that Mr Denholm had been unable to identify any particular documents that had been affected by the inaccurate global description of "certificates" on the interview form. In relation to Ground 3 he said he "did not necessarily agree" with the Judge's approach to hindsight, but that in any event the Appellant was unable to show that the material he had obtained by June 2016 would have been available to him if he had had more time to prepare for an appeal in 2015, so that the Appellant's argument was simply based on speculation.

Ground 1

75. The question of whether sufficient enquiries were made to enable a lawful determination of whether the asylum claim was suitable for the DFT was a matter for the Judge's evaluation, but I have concluded that her reasoning was flawed by misdirection and /or failure to take into account material factors.

76. Firstly, I accept Mr Denholm's submission that in order to assess whether the claim was capable of a fair and sustainable decision within the DFT timescale it was necessary for the decision-maker to have at least an outline understanding of *why* the Appellant said he was under threat from the Taliban, since, in turn, this could affect the nature and extent of the investigations that were appropriate and the timescale for reaching a decision on the application. Mr Seifert pointed out that part 4.2 of the interview form did link the threat to the Appellant's life to his "working in the social sector". However, in itself this did not indicate that at the core of his account were the propositions that: (i) he had supplied information to the Afghan intelligence service about the Taliban; and (ii) his actions in this regard had become known to the Taliban and they had threatened him in consequence. The reasons why he said his life was in danger from the Taliban were directly relevant to the credibility of his professed fear, the level of threat he faced (including whether it could met by relocation to a different part of Afghanistan) and whether he was able to establish a well-founded fear of persecution and satisfy the Refugee Convention 1951 definition. If further support were needed for this, the evident relevance of these matters is underscored both by the reasons that were given for rejecting his claim (para 11 above) and by Judge Hopkins' subsequent finding that the Appellant's past role in the Afghan intelligence services "adds considerably to the risk that he would face from the Taliban" (para 22 above).

77. Accordingly, it was inevitable that these propositions would need to be considered, along with any relevant supporting evidence, in the determination of his asylum claim. Thus it is difficult to see how the likely timescale for investigation and determination of the claim could be assessed without some knowledge and understanding that this was how the Appellant put his claim. It was not a question of going into a lot of detail at the screening stage; the claim could have been summarised in a sentence or two. However, the *reason why* the Appellant feared the Taliban, as opposed to the fact that he was at risk of serious violence from the Taliban, was not "self-evident" from the answers on the interview record; indeed it was not mentioned. Indeed it is not clear to me from the Judge's findings, or the documents themselves whether the interview record was submitted to NAAU (section 3 of the DFT Policy suggests that it could be requested: para 29 above). The DFT Referral Pro Forma simply said "Fear of Taliban" and did not include the other part 4.2 information. I am therefore driven to the conclusion that the Judge's reasoning in para 43 was flawed.

78. Secondly, in the key part of the Judge's reasoning on this topic (paras 42 – 43, set out at para 63 above) it does not appear to me that she abstracted or applied the important principle identified in *JB (Jamaica)* that at the screening stage it was necessary to investigate in a way that would enable an informed assessment to be made as to the likelihood of arriving at a fair and sustainable decision within the DFT timescales (para 37 above). Whilst she cited Moore-Bick LJ's judgment at her para 34, that was in the context of saying that whilst Mr Denholm had relied upon it, Ms van Overdijk (who appeared for the Respondent below) had sought to distinguish it. In her para 42, the Judge appears to be saying that *JB (Jamaica)* did not assist her because it was factually distinguishable, rather than directing herself in accordance with the principle I have

referred to. The fact that *JB (Jamaica)* concerned homosexuality and this case did not was obviously insignificant; whilst the need for further inquiries may have been apparent "on its face" in that case, that is not the test: a more proactive approach is required of the screening officer; and the changes to the standard screening interview form did not impact on part 4 of the document (para 39 above). In so far as factual parallels (as opposed to the principle) is of assistance, it might be thought that *JB (Jamaica)* illustrates the importance of knowing *why* the applicant fears persecution, in order to determine the extent of the requisite investigatory steps.

