Neutral Citation Number: [2011] EWHC 2120 (Admin).

Case No: CO/8140/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 5 August 2011

Before :

DAVID ELVIN QC

(sitting as a Deputy High Court Judge)

- -

Between :

THE QUEEN
(on the application of S)

Claimants

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

(1) GEO GROUP LIMITED
(2) DRUMMONDS MEDICAL LIMITED
(3) THE SECRETARY OF STATE FOR JUSTICE
(4) THE CENTRAL AND NORTH WEST LONDON NHS FOUNDATION TRUST

Interested Parties

- -

Ms. Stephanie Harrison and Ms Bryony Poynor (instructed by Bhatt Murphy) for the **Claimant**
Mr. John-Paul Waite (instructed by the Treasury Solicitor) for the **Defendant**
Mr David Eccles (instructed by Berrymans Lace Mawer LLP) for the **First Interested Party**
(The other Interested Parties did not attend and were not represented)

Hearing date: 16, 17, 31 March and 1 April 2011
Further written submissions 20 June, 4 and 6 July 2011

- -

JUDGMENT

(As approved by the Court)

The Deputy Judge (David Elvin QC):

Introduction

1. The Claimant, known as S, seeks judicial review against the Secretary of State for the Home Department, acting through the UK Border Agency ("the UKBA"), and damages for false imprisonment and compensation for violation of his rights under Articles 3, 5 and 8 ECHR in respect of detention from April 2010 until his release on bail on 29 September 2010 pursuant to the Order of this Court dated 21 September 2010.

2. This case raises the difficult issue of the detention of those who suffer from mental illness and raises serious questions about the handling of such issues by the UKBA and Home Office in the present case.

3. Proceedings were begun on 28 July 2010 and permission was granted by Neil Garnham QC (sitting as a Deputy High Court Judge) on 21 September 2010. He also granted bail on terms which, by common agreement, have been complied with by S and which, also by agreement, I relaxed at the conclusion of the first part of the hearing on 16 March. The Defendant filed an acknowledgment of service and summary grounds opposing the grant of permission on 20 August 2010 and should have filed detailed grounds by late October (see CPR Part 54.14(1)), though she failed to do so. On 20 January 2011, Wyn Williams J. gave directions that the detailed grounds should be filed by 10 February, and also for limited disclosure, though even so no detailed grounds were filed.

4. The skeleton argument filed on behalf of the Defendant on 3 March 2011 also purported to function as the detailed grounds although no permission was sought to do so. Indeed, it turned out to be an inadequate statement of the Defendant's grounds of opposition, as was made clear at the commencement of the hearing. No objection was taken to the continued defence of the proceedings in principle though I will return to the unsatisfactory conduct of this case by the Defendant later in this judgment.

5. S's appeal against the refusal of asylum has yet to be heard by the First Tier Tribunal ("FTT") and that issue is not one for me but nonetheless I have to form my own views on the evidence before the Court whether or not they overlap with issues which may in due course arise before the FTT.

The facts

6. These facts appear in the evidence and, although they have not yet been the subject to any findings by the FTT, are substantially undisputed by the Defendant - although the Defendant reserves her position with regard to the credibility of events which are said to have occurred before S's arrival in the UK. A detailed and helpful cross-referenced chronology was provided to me by Ms Harrison and was not substantially disputed by Mr Waite (subject to the reservation noted). Moreover, from the voluminous evidence before the Court, it appears to me that S's history has been consistently presented from his arrest in 2006 until today to UKBA, the Crown Court, the Prison Service and those providing medical and psychiatric advice and assessment.

7. In particular, whilst no objective verification of S's history is available, there appears to be no suggestion that S's account of his abuse and mental condition is untrue and a number of independent psychiatric experts have noted the consistency of his account of what happened to him. There is undisputed and substantial medical evidence in the form of a diagnosis of post-traumatic stress disorder ("PTSD") and evidence of physical symptoms consistent with his account of past abuse since he needs treatment for a prolapsed rectum and scarring on his body.

8. I set out in some detail S's history leading up to the period of detention which is the subject of the current judicial review since it indicates both the consistent history of his mental problems and the extent of information about S which was available to public authorities as a result of the substantial time he spent in custody or detention from August 2008.

Events up to 25 September 2006

9. S is an Indian national and a Sikh by ethnic origin and was born on 11 November 1976. In 1990, when S was 14 years old his parents were murdered whilst he was present in the house and he was subjected to abuse including anal rape with a bottle by four masked gunmen. It may well be a result of this that four threatening figures feature significantly in S's hallucinations. He left India in June 1994, and travelled to Germany via Moscow, where he remained for about 8 months. While there he was subjected to sexual abuse, raped and forced into prostitution before illegally entering the UK under a false passport in February 1995.

25 September 2006 - 27 April 2009

10. S remained undetected and at large in the UK, taking various jobs, until he was arrested for violent criminal offences committed on 25 September 2006. These comprised one count of unlawful wounding and three counts of assault occasioning actual bodily harm, for which he was convicted by Reading Crown Court on 2 February 2009. The offences comprised an unprovoked attack on four people, including two women, which included kicking one of the women in the stomach and biting through one of the men's ears.

11. Before that conviction he had been remanded in custody since about 11 August 2008 following a failure to answer to bail and committing the theft of two tile cutters, for which he was sentenced to 14 days' imprisonment by the East Berkshire Magistrates on 9 October 2008. S was sentenced at Reading Crown Court to 16 months imprisonment for the above offences, together with the failure to answer to bail, on 9 February 2009. The Judge did not make a recommendation for deportation.

12. During his time in custody, S was placed on ACCT (Assessment, Care in Custody, and Teamwork) on a number of occasions due to his self-harming (January 2009) and making an attempt at suicide (March 2009), and as a result of being found to be in a very fragile emotional state (April 2009). Whilst in custody a physical examination revealed a rectal prolapse and S was referred to a surgeon.

13. S's case is that, since coming to the UK, he has formed a relationship with a Polish national (who I will refer to as "K") and her four children who S says he met in 2005. They were engaged to be married in July 2008. As an EU national, K has a right of permanent residence in the UK. It is clear from the evidence that K has regularly visited S whilst in detention and in hospital and has attended meetings to discuss S and his situation.

14. On 13 February 2009 S claimed asylum and made a human rights claim for leave to remain and submitted evidence of his family life with K and her children. Whilst the UKBA sought reasons from S why he should not be deported on 24 February it did not seek information from K concerning her relationship with S. S has also raised the issue of that relationship in connection with his EEA status but that is not a matter for me to decide although I note that there is significant evidence before the Court

regarding the relationship and, for example, the frequency with which she visited S.

27 April 2009 - 25 June 2009

15. At the conclusion of S's sentence, on 27 April 2009 the UKBA determined that S should be detained pursuant to s. 36(1) of the UK Borders Act 2007 (notified by letter dated 28 April 2009) pending deportation and the decision recorded some of S's history and S's claim that he had had a partner in the UK for some years. It was proposed that deportation be pursued. Similar points were made at the first review on 9 May when it was also noted that "he is believed to be in good health" and "there are no compelling or compassionate circumstances". It soon became clear that this description was inaccurate.

16. During this first period of his immigration detention, S was again placed on ACCT due to his very low mood and his threats of self-harm. The nature of the threats, which were consistent visual and auditory hallucinations suffered by S, took the form of threats from four threatening figures who told S to kill himself. He was placed on anti-psychotic medication. However, this situation continued and S again self-harmed by cutting his wrists twice in late May 2009 and on 1 June made a ligature out of his shoelaces - which led to S being placed on constant watch. H & M, solicitors then acting for S, made representations to the UKBA on 22 May 2009 (reiterated on 3 June) about S's rape (enclosing medical evidence), asked the UKBA to arrange for a medical assessment at HMP Bullingdon and sought temporary admission to K's address indicating K was willing to accommodate him. S again sought asylum on 31 May 2009 and further representations were made by him and his solicitors with regard to his mental condition (he wrote on 7 June 2009 "I have severe mental problems due to all the torture and family problems which I have gone through") and the physical result of his being sexually abused.

17. Despite the ACCT and these events, the UKBA detention review on 5 June 2009 did not refer to any mental health or related issues and blandly stated that there was "no changes in circumstances". A review in similar terms authorised S's continued detention on 3 July. The reviews appear to have taken no account of the mental health and self-harm issues, despite the many representations received. These included a letter from Dr Claudia Koch, the Principal Clinical Psychologist of the Mental Health In-Reach Team at HMP Bullingdon, who wrote to the GP at HMP Bullingdon on 24

June explaining S's history and describing his current state of mind and hallucinations. The description was consistent with the other substantial evidence from 2009 and 2010 of S's state of mind before the Court (which included many of S's drawings):

> "He... has been having images of four masked men threatening him. ... he currently experienced these images most days and nights, and they sometimes prevented him from sleeping. He bought a book in the session with very vivid drawings he had made of his images, and the different situations in which they appeared, such as in his cell... He has also drawn out a picture of a dragon, which he said was a protective figure, derived from a favourite TV program he used to watch as a child. [S] said the images tended to tell him to cut himself, which he has done in the past. They also threatened to kill him, or warned him not to talk to other people... [S] said that the images tended to stay away when he was with his fiancée, when he was reading the Bible, and to some extent if he could conjure up the figure of the 'Mother Dragon'."

S continued to meet with Dr Koch at HMP Bullingdon, for a total of nine occasions between June and September 2009.

18. Mr Lindsey FRACS wrote to the Mental Health In-Reach Team and HMP Bullingdon dated 25 June which, whilst dealing with his physical problems, noted his distressed state during the consultation "crying and sobbing and also explained that he hears voices in his head from time to time, associated with the traumatic time he went through in India" and advised that "he warrants psychiatric assessment and probably some kind of counselling regarding his previous trauma".

25 June 2009 - November 2009

19. Following an AIT bail hearing in Newport on 25 June 2009, on the journey back to HMP Bullingdon S attempted to escape from custody at Membury Services on the M4. S was found some two and a half hours later hiding in bushes in fields nearby, with the assistance of the police. He was then charged with escaping from lawful custody and subsequently remanded in custody. On 6 July he pleaded guilty to that offence at Reading Crown Court and was remanded to await sentence.

20. S was interviewed for the purposes of his asylum application on 14 July. In his interview, S recounted the details of his history (consistently with the accounts given on earlier occasions) which included the following:

> "Q79 If you have been hearing voices for 18 years and receiving treatment for about 4 years how have you dealt with this for 14 years approx in UK?
>
> I have just been suffering. If you tell someone you are hearing voices they make fun of you and sit elsewhere and call you a mad man.
>
> …
>
> 81. Why is your Polish fiancée helping you?
>
> She loves me a lot.
>
> ...
>
> 83. Are you happy for the prison to share your medical information with the Home Office?
>
> Yes.
>
> 84. Is there any other information you would like to tell me that you have not done so already to support your asylum application?
>
> The prison GP has a report on me which states I need an operation due to the abuse I suffered. I would like me caseworker to have a look at this information."
>
> "I have a Polish fiancée with 4 children. We have been living together for 4 ½ years. The children are not mine but accept me as their father."

21. It was clear therefore, that S had agreed to the request to share his medical information with the Home Office.

22. On 15 July, S was seen by Dr Ashley Rule at HMP Bullingdon:

> "Severely depressed with possible psychotic symptoms, related to several significantly traumatic events earlier in his life (murder of parents, kidnap, rapes), and now faced with the imminent prospect of a deportation to India where he believes (rightly or wrongly) that he will be tracked down by his parents' killers and murdered."

23. Whilst unnecessary, since S was at that stage held on remand, the next UKBA detention review on 31 July 2009, whilst noting the refusal of bail and the escape from custody, surprisingly continued to fail to make any mention of S's mental health problems.

24. I also note that the detention reviews continue to refer to the fact that S's release "would carry a substantial risk of harm to the public" whilst, at about the same time, and following it, he was assessed as a low risk for cell sharing and came with very positive reports of his behaviour at HMP Bullingdon and his helpful and co-operative nature. One of those reports refers also to the view that "the support that he gets from

his family on the outside is what keeps him going."

25. On 14 September, Dr Lally, Consultant Forensic Psychiatrist provided a report at the request of S's solicitors for the purposes of S's sentencing for his escape from custody. He made the following observations in the "Diagnosis" section of the Report (pp. 22-23) noting that S's mental state had deteriorated since he was placed on remand:

> "It is quite clear that he has a strong desire to avoid deportation. This could give him a clear reason to feign or exaggerate symptoms. However the consistency of his story over the last months leads me to conclude that it is reasonable to accept his presentation at face value. He currently presents as suffering from a psychotic state characterised by auditory hallucinations and paranoid delusions. These symptoms have occurred in the context of a severely depressed mood with suicidal thoughts and acts of self-harm. It is therefore my opinion that he is currently suffering from a severe depressive illness with psychotic features. It would appear that he has fulfilled the criteria for such a diagnosis for about four months since May 2009. During this period he has only been prescribed medication sporadically for one reason or another. It is therefore not surprising that there has been no real improvement in his condition as this would require consistent treatment with antidepressants and possibly antipsychotic medication."
>
> "I think the most likely explanation is that he has suffered from a constellation of post traumatic symptoms since the age of 14. These have included what might be termed pseudo hallucinations and dissociative episodes. It may well be that some of his symptomatology has been contained by the medication he has been obtaining from Poland via his fiancée. Since his remand his mental state appears to have deteriorated... It is therefore my opinion that on the background of these post traumatic symptoms he has now developed the current presentation of a psychotic depression. I do not think that any aspect of his presentation is significantly attributable to cultural factors."

26. Under "Prognosis" Dr Lally noted that:

> "His severe depressive illness is accompanied by significant thoughts of self-harm. He has self-harmed on numerous occasions despite having sought help on other occasions... there is a significant risk of suicide if his mental state does not improve. I am particularly concerned by the fact that voices have told him to cut off his penis... patients who experience this type of hallucination proceed to self-mutilate in this way. Despite the precautions being taken by the Prison Service, in such an environment this remains a real and significant risk".
>
> "... However, with appropriate treatment he should be able to return to a functional state where he is not at significant risk of self-harm or

> suicide and would, for example be able to sustain a relationship and return to work. Any further psychological treatment that is required would not necessitate continued hospitalisation"

27. Dr Lally considered that "to date none of his symptoms appear to be directly related to risk to others" and concluded by recommending that S be subject to an interim hospital order under s. 38 of the Mental Health Act 1983. Whilst there was not a high risk of violence, but a significant risk of absconding, a low secure unit would be appropriate.

28. Following adjournments and a further remand, on 22 October S was seen by Dr Ollie White, an expert in Forensic Psychiatry, for the purposes of s. 38 of the 1983 Act who agreed with Dr Lally's diagnosis and recommendation that a low secure placement was appropriate. On 19 November S self-harmed by cutting his left wrist for 4 cms, the report noting that "apparently [S] had told the officer he had done it to drink his own blood (voices told him to do this) the wound was minor though it bled quite profusely".

November 2009 - April 2010

29. On 24 November 2009 an interim hospital order was made under s. 38 of the 1983 Act. UKBA failed to comply with an earlier order to provide the Court with details of S's immigration status and so the Judge directed that all information regarding that status should be put before the Court on the next occasion. Following that Order, on 4 December 2009 S was transferred to Woodland House low-secure mental health unit under s. 38 of the Mental Health Act 1983. There were further incidents of self-harm to both S's head and forearm in December 2009 and January 2010.

30. At this time, the Defendant determined to progress S's deportation and on 28 January 2010 the deportation order was signed for the Defendant pursuant to s. 32 of the UK Borders Act 2007. The reasons for the deportation decision were set out by the UKBA in a letter dated 1 February 2010 which was not at that time given to S. The reasons rejected the asylum and human rights claims, including the account that the murder of S's parents was politically motivated. It was also stated that: S's failure to seek medical assistance for injuries undermined his credibility and therefore his claim to have been tortured was not believed; the fact that S did not report the incident to police undermined the authenticity of his claim and that S's failure to claim asylum at an early opportunity also undermined his credibility

31. S's Article 3 medical claim was refused and although reference was made to the report of 24 June 2009 by Dr Koch, which I have referred to above, the letter unaccountably then stated that -

> "you have provided no evidence that any further assessment has been undertaken."

