Neutral Citation Number: [2017] EWHC 2132 (Admin)

Case No: CO/6377/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/08/2017

Before :

NEIL CAMERON QC
(sitting as a Deputy High Court Judge)

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Between :

THE QUEEN ON THE APPLICATION OF MDA by his litigation friend THE OFFICIAL SOLICITOR	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

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Ms Amanda Weston (instructed by **Deighton Pierce Glyn**) for the **Claimant**
Mr Rory Dunlop and Mr Benjamin Tankel (instructed by **Government Legal Department**) for the **Defendant**
Ms Helen Mountfield QC (instructed by **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 27, 28 and 29 June 2017

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Approved Judgment

NEIL CAMERON QC:

Introduction

1. This is an application for judicial review by which the Claimant challenges a decision made by the Defendant to detain him pending deportation.

2. By an order dated 18th January 2017 Dove J granted the Claimant permission to apply for judicial review save that the Claimant's challenge to the 'Adults at Risk' guidance be adjourned. By an order dated 14th June 2017 Lavender J refused permission to apply for judicial review insofar as the Claimant seeks to rely as a ground for judicial review on the allegation that the Defendant's 'Adults at Risk' guidance is defective in law.

3. On 14th June 2017 Lavender J granted permission for the Equality and Human Rights Commission to intervene.

4. Following the hearing, and in accordance with directions that I had given, on 7th July 2017 I received the Claimant's written reply to the Defendant's submissions. On 24th July 2017 I received a chronology agreed between the Claimant and the Defendant.

5. The Claimant seeks a declaration that his detention from 4th November 2015 to 3rd February 2017 was unlawful, and damages, relying on the following grounds:

   i) His initial and continued detention breached his common law rights not to be deprived of his liberty in the absence of fair procedural safeguards and was an oppressive unfair and unreasonable exercise of the power to detain.

ii) His detention breached his rights under section 6 of the Human Rights Act 1998 by breaching his rights under Articles 3 and 8 of the European Convention of Human Rights.

iii) Under the Defendant's policy in Chapter 55.10 of the Enforcement Instructions and Guidance, the Claimant should have been considered unsuitable for detention except in exceptional circumstances. No such circumstances apply in his case.

iv) His continued detention was incompatible with the Guidance on Adults at Risk in Immigration Detention issued pursuant to section 59(1) of the Immigration Act 2016 and brought into force by The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2016 and the accompanying policy set out in Guidance on Adults at Risk in Immigration Detention.

v) His detention breached principle (iii) as set out in *R v. Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704* (at page 706).

vi) His detention breached his rights not to be discriminated against by the Defendant in the exercise of her public functions contrary to Section 29(6) of the Equality Act 2010.

vii) The Defendant failed to make reasonable adjustments for his needs when detained, contrary to section 20 of the Equality Act 2010.

viii) By failing to give due regard to the need to eliminate discrimination, and to advance equality of opportunity the Defendant breached the public sector equality duty imposed by section 149 of the Equality Act 2010.

6. There is no dispute that the Claimant was detained under immigration powers in prison or immigration removal centres by the Defendant from 4th November 2015 until 3rd February 2017.

7. It is for the Defendant to show that there was a lawful justification for detaining the Claimant (*R (on the application of Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12 at paragraph 65).

8. The power of detention relied upon by the Defendant is that contained at paragraph 2(3) of schedule 3 to the Immigration Act 1971 ("the 1971 Act").

9. The issues to be determined in this case are whether the Defendant's decision to detain the Claimant and her subsequent decisions to continue to detain the Claimant were lawful. The court is to take a robust approach in safeguarding the rights of a citizen who has been detained without trial (*R v. Home Secretary ex parte Khawaja [1984] AC 74* at page 122E).

10. Before turning to the facts, I note that neither Ms Weston for the Claimant nor Ms Mountfield QC for the Intervener seeks to argue that the Adults at Risk policy is defective in law. Both counsel stressed that they did not pursue an argument that the system of immigration detention was defective. Ms Weston submitted that the Claimant's case is based upon the facts relating to his detention. Her argument is not that the system is defective, but that the Defendant erred in law when detaining and continuing to detain the Claimant.

The Facts

11. The Claimant is a national of Somalia and was born in Mogadishu on or about the 18th April 1994.

12. The Claimant arrived in the United Kingdom on or about 15th September 2008. His age was assessed as 14 years. He was placed in foster care with Leicestershire Children's Social Services.

13. The Claimant informed the Leicestershire Children and Young Peoples Service that his whole family had been killed and that he had been captured by a militia and enslaved as a child soldier. The Claimant said that he escaped and travelled through 13 countries prior to arriving in the United Kingdom.

14. On 26th September 2008 the Claimant applied for asylum. A screening interview was conducted on 8th October 2008. In reply to the question 'do you have any medical conditions' the Claimant replied "Yes I'm broken. On many occasions I have tried to harm myself, burn myself. This is caused by an invisible person following me."

15. On 31st October 2008 the Claimant was admitted to hospital under section 2 of the Mental Health Act 1983. He was discharged from hospital on 27th November 2008 and placed in residential care as a looked after child.

16. Between 2008 and 2010 the Claimant lived in local authority children's homes in Derby and Leicester.

17. On 8th January 2010 the Claimant was convicted, at South Derbyshire Juvenile Court, of offences of common assault and battery and a six month referral order was made.

18. On 24th March 2010 the Claimant was convicted, at South Derbyshire Magistrates

Court, of an offence of criminal damage and the referral order was extended for six months.

19. On 22nd April 2010 the Claimant started a fire in the children's home where he was living. He was taken into police custody and on 23rd April 2010 was assessed by Dr Wheatcroft. On 26th April 2010 the Claimant was detained under the Mental Health Act 1983 and admitted to Huntercombe Hospital where he remained until 21st June 2011.

20. By a letter dated 18th March 2011 the Defendant refused the Claimant's application for asylum but exercised her discretion to grant him limited leave to remain in the United Kingdom for a period of 3 years. In that letter the Defendant stated that the reason for granting limited to leave to remain was "… because of your medical condition." The decision to grant discretionary leave to remain was communicated by letter dated 21st March 2011. Some further explanation of the reason for granting discretionary leave to remain is set out in a Non-EEA Deportation Minute dated 17th September 2015. In that minute it is recorded that "On 18th March 2011 the asylum was refused and he was granted discretionary leave until 17th March 2014 on the basis of Article 3- medical conditions in Somalia."

21. On 21st June 2011 the Claimant was transferred from Huntercombe Hospital and admitted to a medium secure psychiatric unit at Ardenleigh in Birmingham.

22. On 11th September 2011 the Claimant was transferred to the Herschel Prins Centre at Glenfield Hospital.

23. On 13th June 2013 the Claimant was discharged from hospital, and on 17th June 2013 moved into supported housing.

24. On 5th July 2013 the Claimant was sentenced, by the Leicester, Market Harborough, and Lutterworth Magistrates to a supervision requirement for offences committed on 13th June 2013.

25. On 28th July 2013 the Claimant was arrested and admitted to hospital. On 30th July 2013 he was detained under section 2 of the Mental Health Act 1983 and admitted to the Herschel Prins Centre.

26. On 16th September 2013 the Claimant was arrested for carrying a bladed article in a public place, and on 17th September 2013 was remanded in custody.

27. On 18th September 2013 the Claimant was convicted by the Loughborough, Melton, Belvoir and Rutland Magistrates and sentenced, for the offence of carrying a bladed article in a public place, to eight weeks imprisonment.

28. The Claimant was imprisoned at HMP and Young Offender Institution Glen Parva. The prison Patient Record for 18th September 2013 states "he continues present (sic) in a bizarre manner."

29. The Defendant's records for the 1st October 2013 state that the Claimant's case does not meet the criteria for deportation. On 3rd October 2013 the Defendant wrote to the Claimant stating that she had decided not to take any deportation action against him as a result of his conviction on 18th September 2013.

30. On 14th October 2013 the Claimant was released from prison and accommodated in a hostel for the homeless.

31. On 28th October 2013 the Claimant was sentenced, by the Leicester, Market Harborough and Lutterworth Magistrates, to four weeks imprisonment for an offence

of criminal damage, and returned to HMP Glen Parva.

32. On 22nd November 2013 Dr Thomas, a consultant forensic psychiatrist, visited the Claimant at HMP Glen Parva. Dr Thomas stated that there is a strong possibility that the Claimant may be showing a relapse of psychosis and recommended that he be treated by the team who had cared for him in the past.

33. On 27th November 2013 the procedure for transfer from HMP Glen Parva to a secure psychiatric unit was commenced.

34. On 5th December 2013 the Claimant was transferred to the Herschel Prins Centre.

35. On 17th March 2014, the day on which his leave to remain expired, the Claimant, assisted by a social worker, made an application for further leave to remain.

36. On 4th April 2014 a form was submitted on the Claimant's behalf stating that he wished to return to Somalia. On the form it is stated: "The Social worker states that the subject wishes to leave the UK and return home to his family. Social worker advises that the subs (sic) behaviour is because he wants to return to his family."

37. The Defendant's 'GCID' entry for 20th March 2014 records that the Claimant is not suitable for removal as he has an outstanding leave application, he has expressed a wish to return voluntarily, and ".. he has spent much of his time in the UK in care due to mental illness. In fact, CID indicates that he was not ever interviewed because of the severity of his illness. Email to CROS Africa Team 1 to ask if it would be better pursuing the voluntary route (and can he be relied on to remain consistent with his wish to return, does he have the mental capacity as some of his behaviour is delusional) and, if in regard to his mental health, to ask if level of his medical condition means he doesn't fit the profile for the Somalia removals project?"

38. On 16th December 2014 the social worker assigned to the Claimant wrote to the Defendant. The social worker stated that on 3rd and 4th December the Claimant had been invited to sign a letter confirming that he wished to return to Somalia but had declined to do so despite expressing a wish to return home to his mother. The social worker stated that on 5th December 2014 the Claimant's uncle had visited him and that the Claimant was clear, in the presence of his uncle that he wished to return to Somalia.

39. On 19th December 2014 the social worker requested that a doctor be asked to consider whether the Claimant was 'fit to fly'.

40. On 22nd December 2014 the Claimant was transferred to HMP Glen Parva on remand after he sexually assaulted a member of staff on the psychiatric ward.

41. On 5th January 2015 Dr R Stocking Korzen wrote "This is to confirm that Mr […] does not suffer from any mental disorder which would jeopardise or impair his ability to travel by any means available and possible which includes flying by airplane."

42. On 26th February 2015 following his pleas of guilty to offences of battery the Claimant was sentenced by the Leicester and Rutland Magistrates to 23 weeks custody in a Young Offender Institution.

43. On 1st April 2015 the Claimant signed a letter in which he stated that he wished to apply for the Facilitated Returns Scheme and wished to leave the United Kingdom to travel to Puntland or Mogadishu. On 9th April 2015 the Claimant's application for voluntary return was rejected on the ground that he was awaiting trial.