79. I note the Judge's reference to the Appellant's answers in part 8 of the form (para 63 above); whilst this was something she was entitled to take into account, plainly it could not be determinative of the claim being suitable for the DFT. Part 8 was added to the form to give applicants an additional opportunity to highlight matters relevant to the time it would take for their claim to be decided. It was not suggested that the Appellant had any familiarity with how the respective processes for investigating an asylum claim would operate.

80. Whilst the Judge was impressed with Mr Gardner's evidence, she still had to ask the right questions and then form a view. For the reasons I have identified I uphold Ground 1, in the sense that I find that the Judge erred in concluding that the Respondent had made sufficient enquiries regarding the suitability of the Appellant's claim for the DFT. It follows from this that her conclusion cannot stand. For the avoidance of doubt, I do not consider that there is free-standing merit in the ancillary complaint that there was a failure to give adequate reasons. I will consider written submissions from counsel, via the process I indicate below, as to: (i) whether in light of the conclusions I have set out above I am in a position myself to determine whether (if the right self-directions were given), it was not *open* to the Judge on the evidence in this case to find that sufficient enquiries had been made or whether this is a question that must be re-decided by the County Court; and (ii) as to the impact on the legality of the Appellant's detention if I were to find that it was not open to her to do so.

Ground 2

81. As I have noted, the Judge accepted that the documents produced by the Appellant were not appropriately listed on the interview form. On the face of it, the failure to do so was a breach of section 3 of the DFT Policy (para 28 above), as was the failure to identify the language in which they were written. The Judge found that this failing was not material for two reasons. Firstly, because the determination of the asylum claim and the outcome of the first FTT appeal showed that the documents did not assist the Appellant's case. Secondly, because all the documents had been translated in advance of the interview on 6 January and the refusal decision on 9 January 2015 (see para 64 above).

82. I accept Mr Denholm's submission that the Judge's conclusion involved a misdirection. The correct question to be asked was whether the breach of policy was material in the sense that it was capable of bearing on the decision to detain (*Lumba*: para 36 above). In turn, that question depended upon whether the breach was capable of impacting on whether the claim was suitable for the DFT in terms of the likely timescale for its determination. It does not appear to me that the Judge asked this question. By contrast, whether the documents actually helped the Appellant when it came to deciding the

asylum claim and at the first FTT appeal – which the Judge answered in the negative at paras 45 – 46 - appears to me to be a different question.

83. Accordingly, I accept Ground 2 in the sense that the Judge erred in the way she arrived at her conclusion that the breach of policy was not material.

84. As Mr Denholm also pointed out, this part of the Judge's reasoning contains a factual error in as much as two of the documents provided by the Appellant had not been translated by 9 January 2015 (paras 10 and 11 above). In turn, this had a potential bearing on the issues I have identified, given the examples given in section 2.2 of the policy as to when a quick decision may (and by implication, may not) be possible. In this regard it is also of note that the NAAU's conclusion, which appears on the DFT Referral Form was "no further inquiries will be necessary in order to decide" the asylum claim. Assuming that section 4 of the DFT Policy was followed (para 30 above), this suggests that the NAAU were not aware of any outstanding steps, including the translation of documents.

85. I will give the parties the opportunity via their written submissions to address whether I am in a position to determine the question of whether the breach was material in the sense that I have just discussed, or whether that will be a matter for the County Court.

Ground 3

86. Mr Denholm accepted that Ground 3 was predicated on the proposition that no reasonable decision-maker could have concluded that the Appellant's asylum claim was suitable for the DFT once sufficient enquiries had been made (it not being enough to show that the court would not have made the same decision).

87. I accept that Ground 3 is well-founded in as much as the Judge's rejection of that submission at her para 52 was based upon or tainted by the errors that I have identified in respect of Grounds 1 and 2. In addition, I conclude that she was in error in saying that she would determine the question without reference to the material that was subsequently provided to Judge Hopkins and that "the proper course is for this court to consider the material before the screening officer and consider whether the claimant was suitable for admission to the DFT scheme. It is not for this court to look at the decision through the prism of hindsight." (her para 51). As the Appellant's central complaint was that insufficient enquiries had been undertaken before the decision was made, it was wrong in principle for the Judge to confine her consideration to the material that was available to the decision-maker when the decision to allot the case to the DFT was made. The Appellant contended that had he been given more time he could and would have obtained more material that supported his asylum claim. In these circumstances it was relevant to consider what he was in fact able to obtain when he had more time. Of course, in any particular case it might be decided that, once attempted, such an assessment was simply too speculative, or, in this case, that the appeal would have been heard significantly before June 2016 and thus what was available by that date was not sufficiently probative, but that is a different matter from deciding as a matter of principle that it is not a relevant exercise to undertake. Additionally, the Judge had considered it significant to look at hindsight in so far it extended to what happened at the first FTT appeal and I do not see the distinction. As I have noted, Mr Seifert did not support this aspect of the Judge's reasoning.