32. In the light of the details of the events of 2009 which I have outlined, this statement was made in apparent ignorance of much of what had happened, including matters occurring in immigration detention and the consequences of that detention. It is difficult to understand how the UKBA had failed to inform itself of these matters.

33. S's Article 8 claim was also rejected on the basis that there was no evidence that his relationship with K was subsisting, although it was accepted S might have established a private life. It was not accepted that the deportation decision would interfere with his private life and, in that respect, the UKBA appears either not to have been aware of, or failed to take account, matters made known in the context of S's offending and detention.

34. This letter was eventually served on S on 30 April in an unamended form. The faulty understanding which it displayed of S's circumstances was not corrected and, indeed, was made worse by what occurred in the 3 months between its drafting and service.

35. On 8 February a Care Programme Approach (CPA) meeting was held at Woodlands House, with a number of people in attendance including S, K, Dr Susan Hardy (Consultant Forensic Psychologist and RC), Dr Anne Schmidt (Clinical Psychologist) together with 3 other medical personnel, and Mike Catungal (Mental Health In-Reach Team, HMP Bullingdon). The notes of the meeting record that Dr Schmidt -

> "noted that [S] has difficulty in trusting people. On the day of his admission he was very anxious and reported being very afraid of being in hospital, in spite of this he spoke freely and audibly. Within two weeks his anxiety had diminished noticeably and he appeared more confident, calm and had good eye contact."

36. Dr Schmidt also noted -

> "that when talking about his past he is consistent in his reporting and in the distress it causes him. The voices and hallucinations [S] reports appear to have reduced since his admission to Woodlands House.

> Although [S] self-harms he does not appear to try and kill himself. He feels hopeless about the uncertainty surrounding his future in respect of his immigration status but seems somewhat resigned to being deported... assessments relating to PTSD and aspects of his personality are on-going."

37. Under "Risk" the notes recorded:

> "[S] has a high risk of self-harm and potential suicidal tendencies. This is currently related to the issues around his immigration status. He has difficulty in coping. He has not shown any physically aggressive behaviour to others whilst at Woodlands house although he has convictions for GBH and ABH. His risk of absconscion is high..."

38. The Crown Court made several extensions to the interim hospital order, including on 15 February when it was confirmed to the Court that the Claimant's file had been passed to the UKBA "mental health team" who would monitor the situation with regard to his mental health "and will be kept informed of developments by the hospital directly". It was also said by the Crown that deportation proceedings were on hold pending the outcome of the criminal proceedings.

39. On 8 April the Crown Court refused to extend the interim hospital order further and ordered that the case be set down for sentencing. Defence counsel's note recorded as follows:

> "The UK Border Agency have decided to take no further action until the outcome of [S]'s treatment and his sentence, whereupon the situation will be reviewed…"

40. Before S ended his sentence, and was taken back into detention, two further expert psychiatric reports were produced. The first, dated 20 April, was a Report by Dr Susan Louise Hardy, Consultant Forensic Psychiatrist, who had attended the CPA meeting on 8 February. It is significant since she considered the risk posed to S's mental state by continued detention (Dr Lally had noted the deterioration in S as a result of remand the previous September) and made clear the need to deal carefully with that risk. Dr Hardy also noted the frequent visits which K made to see S. She wrote the following:

> "After a period of detailed assessment of his mental state, it has been concluded that [S] does not suffer from a severe mental illness. Whilst at times during this admission he has presented with symptoms of low mood, tearfulness, and feelings of helplessness, these have not been

> persistent features. They appear to be mainly related to concerns regarding his immigration status and threat of deportation." (pp.12-13)
>
> "[S] has reported experiencing a constellation of symptoms of a post-traumatic nature. He continues to report hearing "voices" (of four masked men, who killed his parents). At times, he reports that these tell him to self-harm, usually by cutting himself. These experiences are most likely to represent pseudo hallucinations, and are not considered to represent true psychotic phenomena, as would be soon [sic] in severe mental illness… It is likely that the currently prescribed medication has had a beneficial effect on these reported symptoms, by reducing anxiety and distress levels. These symptoms may be amenable to specific psychological treatment. Such treatment would not require continued detention in a hospital setting."
>
> "[S] presents with some features of an emotionally-unstable borderline-personality disorder. These include: liability to becoming involved in intense and unstable relationships, often leading to emotional crises; excessive efforts to avoid abandonment; recurrent threats or acts of self harm; chronic feelings of emptiness. These personality traits will contribute to aspects of his clinical presentation."

41. Dr Hardy drew a distinction between the absence of need for detention in hospital but the risk of keeping S in custody, a distinction which the UKBA did not appear subsequently to appreciate:

> "[S] has a history of impulsive self harming behaviour both in prison and hospital settings… He continues to present with a high risk of impulsive self harm… He presents with a significant risk of completed (and, perhaps, accidental) suicide. If [S] were detained into a custodial setting, this risk would need to be identified and monitored. It is very clear that his concerns over his immigration status and the risk of deportation are very significant stressors in [S]'s case, and are strongly associated with self harm behaviour."
>
> "Whilst [S] suffers from significant mental health difficulties, these do not constitute a mental disorder of a nature and/or degree to warrant detention in hospital under the provisions of the Mental Health Act. Therefore, I have no recommendations with regards to a psychiatric disposal to make to the Court."

42. Dr Hardy's opinion that S did not require further detention in hospital was also that of Dr Anne Schmidt, the Chartered Clinical Psychologist who treated S at Woodland House Mental Health Unit and who produced her own report on 21 April. In it Dr Schmidt noted that she had met S on 16 occasions since 4 December and wrote:

> "In my opinion, [S] is suffering from anxiety related Post Traumatic

Stress Disorder, and Avoidant and Schizotypal Personality Disorders with Dependent and Paranoid features. He is likely to benefit from psychological therapy, for which it is not necessary to remain an inpatient."

"Following examination by the ward doctor in Woodlands House, Dr Abdul-Hameed Latifi, [S] was found to be suffering from a rectal prolapse consistent with injury suffered from repeated rape." (3.13)

"There appears to be a pattern of harming himself, linked to being left alone by those who support him or "look after" him, the threat being returned to prison or deported, both situations in which he believes he will not be looked after." (3.25)

"…information obtained during my interviews with [S] suggest that he meets criteria for Post Traumatic Stress Disorder (PTSD) as set out by the Diagnostic and Statistical Manual of Mental Disorders…" (3.30)

"My impressions support the conclusions of Dr Rule and Dr Lally: all details [S] has related concerning his history have been consistent with accounts he has offered previously, and these accounts appear to have been accepted as true; he has related the events of his past to me on several occasions and the details have remained consistent with each retelling; his emotional presentation has been congruent with his story, and consistent with previous reports by clinicians assessing him; over a the 4 month period of his admission he has reported that his symptoms have improved, in particular that the appearance of the 4 men has reduced considerably and that the voices have become 'lower' which he would have been unlikely to do had he been malingering; similarly he has reported that the medication he has been prescribed in Woodlands House has been extremely beneficial in improving his symptoms; objectively he appears significantly less tearful, less distressed, more sociable, less isolative than on first admission; and finally, following the first joint interview with Dr Meina, he misinterpreted a statement she made to mean that he did not suffer from a mental illness – he described feeling great relief that he was not considered to be mentally ill, which is not a behaviour consistent with feigning symptoms." (3.31)

"[S] completed the IPDE screening tool... The summary outcomes indicate definite personality features of Schizoid Personality, Schizotypal Personality, Avoidant Personality, and Dependent Personality, while Paranoid Personality and Borderline Personality show some probable features." (3.38)

"Currently, [S] demonstrates evidence of the presence of Avoidant traits and to such a degree that a definite diagnosis of Avoidant Personality Disorder is warranted." (3.45)

"[S] demonstrates evidence of the presence of Schizotypal traits and to such a degree that a definite diagnosis of Schizotypal Personality

> Disorder is warranted. Schizotypal personality disorder is defined by a number of characteristics including the following which are presented by [S]: unusual perceptual experiences; suspiciousness or paranoid ideation; excessive social anxiety due to paranoid fears; odd thinking; constricted affect, and; ideas of reference." (3.45)
>
> "The prevailing theme which runs through the odd and eccentric cluster of personality disorders is that of paranoid beliefs; [S] does not have a paranoid personality disorder but he does present with strong paranoid personality traits." (para 3.47)
>
> "[S] also meets the diagnostic criteria for Dependent Personality Disorder. Dependent personality disorder is marked by the following which are presented by [S]: inability to make decisions without high degree of reassurance; inability to assume major responsibilities; difficulty in expressing disagreement; difficulty with doing things on one's own; uncomfortable or helpless when alone because of exaggerated fears of being unable to care for himself; pre-occupied with being left to care for one's self." (3.48)
>
> "His description of their relationship [with his partner] indicates that his fiancée 'looks after' [S] and makes those decisions for him that are in his best interest, because he is unable to demonstrate agency." (3.49)
>
> "…there is no corroborative evidence to support or contradict his story, but my impression, after carrying out an extended assessment, is that it is valid and that, as a consequence, he is experiencing significant levels of distress." (4.1)
>
> "[S]'s personality profile suggests that he would respond well to individuals who adopt a caring, protective role towards him, and is likely to be reassured by a relationship in which the therapist appears to be an expert who will give good advice and guidance." (4.3)
>
> "He is likely to benefit from psychological therapy to address his post traumatic symptoms… He is likely to benefit from psychological input to help him cope with his nightmares, and he has already shown himself to be highly motivated to engage with psychological work related to nightmares, being very conscientious in carrying out therapeutic exercises." (4.4)

43. Importantly, Dr Schmidt concluded (Report, para. 4.8) with her opinion of what S needed and underlined her own concern (which echoed that of Dr Hardy) as to the likely deterioration in S's condition if he were returned to custody:

> "Despite these medical and psychological interventions, his prognosis is likely to be more positive if he has access to supportive relationships, and trusted people he can talk to particularly whilst engaged in psychological therapy." (4.8)

> "It is not necessary for [S] to remain an inpatient to engage in the therapy described above and it would be most beneficial for him to be living in his supportive home environment to derive maximum benefit from it. It is likely that if he is returned to prison, he will regress to the position which gave rise to his initial referral to Woodlands House: given his personality profile, in a situation of uncertainty or where there is little access to supportive relationships, he is likely to resort to dysfunctional behaviour to cope with distressing emotions, for example self harm or suicidal behaviour. He may feel vulnerable and threatened, his fear of rejection making it difficult to build relationships."

44. On 22 April, Dr Schmidt met S to go through her report:

> "[S] requested a copy of my report, so I went through it with him and gave him the opportunity to ask questions as we went along. He became tearful when I explained I had had to consider whether he was telling the truth. I went through the paragraph that explained Dr Lally, Dr Rule and myself had all thought he was telling the truth."

45. On 23 April S was sentenced at Reading Crown Court in relation to his escape from custody in July 2009. He was sentenced to 6 months' imprisonment and, given the 301 days spent in custody on remand since 26 June 2009, this meant that S had already served more than the total sentence. The sentencing judge refused to make a recommendation for deportation and said it was a matter for the Home Office.

46. S was immediately taken back into immigration detention. I will return to the reasons given for this decision. S's criminal solicitors, were anxious that S's mental condition was properly understood by the authorities at the time of transfer:

> "I was at pains to try to ensure that [S]'s medical assessments followed him to wherever he might end up. A copy of the latest 2 reports together with a list of the medication he takes did go with him and I told the police officers that he remains a suicide risk."

47. That was made clear in a note taken by S's barrister. He was also anxious to ensure S was properly dealt with and he spoke to the police at Lodden Valley Police Station and noted:

> "I was told by a female officer that he is still there and that UKBA hope to pick him up tonight or tomorrow morning… I was assured that all [S]'s papers etc are with him and that he has already been seen by a doctor."

48. CID note on the Defendant's file of a conversation between a UKBA official and the

police station showed a clear awareness of S's mental condition:

> "Call from Natasha at Lodden Valley police station Thames Valley Police. Subject brought into custody from Reading Magistrates court for immigration offences.
>
> Subject has mental health issues and currently being dealt with by CCD who are considering automatic deportation as of 11/02/2009."

49. S was examined by Dr Swami at the police station and the report notes:

> "Reason doctor requested
>
> Post traumatic stress disorder, dp states he has mental health issues currently on medication for this, Mirtazapine 45mg, Risperidone. Dp is high risk of suicide and has suicidal tendencies. Dr Susan Louise Hardy states dp is high risk…"
>
> "he is still presenting with self harming symptoms and hence need personal supervision while in custody…"

It appears from this that the doctor had access to Dr Hardy's report.

24 April 2010 to 4 August 2010

50. Late on 24 April 2010, S was transferred from the Thames Valley Police Station to IRC Harmondsworth. From 24 April 2010 until 4 August 2010 the Claimant remained in immigration detention at IRC Harmondsworth at which time he was transferred to Hillingdon Hospital in August 2010.

51. The initial reasons for detention were minuted by Toni Tomney (UKBA, Criminal Casework Directorate) on 23 April.

> "Detained by SSHD pursuant to powers contained in Sch 3 Immigration Act 1971.
>
> "On 23 April 2010 we were notified that Mr S had been assessed and did not need hospitalization but would be released as his sentence had been served on remand."

52. With regard to S's relationship with K it was noted:

> "No evidence has been submitted to show that they have co-habited and representations have been rejected."

53. Under the heading of "Other compassionate factors" the minute stated:

> "[S] claims to be mentally ill but we have no evidence of this. He has

> been assessed as not needing detention under the mental health act. Mr S claims that he self prescribed by taking medication provided by his partner. This was all considered when the asylum claim was refused.
>
> He claims he is a victim of torture. He claims that he was sent to Europe (Germany) as a young man where he was frequently raped in exchange for money. This was fully considered when his asylum claim was refused."

54. Under "Proposal" the report stated:

> "He has mental health issues and more information is required. I intend to contact healthcare at the IRC for an assessment of his current health and fitness for detention. We do not have a reliable release address. It is proposed to detain [S] as there is a risk of him absconding. His probation officer has assessed him… as a medium-high risk of serious harm, low risk of reconviction and MAPP1.""

55. The recommendation of detention was accepted by the HEO:

> "He appears to have medical issues (mental health) but no evidence has been forthcoming that would deem him unsuitable for remaining in detention.
>
> He has no fixed abode and alcohol related problems. He is not suitable for release under rigorous contact management and poses a risk to the public.
> ...
>
> **Toni** please continue to investigate his medical issues to establish if there are any reasons he would not be suitable for detention that we are unaware of."

56. On 24 April, S was seen by Dr Kaur at Harmondsworth whose notes suggest concern at S's condition:

> " looks low mood…
> History of suicide attempts
> Diagnosis ? PTSD + suicide risk
> Prescribed Risperidone
> Keep a very close eye ? suicidal"

57. S was served with the notice of deportation, dated 1 February 2011, on 30 April, which was done at IRC Colnbrook, on a short term transfer. S was seen by medical staff at Colnbrook both before and after service of the notice. At 5.10 am the medical notes state:

> "Seen by member of medical staff (name illegible) at Colnbrook.

> "Reported hearing voices and seeing people who are not there (auditory and visual hallucinations), persecuting voices, deliberate self harm, and being instructed by voices to drink blood, Borderline Personality Disorder, voices present all the time, poor memory. Requires someone to monitor and observe him when shaving. Keep knives and all sharp objects away. Very high risk of self harm.
>
> Noted to be low in affect and eye contact; anxious and agitated.
>
> "Detainee has a 4 year mental health history and was previously admitted to Aylesbury Hospital."