44. On 10th April 2015 one of the Defendant's Higher Executive Officers considered the Claimant's case and came to the conclusion that it was proportionate to detain him

subject to his health issues, medication and length of sentence. The HEO states that the social worker has been asked to provide details of the Claimant's mental health condition and medication.

45. 10th April 2015 the Claimant, having been convicted by a jury at the Crown Court at Leicester, was sentenced for offences of outraging public decency and sexual assault. Sentences of 6 months imprisonment for the first offence and 18 months imprisonment for the second offence were imposed, to be served concurrently. The judge expressed the view that the Claimant should be deported to Somalia.

46. On 21st May 2015 the Defendant wrote to the Governor of HM Young Offender Institution Glen Parva enclosing notice of a decision to make a deportation order and requested that it be served on the Claimant. The letter stated that the Claimant was not required to reply to the decision but should he wish to raise reasons why he should not be deported, he must make representations in writing to the Home Office within 20 working days from the date of service of the decision notice. The notice was served on the Claimant on 26th May 2015. The Claimant did not respond.

47. On 8th September 2015 the Defendant emailed HMP Glen Parva and requested information relating to the Claimant's medical condition.

48. On 14th September 2015 one of the Defendant's officials telephoned HMP Glen Parva to enquire as to the Claimant's medical condition.

49. On 18th September 2015 the Defendant made a deportation order relying on the powers, in section 32 of the UK Borders Act 2007, relating to foreign criminals. The deportation minute records that the Claimant had previously been detained under the Mental Health Act. It also records that on 5th January 2015 the consultant psychiatrist

(Dr R Stocking Korzen) had confirmed that the Claimant does not suffer from any mental disorder which would jeopardise or impair his ability to travel. The Senior Caseworker's comments, when agreeing the proposal that the Claimant be deported, include reference to the fact that his latest custodial sentence related to an offence committed whilst on a psychiatric ward in hospital and to a recent medical/mental health assessment. The reference to a medical/mental health assessment was to Dr R Stocking Korzen's letter of 5th January 2015. The deportation order was sent to the Governor of HM Prison Glen Parva, with a request that it be served on the Claimant.

50. On 18th September 2015 Rishi Rakha, a Mental Health Nurse Practitioner employed by HM Prison Service wrote to the Defendant in response to the request for information relating to the Claimant's medical condition. Mr Rakha states that, when in custody, on a few occasions, the Claimant had shown some symptoms of a psychotic illness in the form of hallucinations and thought disorder, and on other occasions had displayed some personality issues. Mr Rakha said that there appeared to be an improvement in overall behaviour and presentation after the Claimant agreed to receive antipsychotic medication.

51. The prison patient records show that the Claimant was served with the deportation order on 24th September 2015.

52. On 1st October 2015 the Claimant wrote to the Defendant saying that he wished "… to go back to my country". The Claimant wrote further letters to the Defendant on or about the 9th,10th , and 26th of November 2015. In those letters he stated he would like to continue to live in the United Kingdom. Those letters are handwritten and it appears that they were written on his behalf. The 9th November 2015 letter states "scribed by Literacy Teacher".

53. The Defendant's minute of 29th October 2015 records the decision to detain the Claimant under immigration powers. The detention minute refers to Mr Rakha's letter of 18th September 2015 and to Dr Stocking Korzen's letter of 5th January 2015.

54. As from 4th November 2015, when his sentence expired, pursuant to section 36(2) of the UK Borders Act 2007, and paragraph 2(3) of Schedule 3 to the Immigration Act 1971 the Claimant was detained pending removal.

55. The Defendant's Detainee Detention History for 12th November 2015 records that "There are identified healthcare needs which require further investigation with HMP Glen Parva. This case will be reviewed regularly."

56. In response to a request for information from the Defendant, Mr Rakha on 2nd December 2015 wrote that the Claimant had been seen by him two days ago and presented as "calm and mentally stable. No evidence of psychotic illness or depression. …"

57. The Defendant's Detainee Detention History for 2nd December 2015 records "This case has been risk assessed on 02/12/15 and will not be transferred to an Immigration Removal Centre (IRC), until further notice, due to an identified mental health issue."

58. A detention review was undertaken on 3rd December 2015. At paragraph 5 there was no entry against the heading "Known or claimed medical conditions (including mental health and/or self-harm issues, PTSD, Risks of suicide)". At paragraph 6, the answer to the question "When do we expect a travel document/EU letter to be issued?" was "6+ months". In response to paragraph 10 (Conditions rendering person suitable for detention only in very exceptional circumstances (see section 55.10 of Enforcement Instructions and Guidance) the entry made was "None known". The conclusion

reached was that the risk of harm, risk of re-offending and the risk of absconding outweighed the presumption in favour of release. The Authorising Officer accepted the recommendation.

59. On 24th December 2015 the Claimant was transferred to Morton Hall Immigration Removal Centre.

60. A further assessment review was undertaken on 31st December 2015. No entry was made in response to paragraph 5 of the form, and the entry against paragraph 10 was 'None known'. The officer states that she has considered the presumption in favour of liberty as outlined in Chapter 55 of the Enforcement Instructions and Guidance but that the presumption is outweighed by the risk of harm to the public and the significant risk of absconding. The Authorising Officer agreed with the recommendation noting that the Claimant is a prolific re-offender and poses a high risk of re-offending along with a medium risk of absconding and harm to the public. It was also noted that the barrier to removal was outstanding representations.

61. In a letter dated 25th January 2016 the Defendant considered the Claimant's further submissions, and determined that those submissions did not meet the requirements of paragraph 353 of the Immigration Rules and did not amount to a fresh claim. In that letter the Defendant referred to and relied upon Dr Stocking Korzen's letter of 5th January 2015 and on a letter dated 21st December 2015 from Dr T Thomas, a consultant forensic psychiatrist. The letter from Dr Thomas states that the Claimant had been discharged from psychiatric care as he has a personality disorder which is not amenable to treatment.

62. A further detention review was undertaken on 1st February 2016. The entry against paragraphs 5 and 10 of the form were both "None Known". The review refers to Dr

Thomas' letter of 21st December 2015. The officer concluded that the presumption in favour of liberty was outweighed by the risk of harm to the public and significant risk of absconding. The Authorising Officer agreed with the recommendation and stated that the Claimant had been assessed as a high risk of re-offending and a medium risk of absconding and harm to the public if he is released.

63. On 18th February 2016 the Claimant saw the duty solicitor. The GCID Case Record Sheet records "The duty sol (sic) asked me to make an appointment to see Mr [MDA] as he is adamant that he wishes to return to Somalia to see his family. However, on speaking to the Immigration staff here it appears that he refused to sign relevant documentation when called for an appointment on Saturday/Sunday."

64. The GCID Case Record Sheet for 19th February 2016 records that other residents at the Morton Hall IRC were becoming increasingly frustrated as a result of the Claimant's inappropriate behaviour.

65. A further detention review was undertaken on 25th February 2016. At paragraph 5 of the form reference is made to Dr Thomas' letter of 21st December 2015. At paragraph 10 of the form the entry is "None known". At paragraph 6 it is stated that: "On 12th February 2016 Country Specialist Team confirmed that Mr [MDA] can be removed to Mogadishu on an EU letter in March 2016. Waiting for him to sign the IS.101 form (disclaimer)". The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The Authorising Officer agreed with the recommendation and stated that detention was required in order to protect the public from harm and to prevent absconding.

66. On 27th February 2016 a vulnerable adult care plan was opened for the Claimant "... to offer a means of support to him due to erratic behaviour and difficulties adjusting

to the regime at Morton Hall."

67. On 29th February 2016, pursuant to rule 40 of the Detention Centre Rules 2001 the Claimant was removed from association with other detained persons.

68. On 5th March 2016 the Claimant was transferred to Harmondsworth IRC, as no healthcare bed was available he was housed in the secure unit although not removed from association with other detained persons under rule 40 of the Detention Centre Rules 2001. The Claimant was disruptive in the secure unit and was then segregated under rule 40.

69. A further review was undertaken on 21st March 2016. The summary of that review states: "In view of the current country situation, it is considered that his removal can not take place within a reasonable timescale. The case owner should consider release before the next review. However based on risk further detention is appropriate in this instance in accordance with chapter 55 of the EIG."

70. In a letter dated 23rd March 2016 the Defendant wrote to the Claimant and enclosed a monthly progress report. In that report it was stated that the current barrier to removal was the lack of a travel document.

71. The Defendant's Complex Case Review records show that on 14th April 2016 the Defendant was supplied with information from Dr Hillman, a consultant psychiatrist, stating that the Claimant was to be referred to Colne Ward for assessment and that he was currently unfit to fly.

72. A further review was undertaken on 15th April 2016. Under paragraph 5 of the form, reference is made to Dr Thomas' letter of 21st December 2015 and it is noted that on 12th April 2016 the Claimant was placed in a single occupancy room due to medical

concerns. It is also noted that on 14th April 2016 the mental health team confirmed that the Claimant "… was presenting a psychotic illness. They have requested for a second opinion from Colne Ward. They stated he is currently unfit for travel. He is being managed well by healthcare facilities in the Centre pending an assessment for hospital." The entry under paragraph 10 of the form is "None known". The officer concluded that the presumption in favour of liberty was outweighed by the risk of harm to the public and significant risk of absconding. The Authorising Officer agreed with the recommendation. The Authorising Officer noted that the Claimant was presenting with a psychotic illness, and that the Mental Health Unit had confirmed that his health is being managed well in the detention centre. The Authorising Officer stated: "Once we have received an outcome of his assessment, his continued detention will need to be reviewed. If he is fit to fly but his removal can not take place within a reasonable timescale, the case owner should then submit a release referral for consideration. Based on risks, further detention is appropriate in this instance in accordance with chapter 55 of the EIG."

73. On 15th April 2016 the Defendant wrote to the Claimant and enclosed a form which would enable him to request assistance from Detention Action in the event of him being released into the community.

74. The Defendant's Complex Case Review records show that on 21st April 2016 the Defendant was supplied with information from Dr Hillman, a consultant psychiatrist, stating that the Claimant remained unfit to fly and is considered "probably very unwell."

75. The GCID Case Record Sheet for 22nd April 2016 states: "Enforced returns to Mogadishu remain paused at the request of the Somalis. At this time, there is no

indication when they may restart."

76. On 16th May 2016 the Defendant wrote to the Claimant and enclosed a form which would enable him to request assistance from Detention Action in the event of him being released into the community. Danae Psilla of Detention Action states the Claimant contacted her by telephone in mid May 2016.

77. On 16th May 2016 the healthcare unit of the centre where the Claimant was detained responded to an enquiry by the Defendant by stating that "He is being managed by the Mental Health team. You will be informed of any deterioration in his mental state."