88. I also note for completeness, that the decision is taken by the NAUU, not by the screening officer (as the Judge's reasoning suggests), but no free-standing ground is advanced in relation to that.

89. I therefore accept Ground 3 in the sense that the Judge's conclusion that there was more than enough material to justify the decision that this was a suitable case for the DFT cannot stand. I will address the consequential orders that I should make after giving counsel an opportunity to make written submissions. I am conscious that I did not hear the oral evidence, in particular the evidence of Mr Gardner and whilst I have determined on this appeal that the Judge's conclusion was flawed by misdirection, inconsistency and/or failure to have regard to material factors; it does not follow that I am in a position to determine the underlying question of whether no reasonable decision-maker could have allotted the claim to the DFT.

Implications

90. For the reasons I have explained and to the extent that I have identified, I uphold Grounds 1 – 3 and, as I have indicated, I will consider written submissions on the consequences of this. Plainly one *potential* outcome, ultimately, is a finding that the claim could not lawfully have been considered suitable for the DFT. In that eventuality, the entirety of the Appellant's detention pursuant to the DFT, including the appeals process, would be unlawful. However, in those circumstances the Respondent would wish to argue, as it did below, that the Appellant should receive no more than nominal damages as he could and would have been lawfully detained outside of the DFT under EIG 55, whilst his asylum claim was determined (including any appeal). Ground 4, which I will now turn to, concerns that scenario.

Ground 4

91. Mr Denholm submitted that the Judge's finding in para 57 (para 66 above) was flawed essentially for the reasons that I have already summarised when setting out his Ground 4 (para 58 above). Accordingly, he said that if the appeal succeeded in relation to Grounds 1, 2 and/or 3, the nominal damages finding in para 57 could not stand.

92. By contrast, Mr Seifert contended that even if I upheld Grounds 1, 2 or 3, the Judge's finding in para 57 should stand, so that the Appellant would not be entitled to compensatory damages in any event. He said that the finding was based on Mr Gardner's evidence, which the Judge heard and was entitled to accept.

93. In my judgment Ground 4 is also well-founded. In order for a court to conclude that a claimant has suffered no loss by application of the principle identified by Lord Dyson at para 95 in *Lumba* (para 36 above), it is necessary for the defendant to establish that if they had acted lawfully then the claimant could *and* would have been detained. At one point in his oral submissions Mr Seifert argued that the test only required a defendant to show that the claimant *could* have been detained. However, this would be inconsistent with Lord Dyson's analysis and he cited no authority in support of that submission. Furthermore, the foundation for the proposition that the claimant has suffered no loss in this situation, is the fact that the defendant has proved that, absent the established unlawfulness, the claimant *would* have been lawfully detained; if the defendant cannot show that to be the case, then, on the face of it, the claimant has suffered compensable loss of liberty.

94. As Mr Denholm pointed out, the Judge did not determine what the Respondent *would* have done, as opposed to what it could have done. In light of her rejection of Grounds 1 – 3, it is understandable that she only addressed the nominal damages argument briefly. However, the question for present purposes is whether that finding can stand to preclude the Appellant from receiving more than nominal damages should the successful appeal on the earlier grounds lead to a finding that his detention under the DFT was unlawful. In my judgment it cannot have that effect when an essential ingredient of the test has not been addressed.