58. After service of the notice, S was seen and the notes record:

> "Anxious ++
>
> Requesting medication
>
> Pt states he hears voices to cut himself 4 report 20/4/10
>
> Impulsive self harm behaviour
>
> Significant risk of completed and perhaps accidental suicide
>
> Immigration issues and custodial setting significant stressors associated self harm
>
> ? emotionally unstable borderline personality disorder
>
> ? PTSD ..."

59. The medical staff at IRC Colnbrook were sufficiently concerned by S to place him on ACDT (Assessment Care in Detention and Treatment, the latest UKBA strategy for self-harm and suicide prevention) which records:

> "ACDT opened by Dr Slara – hourly observations.
>
> "History of previous self harm. Patient agitated and anxious. Seen by psychiatrist who advised that patient is at significant risk of completed and perhaps accidental suicide. Immigration issues and custodial setting are significant stressors associated with self harm."
>
> "[S] remains anxious, wants more freedom than he gets in [the short term holding facility at Colnbrook]. Is moving to Harmondsworth and is happy about this."

60. When the ACDT was opened, S also signed a declaration authorizing release of information relating to risk to UKBA.

61. It was therefore clear to those conducting the medical examination at Colnbrook that S had mental health issues and that he was at "very high risk" of self-harm.

62. Although the Defendant has disputed that the reports of Dr Hardy and Dr Schmidt

travelled with S, and contends that they did not come to UKBA's attention until later, and has said so in evidence from Mr Daewood Mirza (of the UKBA Criminal Casework Directorate), I find that contention difficult to accept. Mr Mirza states that the documents were not on the Home Office file and that "all the documents that UKBA considered should be on the Home Office file". He does not say whether they might have been held at Harmondsworth and not transferred to the Home Office file.

63. Mr Mirza states that Toni Tomney advised him that "she received a phone call from the CPS advising that the Claimant was to be released as his time spent on remand meant that he had served his time. She based her decision to detain on the information on file". She had been informed by the CPS that a section 38 assessment had been ordered, "that he was not considered to be in need of hospitalisation, but she had not received a copy of this report". At that stage Mr Mirza stated that both the Hardy and Schmidt reports were not received until 6 July 2010 although that contention had to be corrected to the extent that it was subsequently accepted by Mr Mirza that Dr Schmidt's report had been received on 11 May.

64. Mr Waite confirmed to me in Court that the normal procedure would mean that any relevant reports and records would be transferred from the hospital and prosecution authorities to the UKBA when a detainee was handed over to them.

65. The Claimant submits that the initial decision to detain on 23 April was unsatisfactory and based on an inadequate understanding of S's circumstances. The statement that "[S] claims to be mentally ill but we have no evidence of this" is a surprising one in the circumstances, given that (according to Mr Mirza) Toni Tomney knew from the CPS that a s. 38 order had been made, and shows a serious failure in UKBA's ability to access information which must have been available to it – or which ought to have been readily obtainable by it from other public authorities. The HEO clearly recognised that there might be mental health issues which might render detention unsuitable. Yet, as I have already explained, S had experienced mental issues when in custody and previously in detention from August 2008 and there were a whole series of reports and medical advice, summarised above, of which Dr Hardy's and Dr Schmidt's reports were only the most recent. UKBA's approach failed to consider the evidence available of S's circumstances since his arrest in September 2006 prior to making its decision to detain and only determined to investigate it after that decision.

66. In any event, little if anything appears from the evidence to have been done to ensure an immediate review, as was noted by both officers on 23 April. I find it surprising that although Toni Tomney has filed three witness statements with the court, the last only 2 days before the hearing, she gave no explanation of her own state of knowledge at the date of her decision of 23 April nor of any attempts to follow up the HEO's requirement to investigate whether there were any reasons S would not be suitable for detention and her own note that more information was needed. That information would have included Dr Schmidt's report at least, given Mr Mirza's later acceptance that Dr Schmidt's report had been faxed by the UKBA team at Harmondsworth to UKBA CCD on 11 May.

67. It is difficult to understand how a greater degree of knowledge and concern for S's condition could be shown by medical staff at Thames Valley Police on 23 April and by IRC Colnbrook on 30 April than that shown by the UKBA taking the decisions regarding S's detention during the same short period.

68. The comment "he has been assessed as not needing detention under the mental health act" seems to be a reference to the advice from Dr Hardy and/or Dr Schmidt but there is no discussion of the remaining key aspects of those reports - including the advice as to the likely harmful effect of detention. Even if the UKBA did not have access to those reports at that time, as was contended, then it still had been put on notice that there had been an assessment. It was therefore incumbent on the UKBA to obtain the documents comprising the assessment to inform its continuing decision to detain. There is no evidence that inquiries were made, and none are referred to in the witness statements, even after the HEO's direction to -

> "continue to investigate his medical issues to establish if there are any reasons he would not be suitable for detention."

69. A modest exercise of effort to track down the latest psychiatric reports (whether internally in the UKBA or from the CPS) would have informed the UKBA of S's condition and the risk which detention itself presented to him. It would have gone directly to the question asked by the HEO. Inexplicably, there is no evidence that the HEO's direction of 23 April was complied with and so the UKBA failed to obtain information which ought to have led it to an immediate review of S's continued detention given the guidance on detention in Chapter 55 of the Defendant's

Enforcement Guidance and Instructions (considered in detail below) which at the time stated:

> "The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration detention accommodation or elsewhere:
> ...
> those suffering from serious medical conditions or the mentally ill - in CCD cases, please contact the specialist Mentally Disordered Offender Team."

70. It is not possible to determine why or how this oversight on the part of UKBA occurred since so little assistance has been provided to the Court in the evidence on these matters. However, it seems to me likely that the relevant evidence and reports as to S's mental health and other circumstances were within the possession and control of the Defendant and the UKBA and at the latest had been handed over when S was transferred into detention. I can only assume that this initial problem was the result of a breakdown in internal procedures in this case and failure by the individual officials to follow up the HEO's direction in April to "continue to investigate his medical issues to establish if there are any reasons he would not be suitable for detention". Of course, it is usual in judicial review to accept the account of the facts as set out by the Defendant but for the reasons I have set out it is difficult to do so here. In any event, it may not matter since the issue should have been, and was not, followed up quickly after the decision to detain and the transfer of S to Harmondsworth - notwithstanding the receipt of Dr Schmidt's report within a few weeks of that decision.

71. S was returned to Harmondsworth on 30 April at 4.30 pm and there was a ACDT review the following day:

> "[S] has made comments to Officer Zamir stating he will self harm if left on his own, he says the voices in his head tell him to do it, says he suffers PTSD and four men in his head are telling him to kill himself. These are the people who killed his mum and dad. Now on constant watch."
>
> "Conversing to me about his life in England and how he went to jail. Said there is no one in India for him as his parents are dead. Has a fiancée here for support. Seems to be sad and has also written the word 'help' on the inside of his left wrist."
>
> "…his watch has been raised to constant watch due to [S] stating that he hears voices telling him to self harm."

> "[S] came to unit office brought to my attention that he has thoughts of self harming himself and voices in his head are telling him to do it. Seemed very low in mood and very unstable. Now moved to hcl3 on a constant watch ..."

72. On 2 May the UKBA received a risk assessment stating that S was on constant watch. The ACDT review that day noted:

> "[S] has stated that he doesn't want to self harm, but the voices are telling him to cut his body and that he saw the people that killed his mum and dad. [S] has also stated that he feels very scared about the house blocks, as he feels very lonely."

73. It is clear that within days of his detention commencing, S was experiencing mental problems again and his hallucinations had returned, as Dr Schmidt had warned on 21 April. ACDT reviews over the next few days mark a consistent pattern of hallucinations, although S was visited by K:

> "[S] handed me a picture of himself lying in bed. Around the bed are 4 other people. I asked who are they. [S] said they are the people who killed my family and they out to kill me… [S] said they tell me to cut myself and drink the blood as you die!! They also say we will blow your head off. [S] also said 'that a dragon sometimes scares them off but not all the time. He also said that these people carry guns and knives they are evil and very powerful."

74. Evidence filed on behalf of GEO Group Ltd. ("GEO"), by Joanne Henney the Centre Manager at Harmondsworth, explains that there were daily briefing meetings involving GEO, Drummond Healthcare, the UKBA contract manager and the Independent Monitoring Board representative. The daily briefing sheets which recorded the content of the meeting show that the UKBA contract manager was made aware on 1 May 2010 that S said he would kill himself and that all subsequent entries show that S had serious mental health issues.

75. On 6 May S lodged a notice of appeal against the deportation decision which had been notified to him on 30 April.

76. On 11 May Dr Schmidt's Report of 21 April was faxed to Harmondsworth. The covering letter stated:

> "In my opinion [S] is suffering from anxiety related post traumatic stress disorder, and avoidant and schizotypal personality disorders with dependent and paranoid features."

77. Despite the relevant advice contained in this Report on the question of the appropriateness of detention, it did not trigger a review and there is no evidence that it caused any further investigation of the issue,

78. A Rule 35 Report was made on 10 May which was received by UKBA on 11 May and chased up by Harmondsworth with UKBA CCD on 14 May:

> "In accordance with Detention Service Order 03/2008 a response to this Rule 35 should have been provided within two working days so that we can be satisfied that a review to maintain detention has been considered."

79. On 17 May the Response to Rule 35 report was made:

> "Your assertion that you are a victim of torture was considered when your asylum claim was refused and was considered when the decision was made to detain you. Your detention is reviewed regularly by a senior officer."

80. I note in passing that reliance was placed on two documents, those of 1 February and 23 April, both of which did not address the evidence of S's condition and the psychiatric and medical evidence which had considered the consistency of his accounts of his treatment.

81. S moved room at about this time in order to share with friends although he was still hearing voices. On 20 May the ACDT was closed on the basis that his condition appeared to have stabilised now S had moved rooms. This proved to be short-sighted since on the following date, 21 May, S cut his left wrist and sucked his own blood and was placed on constant watch again. Despite this, at the end of the day he was found to have cut his wrist again with a razor blade and was holding a piece of paper with hand drawn faces on it, of persons said to have told S to cut himself. ACDT was reopened on 22 May and his anti-psychotic medication was increased.

82. Subsequent ACDT reviews record his changes in mood:

> "[22 May] [S] claims that he cut his wrist because the voices in his head and the hand drawn pictures in his room told him to. He stated he had taken his medication but could not stop the voices. [S] claims he wants to see his wife who is coming tomorrow from Slough. But even she cannot help stop the voices. [S] also claims that he will not go to healthcare as the voices there are louder."

> "He said the 4 masked people gave it to him and the voices said he should hurt himself. He said he couldn't speak to an officer as he couldn't get down the stairs (gate locked). He had a visit yesterday from his girlfriend and phoned her when he hurt himself. He said he hurt himself as the voices tell him to drink blood. He said he will try to drink a red drink when he wants to hurt himself and will try an elastic band on his wrist. He said he tried to help an injured pigeon that was bleeding and seeing the blood made him hurt himself causing flashbacks to his past."
>
> "[24 May] [S] is feeling a lot better now he has a room on the ground floor and in a room with his friends. He is still hearing voices which tell him to hurt himself but the elastic band and red pen he was given is helping slightly. He believes he needs stronger meds, he is taking his meds regularly. Eating all meals and fluids. Has agreed if he has a problem he will come to a member of staff or use the intercom in an emergency. Review panel agreed move the observations to three per shift and conversations three per shift."
>
> "[26 May] Had general chat with [S], he was tearful and feeling down. After speaking to him, his mood was much better, and he seemed relaxed. He said he wants to be with his family and cannot understand why he is in detention."

83. On 28 May, S cut his left wrist again because, he said, voices told him to do so. On 31 May he said he was getting weaker at fighting them.

84. UKBA reviewed S's detention on 2 June (some 3 weeks after receiving Dr Schmidt's report) in the following terms:

> "I spoke to Harmondsworth today who have told me that he is no longer on constant watch but is still under observation."
>
> "[S]'s mental health was fully considered when the asylum claim was refused. He has now provided [Dr Schmidt's report] in which the psychologist says… "It is likely that if he is returned to prison he will regress to the position which gave rise to his initial referral to Woodlands House:… in a situation of uncertainty or where there is little access to supportive relationships he is likely to resort to dysfunctional behaviour to cope with distressing emotions for example self harm or suicidal behaviour." [S's] medical condition was considered in the reasons for deportation letter and the WHO shows that medication is available in India for mental illness.
>
> [S] claims to be in a relationship with a Polish national who has 4 children but he has not provided any evidence that they are in a subsisting relationship. Additionally this was considered in the reasons for deportation letter."

> "[S] has mental health issues and claims to be a victim of torture. He has self harmed and was on constant watch. [S] has been assessed as not needing in patient treatment in order to engage in the therapy described in the medical report."
>
> "It has been taken into account that those with a mental illness can only be detained under immigration powers in exceptional circumstances and full consideration has been given to the presumption to release – liberty… Given the risk of harm, offending and absconding, the presumption in favour of liberty is outweighed in this case…"

85. This review was unsatisfactory for a number of reasons identified in Ms Harrison's submissions:

i) The assessment misunderstands the report and its advice relevant to detention, which it undoubtedly refers to, but deals with S's condition as something which could be treated abroad. It therefore failed to grapple with the effect of detention on S's condition despite the terms of Dr Schmidt's report and the HEO's requirement on 23 April to investigate whether S was suitable to be detained. That advice was underlined by the actual deterioration in S's condition at Harmondsworth. The evidence of S's condition was not put forward as a reason for allowing his appeal against the refusal of his asylum claim and against deportation but as a reason which he should not be detained while awaiting the appeals;

ii) Further, it is not correct to suggest that S's mental health was considered when S's asylum claim was refused and it does not provide a proper answer to Dr Schmidt's concerns;

iii) While S's self-harming is referred to, the report also misunderstands the reference to the lack of need for in-patient treatment. It is not setting out a choice between hospital and detention but simply stating that hospitalisation is not required;

iv) No account seems to have been taken of the more detailed psychiatric assessments that the real risk of harm in S's case was to himself and not to others (see e.g. Dr Lally on 14 September 2009);

v) Whilst reference is made to the policy of exceptional circumstances, it is

> approached as if it were simply a rebuttal of the normal presumption in favour of liberty. The approach taken does not appear to treat S's mental condition as something which requires significantly weighty countervailing considerations to justify detention. Given the HEO's earlier requirement to consider S's suitability for detention, taken with the other defects I have mentioned, this is of importance when I come to determine whether the policy was properly understood and applied.

86. Matters continued much as before and although S was receiving support from his roommate and through visits from K, he continued to hear voices urging him to harm himself. Harmondsworth's visiting psychiatrist, Dr Ahmed, examined S on 10 June and she concluded that S was not fit to be detained:

> "Severe PTSD with flashbacks that are of such intensity that is experienced as visual and auditory hallucinations (compensating for his extreme emotional distress). Severe depress [?] psychotic illness. I believe that due to the nature and degree of his emotional disturbance and due to unavailability of suitable treatment for him (trauma focused cognitive behaviour therapy) he is no longer fit for detention and will require treatment in suitable centre."

87. For reasons which have not been explained, Dr Ahmed's assessment does not appear to have reached UKBA and on 21 June S's continuing detention was authorised in very similar terms to those given on 2 June - continuing to rest the decision on the now outdated consideration of 1 February. The minute of the decision included reference to the policy:

> "It has been taken into account that those with a mental illness can only be detained under immigration powers in exceptional circumstances and full consideration has been given to the presumption to release – liberty" but "Given the risk of harm, offending, absconding, the presumption in favour of liberty is outweighed in this case."

88. The SEO covering Assistant Director accepted the recommendation in these terms:

> "The nature of his convictions indicates a risk of harm to the public, a risk of re-offending and a risk of absconding.
>
> The case needs to be considered under section 55.10 of the enforcement guidance and detention reviews need to show this has been done."

89. Similar criticisms can be made of this decision as in the case of that of 2 June. In addition, since 2 June there had continued to be examples of S's disturbed mental condition.