78. On 18th May 2016 a further detention review was undertaken. At paragraph 5 of the form it was noted that the mental health team at Colnbrook IRC had requested a second opinion from Colne Ward. It was noted that the Claimant was unfit to travel and that he was being well managed by healthcare facilities in the centre. As with previous reviews, 'None known' was entered at paragraph 10. The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer accepted the recommendation and noted that the Claimant is a prolific offender and deportation is justified. It was then noted that the only barrier is resumption of returns to Somalia "and these are currently in negotiation."

79. On 30th May 2016 a form requesting that the Defendant provide or arrange for the provision of accommodation under section 4 of the Immigration and Asylum Act 1999 was filled out by Detention Action and signed by the Claimant.

80. The GCID entry for the 2nd June 2016 states: "This patient is not fit to be transferred at this time, as this would disrupted (sic) his current treatment plan and could be

detrimental to his mental health."

81. A further detention review was undertaken on 15th June 2016. At paragraph 5 of the form it was noted that on 9th June 2016 the case officer attended a "complex meeting dial in" to discuss the Claimant's case with the mental health team at Colnbrook IRC. The note states that the health team reported that the Claimant had taken his psychotic medication, is engaging with treatment and people. They also stated that the Claimant was "not transferable to another IRC.". It was noted that the Claimant was unfit to travel and that he was being well managed by healthcare facilities in the centre. As with previous reviews, 'None known' was entered at paragraph 10. The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer accepted the recommendation and noted that the Claimant is a prolific offender and deportation is justified. It was then noted that the only barrier is resumption of returns to Somalia.

82. The Claimant's patient notes for the 25th June 2016 record: "He presented as paranoid and delusional verbalising delusional beliefs."

83. A further detention review was undertaken on 14th July 2016. The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer accepted the recommendation and noted that there was no reason to believe that the Claimant could not have his health requirements managed in detention.

84. On the 21st July 2016 the Defendant requested the healthcare team at the IRC where the Claimant was detained to answer questions posed by the Section 4 Bail Team, namely "What is Mr [MDA] suffering from?" and "What medication is he on?" The answer given by the healthcare team on 19th August 2016 was "The working

diagnosis is Anti-social personality;? drug induced psychosis."

85. A further detention review was undertaken on 10th August 2016. At paragraph 5 of the form it was noted that on 14th and 21st July 2016 the case officer attended a "complex meeting dial in" to discuss the Claimant's case with the mental health team "in order for them to make plans for his release into the community." As with previous reviews, 'None known' was entered at paragraph 10. The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer stated that it was apparent that the Claimant's health issues needed to be investigated further, and also stated "We need to ascertain whether his removal is a likely prospect". The conclusion was "I agree to maintain detention for further consideration and management of his release."

86. The GCID Case Record Sheet records that on 14th August 2016 the Claimant was removed from association under rule 40 of the Detention Centre Rules 2000 as he had caused damage and disruption whilst located in Healthcare Level 3.

87. A further detention review was undertaken on 7th September 2016. At paragraph 5 of the form it was noted that Colnbrook IRC Mental Health Team confirmed that the Claimant has been diagnosed with anti-social personality, and that he suffered from drug induced psychosis. The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer stated that s/he agreed that the high risk of reoffending and likelihood of absconding justifies ongoing detention pending resumption of returns to Mogadishu and stated: "We have reason to be confident that

returns will resume soon. In the meantime mental health issues are being managed appropriately in detention."

88. On 23rd September 2016 the Claimant was removed from association, and he continued to be so removed for approximately 27 days.

89. A further detention review was undertaken on 5th October 2016. At paragraph 5 of the form it was noted that on 22nd September 2016 (in addition to previous occasions referred to in earlier reviews) the case officer attended a "complex meeting dial in" to discuss the Claimant's case with the mental health team at Colnbrook IRC in order for them to make plans if he is to be released into the community. Paragraph 10 of the form reflected the fact that the Adults at Risk in Immigration Detention guidance had been published on 9th September 2016, and stated "Risk indicators and risk level, according to the Adults at Risk Policy (where relevant)". The entry against paragraph 10 reads: "There are risk indicators and he is assessed as level 3. The healthcare at Colnbrook IRC has confirmed he has several personality disorders". The officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer accepted the recommendation and stated that "… we need to ensure that full and appropriate risk mitigation is in place before we are able to consider release. In the meantime I would like us to review where he will sit in our list of priority cases for removal under the MOU."

90. On 23rd October 2016 the Claimant was transferred to Gatwick IRC at Brook House.

91. A further detention review was undertaken on 8th November 2016. The case officer concluded that the presumption in favour of release was outweighed by the risk of harm, risk of re-offending and risk of absconding. The authorising officer accepted

the recommendation "in order for the CO to arrange for an ongoing care plan to be put in place in terms of release. There is no planned date for enforced removals to Somalia due to current political events occurring at the end of November 2016. Advice is needed from CST [Country Specialist Team] on a realistic timescale. The CO [Case Officer] should review whether removal is recommended particularly due to his current mental health. I note on CID that Mr [MDA] is very disruptive and has demonstrated levels of violence. The CO must also keep updated on this. Release is recommended due to the length of timescale for removal however this can only be done once we are clear on his medical health needs and ongoing care plan if release is agreed."

92. On 12th November the Claimant was removed from association for 24 hours. The Claimant was again removed from association on 21st November 2016 and remained in segregation until the 23rd November 2016.

93. A further detention review was undertaken on 30th November 2016. At paragraph 5 of the form it was noted that on 22nd September 2016 (in addition to previous occasions referred to in earlier reviews) the case officer attended a "complex meeting dial in" to discuss the Claimant's case with the mental health team at Colnbrook IRC in order for them to make plans if he is to be released into the community. Paragraph 10 of the form reflected the fact that the Adults at Risk in Immigration Detention guidance had come into force on 9th September 2016, and stated "Risk indicators and risk level, according to the Adults at Risk Policy (where relevant)". The entry against paragraph 10 reads: "There are risk indicators and he is assessed as level 3. The healthcare at Colnbrook IRC has confirmed he has severe personality disorders". The officer concluded that the presumption in favour of release was outweighed by the risk of

harm, risk of re-offending and risk of absconding. The authorising officer accepted the recommendation and stated that "… we need to ensure that full and appropriate risk mitigation is in place before we are able to consider release. In the meantime I would like us to review where he will sit in our list of priority cases for removal under the MOU."

94. On 30th December 2016 the Claimant was removed from association with other detainees.

95. On 5th January 2017, and between the 7th and 10th January 2017 the Claimant was removed from association with other detainees.

96. In a letter dated 10th January 2017 Dr Oozeerally expressed the opinions that the Claimant was fit to fly, and fit for detention, and then stated "…. but questions have been raised about a suitable location upon release in view of his mental health."

97. On 15th January 2017 Marina Sowter, an Approved Mental Health Professional expressed the view that the Claimant lacks mental capacity to understand, weigh up and retain information provided to him regarding his diagnosis and ensuing care needs.

98. On 30th January 2017 Dr Syed Ali expressed the opinion that the Claimant needs a period of assessment in a psychiatric hospital under section 2 of the Mental Health Act 1983. In that report he further stated "It was difficult to assess Mr [MDA]'s capacity; however it appeared to be limited."

99. On 3rd February 2017 the Claimant was released from immigration detention and detained under section 2 of the Mental Health Act 1983. The Claimant was later detained under section 3 of the Mental Health Act 1983.

100. In November 2016 the Claimant's solicitors instructed Professor Anthony Hale to prepare a medical report. Professor Hale attempted to visit the Claimant at Brook House IRC on 17th November 2016 and on 21st December 2016. On both occasions the Claimant declined to be interviewed by the Professor. On the 18th November 2016 Professor Hale certified that the Claimant lacked capacity to conduct proceedings within the meaning of section 2 of the Mental Capacity Act 2005.

101. Professor Hale produced a report dated 31st May 2017. Professor Hale had been unable to interview the Claimant and expressed the opinion that, based on the medical and other notes, the Claimant lacks the capacity to instruct solicitors, and that it is likely that from time to time he lacked the capacity to consent to treatment and to manage his affairs generally, including making decisions about immigration matters. Professor Hale stated that he favours a diagnosis of complex PTSD (Post Traumatic Stress Disorder) with psychotic features, with possible triggers including environmental stress and khat misuse. He also states that the notes demonstrate that the standard of mental health care provided to the Claimant during his detention was not adequate for his complex needs. He expressed the opinion that there is high risk that segregation further exacerbated the Claimant's existing mental health problems.

102. Dr Gopi Krishnan a consultant psychiatrist at Meadow View Hospital where the Claimant was an inpatient following his release from immigration detention, provided an undated report in which he expressed the opinion that the Claimant "… remains incapacitous in regard to instructing his legal team." Dr Krishnan noted scarring to the Claimant's chest.

The Legal Framework

103. Section 36 of the UK Borders Act 2007 provides:

> "(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State–
>
> (a) while the Secretary of State considers whether section 32(5) applies, and
>
> (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.
>
> (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate."

104. In this case a deportation order was made on 18th September 2015.

105. The power of detention on which the Defendant relied was that set out in paragraph 2(3) of Schedule 3 to the Immigration Act 1971:

> "(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] 7 the Secretary of State directs otherwise)."

106. The Detention Centre Rules 2001, made by the Defendant pursuant to the power conferred by Part VIII and Schedules 11, 12 and 13 of the Immigration and Asylum Act 1999 govern the provision of healthcare within immigration removal centres. Rules 33 to 37 provide for healthcare. Detention Services Orders ("DSO") are also issued by the Defendant to provide instructions to her staff on specific issues relating to the care and management of detainees. DSO 08/2016 relates to Management of

Adults at Risk in Immigration Detention. DSO 09/2016 provides guidance on preparation and consideration of reports submitted in accordance with rule 35 of the Detention Centre Rules 2001.

107. Detention under the powers conferred on the Defendant by the Immigration Act 1971 is the result of the exercise by her of a discretionary power. The power to detain must be exercised reasonably and in a manner which is not arbitrary (*R (on the application of Kambadzi) v. Secretary of State for the Home Department* [2011] 1 WLR 1299 at paragraph 49). The review of a detainee's continued detention is closely related to the exercise of the initial power to detain (*Kambadzi* at paragraph 52).

108. Immigration detention powers need to be identified through formulated policy statements. The individual has a right to have his or her case considered under the policy which the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute (*Lumba* at paragraphs 34 and 35). The relevant policies in this case are Chapter 55 of the Enforcement Instructions and Guidance, and after September 2016, the Guidance on Adults at Risk in Immigration Detention.