95. Additionally, I accept that there is force in Mr Denholm's further point that para 57 does not identify the scenario which the Judge has in mind. For the nominal damages issue to arise in respect of Phase 1 it is very likely, if not inevitable, that there would have been a finding that the claim was outside of the DFT and thus subject to standard timescales for the determination of the asylum claim. There is no explicit indication that the Judge took this into account. Indeed her reference in her para 56 to Mr Gardner's evidence that "it *was considered"* that the claim could be determined within a short period of time, suggests that she was focusing on the assessments that were actually made in 2015, rather than the counter factual situation that the claim was outside the DFT entirely, that had to be considered for the purposes of this issue. Bearing in mind the aspects of EIG 55 that Mr Denholm emphasises (para 31 above) and in accordance with the *Hardial Singh* principles, it was necessary to consider whether the defendant had shown not only that the Appellant could and would have been lawfully detained initially, but also: (i) that it remained reasonable to detain him throughout the period before he was actually released on bail and (ii) throughout that time it appeared his removal would take place within a reasonable period (in circumstances where he was outside of the DFT). As the Judge's finding in para 57 does not address these matters, this is a further reason why her alternative conclusion in respect of nominal damages cannot stand.

96. For the avoidance of doubt, the Judge's conclusions in respect of the legality of the Appellant's detention under EIG 55 for Phase 3 (her para 86) and Phase 4 (her para 89) were predicated on the basis that he had been lawfully detained pursuant to the DFT and in light of his being ARE and thus with no barriers for his removal (until 17 March 2015). They do not avail the Respondent in respect of the scenario I have considered in relation to Ground 4.

97. Subject to Counsels' submissions, it appears to me that I am not in a position to determine whether the Respondent has proved or can prove an entitlement to only nominal damages, not having heard the oral evidence given below.

Grounds 5 and 6

98. The outcome of Grounds 5 and 6 are material if it is ultimately concluded that the Appellant's case was lawfully within the DFT and in consequence his claim in respect of Phase 1 fails.

99. I will first address Ground 6 which focuses on whether the Judge applied the correct test in deciding whether the Appellant's detention from Phase 2 onwards was rendered unlawful by the setting aside order. As I explained earlier, the Judge concluded that the legality of the detention depended upon whether there had been unfairness in relation to the FTT's dismissal of his appeal.

100. Mr Denholm submitted that the Judge applied the wrong test; the question of unfairness was identified in the *TN (Vietnam)* litigation as the touchstone for determining whether an appeal decided under ultra vires rules should itself be set aside, whereas in the Appellant's case his appeal determination had been set aside. He further submitted that it followed from the setting aside order that the Appellant's detention from the outset of Phase 2 was unlawful. He said that *PN (Uganda)* supported this conclusion. In oral submissions I explored this proposition with him in more detail, in order to identify what was relied on as the legal basis for this. Mr Denholm then submitted that the detention was unlawful because: (a) it no longer accorded with the statutory purpose and thus breached the first *Hardial Singh* principle (a proposition which he accepted he had not argued below); or (b) it necessarily followed from the quashing of the appeal decision that the Secretary of State would not have been able to effect detention within a reasonable time and thus there was a breach of the third *Hardial Singh principle*. When I pointed out that the way it appeared to have been argued below (from the written closing submissions) was that there was an error of law which bore on and was relevant to the decision to detain, thereby rendering the continued detention unlawful, Mr Denholm adopted that approach too. He submitted that I should approach matters on the basis of the known facts, namely that no valid decision on the FTT appeal was made until June 2016.

101. Mr Seifert maintained that the Judge was right to ask whether the first FTT appeal was unfair as "it goes to the lawfulness of the detention". (It appears that this was also how the Respondent's case was argued below.) When I asked Mr Seifert to explain how this went to the lawfulness of the detention he had some difficulty in articulating a proposition. Eventually, he said that had the first FTT appeal succeeded there would have been no basis to detain the Appellant, but as it did not and it was not unfair, there was. However, during his oral submissions he also said that he accepted that the lawfulness of the Appellant's detention should be judged by reference to the *Hardial Singh* principles and that in this regard, contrary to Mr Denholm's position, this should be assessed by reference to the contemporaneous understanding, namely that the Appellant's FTT appeal had been dismissed and so there was no barrier to his removal. Mr Seifert also said that as this was not an unlawful policy situation it was wrong to apply the *Lumba* approach to the lawfulness of the detention. He pointed out that if Mr Denholm was correct in suggesting that unlawful detention simply followed from the setting aside order, it would mean that all appellants who had their earlier appeal decisions set aside in similar circumstances because the FTR 2014 were ultra vires would also have claims for unlawful detention.