90. Dr Ahmed saw S again on 24 June and she noted his condition was no different to what she had observed on 10 June:

> "No improvement in mental state remains psychotic with [increased] agitations and restlessness – denies side effects
>
> …ringing his fingers constantly and tearful at times
>
> No changes in delusional [?] and voices and images persist
>
> ... refused to allow me to see the pictures and paintings he has done for dragon mother (his protector) and also of 4 hooded men as believed that if he allow me see them they will punish him for it today they will torture him later today…
>
> Plan:
>
> (1) not fit for detention
>
> (2) will need hospital admission
>
> (3) s 48 form completed
>
> (4) Increase [S?] 150mg/day
>
> (5) Increase Risperidone 4mg BD.
>
> (6) Increase Mirtazapin 30mg/day.
>
> …will need transfer to hospital ASAP…
>
> Risk to self difficult to assess as not answering questions… gets frightened by hallucinatory experiences… risk of self neglect and not eating is high however he has a sympathetic room mate who encourages him to eat constantly and helps him with self hygiene and care.
>
> Will be better nursed in in-patient unit preferably with a person speaks his language he trusts current roommate."

91. At this stage Dr Ahmed took it upon herself, perhaps because of the lack of action by Harmondsworth, to refer S to the Riverside Mental Health Unit for assessment and possible admission to Colne Ward. The referral form noted:

> "Diagnosis: severe depressive disorder.
>
> Very low in mood, with psychotic features, PTSD, extremely anxious and distressed."

92. S's current solicitors, Bhatt Murphy, were first instructed at the end of June 2010.

Further instances of self-harm occurred in July and S's mood was very low. As a result of Dr Ahmed's referral, a Dr Shirolkar from the Riverside Unit attended Harmondsworth to assess S. For reasons not explained, Dr Shirolkar was kept waiting at the gatehouse for nearly 2 hours but had to leave, there being no-one to escort her to meet S. Dr Ahmed's report that day noted S will "need transfer to psychiatric ward" and that "in severe need of psychology input (trauma focused)." Arrangements were made for Dr Shirolkar to attend again on 19 July and there were discussions with the security department. The UKBA manager at Harmondsworth wrote to Hillingdon Hospital to this effect on 9 July and added:

> "It is vital for the health of [S] that this assessment takes place without hindrance and should you experience any problems please telephone me on [number provided]"

93. A further review of detention took place on 14 July and detention was recommended in much the same terms as on the two reviews in June. By this stage the Defendant accepts on any view that the report of Dr Hardy had also been provided to UKBA. The minute of the decision concluded:

> "I have assessed this case under the current detention criteria and in accordance with Chapter 55.10 (persons considered unsuitable for detention) and with the presumption to release – liberty and conclude that [S] is not suitable for release under conditions of rigorous contact management at present.
>
> It has been taken into account that those with a mental illness can only be detained under immigration powers in exceptional circumstances and full consideration has been given to the presumption to release – liberty. However, [S] has received a custodial sentence...
>
> Referral from Mental Health team. – I agree that detention should be maintained. As [S] is not longer detained under the Mental Health Act 1983."

94. The SEO accepted the recommendations and authorised detention:

> "[S] is due to have a mental health assessment on 19 July 2010 and at this stage continued detention to ensure this is carried out and if necessary the correct level of support and medication is provided immediately is in [S's] best interest. [S] has stated he has a Polish girlfriend however no evidence has been provided and there it is possible that [S] would have no support if released […]
>
> When the mental health assessment is received continued detention

> should be looked at urgently and if necessary a referral for release should be made."

95. My observations are much the same as in respect of the previous review and similar criticisms are advanced on behalf of the Claimant. There is a history of repeated reviews which, Ms Harrison submits, fail to consider the application of the policy properly in the light of the ample information then available. The reference to the policy, she says, does not suggest that the writer genuinely understood the difference between the normal presumption and the need for weighty circumstances to justify the detention of someone suffering from mental illness. The continuing failure to acknowledge the fact of S's relationship with K underscores the general lack of understanding of his circumstances. Despite the further occurrences since the 2 June review, there is no evidence that UKBA even in mid-July attempted to grapple with Dr Schmidt's advice regarding the likely damaging effects of detention, though the assessment is repeated. Moreover, there is no recognition of Dr Ahmed's concurring advice that what S needed could not be provided while he was detained. Ms Harrison points out that the SEO's statement in fact misunderstands that the expert advice is that, in S's own interest, continued detention is not appropriate.

96. A visit by Dr Summers of Medical Justice on 16 July considered Dr Ahmed's assessments and the notes indicate that the opinion formed was consistent with the earlier assessments of S's condition. It says much about the lack of progress by UKBA despite the repeated statements in the detention reviews:

> "It is not clear why no further action has taken place on this referral. Staff at Harmondsworth IRC Health Centre did not know, nor could they tell me how to contact Dr Ahmed, nor the location of Riverside Mental Health Unit. ..."

> "**Opinion**

> [S] has depression with psychotic features (auditory hallucinations) and is at risk of self harm. His condition has worsened since being in detention and cannot be adequately treated in the IRC. He requires assessment and treatment as a psychiatric in-patient, and this was recommended urgently by a specialty doctor in psychiatry, three weeks before my visit. It is unclear why this admission has not yet taken place, and there is no information in his Harmondsworth medical records which would enable staff to contact Dr Ahmed or Riverside Mental Health Centre to take this forward. I am continuing to pursue this..."

97. ACDT reviews continued without any significant signs of improvement and on 19 July Dr Shirolkar again attended Harmondsworth, as arranged, to assess S. However, yet again, appropriate arrangements had not been made at Harmondsworth and Dr Shirolkar was again kept waiting for nearly 2 hours without admission due to the absence of an escort.

98. Bail was refused by the FTT on the same day and whilst the Immigration Judge noted the risk of the commission of other offences he also recognised S's mental condition (though it is not clear whether he was shown any of the expert's reports which indicated S did not present a risk to others):

> "The applicant is suffering from a mental disorder and continued detention is needed in his interests or for the interests of others...
>
> He has… shown his unwillingness to co-operate, by being less than helpful in the documentation process, although this (and indeed all other adverse conduct noted) may be attributable for his mental condition.
>
> His current immigration status (facing deportation), when coupled with his severe mental health problems, effectively renders him unaccountable for all conduct, including any future offending, and removes incentive to comply with conditions of any bail granted.
>
> … he told me that he hears voices telling him to 'take blood' and he said there are four people telling him he has to kill himself. There is evidence of two recent serious incidents of self harm during his detention.
>
> I am not a doctor. I cannot assess the effect that [his appeal against deportation] may have on his mind. But it is reasonable to assume that he will be more agitated when facing proceedings more imminently. Therefore my conclusion is that particularly at this moment, it would be wrong to release him. I do not say he will never be fit to be released. But at this time, it is a particularly bad time to be doing it… I would be failing in my duty if I were to release the Applicant in his current mental state… In my view this is a clear case for the application of para 30(2) of Schedule 2 to the 1971 Act and I propose making an order accordingly – the Applicant is suffering from mental disorder and his continued detention is necessary in his interests and in the interests of the public."

99. S self-harmed again on 21 July and his ACDT review noted

> "he said that all the pressure's got too much. He is very frightened and agitated at present. Given the circumstances have moved [S] to healthcare on a constant watch."

100. Later that day an officer found a crowd with two detainees pulling a naked S along the corridor. S told him that everyone was saying "he is a danger to others" and "it would be better if I was not here." He said "all he really wants is just to see his family but he is being told he is a danger to them." Afterwards, S was seen with shoelaces in his hands which had to be taken from him.

101. While further attempts were made to arrange an effective visit by Dr Shirolkar to assess S, Bhatt Murphy made further representations to UKBA explaining their obligations with regard to transfers under s. 48 and the requirement to consider temporary admission. Notice was given of likely judicial review and the present proceedings were issued on 28 July.

102. On the same day, Mr. C.M.G. Ockleton sitting as a Deputy High Court Judge made an order that

i) the Defendant was to obtain within 48 hours an opinion from a second registered medical practitioner on whether S should be transferred to a hospital under s. 48 of the Mental Health Act; and

ii) If the second registered medical practitioner concurs with the assessment of Dr Ahmed of 24 June 2010, the SSHD make a Transfer Direction and arrange S's transfer.

103. Following further correspondence, in which UKBA sought to place some blame on S for not co-operating, Dr Steven Lomax, a psychiatrist and registered medical practitioner, assessed S and recommended that he be transferred to a hospital under s. 48. A bed was available for S at Colne Ward, Hillingdon Hospital from 4 August. A transfer direction was made on 3 August and S was transferred to hospital on 4 August.

4 August 2009 to date

104. Following S's transfer to Hillingdon Hospital, Bhatt Murphy applied for temporary admission on S's behalf. The UKBA considered this on 18 August but declined to deal with the application while he was in hospital and minuted:

105. "Reps have requested TA for Mr S on the basis of his mental health and long term

relationship with an EEA national. He has also applied for a JR on the basis of unlawful detention due to his poor health.

106. Mr S is currently in hospital under section 48 of the MHA and we are not in the position of releasing him. I have written to the reps advising that we will not release at this time but once his medical team tell us that he is fit for discharge we will review the detention."

107. The following day a further review of detention was carried out (by which stage the UKBA undoubtedly had access to Dr Hardy's report and Dr Schmidt's report):

> "On 13 July 2010 a pre-action protocol was received asking for an assessment of [S's] mental health. On 29 July 2010 the assessment was conducted. Attempts had previously been made to have [S] assessed but these failed due to his lack of co-operation with the assessment process. On the same day an application for a Judicial Review was received for unlawful detention on the basis of his mental health."
>
> "**2. Progress since last review**
>
> [S] was assessed and re-admitted to hospital on 4 August 2010 after further self harming himself."
>
> "**11. Recommendation (Reasons to maintain detention or to release and must contain consideration of presumption to release)**
>
> [References to S's violent offending, risk of absconding and lack of evidence of a durable relationship with his Polish partner]
>
> I have considered the presumption to liberty as outlined in Chapter 55 of the Enforcement Instructions and Guidance that states that detention of those suffering from mental illness should be in exceptional circumstances only. [S] suffers from mental health difficulties but in this case, the presumption is on balance outweighed by the risk of harm to the public and the significant risk of absconding. Additionally, [S] is currently detained under section 48 of the MHA and will not be discharged into the community until he is considered well enough by his [Responsible Clinician]."
>
> His representative has requested temporary admission when he is discharged. They claim that his previous and continued detention is unlawful according to Hardial Singh principles ... they also claim that immigration detention has been the cause of his deteriorating mental health. They state that he could be considered for hospitalization under sections 2/3 of the MHA. The RC told me this would not be a consideration until the assessment is complete."

108. The Assistant Director agreed that detention should be maintained, on this occasion because of his mental condition, though pointed out that if he was released the original UKBA team should assess whether continued detention was appropriate:

> "Agreed that detention should be maintained. As highlighted above [S] is an immigration detainee under the Mental Health Act (section 48) and thus we must continue to complete detention reviews. If [S] is assessed as fit and well by the Responsible Clinician then this case should be sent back to the original case owning team. It will be their responsibility to then consider whether continued detention under section 55.10 of the Enforcement Guidance is appropriate and whether [S] is an exception..."

109. UKBA thereafter wrote:

> "…I regret to inform you that I am not minded to grant temporary admission at this time. Your client is currently detained in hospital under section 48 of the Mental Health Act 1983. He cannot be considered for release into the community until his responsible clinician considers him well enough for discharge.

110. Your client's continued detention will be reviewed when his medical team inform the Criminal Casework Directorate that he is well enough to be returned to immigration detention."

111. The Claimant submits that, even given the transfer order and the application for judicial review, the detention review did not seek to assess what had caused the need for hospitalisation, the expert advice which had been given or how this might impact on the policy of exceptional circumstances. This issue was said to be a matter for the original casework team which had already failed to deal properly with that issue. While there may well have been countervailing grounds in favour of detention, they had to be properly considered in the context of the mental condition as required by the Defendant's own policy.

112. On 26 August I expedited the permission and interim relief hearing. Prior to the hearing, a final detention review took place on 8 September. It included:

> "**2. Progress since last review**
>
> His responsible clinician has advised that the assessment is reaching its conclusion and a Care Plan Assessment will take place sometime next week. [S] is quite settled and there are no apparent symptoms of mental illness. He is taking his medication. There is nothing significant

> and they are looking to sending him back to the detention centre. What he tells them and their observations are contradictory, he doesn't come across as depressed."
>
> "**6. Compassionate circumstances / Medical Conditions – (including mental health issues)**
>
> [S] has been admitted to hospital under section 48 of the MHA. He is currently being assessed and his responsible clinician has said that he will be returned to detention in the next few weeks."
>
> "He claims to have a Polish partner but has provided no evidence that he has been in a durable relationship."
>
> "I have considered the presumption to liberty as outlined in Chapter 55 of the Enforcement Instructions and Guidance that states detention of those suffering from mental illness should be detained in exceptional circumstances only. However, his RC has advised that he has not shown significant symptoms of illness and will be returned to immigration detention in the next few weeks. The presumption is on balance outweighed by the risk of harm to the public and the significant risk of absconding. Additionally, [S] is currently detained under section 48 of the MHA and will not be discharged from hospital until he is considered well enough by his RC. ...
>
> I propose that detention is maintained and reviewed in 28 days or when the RC states that he is fit to be discharged."

113. On 9 September, this was authorised by an acting Assistant Director:

> "Based on the information that you have provided I agree that detention should be maintained. It is clear from the RC that [S] is unlikely to need further treatment and we will need to ensure that he is moved back to the IRC via DEPMU. Please ensure that the SEO in DEPMU is made aware of the case as there has been some difficulties with [mentally disordered offender] cases."

114. Thus, Ms Harrison points out, consistently with the flawed approach to earlier detention reviews, little or no consideration was given to the effect of detention on S's condition or the consistent advice which had been given which was relevant to this and notwithstanding the recent actual experience of S's mental condition in detention from 23 April to 4 August. Again, the AD proceeded on the basis that because S did not require hospitalisation it followed that he could be transferred back into detention.

115. On 21 September 2010 Neil Garnham QC, sitting as a Deputy High Court Judge, granted S permission to bring these proceedings and released him on bail with strict conditions of a curfew, tagging and reporting requirements. Pursuant to the Order, the

suitability of S's discharge into the community was first confirmed in writing by Dr Shirolkar (on clinical grounds). S was released on bail on 29 September.

116. On 13 January 2011, the FTT adjourned the hearing of S's asylum appeal to allow UKBA time to consider further evidence. The appeal has yet to be heard.

117. Further orders and directions in these proceedings (including a variation in bail) were made by Wyn Williams J. on 20 January 2011.

118. It is common ground that S has complied with the terms of his bail and the conditions were relaxed by consent at the hearing in April 2011.

Conduct of the Defence

119. Whilst the pressure of time and resources as a result of the UKBA caseload is well-known, nonetheless the defence of the claim by the UKBA has not been satisfactory in several respects. Even now, there are relevant aspects of the facts in the handling of the case by the Defendant which are simply unclear. No detailed grounds of opposition were filed except to the extent that they were combined with the skeleton argument dated 3 March 2011 although permission was not sought to do so and it was an inadequate statement of the Defendant's grounds of opposition as was made clear at the commencement of the hearing. The grounds then appeared in an amended skeleton on the second day of the hearing. It is not for a Defendant to determine unilaterally to combine its detailed grounds with its skeleton, at least when that means that the detailed grounds are not served within the 35 days of the grant of permission as required by the CPR. Since their purpose is to give the Claimant and the Court notice of the detailed basis on which the case is contested shortly after the grant of permission they are bound to be of less assistance served 5 months late and shortly before the hearing.

120. Moreover, the failure was also in breach of additional directions which have been given in this case by Wyn Williams J. on 20 January 2011 who had ordered that detailed grounds should be served on 10 February 2011. His other orders for limited disclosure were equally not complied with by the dates stipulated on 27 January and 10 February and indeed were still not fully complied with at the beginning of the hearing before me.