109. When determining whether administrative detention is lawful the Court should reach its own judgment not simply adopt a review based upon ordinary public law principles. That such an approach should be taken is to be derived from the judgments in *R (on the application of A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 (Toulson LJ at paragraph 62, and Keene LJ at paragraph 72):

> "62. Where the court is concerned with the legality of administrative detention, I do not consider that the scope of its responsibility should be determined by or involve subtle distinctions. It must be for the court to determine the legal boundaries of administrative detention. There may be incidental

> questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself, and the court will no doubt take such account of the Home Secretary's views as may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court at common law and does not depend on the Human Rights Act (although Human Rights Act jurisprudence would tend in the same direction).
>
> …
>
> 72 The Privy Council seems to have adopted a similar approach in Tan Te Lam, finding that the facts which had to be found for the power to detain to exist were jurisdictional facts and hence for the court to determine. Mr Giffin has pointed out that the decision went to the existence of the power rather than to its exercise, which is true, but the reasoning in that decision seems to be of broader significance. As was said by Lord Browne-Wilkinson, giving the judgment, at page 114 B–C:
>
> "If a jailor could justify the detention of his prisoner by saying 'in my view, the facts necessary to justify the detention exist' the fundamental protection afforded by a habeas corpus would be severely limited. The court should be astute to ensure that the protection afforded to human liberty by habeas corpus should not be eroded save by the clearest words."
>
> If the Secretary of State were to be entitled to determine what weight should be attached to, say, the risk of the detainee absconding if released, as compared to the weight to be attached to other factors, and so to decide whether the length of detention was reasonable, with the court only intervening if his decision was not one properly open to him, the erosion of the protection of human liberty referred to by Lord Browne-Wilkinson would be very substantial indeed."

110. That approach was affirmed in *R (on the application of Anam) v. Secretary of State for the Home Department* [2010] EWCA Civ 1140 at paragraph 77, where Black LJ stated that the court must assume the role of primary decision maker when considering the lawfulness of detention rather than simply reviewing the Secretary of State's decision on traditional public law grounds.

111. At paragraph [7] above I have noted that it is for the Defendant to show that there was a lawful justification for detaining the Claimant. The Claimant places emphasis on the fact that it is for the Defendant to justify the decision to detain and to continue to detain the Claimant and relies upon the fact that the Defendant has not submitted witness evidence to justify her position.

112. A similar argument, in relation to the absence of witness evidence from the Defendant, was advanced on behalf of the Claimant in *R (on the application of VC) v. Secretary of State for the Home Department* [2016] 1 WLR 3704. I adopt the approach taken by HH Judge Seys Llewellyn QC at paragraphs 37 to 39 in that case:

> "37 The defendant filed a witness statement from Mr Alistair Albosh a member of the Mentally Disordered Offenders Team ("MDOT") in respect of the period after the claimant was compulsorily detained under the 1983 Act, namely between 27 April 2015 and 28 September 2015. The claimant drew attention to the lack of witness evidence from the defendant in respect of the period prior to transfer to the psychiatric hospital.
>
> 38 Counsel for the defendant in reply drew my attention to *R (JS (Sudan)) v Secretary of State for the Home Department* [2013] EWCA Civ 1378, where McFarlane LJ said, at para 45:
>
> "I consider that whether or not the burden of proof is strictly engaged on a particular issue is largely dependent upon context … Where, however, as in the present case, the issue relates to a period of detention, the basic facts relating to the dates upon which an individual was detained and the administrative steps that were undertaken are unlikely to be in issue. The initial burden of proof would be upon the claimant to establish the fact of detention; thereafter the burden will shift to the Secretary of State to establish lawful authority for detention as a matter of principle. The main focus of the hearing, however, is likely to be the evaluation of whether or not what had occurred was, in all the circumstances, 'reasonable'. In that context consideration of the burden of proof seems to me neither apt nor useful."
>
> 39 I note that the *JS (Sudan)* case was a *Hardial Singh* claim, but I consider that these observations are no less applicable in a policy challenge subject to a Wednesbury test of unreasonableness. Thus the defendant has elected not to

> introduce witness evidence, but it is not a case in which I should draw adverse inference from the fact that the defendant has not lodged witness evidence. However there is no evidence that the case worker dealing with the case of the claimant contacted the relevant mental health authorities for further advice as it was said he/she would in the reply of 2 July 2014 to the first rule 35 report."

113. The use of immigration detention cannot be justified on the ground that it was for a detainee's own well-being. The purpose of immigration detention is to facilitate removal (*R (on the application of AA) v. Secretary of State for the Home Department* [2010] EWHC 2265 (Admin) at paragraph 40).

Common Law Principles of Fairness

114. The principles identified by Lord Mustill at page 560 D-G in *R v. Secretary of State for the Home Department ex parte Doody* [1984] 1 AC 531 are applicable.

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

115. In *VC* the application of those principles to a case where the duty to inquire was at issue was considered at paragraphs 45 to 47:

> "45 As to the contended duty of inquiry, counsel for the defendant says: (i) in deciding whether the decision-maker as to inquiry is in breach of the duty it is only where the view taken is Wednesbury irrational that the court can impose a different approach, it is not a question of what the claimant considers would be ideal or even sensible; (ii) that any duty to inquire was contextual; and (iii) that the context here was of a closely prescribed system of medical care and oversight of any detainee pursuant to the Detention Centre Rules and the operational standards formally adopted and used for audit within the detention centre system.
>
> 46 In *R (K) v Secretary of State for the Home Department* [2014] EWHC 3257 (Admin) Haddon-Cave J approved and applied the approach adopted by Mr C M G Ockelton, Vice President of the Upper Tribunal sitting as a deputy High Court judge in *R (SA (Holland)) v Secretary of State for the Home Department* [2014] EWHC 2570 (Admin) at [10], that:
>
> "The Secretary of State is generally entitled to rely on the responsible clinicians where reasonable inquiries had been made and the requirements of [paragraph 55.10] were considered where applicable, so long as there was not a total abdication of the Secretary of State's own responsibilities to the clinician."
>
> 47 I respectfully agree with that view of Haddon-Cave J in the *R (K)* case, and with the submissions of counsel for the defendant at para 45 above. In my judgment this is not to say that the defendant is entitled to be simply passive, or to review and decide against continuing detention only if advised by the medical staff that it should do so; but I consider that the defendant was entitled to act in the expectation that there is (in default of evidence to the contrary in an individual case) a closely prescribed system of medical care and oversight of any detainee, and that the centre will be informed by medical staff if in their opinion the detainee's health (a) is likely to be significantly harmed by being detained further or (b) has become more likely than before to be so harmed."

<u>Articles 3 and 8 of the European Convention on Human Rights</u>

116. In order to demonstrate a breach of Article 3 the Claimant must show 'beyond

reasonable doubt' that his treatment involved a high degree of suffering. Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. (*Ireland v. UK* (1979-1980) 2 EHRR 25 at paragraph 161, and *VC* at paragraph 118). The standard of proof, of beyond reasonable doubt, applies to the assessment of evidence, and has an autonomous meaning as applied by the European Court of Human Rights (*Mathew v. Netherlands* (2006) EHRR 23 at paragraph 156).

117. The principles relating to Article 3 were set out by Singh J in *R (on the application of HA (Nigeria)) v. Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (at paragraph 174)

> "174 The following principles relating to Article 3 are well-established in the Strasbourg jurisprudence and can be summarised by reference to the decision of the European Court of Human Rights in *Kudla v Poland* (2002) 35 EHRR 11, although many other cases could be cited:
>
> (1) Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (para. 90).
>
> (2) However, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (para. 91).
>
> (3) The Court has considered treatment to be inhuman because, inter alia, it was premeditated, was applied for hours at a stretch, and caused either bodily injury or intense physical or mental suffering (para. 92).
>
> (4) It has deemed treatment to be degrading because it was such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them (para. 92).

> (5) On the other hand, the Court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element connected with a given form of legitimate treatment or punishment (para. 92). Measures depriving a person of liberty may often involve such an element (para. 93).
>
> (6) It cannot be said that Article 3 lays down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to receive a particular kind of medical treatment (para. 93). Nevertheless, the state must ensure that a person is detained in conditions which are compatible with his dignity and that the manner and method of execution of measures used 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 (para. 94)."

118. In *R (on the application of ASK) v. Secretary of State for the Home Department* [2017] EWHC 196 (Admin) Green J summarised the conditions to be fulfilled in order to establish a breach of Article 3 in a case where there has been a failure to transfer a detainee in need of hospital treatment (at paragraph 33):

> "33 For a violation of Article 3 to arise there must therefore be: (a) a denial of medical treatment which is available in hospital; (b) which is of a nature which the person's mental condition requires; (c) where evidence exists that the person concerned suffered serious consequences as a result of the denial; (d) a failure to exercise a transfer power to hospital "promptly"; and (e) the consequences suffered by the person in question reach a level of "sufficient severity" to engage the operation of Article 3. These conditions are expressed in Drew as being cumulative."

119. Treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are significantly adverse effects on physical and moral integrity. Mental health is to be regarded as crucial part of private life associated with the aspect of moral integrity (*Bensaid v. United Kingdom* (2001) 33 EHRR 205 at paragraphs 46 and 47).

Chapter 55.10 of the Enforcement Instructions

120. Chapter 55 of the Defendant's Enforcement Instructions and Guidance ("EIG") is the Defendant's main published policy on the use of immigration detention. In September 2016, in relation to adults at risk, Chapter 55.10 was superseded by the Adults at Risk in Immigration Detention guidance. In the version applicable in this case Chapter 55.10, so far as material, 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 prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
>
> In criminal casework 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. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> …
>
> • Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in criminal casework cases, please contact the specialist mentally disordered offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act.
>
> …
>
> If a decision is made to detain a person in any of the above categories, the casework must set out the very exceptional circumstances for doing so on file."

121. It is necessary for the Defendant to consider whether the policy in paragraph 55.10 applies to the case of an individual whose detention is being considered (*R (on the application of Das) v. Secretary of State for the Home Department* [2014] 1 WLR 3538 at paragraph 66).

122. The threshold for application of the policy is that the mental illness must be serious enough to mean that it cannot be satisfactorily managed in detention. Although the policy is capable of applying to anyone with a 'mental disorder' within the definition in the Mental Health Act 1983, the mere fact that a detainee falls within that category is not, of itself, sufficient. The effects of the illness on the particular individual, the effect of detention on him or her, and on the way his or her illness would be managed if detained must also be considered (*Das* at paragraph 57). In making a decision at the time of detention, the Defendant should consider matters such as the medication that the person is taking, and whether his or her demonstrated needs at the time are such that they cannot be provided for in detention. (*Das* at paragraph 67).

123. In order to implement her policy the Defendant must ensure that she is kept informed of the condition of mentally ill detainees on a regular basis when detention is being reviewed (*R (on the application of EH) v. Secretary of State for the Home Department* [2012] EWHC 2569 (Admin) at paragraph 152).