102. The approach adopted by the Judge reflected the submissions made to her by the Respondent. I agree with her conclusion to the extent that, contrary to Mr Denholm's first way of putting matters, it does not follow automatically from the setting aside order that the Appellant's detention was unlawful. As I have cited earlier, Lord Dyson made it clear in *Lumba* that not every breach of public law will give rise to a cause of action in false imprisonment (para 36 above). Lord Justice Dingemans' reasoning in para 86 of *PN (Uganda)* (paras 50 - 51 above) did not proceed on the basis that quashing the FTT appeal decision in that claimant's case automatically led to a conclusion of unlawful detention.

103. However, I have concluded that the Judge erred in treating the lawfulness of the Appellant's detention as determined by whether the first FTT appeal was fair or not.

The analysis in *TN (Vietnam)* which she relied upon in identifying this test was concerned with a different question, namely the impact of the determination that the FTR 2005 were ultra vires on individual appeal decisions; whether they were automatically rendered a nullity and, if not, the circumstances in which such decisions should be set aside. This is quite clear from the issues before the courts in that case and from my earlier citations from Singh LJ's judgment in *TN (Vietnam) CA* and from Lady Arden's judgment in *TN (Vietnam) SC* (paras 43 – 47 above). The issues before the courts in that litigation did not concern the legality of detention.

104. By contrast, in the present case (decided before the FTT had the benefit of the decisions made in the *TN (Vietnam)* litigation), the FTT's order dismissing the appeal had *already* been set aside and the Secretary of State had not challenged the setting aside order. Mr Seifert accepted during his submissions that setting aside the appeal decision had the same effect as a quashing order and that it rendered the first appeal a nullity. No authority was cited to me that suggests the fairness of an appeal decision which had already been quashed, should determine the legality of detention pending that appeal and/or detention predicated on the outcome of that appeal. In *PN (Uganda)* the Court of Appeal had to consider whether the appeal had been unfair in the particular case, in order to decide an issue raised by the Secretary of State on appeal, namely that that Lewis J should not have quashed the FTT appeal decision in that particular case. This explains the references in *PN (Uganda)* to the fairness of the appeal hearing which the Judge referred to. However, when it came to considering the legality of detention at para 75 onwards, Dingemans LJ turned to the recognised principles concerning false imprisonment and the focus of his para 86 is the effect on detention of the quashing of the FTT proceedings. He did not suggest that the fact he had confirmed the finding below that the FTT appeal was unfair, was also determinative of whether PN's subsequent detention was unlawful.

105. As I have already noted, Mr Seifert did not explain in terms of applicable principles why a test dependant on the fairness of the appeal should be applied in circumstances where that appeal decision had already been set aside. It appeared to me that his submissions on this area of the case did not take account of the fact that the appeal decision had already been set aside.

106. It follows that I uphold Ground 6. In light of my conclusion that the wrong test was applied, I will not dwell on the detail of the Judge's reasoning at her paras 68 – 71, which, at times, is a little hard to follow. In particular her test appears to adopt an approach that she disavowed in the third sentence of her para 69 (para 68 above). In light of my conclusion in respect of Ground 6, the issue raised by Ground 5 does not arise. I will now turn to consider the correct approach to the legality of the Appellant's detention in light of the setting aside order.

107. I reject Mr Denholm's submission that it follows from the setting aside order that the Appellant's detention was not in accordance with the statutory purpose. As the Court of Appeal and the Supreme Court found in *TN Vietnam* the FTT's jurisdiction in respect of the appeal stemmed from the 2002 Act (paras 44 and 47 above), not from the rules governing the procedure in relation to such appeals. As Lord Sales JSC said in *TN (Vietnam) SC* at para 80: "The jurisdiction of the FTT to hear and determine an immigration appeal of the kind brought by TN is conferred by section 82(1) of the…[2002 Act] not by the FTR 2005". As the setting aside order explicitly recognised in this case, its effect was to wipe away the appeal decision, so that the Appellant had

yet to have his appeal to the FTT determined, but he still had a pending appeal and the order did not in and of itself remove the statutory basis for the Appellant's detention. Mr Denholm's submission also appeared to lose sight of the fact that in the scenario in which these issues are live, the proposition that the Appellant's claim was unsuitable for the DFT has been rejected. I also note that the Court of Appeal did not suggest in *PN (Uganda)* that quashing the earlier FTT appeal had the effect of rendering detention unlawful because it took it outside of the statutory purpose. If Mr Denholm's submission in this regard is well-founded, it appears that it would have applied in *PN (Uganda)* as well.