121. As a result of additional material and the need to manage a case which ought to have been ready for hearing at least a month before it began, the case - which ought to have taken two days, possibly three - took four days which still did not allow S's counsel to complete her reply, which I allowed to be done in writing. On the first day of the hearing, I required the Defendant to provide a witness statement which explained to the Court and the Claimant how the Defendant had complied with its duty of candour to the Court since it was plain on the first day that it had not done so. Even so, the witness statement then produced by Mr Daewood Mirza required additional material to be disclosed and then itself had to be corrected before the resumed hearing. It is all the more troubling that this prolonged series of procedural failures by the Defendant should occur in a case where serious questions have arisen as to the handling of an undoubtedly vulnerable person and the approach taken by the Defendant to those sought to be detained and who are mentally ill.

122. There are a number of important issues where the Defendant has not provided an adequate explanation for what has occurred, or for failures to act, for example over the issue of the expert reports on transfer into detention in April 2010 or the lack of response to Dr Ahmed's report in June 2010. The Defendant also introduced at a late stage the question of responsibility of the First and Second Interested Parties for any acts or omissions which may give rise to liability to the Claimant. I will deal with that issue when I consider the claim for breach of Articles 3 and 8, below.

The Issues

123. The case raises the following issues:

i) In considering whether the tort of false imprisonment has been committed -

a) Was the initial detention of S unlawful since it was begun before he had been served with the deportation order;

b) If the initial detention was lawful, did S's detention subsequently become unlawful as a result of the failure of the Defendant to follow its own policy on the detention of those with mental health issues;

ii) Did the treatment of S amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights ("**ECHR**") (as applied

by the Human Rights Act 1998) either because -

a) The treatment of S reached the threshold of Article 3 on the facts;

b) The procedure and approach of the Defendant was insufficient to protect S (or any other mentally ill detainee) from treatment in breach of Article 3;

iii) If the treatment of S did not breach Article 3, did it nonetheless breach Article 8 ECHR?

iv) Whether the circumstances amount to the tort of unlawful imprisonment and/or breach of Article 5 ECHR?

v) Whether S is entitled to damages, whether nominal or substantial.

124. I sought from the parties, and obtained, written submissions following the close of oral argument on the Supreme Court's decision in **R (Kambadzi) v. Secretary of State for the Home Department (Bail for Immigration Detainees intervening)** [2011] 1 W.L.R. 1299.

The tort of false imprisonment and Article 5 ECHR

125. In **R v. Deputy Governor of Parkhurst Prison, ex p. Hague** [1992] 1 A.C. 58, 162C-D, Lord Bridge held:

> "An action for false imprisonment is an action in personam. The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it. In *Meering v. Grahame-White Aviation Co. Ltd.* (1919) 122 L.T. 44, 54, Atkin L.J. said: "any restraint within defined bounds which is a restraint in fact may be an imprisonment." Thus if A imposes on B a restraint within defined bounds and is sued by B for false imprisonment, the action will succeed or fail according to whether or not A can justify the restraint imposed on B as lawful. A child may be lawfully restrained within defined bounds by his parents or by the schoolmaster to whom the parents have delegated their authority. But if precisely the same restraint is imposed by a stranger without authority, it will be unlawful and will constitute the tort of false imprisonment."

126. Detention for immigration purposes is imprisonment in fact. So much is established here for the period from the transfer from detention until bail was granted by the High Court. The issue in the present case is whether detention was unlawful for some or all

of the period.

127. Article 5 of the ECHR prohibits detention that is not in accordance with a procedure prescribed by law or is otherwise arbitrary:

> *Article 5—Right to liberty and security*
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

128. Under Article 5(1)(f) detention must be *lawful* so that a finding with respect to Article 5 goes hand in hand with a consideration of the domestic law governing unlawful imprisonment.

129. The well-known principles enunciated by Woolf J. in **R v. Governor of Durham Prison ex p Hardial Singh** [1984] 1 W.L.R. 704, which explain the constraints on the Secretary of State's powers of detention, were summarised in **R (I) v. SSHD** [2003] I.N.L.R. 196 by Dyson L.J. (as he then was):

> "46. There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in Re Hardial Singh [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in Tan Te Lam v Tai A Chau Detention Centre [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12

> above. In my judgment ... the following four principles emerge:
>
> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.
>
> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.
>
> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

130. This formulation of the law was approved by the majority of the Supreme Court in **R (Lumba) v. Secretary of State for the Home Department (JUSTICE and another intervening)** [2011] 2 W.L.R. 671, *per* Lord Dyson JSC at paragraphs [22] to [25]. He held with regard to the first two principles derived from **Hardial Singh**:

> "23 ... As regards the first principle, I consider that Woolf J was saying unambiguously that the detention must be for the purpose of facilitating the deportation. The passage quoted by Lord Phillips PSC includes, at para 262, the following: "as the power is given *in order to*

> *enable the machinery of deportation to be carried out,* I regard the power of detention as being impliedly limited to a period which is reasonably necessary *for that purpose* " (emphasis added). The first principle is plainly derived from what Woolf J said.
>
> 24 As for the second principle, in my view this too is properly derived from Hardial Singh. Woolf J said that (i) the power of detention is limited to a period reasonably necessary for the purpose (as I would say) of facilitating deportation; (ii) what is reasonable depends on the circumstances of the particular case; and (iii) the power to detain ceases where it is apparent that deportation will not be possible "within a reasonable period". It is clear at least from (iii) that Woolf J was not saying that a person can be detained indefinitely provided that the Secretary of State is doing all she reasonably can to effect the deportation."

131. It is common ground that in considering the principles set out above, the Court should reach its own judgment as to whether administrative detention is lawful and should not simply adopt a review approach to the Defendant's decision: **R (A) v. Secretary of State for the Home Department** [2007] EWCA Civ 804 per Toulson LJ at [62] and Keene LJ at [74]. Toulson LJ held:

> "It must be for the court to determine the legal boundaries of administrative detention. There may be incidental questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself, and the court will no doubt take such account of the Home Secretary's views as may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court at common law and does not depend on the Human Rights Act (although Human Rights Act jurisprudence would tend in the same direction)."

132. It is also now common ground, in the light of the judgments in **Lumba**, that if I determine that detention was unlawful it is no longer relevant to consider whether in the circumstances S might otherwise have been lawfully detained. The majority of the Supreme Court rejected the "causation" principle which had been applied by the Court of Appeal although it may still be relevant to the question of damages if I find the detention to have been unlawful.

133. The testing of the legality of detention by reference to public law principles is also made clear by **Lumba** and **R (Kambadzi) v. Secretary of State for the Home Department (Bail for Immigration Detainees intervening)** [2011] 1 W.L.R. 1299.

In **Kambadzi**, the majority of the Supreme Court held that the Secretary of State was under a public law duty to give effect to a published policy which was sufficiently closely related to the authority to detain so that it provided a further qualification to the statutory power. A failure to adhere to such policy without good reason was an error which bore on and was relevant to the decision to detain the claimant throughout the period when reviews should have been carried out, and was an abuse of power which rendered the detention itself unlawful. In the context of that case, which concerned the need for regular reviews, Lord Hope, at [16] made it clear that he preferred to rest his decision on the application of policy itself rather than on rule 9 of the Detention Centre Rules 2001.

The power to detain

134. In the present case, the Defendant submits that detention was lawfully required pursuant to the powers in paragraph 2 of Schedule 3 to the Immigration Act 1971 ("the 1971 Act") as amended. This gives the Defendant power to detain in a number of circumstances. The provisions, so far as relevant state:

> "2.— (1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs or a direction is given under sub-paragraph (1A) below, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail.
>
> (1A) Where—
>
> (a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and
>
> (b) he appeals against his conviction or against that recommendation, the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.
>
> (2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

The Claimant's submissions

135. It is submitted by Ms Harrison that the detention of the Claimant was unlawful for a number of reasons:

i) The initial period of detention until 30 April 2010 was unlawful from the outset and in any event since the deportation order relied upon to authorise the detention was not served on the Claimant until 30 April 2010. This was due, as Mr Waite said, to the fact that S was not in a fit mental state to be served with the order (a point of some relevance to other issues). In any event, it was submitted that as a result of the judgment in **R (Anufrijeva) v. Secretary of State for the Home Department** [2004] 1 A.C. 604 the power to detain under para. 2(3) of the 1971 Act (when a deportation order is "in force") can only be exercised if the detainee has been served or notified of the order.

ii) The detention was unlawful from the outset and, in any event, from 30 April 2010 since the deportation order was unlawful on public law grounds since

a) it failed to take proper account of S's mental illness at the time the order was drawn up earlier in 2010;

b) in any event there had been a failure to review the position in April 2010 in the light of the circumstances at that time including the undisputed advice that detention was likely to be harmful to S and to cause his condition to deteriorate

See **HXA v. SSHD** [2010] EWHC 1077 (Admin), [42]-[45], [196]-[200] and **R (SM) v. SSHD** [2011] EWHC 338 (Admin), [98]-[101].

iii) Subsequent reviews of the decision to detain failed to understand and properly apply the Defendant's guidance, the effect of which was explained by Cranston J. in **Anam v. SSHD** [2009] EWHC 2496 (Admin) at [51] to [55] (in

terms which were not affected by the appeal) and now having regard to recent Supreme Court decisions in **Lumba** and **Kambadzi**.

iv) The Defendant's failures resulted in breaches of Articles 3, 5 and 8 ECHR. In particular there were breaches both in respect of (a) a systemic failure to give advice and have in place procedures to deal with those with mental illnesses and (b) the treatment and state of health of S in any event. A contrast was drawn between the lack of guidance in detention cases with the guidance given to the Prison Service, e.g. through PSI 50/2007.

v) The Defendant also failed to act lawfully under s. 48 of the Mental Health Act and to recognise the need to act urgently given S's illness and his state of mental health from May to July 2010, evidenced by the frequent reports of his behaviour and health and the expert advice given as to the effect of detention upon him.

vi) It followed that the **Hardial Singh** principles were breached in the present case and the Court should hold on the evidence that the detention of the Claimant was unlawful.

136. Ms Harrison also submits that the decision to detain was also flawed in public law terms since it failed to take proper account of the material evidence which existed of S's family relationship including the application under the Immigration (European Economic Area) Regulations 2006. Had this been done, it could not have been properly concluded that this was an automatic deportation case under s. 36(2) of the UK Borders Act 2007. I have not found it necessary to deal with this specific allegation but have taken the factual context into account in reaching my judgment.

The Defendant's case

137. Mr Waite submitted that detention was lawful from the outset under para. 2(3) of Schedule 3 to the Immigration Act 1971 and, further, accorded with **Hardial Singh** principles having regard to the following factors:

i) The gravity of the offences of which S was convicted and the ongoing lack of any rational explanation for those offences.

ii) The conclusion of the Probation Service that there was risk of S causing serious harm to the public.

iii) The failure of S to bring himself to the attention of the authorities for fourteen years after his arrival, indicating a clear risk that he would go underground and abscond.

iv) S's recent convictions for failing to surrender to bail and attempting to escape from custody, both of which supported the existence of a compelling absconding risk.

v) The fact that the Claimant's convictions were committed whilst he was in an alleged relationship with his current partner, thereby seriously undermining the Claimant's reliance upon that factor.

vi) The Defendant does not dispute that the medical evidence of S's mental condition is a relevant question to be taken into account in deciding the appropriateness of the decision not to order release under Immigration Act powers but points out that the nature of the condition is not severe and that the detention reviews make express reference to those conclusions. The medical reports, Mr Waite submits, are incapable of giving rise to any reasonable inference that the risk to the public would be reduced to an acceptable level if the Claimant was to be released. They indicate a level of mental instability on the part of S, even after the benefit of in-patient care, which would be of concern to any responsible decision maker assessing the risk of harm to the public. It was submitted that the policy guidance with regard to the detention of mentally ill persons was referred to in S's detention reviews and properly applied.

138. I therefore turn to consider those submissions in more detail in the light of the authorities I have referred to, above.

The lawfulness of detention

139. As I have already noted, the basis on which the initial decision to detain S was made and on which subsequent reviews were determined was that he remained a significant risk of reoffending with consequent risk to the public and there was also a significant

risk that he would abscond given his earlier attempt to abscond and the fact he faced deportation. The purpose of detention was to facilitate the deportation of S - a purpose which, it is submitted by Ms Harrison, was undermined by the very act of detention itself since it caused S's mental state to deteriorate and for him to be unfit to be deported.

140. However, before I deal with the substance of that issue and its implications in this case for the exercise of the power to detain, I shall first deal with the question of the initial exercise of the power since that is said to have been unlawful regardless of the reasons for its exercise.

141. Mr Waite cautions that the lawfulness of the deportation order itself is not a matter for the Court but for the FTT, which I accept, but it is nonetheless relevant to consider the relevance of the order to the power to detain and also the extent to which the considerations in making the order were relied upon in assessing whether or not to detain S.

The initial exercise of the power to detain

142. The basis upon which it is contended that the Defendant exercised the power to detain on S's release from hospital was pursuant to para. 2(3) of Schedule 3 to the Immigration Act 1971, i.e. following the signing of the deportation order on 21 January 2010. This was not a case where paras. 2(1) or (1A) could be relied upon since the Crown Court Judge declined to make a deportation recommendation when sentencing on 23 April 2010 and there had not been prior notification of any intention to make an order under para. 2(2).

143. At Reading Crown Court, on 15 February, while the Court was told that deportation proceedings were on hold pending the outcome of the criminal proceedings S was not given notice at that time that the deportation order had been made.

144. The deportation order was not served until 30 April 2010, i.e. 7 days after S was detained purportedly pursuant to para. 2(3). Was it lawful for the Claimant to be detained pursuant to para. 2(3) before he had been notified of, or served with, the deportation order?

145. It is submitted by Mr Waite on behalf of the Defendant that para. 2(3) does not

require the service of the order but merely that such an order must have been properly made. It is implicit in that submission, as Mr Waite acknowledged, that this would allow the Defendant to exercise the power whilst keeping the order undisclosed for an indefinite period. I do not find such a submission to be either consistent with constitutional principle or the ECHR and would only be prepared to accept this submission if the language used by Parliament left open no reasonable alternative construction.

146. The issue was considered as a matter of high principle by the House of Lords in **R (Anufrijeva) v. Secretary of State for the Home Department** [2004] 1 A.C. 604. The House of Lords (Lord Bingham dissenting) held that where limited leave to enter had been granted pending the determination of an asylum claim, with consequent social security benefits, the dismissal of that claim and termination of income support had been unlawful since the appellant had not been notified of the asylum decision. The case turned on whether regulation 70(3A)(b)(i) of the Income Support (General) Regulations 1987 was in sufficiently unambiguous terms to operate without the need for notice to be given of the decision to the appellant. Since Lord Bingham dissented on that issue (see his judgment at [12]), it is relevant to consider the language which the majority considered was not sufficient to displace the need for notice to be given and which referred only to the "recording" of an asylum decision:

> "For the purposes of this paragraph, a person (a) is an asylum seeker when he submits on his arrival (other than on his re-entry) in the United Kingdom from a country outside the Common Travel Area a claim for asylum to the Secretary of State that it would be contrary to the United Kingdom's obligations under the [1951 Geneva Convention and the 1967 Protocol relating to the Status of Refugees] for him to be removed from, or required to leave, the United Kingdom and that claim is recorded by the Secretary of State as having been made ..."

147. Lord Steyn gave the view of the majority and noted at the outset at [24] that -

> "In oral argument before the House counsel stated that the Secretary of State did not condone delay in notification of a decision on asylum. These were weasel words. There was no unintended lapse. The practice of not notifying asylum seekers of the fact of withdrawal of income support was consistently and deliberately adopted. There simply is no rational explanation for such a policy. Having abandoned this practice the Secretary of State still seeks to justify it as lawful. It provides a peep into contemporary standards of public administration. Transparency is not its hallmark. It is not an encouraging picture."