124. The meaning of 'satisfactory management' in paragraph 55.10 and the requirement to carry out enquiries was considered by Lord Wilson JSC in *R (on the application of O) v. Secretary of State for the Home Department* [2016] 1 WLR 1717 at paragraphs 30 and 31:

> "30. In formulating policy that, save very exceptionally, management of serious mental illness in an IRC, if not "satisfactory", should precipitate release, the Home Secretary

has adopted a word of extreme and appropriate elasticity. It catches a host of different factors to which the circumstances of the individual case may require her to have regard. In *R (Das) v Secretary of State for the Home Department (Mind intervening)* [2014] 1 WLR 3538, in a judgment with which Moses and Underhill LJJ agreed, Beatson LJ, at paras 45–47, 65–70, offered a valuable discussion of the phrase “satisfactory management”. I respectfully disagree with him only in relation to an aside in para 71 of his judgment. Beatson LJ there expressed an inclination to accept the Home Secretary's contention that, if the management of the illness in an IRC was likely to prevent its deterioration, it would be satisfactory even if treatment was available in the community which was likely to secure its improvement. I would not exclude the relevance of treatment, available to the detainee only if released, which would be likely to effect a positive improvement in her (or his) condition. If it was likely that such treatment would actually be made available to the detainee (rather than be no more than on offer in principle to all members of the community in NHS publications), its availability should go into the melting-pot; and the burden would be upon the Home Secretary to inquire into its availability. If, contrary to the Partnership Agreement quoted in para 29 above, the standard of care (expressly aimed at improving health as well, of course, as preventing it from deteriorating) provided to a detainee in an IRC were for some reason not equal to that which would be made available to her if released, it would in my view be questionable, subject to the strength of other relevant factors, whether the management of her illness in the IRC was satisfactory. While satisfactory management does not mean optimal management, a narrow construction of the word “management” as meaning no more than “control” of the illness would lack principled foundation, particularly when in very exceptional circumstances the detainee may continue to be detained in the IRC pursuant to the policy notwithstanding the unsatisfactory management of her illness there.

31. Above all the policy in paragraph 55.10 of the manual mandates a practical inquiry. As Beatson LJ stressed in the *Das* case, the phrase “satisfactory management” should be interpreted with regard to its context and purpose (para 45); should not be subjected to the fine analysis appropriate to a statute (para 47); nor invested with a spurious degree of precision: para 65. An important part of its context is that the management of the illness takes place in detention pending likely deportation. Treatment of a patient who finds herself in the doubly stressful circumstances both of detention and of likely deportation has its own considerable, extra challenges; treatment in those circumstances might be satisfactory even if it would not otherwise be satisfactory.”

Guidance on Adults at Risk in Immigration Detention

125. With effect from 12th September 2016 paragraph 55.10 of Chapter 55 of the EIG was replaced by the Adults at Risk in Immigration Detention guidance ("AAR") published on 9th September 2016. That guidance was issued by the Defendant pursuant to the power conferred on her by section 59 of the Immigration Act 2016. The AAR includes the following guidance:

> "**Assessment: general principles**
>
> The decision making process a decision maker should apply is:
>
> - does the individual have need to be detained in order to effect removal?
> - if the answer is no, they should not be detained
> - if the answer is yes, how long is the detention likely to last?
> - if the individual is identified as an adult at risk, what is the likely risk of harm to them if detained for the period identified as necessary to effect removal given the level of evidence available in support of them being at risk?
>
> If the evidence suggests that the length of detention is likely to have a deleterious effect on the individual, they should not be detained unless there are public interest concerns which outweigh any risk identified. For this purpose, the public interest in the deportation of foreign national offenders (FNOs) will generally outweigh a risk of harm to the detainee. However what may be a reasonable period for detention will likely be shortened where there is evidence that detention will cause a risk of serious harm. Where the detainee is not an FNO, detention for a period that is likely to cause serious harm will not usually be justified.
>
> An individual will be regarded as being an adult at risk if:
>
> - they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention

- those considering or reviewing detention are aware of medical or other professional evidence which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves

- observations from members of staff lead to a belief that the individual is at risk, in the absence of a self-declaration or other evidence

The nature and severity of a condition, as well as the available evidence of a condition or traumatic event, can change over time. Therefore decision makers should use the most up-to-date information each time a decision is made about continuing detention."

126. The AAR, at page 7, refers to 'Evidence Levels' and then sets out three levels.

"**Evidence levels**

Once an individual has been identified as being at risk, by virtue of them exhibiting an indicator of risk, consideration should be given to the level of evidence available in support, and the weight that should be afforded to the evidence, in order to assess the likely risk of harm to the individual if detained for the period identified as necessary to effect their removal:

Level 1

A self-declaration of being an adult at risk - should be afforded limited weight, even if the issues raised cannot be readily confirmed.

Level 2

Professional evidence (for example from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that the individual is (or may be) an adult at risk - should be afforded greater weight. Such evidence should normally be accepted and consideration given as to how this may be impacted by detention. Representations from the individual's legal representative acting on their behalf in their immigration matter would not be regarded as professional evidence in this context.

> **Level 3**
>
> Professional evidence (for example from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm – for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk, should be afforded significant weight. Such evidence should normally be accepted and any detention justified in light of the accepted evidence. Representations from the individual's legal representative acting on their behalf in their immigration matter would not be regarded as professional evidence in this context."

127. Guidance is given on evidence assessment. At page 11 the following guidance is given in relation to Level 3:

> "**Level 3**
>
> Where on the basis of professional and / or official documentary evidence, detention is likely to lead to a risk of significant harm to the individual if detained for the period identified as necessary to effect removal, they should be considered for detention only if one of the following applies:
>
> - removal has been set for a date in the immediate future, there are no barriers to removal, and escorts and any other appropriate arrangements are (or will be) in place to ensure the safe management of the individual's return and the individual has not complied with voluntary or ensured return
> - the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or the individual presents a current public protection concern
>
> It is very unlikely that compliance issues, on their own, would warrant detention of individuals falling into this category – though non-compliance should be taken into account if there are also public protection issues or if the individual can be removed quickly."

128. The AAR, at page 11, states that each case must be decided on its own merits, taking into account the full range of factors, on the basis of the available evidence.

129. Version 2 of the AAR was published on 6th December 2016. As relevant to the issues in this case there is no material difference between version 1 and version 2.

Hardial Singh

130. The principles established in *R v. Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 at page 706 were summarised by Dyson LJ (as then was) in *R (on the application of 'I') v. Secretary of State for the Home Department* [2002] EWCA Civ 888 at paragraphs 46 and 47:

> "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, Mr Robb correctly submitted that 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."

131. The *Hardial Singh* principles require the power to detain to be exercised reasonably and for the prescribed purpose of facilitating deportation (*R (o the application of Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245 at paragraph 30).

132. When the statutory purpose no longer exists the power to detain falls away. The means of ascertaining whether the statutory purpose remains achievable is by periodic review (*Lumba* at paragraph 250).

133. The risk of absconding or committing further offences are relevant circumstances to be taken into account when determining whether a reasonable period has elapsed (under principle (ii)) (*R (on the application of A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 at paragraphs 54 and 55).

134. In this case the Claimant places reliance on principle (iii). The attack is made both on the original decision to detain and on a number of decisions to continue to detain the Claimant, in particular the decision to continue to detain after mid January 2016. When considering either ground of attack, the issue is whether the statutory purpose was achievable.

<u>Section 29 Equality Act 2010</u>

135. Section 29(6) of the Equality Act 2010 provides:

> "(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

136. Section 29(7) of the Equality Act 2010 provides:

> "(7) A duty to make reasonable adjustments applies to—
>
> (a)………..;
>
> (b) A person who exercises a public function that is not the provision of a service to the public or a section of the public."

Section 20 Equality Act 2010

137. The duty to make reasonable adjustments is set out in section 20 of the Equality Act 2010:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

Section 149 of the Equality Act 2010

138. Section 149 of the Equality Act 2010 provides:

> "149 Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic

> and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) Tackle prejudice, and
>
> (b) Promote understanding.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are—
>
> Age;
>
> Disability;
>
> Gender reassignment;
>
> Pregnancy and maternity;
>
> Race;
>
> Religion or belief;
>
> Sex;
>
> Sexual Orientation.
>
> ………."

139. The principles relating to the application of the public sector equality duty ("PSED") were summarised by McCombe LJ in *Bracking v. Secretary of State for Work and Pensions [2013] EWCA Civ 1345* at paragraph 26:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home*

Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms

> Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
>
> '….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree…."

140. The principles set out in *Bracking* were affirmed by the Supreme Court in *Hotak and Kanu v. London Borough of Southwark* [2016] AC 811 (at paragraph 73).

Ground 1 – Common Law Rights

The Claimant

141. Ms Weston submitted that prior to making the decision to detain the Claimant,

i) The Defendant was under a duty to enquire as to the Claimant's capacity.

ii) The evidence of lack of capacity was available to the Defendant upon reasonable enquiry. Attached to Ms Weston's written reply, submitted after the oral hearing, is a 36 page Annex identifying the evidence which Ms Weston submitted was available to the Defendant upon reasonable enquiry.

142. Ms Weston submitted that upon the first capacity enquiry undertaken, namely that carried out by Professor Hale, and on subsequent assessments, the unanimous medical opinion was that the Claimant lacked capacity.

143. Ms Weston submitted that the Defendant required the Claimant to make representations based upon human rights grounds when, as a result of lack of capacity, he was unable to do so. She submitted that as a result of the Claimant's lack of capacity he did not make representations within 20 working days of receipt of the

deportation notice in May 2015 and lost his right of appeal under section 82 of the Nationality Immigration and Asylum Act 2002.

144. Ms Weston submitted that reliance on the letter dated 5th January 2015 from Dr Stocking Korzen, the letter from Mr Rakha of the 18th September 2015 and the letter from Dr Thomas of the 21st December 2015 was not sufficient to discharge the Defendant's duty of enquiry.

145. Ms Weston further submitted that the reviews undertaken by the Defendant were inadequate in that they concentrated on the Claimant's offending.

The Intervener

146. Ms Mountfield QC submitted that, on the facts of this case, the Defendant was under a duty to enquire into the Claimant's litigation capacity and to adjust her usual procedures in order to enable the Claimant to have his interests properly represented. She submitted that until Professor Hale considered the Claimant's case and certified his lack of capacity (on 18th November 2016) no one had turned their mind to whether or not he had mental capacity.

147. Ms Mountfield QC made clear that she was not arguing that the system was incapable of operating fairly. Her argument is that the Defendant failed to make sufficient enquiries in this case.

148. Ms Mountfield QC submitted:

i) The statutory right to detain is impliedly limited to those circumstances where there is a right to challenge detention.

ii) The Claimant fell into the category described at page 1 of the Mental Capacity Act 2005 Code of Practice, namely a person who lacked capacity to make particular decisions.

iii) That, as referred to in the witness statement of Mr Henson-Webb, of the mental health charity MIND, there appeared to be inadequate procedural safeguards to protect the rights of the Claimant who lacked capacity, which might be said to be equivalent to the 'Bournewood Gap' referred to in *HL v. United Kingdom* (2005) 40 EHRR 32. She also referred to the witness statement of Theresa Schleicher, a Casework Manager with Medical Justice. Ms Schleicher states that decisions on capacity are not normally part of the remit of a healthcare provider.

iv) The Defendant never asked what was the Claimant's capacity and did not enquire whether he was able, genuinely, to participate in decisions on his deportation and detention.

v) As there is a foreseeable risk that ill treatment will occur, and as reference had been made in one of the Defendant's GCID records for 20th March 2014 which questioned whether the Claimant had mental capacity, a duty to make enquiries arose.