108. In my judgment the correct approach is to ask whether the appeal decision that was set aside (and which, the Respondent accepts was then a nullity) bore on the Appellant's detention. There are a number of reasons why I have reached that conclusion.

109. Firstly, it follows from Lord Dyson's analysis in *Lumba* of the inter-relationship between public law error and unlawful detention. His analysis was not confined to or specific to the effects of unlawful policies but was based on a wide-ranging consideration of the false imprisonment principles and authorities. By way of example only, in arriving at the correct approach to be applied, he rejected propositions that the tort of false imprisonment involved a causation test (as the Court of Appeal had found); that false imprisonment was confined to instances of bad faith and the exercise of powers for an improper purpose; and that authority to detain was vitiated only by failure to have regard to a material consideration which had an effect on the detention (paras 65 – 66, 71 and 86 – 88). Consistent with this, the conclusion Lord Dyson expressed in para 68 was in terms of the impact of public law error on detention, as opposed to suggesting his analysis was confined to the impact of unlawful policies (para 36 above).

110. Secondly, it is consistent with the fundamentals of false imprisonment, under which detention is unlawful unless the defendant can establish a lawful authority for it (para 33 above).

111. Thirdly, it is consistent with the approach taken by the Court of Appeal in *PN (Uganda)* in determining that the third period of detention was unlawful (paras 50 - 51 above). In short, Dingemans LJ considered that the quashed appeal decision bore on the decision to detain the claimant in that case because, absent the appeal having been determined it was not possible to remove her within a reasonable time. On the face of it, that approach is either binding on me or, if not (because it concerned the consequences of a setting aside a decision made under the FTR 2005) it is highly persuasive authority. I have already explained why I consider that the Judge erred in distinguishing *PN (Uganda)* on the basis that the appeal had been found to be unfair in that case.

112. Fourthly, although Mr Seifert submitted that the test identified by Lord Dyson in *Lumba* was not the correct test to apply, the only reason he gave for this was that *Lumba* concerned the application of an unlawful policy and the Court's reasoning was or should be confined to those circumstances. I have already indicated why I do not accept that submission.

113. Fifthly, in any event, given that the trigger for the setting aside order was the finding that the FTR 2014 were ultra vires, the present situation could be regarded as an unlawful policy case or closely analogous to it.

114. Accordingly, the correct question to ask in the Appellant's case (in a scenario where his claim was not unsuitable for the DFT) is whether the dismissal of his appeal on 26 January 2015 bore on his detention in the sense of it being capable of affecting the decision to detain him. If that is the correct question to ask, it is very difficult to see how detention pursuant to the appeals process *before* that decision was made (the period 9 – 26 January 2015) can be said to meet this test. However, as regards detention *subsequent* to the date of the appeal decision, the Appellant's case proceeded on the basis that his appeal had failed, he was ARE and was shortly to be removed; absent an appeal determination having been made at that stage and an appeal still pending, the timescale would inevitably have been significantly longer and thus, on the face of it, the set aside decision was capable of affecting the decision to detain him, so as to render his detention unlawful in that scenario.

115. Of course that it is not the end of the matter, as the Respondent argues that the Appellant would and could have been lawfully detained and thus only nominal damages should be awarded. I have already discussed this issue under Ground 4. However, if Phase 1 of the detention was lawful (and Phase 2 up until 26 January 2015), it could arise specifically in respect of the remainder of the Appellant's detention after the dismissal of his appeal. As Dingemans LJ noted in para 86 a nominal damages contention did not arise on the facts of *PN (Uganda).* In their submissions to me Counsel were not agreed on the appropriate counter factual that would apply in these circumstances.