148. I refer to that passage and the concerns expressed since the same concern as to a lack of transparency and fairness would apply here if the Defendant's submissions were correct and detention could be carried out without the need to be given notice of the order for an indefinite period. It is also notable that the Defendant here advanced no compelling reason why it was necessary to be able to detain under para. 2(3) without at least notifying the proposed detainee of the deportation order. Indeed, such notification could be given contemporaneously with taking a person into detention especially where, as here, the individual is in custody for the purposes of criminal sentence. Notification was not given here for 7 days after detention began for reasons which have not been explained.

149. Lord Steyn stated:

> "26. The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system: *Raymond v Honey* [1983] 1 AC 1, 10g, per Lord Wilberforce; *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, 209d; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.
>
> 27. What then is the relevance of this dimension for the present case? The answer is provided by Lord Hoffmann's elegant explanation of the principle of legality in the *Simms* case. He said, at p 131:
>
> > "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the

> legislature is expressly limited by a constitutional document."

This principle may find its primary application in respect of cases under the European Convention on Human Rights. But the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann's dictum applies to fundamental rights beyond the four corners of the Convention. It is engaged in the present case.

28. This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e g arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category. If this analysis is right, it also engages the principle of construction explained by Lord Hoffmann in *Ex p Simms*.

29 In European law the approach is possibly a little more formalistic but the thrust is the same. It has been held to be a "fundamental principle in the Community legal order ... that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it": *Firma A Racke v Hauptzollamt Mainz* (Case 98/78) [1979] ECR 69, para 15; *Opel Austria GmbH v Council of European Union* (Case T-115/94) [1997] ECR II-39, para 124; **Schwarze, European Administrative Law** (1992), pp 1416-1420; **Council of Europe Publishing, The Administration and You, A Handbook** (1997) chapter 3, para 49.

30. Until the decision in Ex p Salem it had never been suggested that an uncommunicated administrative decision can bind an individual. It is an astonishingly unjust proposition. In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our public law. In *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787, Lord Diplock explained the position:

> "Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision."

Where decisions are published or notified to those concerned

> accountability of public authorities is achieved. Elementary fairness therefore supports a principle that a decision takes effect only upon communication.
>
> 31. If this analysis is correct, it is plain that Parliament has not expressly or by necessary implication legislated to the contrary effect. The decision in question involves a fundamental right. It is in effect one involving a binding determination as to status. It is of importance to the individual to be informed of it so that he or she can decide what to do. Moreover, neither cost nor administrative convenience can in such a case conceivably justify a different approach. This is underlined by the fact that the bizarre earlier practice has now been abandoned. Given this context Parliament has not in specific and unmistakeable terms legislated to displace the applicable constitutional principles.

150. It is important also to note how Lord Steyn addressed the arguments advanced by the Home Secretary since they are relevant to the arguments here:

> "32. The contrary arguments can be dealt with quite briefly. Counsel for the Home Secretary submits that before a "determination" can be "notified" there must be a determination. This is legalism and conceptualism run riot. One can readily accept that in this case there must have been a decision as reflected in the file note. That does not mean that the statutory requirement of a "determination" has been fulfilled. On the contrary, the decision is provisional until notified.
>
> 33. Counsel for the Home Secretary relied strongly on some niceties of statutory language. He pointed out that in regulation 21ZA of the Regulations, as well as in section 6 of the Asylum and Immigration Appeals Act 1993, the draftsmen provided expressly for notification. In contrast regulation 70(3A)(b)(i) makes no reference to notification. The fact, however, that other provisions made the requirement of notification explicit does not rule out the possibility that notification was all along implicit in the concept of "the determination". For my part a stronger indication of Parliamentary intent is provided by the Statement of Changes in Immigration Rules (HC 395), which were laid before Parliament on 23 May 1994 under section 3(2) of the Immigration Act 1971. The concept of a "refusal" of asylum to be found in rules 331, 333 and 348 plainly contemplates notification of an adverse decision. These rules are part of the contextual scene of regulation 70(3A)(b)(i). They support the argument that notification of a decision is necessary for it to become a determination. But the major point is that the semantic arguments of counsel for the Home Secretary cannot displace the constitutional principles outlined above."

151. In principle it seems to me that a decision which gives rise to the power to deprive an individual of liberty must *a fortiori* be subject to the principle of notification which applies to the deprivation of an individual entitlement to income benefits.

152. Further, I consider the construction argument advanced by the Defendant here to be no stronger than that which failed to convince the House of Lords. The beginning and the end of Mr Waite's argument was reliance upon the requirement that a "deportation order is in force" and the contrast of the absence of the requirement for notice in para. 2(3) from that in para. 2(2). It was the Defendant's contention that "in force" simply meant that the order had been made, regardless of whether it had left the desk of the official making it.

153. However this argument, like the argument rejected in **Anufrijeva** with regard to "determination", simply assumes that the order is "in force" regardless of whether it is notified. I consider that the language used in 2(3), like that in the regulation considered in **Anufrijeva**, is simply not clear enough to displace the presumption that notice should be given before it is "in force".

154. It is important to bear in mind in this context that the making of a deportation order is an immigration decision within s. 82(2)(j) of the Nationality, Immigration and Asylum Act 2002 which must in any event be notified to the individual under reg. 4 of the Immigration (Notices) Regulations 2003 SI No 658 and itself triggers the right of appeal under s. 82(1) of the 2002 Act. This right of appeal self-evidently cannot be exercised until the individual affected has been notified that such an order has been made against him. S has an in-country right of appeal under s. 92(4)(a) since he made an asylum claim whilst in the UK and that claim has not been certified by the Defendant as being "clearly unfounded" under s. 94. These considerations fortify the approach to be taken to para. 2(3) and to the need for notice be given before the order can be regarded as being "in force."

155. S gave notice of appeal against the deportation order on 6 May 2010 pointing out that though the notice of decision was dated 1 February it was given on 30 April.

156. I do not find the argument contrasting para. 2(3) with 2(2) to be convincing where the 2(2) power is expressly dependent on the giving of notice of the intention to make a deportation order "pending the making of" that order. First, this is dealing with different circumstances where the Defendant has yet to make an order and is seeking to communicate an intention to proceed. Secondly, the language used is not consistent with 2(3) in any event since it refers to the "making" of the order rather than the order

being "in force".

157. Mr Waite suggested it was intended that there should be continuity of the existence of power to detain from the time the intention to make an order is communicated up to and beyond the time once the order has been made and is in force. However, there is no necessary discontinuity in my view provided the individual is notified of the decision as soon as it is made so that it is then "in force". Since the Defendant is required to notify the individual affected by the immigration decision under the 2003 Regulations in any event, I do not consider that this should prove a matter of significant concern.

158. If there is a degree of uncertainty here this is caused by the language chosen in any event and the potential difference between "the making" of the order in 2(2) and the order being "in force" in 2(3). I also observe that if the individual is detained under 2(2) (following notice of the intention to make the order) then there should be little difficulty in giving notice of the order itself.

159. I reject the Defendant's submissions and hold that the deportation order was not "in force" for the purposes of 2(3) and that the failure to notify S of the deportation order from 23 April until 30 April rendered S's detention unlawful from the outset.

160. It follows that in my judgment S was unlawfully detained from the outset and that such detention was in breach of Article 5 ECHR.

161. However, since the point was extensively canvassed in argument, I now turn to consider whether, even if S's detention had been lawful at its inception, there were any factors or circumstances subsequent to 23 April which would have rendered unlawful any continued exercise of the power to detain.

Detention in the light of the Secretary of State's policy

The Secretary of State's guidance as to the detention of mentally ill persons

162. Chapter 55 of the Defendant's *Enforcement Instructions and Guidance* ("EIG") contains the Defendant's main published policy on the use of immigration detention. In the version applicable until 26 August 2010, section 55.10 provides:

> "**55.10. Persons considered unsuitable for detention**
>
> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration accommodation or elsewhere. Others are unsuitable for Immigration detention accommodation because their detention requires particular security, care and control. In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration detention accommodation or elsewhere:
>
> ...
>
> those suffering from serious medical conditions or the mentally ill - in CCD cases, please contact the specialist Mentally Disordered Offender Team."

163. This last section was amended after 26.8.10 to state:

> "those suffering serious mental illness which cannot be satisfactorily managed within detention."

164. It is important to note that this specific guidance with regard to the mentally ill is set in the more general context of EIG Section 55.1 which sets out the presumption in favour of temporary admission or release. The starting point even in CCD cases remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. This underlines the fact that in a genuine case of serious mental illness the emphasis is not simply on the general presumption of liberty which applies in any case but a specific presumption that detention will only take place in very exceptional circumstances. This does not preclude detention in all cases, but undoubtedly creates a high hurdle to overcome if it is to be imposed. It follows that if, as may be the case here, the officials considering detention simply apply the general approach which requires some justification for detention and do not properly apply the exceptional circumstances test, they may have asked themselves the wrong question and approached the detention issue unreasonably.

165. Other provisions deal with additional obligations to deal with those who have mental health problems. EIG Section 55.8A provides:

> **"55.8A. Rule 35 – Special Illnesses and Conditions**
>
> Rule 35 of the Detention Centre Rules 2001 sets out requirements for healthcare staff at removal centres in regards to:
>
> • any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention;
>
> • any detained person suspected of having suicidal intentions; and
>
> • any detained person for whom there are concerns that they may have been a victim of torture.
>
> Healthcare staff are required to report such cases to the centre manager and these reports are then passed, via UKBA contact management teams in centres, to the office responsible for managing and/or reviewing the individual's detention.
>
> The purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention.
>
> The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case.
>
> Upon receipt of a Rule 35 report, caseworkers must review continued detention in light of the information in the report (see 55.8 – Detention Reviews) and respond to the centre, within two working days of receipt, using the appropriate Rule 35 pro forma."

166. Rule 35 of the DCR provides, materially, as follows:

> "**Rule 35 -- Special illnesses and conditions (including torture claims)**
>
> (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
>
> (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which

appear necessary for his supervision or care."

The legal effect of breaches of policy

167. The relevance of breaches of published policy to the lawfulness of detention has been recently considered and reaffirmed by a majority of the Supreme Court in **Kambadzi**, above, in the context of the Home Office's *Operational Enforcement Manual* and the need for periodic reviews of the need for detention. Lord Hope DPSC (with whom Lady Hale JSC and Lord Kerr JSC agreed) held that the lawfulness of detention was to be judged by the lawful application of policy. At [36] he stated:

> "36 I do not accept the Court of Appeal's view that the question is one of statutory construction. We are dealing in this case with what the Secretary of State agrees are public law duties which are not set out in the statute. Of course it is for the courts, not the Secretary of State, to say what the effect of the statements in the manual actually is. But there is a substantial body of authority to the effect that under domestic public law the Secretary of State is generally obliged to follow his published detention policy. In **R (Saadi) v Secretary of State for the Home Department** [2002] 1 WLR 356 , para 7 Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said that lawful exercise of statutory powers can be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such policy gives rise. In **R (Nadarajah) v Secretary of State for the Home Department** [2004] INLR 139, para 54 the Master of the Rolls, again delivering the judgment of the court, said: "Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow." In D v Home Office (Bail for Immigration Detainees intervening) [2006] 1 WLR 1003 , para 132 Brooke LJ said that what the law requires is that the policies for administrative detention are published and that immigration officers do not stray outside the four corners of those policies when taking decisions in individual cases. *Wade & Forsyth, Administrative Law* 10th ed (2009), pp 315–316 states that the principle that policy must be consistently applied is not in doubt and that the courts now expect government departments to honour their statements of policy. Policy is not law, so it may be departed from if a good reason can be shown. But it has not been suggested that there was a good reason for the failure of officials of the required seniority to review the detention in this case and to do so in accordance with the prescribed timetable.
>
> ...
>
> 40 In **Mohammed-Holgate v Duke** [1984] AC 437, 443, Lord Diplock said that the Wednesbury principles (**Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223) are applicable not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for trespass by false imprisonment. It may be that not every public law error will

justify resort to the common law remedy in every case. But I do not think that it is necessary to show that there was bad faith or that the discretion was exercised for an improper purpose in the present context. Where there is an executive discretion to detain someone without limit of time, the right to liberty demands that the cause of action should be available if the discretion has not been lawfully exercised. In **R v Deputy Governor of Parkhurst Prison, Ex p Hague** [1992] 1 AC 58, 162 Lord Bridge of Harwich said that the tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it. The requirements of the 1971 Act and **Hardial Singh** principles are not the only applicable law with which the Secretary of State must comply. **Nadarajah's case** shows that lawful authority for an executive power of detention may also be absent when there is a departure from the executive's published policy.

41 As Lord Brown JSC points out, the published policy in **Nadarajah's case** [2004] INLR 139 entitled the detainee to release because it narrowed the grounds on which the power of detention was exercisable: para 107 below. In this case the policy was different because it was concerned not with the grounds for detention but with procedure. All it did was to provide that the detention would be reviewed by designated officers at regular intervals. Of course I agree with him that the policies are different. But I do not think that this difference means that Nadarajah's case offers no assistance in this case. On the contrary, it seems to me to indicate that a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful. I use this expression to describe a breach of public law which bears directly on the discretionary power that the executive is purporting to exercise. The importance of the principle that the executive must act within the law was emphasised by Lord Bingham of Cornhill in his seminal Sir David Williams lecture, *The Rule of Law* [2007] CLJ 67, 72 when he said:

> "The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification."

42 That is a proposition which can be applied to this case. The published policy narrowed the power of executive detention by requiring that it be reviewed regularly. This was necessary to meet the objection that, unless it was implemented in accordance with a published policy, the power of executive detention was being applied in a manner that was arbitrary. So it was an abuse of the power for the detainee to be detained without his detention being reviewed at regular intervals. Applying the test proposed by Lord Dyson JSC in Lumba, it was an error which bore on and was relevant to the decision to detain throughout the period when the reviews should have been carried out:

[2011] 2 WLR 671, para 68 ..."

168. Lady Hale JSC added at [69] and [73]:

> "69. ... While accepting that not every failure to comply with a published policy will render the detention unlawful, I remain of the view that
>
> > "the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result—which is not the same as saying that the result would have been different had there been no breach": see **Lumba**, para 207. ..."
>
> "72. It is not statute, but the common law, indeed the rule of law itself, which imposes upon the Secretary of State the duty to comply with his own stated policy, unless he has a good reason to depart from it in the particular case at the particular time."

169. The relevance of the EIG to the lawfulness of detention of the mentally ill was specifically considered pre-**Lumba** and **Kambadzi** in **Anam v. SSHD** [2009] EWHC 2496. **Anam** concerned the detention of a mentally ill person and the application of para 55.10 of the EIG where that person was also a persistent violent offender – in circumstances further along the spectrum of seriousness than those here.

170. Cranston J. considered the requirement that the mentally ill should only be detained in "very exceptional circumstances" in the following terms (which were endorsed by the Court of Appeal [2010] EWCA Civ 1140, at [81]):

> "51 Paragraph 55.10 provides that those mentally ill are normally considered suitable for detention in only "very exceptional circumstances". To my mind the existence of very exceptional circumstances demands both a quantitative and qualitative judgment. Were this provision to stand in isolation in the policy the power to detain the mentally ill could only be used infrequently, and the circumstances would have to have a quality about them which distinguished them from the circumstances where the power is frequently used. Otherwise effect would not be given to the requirement that the circumstances not simply be exceptional but very exceptional.
>
> 52 There are two points to be made. The first is that in my view mental health issues only fall to be considered under Chapter 55 where there is available objective medical evidence establishing that a detainee is, at the material time, suffering from mental health issues of sufficient seriousness as to warrant consideration of whether his circumstances are sufficiently exceptional to warrant his detention. Thus

> consideration must be given to the nature and severity of any mental health problem and to the impact of continuing detention on it.
>
> 53 Secondly, the provision that the mentally ill be detained in only very exceptional circumstances does not stand in isolation. The opening part of paragraph 55.10 provides that for Criminal Casework Directorate cases "the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention". Paragraph 55.13 indicates, as would be expected that that demands a consideration of the likelihood of the person re-offending and the seriousness of the harm if re-offending occurred. With an offence like robbery, the paragraph specifically requires substantial weight to be given to the risk of further offending and harm.
>
> 54 Absconding as a consideration is introduced by paragraph 55.3A for CCD cases. That provides that in assessing what is a reasonable period of detention necessary for removal in the individual case, case-workers must address all relevant factors, including the risks of re-offending and absconding. That paragraph specifically mentions mental illness when considering more serious offences such as robbery. The relevant passage has been quoted earlier in the judgment: case-workers must balance the risk to the public from re-offending and absconding if the detainee is mentally ill.
>
> 55. The upshot of all this is that although a person's mental illness means a strong presumption in favour of release will operate, there are other factors which go into the balance in a decision to detain under the policy. The phrase needs to be construed in the context of the policy providing guidance for the detention of all those liable to removal, not just foreign national prisoners. It seems to me that there is a general spectrum which near one end has those with mental illness who should be detained only in "very exceptional circumstances" along it – the average asylum seeker with a presumption of release – and near the other end has high risk terrorists who are detained on national security grounds. To be factored in, in individual cases, are matters such as the risk of further offending or public harm and the risk of absconding. When the person has been convicted of a serious offence substantial weight must be given to these factors. In effect paragraph 55.10 demands that, with mental illness, the balance of those factors has to be substantial indeed for detention to be justified."