149. Ms Mountfield QC submitted that if there is any doubt as to the correctness of the Intervener's submission that the failure to secure equal access to a fair appeal or review process violates the Human Rights Act 1998 or the Equality Act 2010, such doubt should be resolved in favour of the Claimant in the light of the interpretive implications of the provisions of the United Nations Convention on the Rights of Disabled Persons ("UNCRPD"), in particular the right of equality before the law in

Article 12 and the right of equal access to justice in Article 13, the right to liberty and security of the person in Article 14, to freedom from torture in Article 15 and the right to respect for private and family life in Article 23.

150. In support of those submissions Ms Mountfield QC relies upon *Burnip v. Birmingham City Council* [2012] EWCA Civ 629 at paragraphs 19-22, and *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47 at paragraph 44.

The Defendant

151. Mr Dunlop submitted

i) No duty to conduct a capacity assessment under the Mental Capacity Act 2005 arose in this case.

ii) The issue of whether such a duty arises has been considered and rejected in *VC* at paragraphs 129-147.

152. In response to the arguments that a duty to make enquiry arose, Mr Dunlop submitted:

i) Some substantial trigger would be required before the Defendant would be required to effect, invite or secure independent representation (*VC* at paragraph 169).

ii) The test should be whether a detainee has capacity to make decisions about whether he should seek help from a lawyer, not whether he has capacity to give instructions. If the detainee can take himself to a see a solicitor that will be enough to protect his interests.

iii) If there was strong evidence before the Defendant that the Claimant was continuously lacking in capacity to make decisions about whether to seek assistance from a lawyer then it would be *Wednesbury* unreasonable not to enquire into capacity.

153. Mr Dunlop submitted on the facts:

i) The trigger did not arise in this case; and

ii) In any event the Defendant did take reasonable steps to enquire into capacity.

Analysis

154. The issue of whether a duty to enquire into a detainee's mental capacity arises received consideration in *VC* (at paragraphs 129-147 of the judgment).

155. The submissions made in this case can be distinguished from those made and considered in *VC*.

156. The three submissions made in *VC* are summarised in paragraph 129 of the judgment:

> "129 The Claimant makes three submissions, as set out in skeleton argument for trial. (i) Pursuant to the public law duty of enquiry and in order to facilitate compliance with the MCA 2005, the Defendant is under an obligation to arrange for a detainee to have a capacity assessment where there is a reasonable suspicion that the detainee may lack capacity. (ii) Where a detainee is assessed as lacking capacity in relation to areas of decision making that are the sole responsibility of the Defendant the Defendant is obliged to make those decisions compliantly with section 4 MCA 2005, namely in the detainee's best interests; (iii) In order to make best interests decisions the Defendant must ensure that the incapacitated detainee's wishes and feelings are put forward, and that the detainee is supported to participate so far as is possible and that the detainee's interests are represented."

157. In *VC* the argument that the Defendant is obliged to make detention decisions

compliantly with section 4 of the Mental Capacity Act 2005, in the detainee's best interests was rejected. As stated in *VC* (at paragraph 137) the decision to detain is the sole responsibility of the Defendant. The detainee does not make or participate in the decision itself. Judge Seys Llewellyn QC held (at paragraph 138):

> "138 First, therefore as a matter of construction of the Act I consider misconceived the submission that in areas of decision making which are her sole responsibility the Defendant is obliged to make those decisions compliantly with section 4 MCA 2005, namely in the detainee's best interests. Further if the Act thereby required any decision "affecting" a person without capacity to be made in his best interests it would lead to remarkable results: for instance, on his conviction in an ordinary criminal case his individual best interests would trump other interests when considering whether or for how long he should be imprisoned."

158. The argument advanced in this case, namely that the Defendant breached the common law duty of fairness by not enquiring into the Claimant's capacity, can be distinguished from the three submissions made in *VC*, although it is close to submission (i). Submission (i) made in *VC* was considered at paragraph 143 of the judgment in that case:

> "143 As to submission (i), of an obligation to arrange for a detainee to have a capacity assessment whenever there is a reasonable suspicion that they may not have capacity 'to participate in' decisions, (a) similar considerations apply; and (b) such must in my judgment be contextual. To take a strong case, if it were all but certain that the detainee was to be removed from the UK within days and by his history and convictions he was likely to kill and maim if released in the UK, a capacity assessment might be otiose."

159. The issue of procedural fairness during detention was considered at paragraph 169 in *VC*:

> "169 Since the presumption of the policy is one of liberty subject to the further provisions of that policy, the decision to

> detain is not one in which the detainee himself truly "participates", and detention is subject in the ordinary case to challenge by review, some substantial trigger is in my view required before the Secretary of State would be required to effect, invite, or secure independent representation. If there has been only a restricted period of such lack of capacity or detachment from reality, I consider it is for the Claimant to show that it would not be artificial or over-burdensome for the Defendant not so do so. Equally I accept that temporary segregation decisions are often taken for individual operational reasons which will often demand a rapid response. It would be heavy handed and often difficult to require some formal representations in each such case, particularly where segregation may be of short duration as it was up to 24 March 2015 in each case here save one (that of 21/02/2015 to 24/02/2015). If segregation occurs repeatedly, and for longer duration, that may become a substantial trigger."

160. The central issue in this case is whether on the facts a substantial trigger, requiring the Defendant to inquire into the Claimant's capacity, arose at the time the decision to detain was made. That issue turns on the specific facts of this case.

161. The facts to be considered are those available to the Defendant at the time the decision to detain was made. I note that Professor Hale's report was not available at the time that the decision to detain was made. However, it is also right to note that Professor Hale's conclusion, that the Claimant lacks capacity, was based upon his examination of the documents.

162. It is important to consider all the information available and not to alight on individual entries in the various records. However, the entry in the GCID Case Record Sheet for 20th March 2014, which I refer to at paragraph [37] above, is of particular relevance. That entry raises the question of whether the Claimant has mental capacity.

163. Capacity, or lack of it, is defined in section 2 of the Mental Capacity Act 2005.

164. Mr Dunlop's submission is that the test should be whether a detainee has capacity to make decisions as to whether he should seek help from a lawyer. The issue in this

case does not turn on the precise nature of the test to be applied. The issue is whether the duty to act fairly required, on the facts of this case, the Defendant to make enquiries into capacity.

165. In my judgment that entry in the GCID Case Record Sheet, which raises the question of whether the claimant has mental capacity, when seen in the context of the considerable other information relating to the Claimant's mental health, was sufficient to trigger the need for further enquiry. That trigger arose whether the test to be applied was the one contended for by Mr Dunlop or whether it is the test set out in section 2 of the Mental Capacity Act 2005.

166. Mr Dunlop submitted that if the need to make further enquiry was triggered, such enquiry was undertaken.

167. The minute of the decision to detain shows that the Defendant did enquire into to the Claimant's medical condition. Reference is made to Dr Stocking Korzen's letter of 5th January 2015 and to Mr Rakha's letter of 18th September 2015. The recommendation in the deportation minute places particular reliance upon Dr Stocking Korzen's opinion that the Claimant does not suffer from any mental disorder which jeopardise or impair his ability to travel, including flying by airplane. However, neither letter addressed the issue of the Claimant's capacity. No enquiries were made into the Claimant's capacity at the time of his detention.

168. In my judgment, and for the reasons I have given, in the particular circumstances of this case the information before the Defendant was such as to trigger a requirement for her to enquire into the Claimant's mental capacity at the time that she made the decision to detain. She did not enquire into capacity at the time she made the detention decision. The failure to make such enquiry amounts, on the facts of this

case, to a breach of the common law duty of fairness.

169. For those reasons, the Claimant succeeds on ground 1.

Ground 2- Articles 3 and 8 of the ECHR

The Claimant

170. Ms Weston submitted that measures were required to prevent the aggravation of mental illness.

171. Ms Weston submitted that the decision to remove the Claimant from association with other detainees pursuant to rule 40 of the Detention Centre Rules 2001 exacerbated the Claimant's mental health problems. She drew particular attention to the period of segregation in October 2016 (over 28 days) and to Professor Hale's report. Professor Hale, after referring to a number of studies, stated: "These studies, and other research, demonstrate the high risk of segregation further exacerbating Mr [MDA]'s existing mental health problems."

172. In making her submissions Ms Weston referred to the Review into the Welfare of Vulnerable Persons by Stephen Shaw (January 2016) and to Appendix 4 to that report, being an Assessment of Cases Where a Breach of Article 3 of the European Convention of Human Rights Has Been Found in Respect of Vulnerable Immigration Detainees. That report refers to six cases in which a breach of Article 3 of the ECHR has been found in respect of vulnerable immigration detainees.

The Intervener

173. Ms Mountfield QC relied upon *Saadi v. Italy* [2008] 24 BHRC 123 in support of the proposition that the right to be free from Article 3 ill-treatment is absolute and cannot

be balanced against any threat that a person may pose to the public or the state. She submitted that the Defendant has a positive obligation to ensure that the Claimant does not suffer ill treatment whether by being returned to Somalia or in immigration detention.

174. Ms Mountfield QC submitted that compliance with Article 3 means that there must be a realistic and effective procedure to challenge a decision to continue a person's detention or to return a person to a third country in which they may be subject to inhuman or degrading treatment. She submitted that the procedure which is available in theory to allow the Claimant to challenge potential Article 3 ill treatment was not available to him in practice because it was not realistic to suppose that he could access the procedure without help and the Defendant provided no means of identifying his need for help or providing help so as to ensure that he could participate.

175. Ms Mountfield QC relied upon the same reasoning to support the Article 8 claim. In addition, she relied upon *Airey v. Ireland* (1979-1980) 2 EHRR 305 (at paragraph 33) to argue that by being deprived of access to a court, the Claimant's procedural rights of access to a court, protected (in *Airey)* by Article 6, but in this case, by Article 8, were breached.

The Defendant

176. Mr Dunlop submitted that in assessing the evidence on which to base the decision as to whether there has been a violation of Article 3, the standard of proof to be applied is 'beyond reasonable doubt'. In making that submission he relies on *VC* at paragraph 118, and *ASK* at paragraph 33.

177. Mr Dunlop submitted that the high threshold of proving, beyond reasonable doubt, a

violation of Article 3 was not satisfied in this case as:

i) The Claimant had frequent contact with healthcare workers.

ii) The Defendant was never warned by the healthcare workers that detention was harmful to the Claimant or damaging him.

iii) The healthcare workers informed the Defendant that the Claimant was being well managed and was fit for detention.

iv) The Claimant has not proved that he suffered from intense suffering beyond that which was inevitable with a mental health condition when in detention.

v) The threshold referred to at paragraph 33 in ASK is not met.