116. The counter factual involves assessing whether the Respondent could and would have detained the Appellant if it had acted lawfully: see the passages from *Lumba* I have cited earlier and also the discussion in the judgment of Sir Brian Leveson, President in *Parker v Chief Constable of Essex Police* [2018] EWCA Civ 2788; [2019] 1 WLR 2238 at paras 93 – 100 and 104 – 105.

117. Accordingly, I do not accept Mr Seifert's submission that the counterfactual involves proceeding on the basis that the 26 January 2015 appeal decision was still in place. Equally, it appears to me that the counterfactual must proceed on the basis that the appeal would not have occurred within FTR 2014 timescales, since those rules are ultra vires. The court making this determination would need to assess whether the Appellant could and would have been detained in circumstances where his appeal would be considered under non FTR 2014, standard timescales and thus there would have been a barrier to his removal in place for a lengthier period of time. However, I also disagree with Mr Denholm's proposition that the counter factual must be constructed on the basis of the date when it is now known that the appeal actually took place (June 2016), given that the assessment looks to what would have happened in the period January – March 2015; albeit I accept that the actual date by which an appeal was heard may have some evidentiary significance in the sense of being illustrative of likely timescales (albeit, perhaps less so here, as I understand that the appeal was adjourned for specific reasons from an earlier scheduled date).

118. I will give the parties the opportunity to make written submissions on the consequences of my conclusions and in particular as to how the nominal damages issue should be determined (if it arises).

Ground 7

119. This ground is specific to Phases 3 and 4 and relates to the date from when it appeared that there was a barrier to removal. It is only likely to be of relevance if the claim for unlawful detention failed in relation to the contentions raised in respect of Phases 1 and 2 which I have discussed above. I can deal with it very shortly. The date on which the Respondent received the further representations was a finding of fact. I have set out the Judge's reasoning at para 70 above. It cannot be said that no reasonable Judge could have reached that conclusion or that there was no basis for the finding. I therefore reject this ground of appeal.

Conclusion and further submissions

120. For the reasons set out above, I upholds Grounds 1 – 4 inclusive and Ground 6 to the extent that I have indicated. In summary I have found that:

i) The Judge erred in the way she arrived at her conclusion that the Respondent had made sufficient enquiries regarding the suitability of the Appellant's asylum claim for the DFT (Ground 1); erred in her approach to the failure to comply with the relevant policy guidance in respect of the documentation supplied by the Appellant (Ground 2); and erred in the basis for her conclusion that it was open to the Respondent to conclude that the asylum claim was suitable for the DFT (Ground 3);

ii) The Judge's alternative conclusion that only nominal damages were payable if the detention was unlawful was also flawed by a failure to determine relevant matters (Ground 4); and

iii) The Judge applied the wrong test in deciding that the setting aside of the order dismissing the Appellant's FTT appeal did not render his detention unlawful because there was no unfairness in relation to his particular appeal (Ground 6).

121. In relation to these grounds I have identified why the Judge's self-directions and reasoning was flawed and I have identified what I consider to be the correct approach to be adopted, but I have been careful not to substitute my own conclusions on matters of fact, conscious that I did not hear the evidence given below.

122. However, it may be (and I put it no higher than that), that there are some consequences, in terms of the legality of the detention, that flow from my conclusions and which are now capable of resolution, as the facts are not in issue and the relevant documentary material is available to me. Equally, there may be matters that are now capable of agreement between the parties, in light of the guidance I have given. As I indicated at the hearing and as I have referred to in para 54 above, I will give the parties an opportunity to consider this judgment and make written submissions to me on: the appropriate consequential orders I should make, including whether I am in a position to determine any of the outstanding issues (see in particular paras 80, 85, 89, 97 and 118 above); and / or whether a new trial should be ordered and, if so, in relation to which issues, including whether findings made by the Judge that are untouched by the appeal can stand in any event (for example, in relation to the absence of signed detention reviews at her paras 94 – 96; and in respect of the Appellant's psychiatric injury at her paras 98 – 109).

123. Accordingly, the order accompanying this judgment sets out a timetable for filing the further written submissions. I have also directed that time for any applications for permission to appeal will run from the date of the further order I will make after I have considered those written submissions (rather than from the date of this judgment). I will deal with any issues as to costs at that later stage. In the event it proves necessary to do so, I will hold a further hearing before determining the issues raised by the written submissions.