171. It is therefore important, first, that consideration should be given to the nature and severity of any mental health problem and to the impact of continuing detention on it. This issue must be considered in the light of objective, expert medical evidence. If this consideration does not occur, then the decision maker cannot properly determine whether there are circumstances which outweigh the impact of detention. Secondly, other factors must also be considered, such as the risk of further offending or harm to

the public, and carefully weighed against the reason why the individual may be unsuitable for detention. It by no means follows that the mental illness of a potential detainee will prevent detention. There may, for example, be cases which are not significantly affected by the illness or which are susceptible to treatment in detention. There may also be cases of such significant risk to the public which outweigh even significant problems which would be caused by detention.

172. The fact that Cranston J. considered that detention could be justified was a matter of the lawful application of the policy to the facts of that case. He held that the claimant's detention had remained lawful notwithstanding the Defendant's failure to apply the "very exceptional circumstances" policy to the detention. That case involved an assessment of the condition of the claimant as set against a history of very serious offending, far more so than in the present case, including forty individual offences, 26 convictions, including a serious robbery involving serious physical violence against a young woman, numerous unmeritorious claims for asylum, a refusal to cooperate in documentation to effect removal, use of multiple aliases, and the last barriers to removal being anticipated to disappear very shortly. In the present case, S's appeals to the FTT have yet to be heard and he is some way removed from the final barriers.

173. In my judgment, the policy requiring an exceptional justification for the detention of mentally ill people was one which was highly relevant to the decisions to detain in S's case. Indeed, the UKBA decisions purported to apply it and Mr Waite submits it was properly applied. It therefore falls within the scope of the approach in **Lumba** and **Kambadzi** of a published policy the breach of which would render detention unlawful. Its meaning and application are therefore to be judged according to public law principles and, if I find the policy to have been breached or misapplied (it being common ground that it was applied) then this will provide a basis on which the detention should be considered to be unlawful.

174. Following the initial decision to detain, there were five subsequent reviews of the decision until the grant of bail by this Court. Each is said by S to have been flawed due to failures which included: first, a failure to take into account relevant expert medical evidence; secondly, failure to address properly or at all the true nature and extent of the Claimant's mental illness and its relevance to the decision to detain;

thirdly, subsequent reviews failed to address properly or at all the evidence of the Claimant's rapidly deteriorating mental illness with increasing incidence of self harm; fourthly, the lack of proper consideration given to release from detention to prevent further deterioration in his mental health and to access treatment in the community, which had been assessed by all specialists as the appropriate context for his treatment; fifthly, failure to consider expert advice that S presented only a risk to himself; and, finally, unlawfully limiting consideration to whether or not the Claimant, if not suitable to be detained in the IRC, should remain detained but be transferred to hospital under s 48 of the Mental Health Act 1983.

175. The Defendant relies upon the fact that the decision to detain and subsequent reviews properly considered both the implications of S's mental condition and that she was entitled to have regard to the risk of absconding and of further harm to the public. Mr Waite also submitted that even in the light of Dr Schmidt's report it was not appropriate simply to order S's release but to consider all the circumstances including the public interest in detaining S, the nature of his offending and that risk of his absconding.

176. In considering the reasons advanced by the Defendant it is appropriate to recall what Dyson L.J. said in **R (I) v. SSHD** at paras. 53-54 regarding the risk of absconding and the need to assess the risk presented by an individual in its specific context:

> "53. But there are two important points to be made. First, the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake.
>
> 54. Secondly, it is for the Secretary of State to satisfy the court that it is right to infer from the refusal by a detained person of an offer of voluntary repatriation that, if released, he or she will abscond. There will no doubt be many cases where the court will be persuaded to draw such an inference..."

177. In the present case, all of the decisions regarding S's detention have included consideration of, and a justification for detention, based on the criminal acts committed by S in 2006, his attempt to escape from custody in 2009 and his general disposition to seek to avoid deportation. The risks of absconding and of further

violence which might place the public at risk are plainly legitimate considerations when considering whether a person should be detained. However, the question here is not the undoubted relevance of those factors but whether they have been properly weighed in the context set by the policy on detention of the mentally ill.

178. The Defendant's own policy, as explained and applied in **Anam**, requires exceptional reasons for the detention of those who are mentally ill but nonetheless allows detention to take place if, following a careful assessment of the impact of detention on the proposed detainee's mental condition, the countervailing factors in favour of detention are compelling. In that context, it was not suggested by Mr Waite for the Defendant that S did not have a mental illness within the meaning of the policy (in either form noted above) and, in the light of the undisputed medical evidence, this seems to have been correct. Indeed, his case was that these matters were properly considered. Although he sought to suggest that the condition was not severe, nonetheless he did not dispute the applicability of the policy and in my judgment the severity of the condition was sufficient to give rise to the circumstances that I have described, and to acts of self-harm and concerns with regard to suicide.

179. Quite apart from the general vulnerability of the mentally ill, a critical consideration here was the fact that S's condition was specifically aggravated by detention. His time spent in hospital, both in 2009/10 and August 2010 both demonstrated that he did not require hospitalisation but treatment within the community. It is unfortunate that on occasions the UKBA read the advice that S did not require hospitalisation as equivalent to advice that he could be detained: see the initial decision to detain of 23 April and the subsequent review of 2 June. However, Dr Hardy and, more particularly Dr Schmidt, saw custody as presenting a threat to S's condition and stability. As Dr Schmidt advised on 21 April 2010:

> "It is likely that if he is returned to prison, he will regress to the position which gave rise to his initial referral to Woodlands House: given his personality profile, in a situation of uncertainty or where there is little access to supportive relationships, he is likely to resort to dysfunctional behaviour to cope with distressing emotions, for example self harm or suicidal behaviour. He may feel vulnerable and threatened, his fear of rejection making it difficult to build relationships."

180. Even if the UKBA had not been provided with a copy of this report until 11 May, in

the context of the initial detention decision and the need for review and of the evidence of growing concerns with S in April/May that a proper understanding and application of policy should have led UKBA to review their decision speedily and against compelling circumstances which made continued detention unsuitable. This appears to have been the intention of those making the initial decision on 23 April. Indeed, the examination of S at Colnbrook on 30 April, only 7 days after detention recommenced, displayed a better understanding of S's condition than did those authorising detention. That position became ever clearer as May and June progressed, with increasing incidents of mental disturbance and incidents of self-harm (and frequent application of ADCT) and Dr Ahmed independently formed the opinion consistently with earlier experts that S was not fit to be detained.

181. However, it appears clear to me that the decision to detain was flawed and, even if I am wrong with regard to the initial decision, certainly flawed as the subsequent reviews failed to grapple with the need to understand and apply the policy requirement of exceptional circumstances, to recognise properly S's mental condition and to consider properly objective evidence as to the effect of detention on it. As Ms Harrison observes, the decision making process in fact made it more difficult for the UKBA to pursue its objective of deportation and, in any event, there seemed little prospect of an early hearing of S's appeals.

182. I have already mentioned whilst summarising the facts of the case the Claimant's contentions as to the unsatisfactory aspects of the initial decision to detain and the decision taken against an absence of a correct understanding of S's mental condition - repeated on the subsequent reviews. I agree with those criticisms. In my judgment, they lead to the clear conclusion that the policy was not properly understood by those authorising detention and was certainly not properly applied and that the decision and subsequent reviews failed to both understand and assess the impact of detention on S's mental condition. The risks which S presented were plainly factors which were relevant to the decision to detain, but that cannot be determinative here, contrary to Mr Waite's submissions. The decisions balancing the risk elements of releasing S against the appropriateness of detention at no stage properly assessed the issues due to the failure to grapple with the impact of detention on S. I find that had they done so, there would have been a compelling case for release (albeit on stringent bail

conditions) especially given the expert evidence that the risk which S presented was to himself, not others, a matter which I find was shown clearly from his behaviour at Harmondsworth. This was a course eventually adopted by this Court in granting bail.

183. The considerable number of incidents at Harmondsworth, including some degree of provocation from other detainees on occasion, did not once lead S to any attempt at violence against anyone other than himself. This and the experts reports which resulted from detailed consideration of S's mental state did not support the conclusion that S poses a risk to others, as opposed to himself, and this does not appear to have been considered at all and put against the assessment of risk carried out as part of the criminal sentencing process which would have inevitably been based on a lesser period of assessing S.

184. There are other unsatisfactory aspects of the reviews, not least the lack of understanding of the support provided by K and her family which is plain from the evidence shown to the Court. However, in this context they simply provide support to my conclusion that the UKBA failed to assess S's circumstances properly as required by EIG Section 55.10 and Cranston J. in **Anam**. They essentially put out of mind the possibility that there might exist a caring environment into which S could be released. I note that S, once bailed by this Court, has resided with K and has properly complied with the terms of his bail for the last 10 months. Whilst the failure to take account of the material evidence which existed of S's family relationship including the application under the EEA Regulations 2006 is also put forward by Ms Harrison for S, it is unnecessary for me to deal with this and it will be considered by the FTT.

185. Since the application of policy in EIG Section 55.10 was one which went to the heart of the decision to detain S, I have no doubt that it fell within the compass of the decisions in **Lumba** and **Kambadzi** as being policy the breach of which would make detention unlawful. It follows that even had I not concluded that detention was unlawful from the outset, I find that the breaches of the Secretary of State's policy with regard to the detention of mentally ill persons in any event would have rendered that detention unlawful.

Articles 3 and 8

186. Finally, for the reasons set out in the following section, I consider that the detention of

S was a violation of his rights under Article 3 (and 8) ECHR.

(1) Relevant legal principles

187. Articles 3 and 8 ECHR provide:

> "*Article 3—Prohibition of torture*
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> *Article 8—Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

188. The approach required by Article 3 is set out in the following authorities: **Suppiah & others v. SSHD & others** [2011] EWHC 2 (Admin) at [150] to [156]; **Pretty v. UK** (2002) 35 E.H.R.R. 1; **Kudla v. Poland** (2002) 35 E.H.R.R. 11; **Bensaid v. UK** (2001) 33 E.H.R.R. 1; C; **Kalashnikov v. Russia** (2003) 36 E.H.R.R. 34; **Keenan v. UK** [2001] 33 EHRR 913; and **Savage v. South Essex Partnership NHS Foundation Trust** [2009] 1 A.C. 681.

189. In **Pretty v. UK**, the ECtHR observed in terms frequently repeated by that Court that:

> "49. Article 3 of the Convention, together with Article 2, must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe. In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.

190. At [50] to [51] the ECtHR referred to both the positive and negative obligations under Article 3, namely "to refrain from inflicting serious harm on persons within their jurisdiction" (negative) and "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals" (positive).

191. As to the threshold of severity of treatment which engages Article 3, at [52] the Court stated it in terms which included both the physical and mental aspects of treatment:

> "52. As regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."

192. The latter part of that passage makes it clear that the exacerbation of existing mental illness by the conditions of detention may fall within Article 3. It appears to me that this formulation is wide enough also to encompass the effects of detention itself in a sufficiently extreme case, of which this is said to be one.

193. At [61] to [65], in the context of a claim for immunity from prosecution for assisting suicide, the Court considered Article 8 and held that it encompassed issues of the quality of life:

> "65 The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."

194. The severity of the treatment is a relative question and must be assessed on the individual facts:

> "it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim" (**Kalashnikov** at [95])

195. The relationship between Articles 3 and 8 was considered in **Bensaid**, where the ECtHR made it clear that even if the treatment of a mentally ill person did not cross

the Article 3 threshold it might nonetheless breach Article 8 (though finding no breach on the facts):

> "46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.
>
> 47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

196. In **Kudla v. Poland** the Court considered the implications of criminal detention:

> "92. ... the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> 93. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.
>
> 94. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measures do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance."

197. In **Kudla,** where the fact that authorities were properly informed as to the claimant's mental condition and a psychiatric report had been obtained which found that his mental condition was compatible with detention meant there had not been ill-

treatment at the level of severity required to breach Article 3, the Court noted at [99] -

> "... that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention may have exacerbated to a certain extent his feelings of distress, anguish and fear."

198. Vulnerability will not of itself establish a breach, nor the mere fact that detention may exacerbate "to a certain extent" the mental suffering experienced. That does not mean, however, that any increase in suffering would not reach the requisite level of severity.

199. Further, it is not necessary that the authorities should have any intention to inflict suffering on the subject:

> "101. The Court accepts that in the present case there is no indication that there was a positive intention of humiliating or debasing the applicant. However, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Art.3 ...
>
> 102. ... the Court finds the applicant's conditions of detention, in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment." (**Kalashnikov** at [101], [102])

200. In **Keenan v. UK** the Court considered the implication of the suicide of the claimant's mentally ill son, serving a sentence of four months imprisonment, and who had received additional punishment for assaulting prison officers in the form of a period of segregation and an extension of his sentence by 28 days. The Court found a violation of Article 3 though not of Article 2. It considered both the duty imposed in cases of mental illness and the difficulty which may arise in assessing to what extent the illness is exacerbated by the conditions of detention.

> "110 It is relevant in the context of the present application to recall also that the authorities are under an obligation to protect the health of persons deprived of liberty. The lack of appropriate medical treatment may amount to treatment contrary to Article 3. In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standard of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how

> they are being affected by any particular treatment.
>
> 111 The Court recalls that Mark Keenan was suffering from a chronic mental disorder, which involved psychotic episodes and feelings of paranoia. He was also diagnosed as suffering from a personality disorder. ... That he was suffering anguish and distress during this period and up until his death cannot be disputed. ... However, as the Commission stated in its majority opinion, it is not possible to distinguish with any certainty to what extent his symptoms during this time, or indeed his death, resulted from the conditions of his detention imposed by the authorities.
>
> 112 The Court considers however that this difficulty is not determinative of the issue as to whether the authorities fulfilled their obligation under Article 3 to protect Mark Keenan from treatment or punishment contrary to this provision. While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor. For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3. Similarly, treatment of a mentally-ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be capable of pointing to any specific ill-effects."

201. The factors which the Court considered of relevance to its finding of breach were: first, the lack of medical notes for a man known to be a suicide risk which showed "an inadequate concern to maintain full and detailed records of his mental state and undermines the effectiveness of any monitoring or supervision process" [113]; secondly, despite an examination on admission, no further expert psychiatric report was obtained whether before or after the assaults or the adjudication [114]; thirdly, the failures to carry out effective monitoring and obtain expert advice disclosed "significant defects in the medical care provided to a mentally-ill person known to be a suicide risk" [115]; and the additional punishment shortly before the due release date "which may well have threatened his physical and moral resistance" was "not compatible with the standard of treatment required in respect of a mentally-ill person" [115].

202. The implications of **Keenan** for the positive duty are clear: in the case of severe mental illness, there must be in place effective monitoring of the detainee and the obtaining of suitable expert advice as to how that person should be dealt with and

treated.