178. Mr Dunlop submitted that, based on the same facts, there was no breach of Article 8 of the ECHR.

Analysis

179. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

180. Article 3 imposes positive and negative obligations, namely to refrain from inflicting serious harm (negative) and to take measures designed to ensure that the individuals are not subject to torture or inhuman or degrading treatment or punishment (*R (on the application of S) v, Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) at paragraph 190).

181. In order to engage Article 3 the treatment must reach a minimum level of severity as recognised in *Pretty v. United Kingdom* (2002) 35 EHRR 1 at paragraph 52:

> "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."

182. The exacerbation of existing mental illness by conditions of detention may fall within Article 3 (*S* at paragraph 192).

183. The principles relating to Article 3 of the ECHR as summarised by Singh J at paragraph 173 in in *HA Nigeria* are to be applied.

184. Professor Hale's report is based upon his examination of the relevant documents including the medical records. His conclusions include the following:

    i) The standard of mental healthcare provided to the Claimant during his detention was not adequate for his complex needs.

    ii) Treatment was not offered in a suitable therapeutic environment.

    iii) A person with a psychotic mental health problem who in addition may have a past history of PTSD from events in Somalia should be considered unsuitable for detention which is known to worsen mental health conditions in such patients.

iv) When transferred from one IRC to another it appears that the new healthcare unit was not provided with adequate information about the Claimant's complex disorder and treatment and care needs.

v) Various studies indicate that there is a high risk of segregation further exacerbating existing mental health problems.

185. The standard of proof to be applied is that referred to at paragraph [116] above.

186. In order to amount to an infringement of Article 3 the treatment must go beyond that inevitable from legitimate treatment in immigration detention.

187. It is clear from the records before the Court including the Complex Case Review notes, and the Detention Review reports, that the Claimant had access to healthcare when in detention.

188. It is equally clear from those records that the Claimant was exhibiting what was described as 'inappropriate behaviour'. As an example, the GCID Case Record Sheet for 18th February 2016 records that the Claimant defecated in his room and later on the landing. The other residents complained about the Claimant's behaviour which they stated had been noisy and disruptive and had lasted for three months. The record states that the Claimant would press the cell bell, and if a female officer attended in response to his call, he would press the bell all night. The record for the 5th March 2016 states that the Claimant stripped naked even though female staff members were present.

189. The record for 14th April 2016 states that Dr Hillman a Consultant Forensic Psychiatrist considered the Claimant to be "currently well managed by healthcare facilities in the Centre pending an assessment for hospital."

190. In my judgment, based in particular on Professor Hale's analysis of the medical records and his conclusions, the treatment of the Claimant, whether when associating with other detainees or when removed from association did not reach the level of severity to infringe Article 3. Professor Hale does not identify such a level of severity. In addition, at the time when transfer to a hospital was contemplated the Claimant was not deprived of treatment only available in hospital and which his mental condition required, indeed the consultant psychiatrist was of the view that his condition was well managed by healthcare facilities in the IRC pending an assessment for hospital.

191. For those reasons, I find no infringement of Article 3.

192. I have also considered whether there was an infringement of Article 8. Based upon the same evidence I find that there was no significant adverse effect on mental health being a crucial part of private life associated with the aspect of moral integrity, and therefore no infringement of Article 8.

193. Ground 2 fails.

Ground 3 – Chapter 55.10 of the Enforcement Instructions and Guidance ("EIG")

The Claimant

194. Ms Weston submitted that the Defendant took the decision to detain without obtaining advice material to the question posed by her policy in Chapter 55.10 of the EIG. She submitted that:

i) The Defendant was not entitled to rely on Dr Stocking Korzen's letter of 5th January 2015.

ii) The Defendant failed to take account of the letter of 18th September 2015 from Mr Rakha.

iii) The Defendant failed to take account of other information already held by the Home Office.

iv) The Defendant failed to pose the correct questions regarding the Claimant's ongoing care and treatment needs.

v) The Defendant breached her duty of enquiry in failing to address the questions relating to 'satisfactory management' in that she interpreted 'satisfactorily managed' as meaning not detainable in hospital under the Mental Health Act.

The Defendant

195. The Defendant submitted that it was reasonable for the Defendant to conclude, on the evidence before her, that the Claimant's condition was satisfactorily managed in detention.

Analysis

196. The main questions which the policy in chapter 55.10 requires to be asked and answered are:

i) Whether a potential or existing detainee falls into one the categories listed? In this case the relevant category being those suffering from serious mental illness which cannot be satisfactorily managed within detention; and

ii) If the detainee does fall into one of those categories: are there very exceptional circumstances which justify detention or continued detention?

197. In this case the Defendant when making the decision to detain and when reviewing the decision considered whether there were conditions rendering the Claimant suitable for detention only in very exceptional circumstances. In the detention minute of 29th October 2015 and in the subsequent reviews carried out whilst chapter 55.10 of the EIG was in force, express reference is made to that chapter.

198. In the detention minute reliance was placed on Dr Stocking Korzen's letter of 5th January 2015 and upon Mr Rakha's letter of 18th September 2015.

199. The GCID Case Record Sheet shows that on 9th September 2015 the Defendant's officials telephoned the healthcare unit at HMP Glen Parva and spoke to Caroline Staples.

200. The submission made on behalf of the Claimant that the Defendant failed to take account of Mr Rakha's letter or other information available to the Home Office is not made out on the facts.

201. When considering a challenge based upon the application of a policy which sets out an approach to be taken when exercising a discretion, the meaning of the policy is a matter of law, whereas the making of a judgement or decision based upon a proper understanding of the policy is a matter for the decision maker subject to challenge only on traditional public law grounds (*R (on the application of LE Jamaica) v. Secretary of State for the Home Department* [2012] EWCA Civ 597 at paragraphs 27 and 29).

202. The meaning of the words 'satisfactory management' was considered in *O*. Lord Wilson described the word 'satisfactory' as one of extreme and appropriate elasticity. The phrase 'satisfactory management' is to be interpreted with regard to its context and purpose.

203. The issue to be determined is whether the decisions made in the application of the policy, at the time of the decision to detain, and on each review, offended against the *Wednesbury* principles

204. By relying on Dr Stocking Korzen and Mr Rakha's letters at the time of detention, the Defendant took account of relevant information relating to the Claimant's medical condition.

205. There is some force in the Claimant's submission that the Dr Stocking Korzen's letter of 5th January 2015 did not go directly to the question of whether the Claimant was suffering from a serious mental illness which could not be satisfactorily managed within detention. The letter addressed the question of whether the Claimant was suffering from any mental disorder which affected whether he was fit to travel. However, I reject the submission that the Defendant was not entitled to take that letter into account. The letter was from a consultant psychiatrist at the Herschel Prins Centre where the Claimant had been treated, and related to his mental health.

206. During the review process no further reference was made to the Claimant's medical condition until February 2016 when reference was made to Dr Thomas' letter of 21st December 2015.

207. In the April 2016 review, reference is made to the fact that the mental health team at Colnbrook IRC had confirmed that the Claimant had presented as having a psychotic

illness, that he was unfit for travel, and being managed well by healthcare facilities. The GCID Case Record Sheet for the 14th April 2016 records Dr Hillman's view that the Claimant "can currently be well managed by healthcare facilities in the Centre pending an assessment for hospital."

208. At the time of the June 2016 review reference is made to further enquiries made of the healthcare team and Colnbrook IRC. The report received by the Defendant was that the Claimant was taking his psychotic medication and engaging better.

209. The August 2016 and the September 2016 review includes reference to further communication between the Defendant and the healthcare team at Colnbrook IRC.

210. It is clear that the Defendant took steps to inform herself of the Claimant's medical condition both when making the decision to detain and during the review process. The form used to minute the detention decision, and to undertake monthly reviews, contains express reference to chapter 55.10 of the EIG. There is no substance in the Claimant's contention that the Defendant misunderstood her own policy, or that she misapplied it.

211. The conclusion reached by the Defendant that the Claimant was being satisfactorily managed cannot be characterised as being *Wednesbury* irrational; it was a conclusion that she was entitled to reach on the information before her, in particular the reports of Dr Stocking Korzen, Dr Thomas and the GCID Case Record Sheets relating to communications with the healthcare unit in the immigration removal centre. The GCID Case Record Sheet for 14th April 2016 is of particular relevance as it records that Dr Hillman, a Consultant Forensic Psychiatrist, had advised that the Claimant can currently be well managed.

212. For those reasons, this ground of challenge fails.

Ground 4 – Adults at Risk Guidance ("AAR Guidance")

The Claimant

213. Ms Weston drew attention to and placed reliance upon the witness statement of Michael Henson-Webb the Head of Legal at MIND. Mr Henson-Webb notes that the AAR Guidance does not contain a single reference to mental capacity. He states that if decisions are made without reference to mental capacity adults without capacity will be at a serious disadvantage when compared to those who lack some form of capacity in the community.

214. Ms Weston submitted that, in the first review following the coming into force of the AAR Guidance (the review of 5th October 2016), the question set out at page 3 of the Guidance, namely 'does the individual need to be detained in order to effect removal?' was not asked. Ms Weston also relies on the fact that, in the detention review of 5th October 2016, the Claimant was assessed as falling in Level 3, and therefore, under the policy set out at page 11 of the AAR Guidance should only be considered for detention if one of the identified factors applies.

The Defendant

215. Mr Dunlop submitted that the questions set out in the AAR Guidance were asked and answered. He submitted that when considering whether the risk of harm, risk of re-offending, and risk of absconding outweighed the presumption in favour of release the Defendant addressed the questions which the policy required to be asked and answered.

Analysis

216. The approach set out when considering Ground 3 applies, in particular paragraph [201] above. When considering a challenge based upon the application of a policy which sets out an approach to be taken when exercising a discretion, the meaning of the policy is a matter of law, whereas the making of a judgement or decision based upon a proper understanding the policy is a matter for the decision maker subject to challenge only on traditional public law grounds.

217. It is clear from the detention review undertaken on 5th October 2016 that the Defendant had regard to the AAR Guidance. Express reference is made to that guidance at paragraph 10 of the form. The case officer applied the guidance and assessed the Claimant as falling in the Level 3 category.

218. At page 11 of the AAR Guidance it is stated that detainee assessed as Level 3 should only be considered for detention if one of a number of conditions applies. Those conditions include when an individual presents a current public protection concern.

219. In the October 2016 review the case officer's recommendation was that the presumption in favour of release was outweighed by the risk of harm to the public and the significant risk of absconding. The authorising officer accepted the recommendation noting that the Claimant is considered to pose a risk of harm and absconding. The reviewing officers addressed the questions posed in the policy, and the analysis contains no irrationality or other public law error.

220. This ground of claim fails.

Ground 5 – the Hardial Singh Principles

The Claimant

221. Ms Weston, relying on the third principle set out in *Hardial Singh*, submitted that the Claimant's detention was unlawful from the outset. In the alternative, she submitted that continued detention became unlawful in 2016.