203. Furthermore, at [92] in the context of Article 2 the Court considered whether the authorities "knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide". See **Osman v. United Kingdom** (1998) 29 EHRR 245 which appears to be the origin of that approach.

204. In **Savage v. South Essex Partnership NHS Foundation Trust**, albeit in the context of Article 2, the Court considered that the approach in the criminal detention cases to Article 2 also applied to those whose liberty was restricted by other means, including administrative detainees and those detained in hospital: see Lord Rodger at [33], [49] and [50] and Lady Hale at [97] to [103]. While the consideration in **Savage** concerned the application of Article 2 there is no reason in principle why the approach adopted by the Court should not apply to Article 3 cases. See Lady Hale at [98] applying the approach under Article 3 to Article 2 and Wyn Williams J. in **Suppiah v. SSHD** at [105], proposition (3), applying **Z v. United Kingdom** [2002] 34 EHRR 3.

205. At [49] Lord Rodger noted:

> "Plainly, patients, who have been detained because their health or safety demands that they should receive treatment in the hospital, are vulnerable. They are vulnerable not only by reason of their illness which may affect their ability to look after themselves, but also because they are under the control of the hospital authorities. Like anyone else in detention, they are vulnerable to exploitation, abuse, bullying and all the other potential dangers of a closed institution."

206. At [50] he considered the duty imposed by Article 2 in terms which are also relevant to the exercise of the positive duty under Article 3:

> "50 I am accordingly satisfied that, as a public authority, the trust was under a general obligation, by virtue of article 2, to take precautions to prevent suicides among detained patients in Runwell Hospital. So the trust had, for example, to employ competent staff and take steps to see that they were properly trained to high professional standards. The hospital's systems of work—and, doubtless, also its plant and equipment—had to take account of the risk that detained patients might try to commit suicide. When deciding on the most appropriate treatment and therapeutic environment for detained patients, medical staff would have to take proper account of the risk of suicide. But the risk would not be the same for all patients. Those who presented a comparatively low risk could be treated in a more open environment,

> without the need for a high degree of supervision. Those who presented a greater risk would need to be supervised to an appropriate extent, while those presenting the highest risk would have to be supervised in a locked ward. The level of risk for any particular patient could be expected to vary with fluctuations in his or her medical condition. In deciding what precautions were appropriate for any given patient at any given moment, the doctors would take account of both the potentially adverse effect of too much supervision on the patient's condition and the possible positive benefits to be expected from a more open environment. Such decisions involve clinical judgment. Different doctors may have different views."

207. Lady Hale added at [103]:

> "I would phrase the question which the court should ask itself in the same language as the question asked by the Strasbourg court in Keenan's case 33 EHRR 913, para 92.. In so far as there is any difference between them, it is clear that in the most closely analogous case of Keenan's case and also in the two conscript suicide cases the Strasbourg court addressed its mind to the "all they could reasonably be expected to do" test."

208. In applying the positive duty under Article 3 it is not appropriate to "wait and see" what occurs if there are grounds for harm occurring which would pass the Article 3 threshold but to take an informed decision to prevent such harm occurring. See the decision of Collins J. in granting bail in the SIAC case of **G** (Appeal SC/2/2002, Bail application SCB/10, 20.5.04) at [11]-[12], albeit exceptionally, where there was a real risk of harm to G if the subject were detained on the basis of expert evidence that detention had a damaging effect on his mental health. This was notwithstanding the fact that the Commission was satisfied there was a reasonable suspicion that G was an international terrorist and "was more dangerous than some". It nonetheless considered matters which were not considered by the SSHD in this case:

> "... it would in our view only be appropriate to consider granting bail if we were satisfied that a result of not granted it would be an overwhelming likelihood that the detainee's mental or physical condition would deteriorate to such an extent as to render his continued detention a breach of Article 3, because inhuman, or Article 8, because disproportionate. The imminence and predictability of any such breaches are obvious relevant factors."

(2) Application of the principles to the case

209. It is important when considering the question of whether there has been compliance with the ECHR to consider the circumstances which in my view were or ought to

have been known to the Defendant:

i) The clear evidence of S's history of mental illness which UKBA had been aware of since early 2009 and which was put beyond doubt by the making of a hospital order by the Crown Court in November 2009. As I have set out above, the UKBA was aware of the criminal process and has offered no explanation of this when considering detention in April 2010. Indeed, it was specifically acknowledged to Reading Crown Court on 15 February 2010 that deportation proceedings were on hold pending the outcome of the criminal proceedings (which were dependent on the hospital order) and on 8 April when it was said that the UKBA had decided "to take no further action until the outcome of [S]'s treatment and his sentence, whereupon the situation will be reviewed".

ii) S's condition was the subject of two experts' reports, the contents of which have not at any stage been disputed by the Defendant and which, in my judgment, were known to the UKBA by 11 May at the latest - at least in the case of one report. In all probability, those reports were disclosed to UKBA when S was transferred into immigration detention given that they appear to have been provided to Thames Valley police at the time. The police custody record shows that the police had available to them at least one of the expert reports since the record refers to the substance of one of them.

iii) The initial decision to detain on 23 April which noted the need to review and take advice from the outset, and specifically to investigate the suitability of S to be detained. Despite this statement of intention, officers of the UKBA failed to follow it up or to take any steps to acknowledge that need and evidence was not presented to the Court that they sought to do so. Officials' apparent complacency and lack of action is a matter for significant criticism especially given the developing circumstances of S's condition which deteriorated rapidly shortly after detention began. As with so many critical aspects of the handling of S's case, the Defendant has failed to provide any explanation to the Court for this lack of action which continued for several months. It was not enough simply to place S on ACDT given that the expert view was that detention itself was harmful to his mental state and it did not advance UKBA's understanding of his condition. It remains unexplained why S's state of mind

and his condition, which led Dr Ahmed to conclude that S was unfit to be detained, at no stage seems to have spurred UKBA to address the issue.

iv) The fact that S began to hallucinate and self-harm so soon after he was detained, requiring frequent placement on ACDT, which was a situation which had been forewarned by Dr Schmidt and Dr Hardy. I have set out in detail the history of S's circumstances above and it seems clear that anyone who had informed themselves of S's circumstances and history would have understood that detention would at least create a risk of deterioration in his condition. There should have been no doubt in the mind of any responsible public official that S was an individual whose condition should be reviewed as a matter of urgency in order to determine whether continued detention was likely to exacerbate S's mental problems and whether his condition could in any real sense be treated in detention or whether he could only be treated out of detention.

v) Dr Ahmed's written observations made on 10 June 2010 and followed up on 24 June. It was clear to her, and she was the psychiatrist who made routine fortnightly visits to Harmondsworth, that detention was harmful to S and that he could not be provided with the treatment he needed whilst in detention. If this was clear to Dr Ahmed on 10 June then this underlines the evidence then available to the authorities detaining S that he was undergoing serious mental and physical suffering as a result of his continuing detention. Whilst Dr Ahmed's views may not have been communicated immediately to those responsible for decision-making with respect to S's detention (also unexplained and of itself a cause for concern) this does not provide an excuse for the failure of the UKBA to follow up at the outset of detention its own requirement to review and follow up S's condition or its failure to acknowledge, understand and take action based on the existing expert report. Dr Ahmed's views were entirely consistent with earlier advice and experience.

vi) The continuing failure by UKBA to grapple with the difficulties which detention caused S from April until July, added to which the inability to ensure that Dr Shirolkar was enabled to visit and assess S on several occasions which delayed the admission of S to hospital. Even Dr Ahmed's report of 24 June

failed to lead UKBA to bring the matter to a resolution until another 5-6 weeks had passed and the order of this Court had been obtained on 28 July.

vii) The very fact that S's condition was allowed to deteriorate to the point of requiring hospitalisation was itself a symptom of the failure, given the evidence available and the noting of the need to review on 23 April at which stage UKBA expressed ignorance of any evidence of S's mental condition, itself remarkable in the circumstances.

210. In my judgment, the circumstances of S's detention passed the high threshold required for a violation of Article 3 and amounted to inhuman or degrading treatment. I find that there here was a breach of both the negative and positive aspects of Article 3.

211. With regard to the negative aspect, I find that S was subjected to inhuman or degrading treatment in both the fact of his detention which was contrary to the undisputed expert psychiatric and medical advice and the continuation of his detention as his mental condition deteriorated rapidly without the effective addressing of the causes of his condition, notwithstanding the clearest warnings which the Defendant had been given by the expert advice and the history of S's condition and treatment whilst going through the criminal process. Even the recommencement of serious self-harming by S did not stir the UKBA to effective and urgent action.

212. Having considered the authorities on Article 3 set out earlier, I find that the treatment of S, both in the fact of detention, and its continuation despite S's deteriorating condition, and both the mental and physical manifestations of S's condition were sufficiently severe to fall within the Article 3 prohibition. S's pre-existing mental condition was both triggered and exacerbated by detention and that involved both a debasement and humiliation of S since it showed a serious lack of respect for his human dignity. It created a state in S's mind of real anguish and fear, through his hallucinations, which led him to self-harm frequently and to behave in a manner which was humiliating. It also led to his humiliating treatment in the hands of other detainees on 21 July.

213. I have had regard to the requirement that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a form of legitimate treatment. There are a number of elements here. First, I have found that

detention was unlawful from the outset and therefore S should not have been subjected to it and it was not legitimate. Secondly, and in any event, the specific circumstances applying to S made the fact of his detention liable to create serious mental problems and thus go beyond what might reasonably be anticipated to occur as the inevitable result of detention. This was the clear view of the expert advice given both before detention commenced and by Dr Ahmed after some 2-3 months of detention.

214. This case is plainly distinguishable from **Kudla** where a psychiatric report had found that the mental condition of the claimant was compatible with detention. There was no such evidence here, but quite the contrary. The medical advice here was not that there were certain steps which should be taken to make detention workable but that detention itself was the problem, and S's mental health issues could not be addressed whilst in detention. The initial failure to obtain medical advice was followed by a failure to consider and apply it appropriately or to understand that the advice that hospitalisation was not required was not equivalent to advice that detention was appropriate.

215. I also find breaches of the positive aspect of Article 3, in that the Defendant failed here to have in place measures which were designed to ensure that S was not subjected such treatment. Such procedures which were in place were not utilised to deal effectively with S's condition nor sufficient to ensure a timely response to it. Further, the procedures in place were not such that they were treated with an appropriate level of seriousness or urgency and the attention to S's condition was inadequate, as the successive reviews of S's detention all too clearly illustrate.

216. Dr Ahmed's clear perception of S's condition and the inappropriateness of his detention does not seem to have reached the appropriate officials for several weeks - and no explanation is offered as to why Dr Ahmed's views were not communicated or acted upon immediately. All the Court has been given are the uninformative statements by Ms Toni Tomney (of UKBA CCD), and Daewood Mirza, who were working only from file notes and unidentified sources at Harmondsworth, which suggest that Dr Ahmed's view was not communicated immediately. Since she refers to Dr Ahmed as carrying out regular fortnightly visits, there is surprisingly no attempt to explain to the Court why there was no follow-up to the visit. It can reasonably be

assumed that the purpose of fortnightly visits by a psychiatrist is that problems which are identified on such visits are communicated and dealt with. These failures together with the abortive attempts to arrange S's examination by Dr Shirolkar, were all indicative of the inadequacy of the procedures in place for this Claimant.

217. Moreover, taking into account the consistency of the psychiatric advice in this case, the Defendant's own guidance and the expert advice against detaining S, it follows that I am far from being satisfied that the UKBA or Defendant did all that they might reasonably have been expected to do in this case to prevent the treatment which I have criticised.

218. Ms Harrison has submitted that the manner in which mentally ill detainees are dealt with by the Defendant, and the procedures in place, are such that they are insufficient to ensure compliance with Article 3. Although some additional information was provided to me about the treatment of detainees I am not in a position to do other than to consider the specific circumstances of S and the manner in which his case was dealt with - though noting the judgment in **Anam** and that this is not the first case of its kind in recent years. Whilst what I find with respect to the treatment of S may indeed have implications for the future treatment of the mentally ill who are proposed to be deported or removed, and it is to be hoped that the treatment of S's case is not typical, I nonetheless confine my judgment to the evidence of the case before me.

219. There was a half-hearted attempt by the Defendant to blame the contractors at Harmondsworth for many of the failures which I have identified in the treatment of S. This was not done in the summary grounds or even the first skeleton argument but was only raised orally before me by Mr Waite on the first day of the hearing and, later, in the amended skeleton. At that point I asked that the contractor be notified of what the Secretary of State was now suggesting and, at the resumed hearing, one of them (GEO) were represented by Mr Eccles. The Defendant, having set this hare running at the last minute and, I assume, with a degree of deliberation since it was raised so late, surprisingly failed to follow it up with evidence or to make good any allegations. Indeed, the point scarcely figured in Mr Waite's submissions and I can find no basis on the evidence before me that the fault lay with any of the contractors. Indeed, given the lack of explanation from the Defendant for so many of the failures which occurred in the present case, it would have been difficult to begin to allocate

specific responsibility. GEO has filed evidence with the Court, which suggests that S's condition was regularly considered with the UKBA manager. It would be speculation on my part as to where the problems in communication, process and decision-making actually originated.

220. If such points are to be raised with so little notice and at such a late stage by the Secretary of State, especially when the Court has not had the benefit of Detailed Grounds, it is incumbent on her, and those advising her, to be satisfied that there is substance in the point and that some sensible purpose is served by pursuing it. If it had been made clear to the Court at the outset how little was to be made of the point, or where the point was thought to be going, I would have refused to allow it to be taken at that late stage.

221. Indeed, whatever the position of responsibility for specific functions under the various regulations, it is for the State to secure compliance with the ECHR, especially a provision of such importance as Article 3: see **Pretty v. UK**, at [50], [51]. Although Mr Waite at one point suggested that enough had been done in terms of delegation to GEO and Drummonds to secure compliance, this was not pursued with any degree of rigour or enthusiasm. Insufficient evidence has been provided to the Court on the Defendant's behalf to be satisfied of this in any event. Therefore, even had I found that the Defendant had made good her suggestions of failures by contractors, legal responsibility for compliance with Article 3 rests with her as the responsible minister. This is a matter which should be pursued, if at all, by the Defendant and UKBA with the contractors outside the scope of the present judicial review.

222. Since I have found that the Defendant breached Article 3 it is unnecessary for me to consider whether there was a breach of Article 8 although I would have found this to be the case had it been necessary to do so. In Article 8 terms, the decisions of the UKBA to detain were not according to law and/or proportionate for the reasons I have explained.

Damages

223. The unlawful detention of S gives rise to damages both at common law and by way of compensation under Article 5(5) ECHR, which reflects the common law position. This raises the question of whether the damages should be nominal or substantive. In

this respect the judgments in **Lumba** and **Kambadzi** make it clear that causation may be relevant to this question since, if the Claimant would have been detained in any event, the damages may be nominal only.

224. Whilst I have not heard full argument on the causation point as yet, I note that given that a critical issue in this case was whether S should have been detained at all, had the expert psychiatric evidence been communicated and understood when it ought to have been, and had the guidance been properly understood and applied, it seems to me unlikely that it could be established that S would have been detained in any event. However, should this issue be contentious, I will hear further argument.

Conclusion

225. In conclusion, in my judgment, the detention of S was unlawful from the outset and, even if I were wrong with regard to that conclusion, in any event detention became unlawful within a short period of time following its commencement due to the failure of the Defendant through UKBA to properly understand and apply the Defendant's published policy regarding the detention of those with serious mental conditions to the circumstances of S's case. Accordingly, both at common law and under Article 5 ECHR S's detention was unlawful.

226. In reaching this conclusion, although not strictly necessary to do so, I have also found that S's treatment by the Defendant by detaining him, in the circumstances which I have explained, amounted to inhuman and degrading treatment in breach of Article 3 ECHR.

227. I will hear further submissions on the form of relief and the question of damages.