222. In support of her contention that the detention was unlawful from the outset Ms Weston submitted that it would have been apparent to the Defendant that removal would not be possible within a reasonable period of time, as the Claimant's removal to Somalia would breach Article 3 of the ECHR. Ms Weston relies upon a letter from the Defendant to the Claimant dated 25th January 2016, in which her official states that the reason that the Claimant was granted discretionary leave to remain for three years from March 2011 was on the basis of Article 3 ECHR. The Defendant's letter then refers to a Country of Information Report request dated 30th October 2015 which refers to the fact that the practice of keeping mentally ill people in chains is common in Somalia.

223. In support of her alternative submission Ms Weston relies, in particular, on:

i) The entry on a Bail Accommodation Proforma dated 12th January 2016 in which it is stated "We are unable to remove Mr (MDA) to Somalia within a reasonable timescale due to CST stating that 'Enforced returns to Mogadishu remain paused at the request of the Somalis. At this time there is no indication when they may restart'."

ii) The summary of a detention review carried out on 9th November 2016, in which it is stated:

> "I agree to maintain detention in order for the CO to arrange for an ongoing case plan to be put in place in terms of release. There is no planned date for enforced removals to Somalia due to current political events occurring at the ending of November 2016. Advice is needed from CST on a realistic timescale. The CO should also review whether removal is recommended particularly due to his current mental health."
>
> I note on CID that Mr [MDA] is very disruptive and has demonstrated levels of violence. The CO must also keep updated on this. Release is recommended due to the length of timescale for removal however this can only be done once we are clear on his medical health needs and ongoing care plan if release is agreed."

224. Mr Dunlop relied on five principles:

i) The third principle in *Hardial Singh* is only breached when it becomes apparent that lawful removal will not take place within a reasonable period of time (*Lumba* paragraph 22).

ii) Reasonableness is a matter of fact for the court.

iii) Detention can be lawful for a period when arrangements for accommodation on release are considered (*R (on the application of FM) v. Secretary of State for the Home Department* [2011] EWCA Civ 807 at paragraph 60).

iv) The Defendant does not have to anticipate potential challenges to removal (*R (on the application of AR) v. Secretary of State for the Home Department* [2011] EWCA Civ 857 at paragraphs 21-23).

v) The lawfulness of the Defendant's actions cannot be judged retrospectively in the light of the fact that she was not in fact able to remove the Claimant within the timescales envisaged (*R (on the application of Botan) v. Secretary of State for the Home Department* [2017] EWHC 550 (Admin) at paragraph 96).

225. Mr Dunlop relies on the analysis in *Botan*. In that case Lang J found that it was never apparent to the Defendant from 2016 to March 2017 that removal to Somalia within a reasonable period of time was not possible.

226. Mr Dunlop submitted that Ms Weston's argument that the Claimant's detention was unlawful from the outset should not be entertained as it was not pleaded. He further submitted that if the argument is considered it should be rejected for the following reasons:

i) As stated in the letter from the Defendant to the Claimant dated 25th January 2016, she was entitled to conclude that whatever the issues with treatment of those suffering mental illness in Somalia, the Claimant would not suffer such treatment as (on the basis of Dr Stocking Korzen's letter of 5th January 2015) he was not suffering from mental disorder and therefore did not require treatment on return to Somalia.

ii) Alternatively in the absence of a challenge from the Claimant the Defendant was entitled to assume that removal could take place as soon as Somalia agreed.

Analysis

227. The argument that detention was unlawful from the outset is based upon the letter from the Defendant to the Claimant dated 25th January 2016 and the reference in that letter to the fact that in March 2011 the Claimant was granted discretionary leave to remain for 3 years "…. on the basis of Article 3 of the ECHR". That ground of claim was not pleaded.

228. The statement in the letter of 25th January 2016 does not appear to be entirely consistent with the reason given for granting discretionary leave at paragraph 41 in the Defendant's letter dated 11th March 2011, where it is stated that such leave was granted "because of your medical condition".

229. As this ground was not pleaded, and the Defendant did not have the opportunity to respond to it in the pleadings, or to investigate the facts, I consider that the Defendant would suffer considerable prejudice were this ground to be allowed to be added to the claim. I do not allow this ground to be added.

230. If I had allowed that ground of challenge to be added I would have accepted Mr Dunlop's submission, based on *AR*, that when considering whether the Claimant would be removed within a reasonable period the Defendant did not have to anticipate a potential challenge to her letter dated 25th January 2016 in which she concluded that Article 3 of the ECHR did not prevent removal as the Claimant would not require treatment on return to Somalia.

231. The Claimant relies upon the 12th January 2016 bail proforma form in which it is stated: "We are unable to remove Mr [MDA] to Somalia within a reasonable timescale due to CST stating that 'Enforced returns to Mogadishu remain paused at the request of the Somalis. At this time there is no indication when they may restart.' ". It appears from the GCID Case Record Sheet for 22nd April 2016 that the statement quoted was made on 15th April 2016 and that the entry on the 12 January 2016 form may have been made in April 2016.

232. The Claimant also relies upon the Authorising Officer's statement made in the review form of 9th November 2016, in which she stated "Release is recommended due to the

length of timescale for removal however this can only be done once we are clear on his medical health and ongoing care plan if release is agreed."

233. As stated by Green J in *ASK* (at paragraph 71) it is important for the Court to review the documents in the round and not to take snapshots and then treat the snapshot as typical or representative. The detention review records have to be seen for what they are, part of a continuous process of assessment and review. I have set out a summary of that review process in my assessment of the facts above. The entry on the bail proforma is one such snapshot.

234. Lang J in *Botan* considered the position in relation to the prospect of removal to Somalia as derived from reported cases. The period from June 2014 to March 2017 is considered at paragraphs 64 to 92 in *Botan*.

235. Analysis of the detention review forms from December 2015 to November 2016 shows that Defendant was conscientiously reviewing the lawfulness of the Claimant's detention every 28 days or so and was applying the correct legal tests.

236. Throughout the review process reference is made to the balance between the presumption in favour of release and the need to protect the public and prevent absconding. Those were relevant matters when considering whether a reasonable period had elapsed (under *Hardial Singh* principle (ii)) (*A* at paragraphs 54 and 55).

237. The detention review forms record that careful consideration was given to the prospect of removing the Claimant to Somalia. For example, in May 2016 the authorising officer noted that the only barrier was the resumption of returns to Somalia. A similar entry was made in June 2016. In July 2016 it was noted that the position relating to return to Somalia may soon become more positive. In August

2016 the authorising officer states "we need to ascertain whether his removal is a likely prospect ". In September 2016 the authorising officer noted "We have reason to be confident that returns will resume soon." In October 2016 the authorising officer stated "…. I would like us to review where he will sit in our list of priority cases for removal under the MOU." On 8th November 2016 the authorising officer noted that advice was needed from CST on timescale.

238. The entries made in the review documents must not be judged with the benefit of hindsight (*Botan* at paragraph 96). Assessing those entries based upon the facts known to the Defendant at the time, it was never apparent that the Claimant could not be removed within a reasonable period.

239. In the review dated 8th November 2016 the authorising officer recommended release due to the length of timescale for removal, but stated that release should only take place when the Defendant was clear on medical health needs and ongoing care plan was agreed.

240. The entry for the 8th November 2016 review discloses no error of law. The Defendant was entitled to continue to detain the Claimant whilst ensuring that appropriate arrangements were in place were he to be released (*FM* at paragraph 60).

241. In my judgment, in relation to this ground of claim, the power to detain was at all times exercised reasonably for the prescribed purpose of facilitating deportation. As a result, this ground of claim fails.

Grounds 6 and 7: Sections 20 and 29 of the Equality Act 2010 - reasonable adjustments

The Claimant

242. Ms Weston submitted that, without some form of adjustment, the Claimant was denied access to his legal remedies in relation to deportation, detention, and segregation.

The Intervener

243. Ms Mountfield QC submitted that:

i) The duty imposed by section 20 of the Equality Act 2010 is an anticipatory duty and is owed to the disabled persons at large in advance of an individual disabled person coming forward (*Finnigan v. Chief Constable of Northumbria Police* [2014] 1 WLR 445 at paragraph 32). She also relied upon *H v. Commissioner of Police for the Metropolis* [2013] EWCA Civ 69 at paragraph 67.

> "There should have been a policy to enable the Defendant to determine the legal capacity of detained persons upon detention and for there to be regular reviews of litigation capacity."
>
> Failure to provide particular assistance to those who lack mental capacity to enable them to access the available procedures constitutes unjustified unequal treatment.
>
> If the Claimant's inability to litigate is disability-related, a procedure which makes it more difficult for a person with a mental disability to access the system, by contrast to a person who does not have that disability, is unlawful unless objectively justified.
>
> There was a failure to make reasonable adjustments to features of the various systems of review and appeal available to challenge immigration detention because they proceed on the

> basis that the Claimant could represent his own interests. Such failure constituted a breach of section 20 read with section 29, of the Equality Act 2010.

244. Ms Mountfield QC responds to the argument raised on behalf of the Defendant that section 113(1) of the Equality Act 2010 provides that proceedings relating to a contravention of Part 3 of the Act (which includes section 29) must be brought in accordance with Part 9, and therefore as provided by section 114(1) should be brought in the County Court. Ms Mountfield QC relies on section 113(3) which provides that section 113(1) does not prevent a claim for judicial review. She submitted, that in the exercise of the Court's discretion, it should determine the section 29 claim.

The Defendant

245. Mr Dunlop accepts that the Court is not prohibited by section 113 from hearing this aspect of the case, but argues that it should not do so in the exercise of its discretion. He argues that:

i) The claim has not been properly pleaded and particularised. He referred to *H v. Commissioner of Police for the Metropolis* [2013] EWCA Civ 69 at paragraphs 60 and 61 as an example of how such a claim should be pleaded.

ii) The County Court is the more appropriate forum as the issues turn on disputed expert evidence as to what the Claimant's impairment was.

iii) There has been no disclosure

iv) The Defendant should be able to consider whether to join healthcare providers using the Part 20 procedure.

246. In the event that this ground of claim is heard, Mr Dunlop submitted

i) At all material times the Claimant's disability was a personality disorder not a psychotic illness.

ii) The Claimant was not treated less favourably as a result of his disability

iii) The action that the Defendant took constituted anticipatory reasonable adjustments.

Analysis

247. The first issue to be determined is whether this Court is the right forum to determine this ground of claim.

248. There is a dispute as to the nature of the Claimant's condition. Professor Hale is of the opinion that the Claimant lacks capacity due to complex PSTD with psychotic features. Dr Thomas is of the opinion that he suffers from a personality disorder. The medical records include references to the Claimant being agitated and manipulative (19th November 2015).

249. Ms Mountfield QC's submissions are based upon an assumption that the Claimant lacked capacity. She submitted that there was a failure to make reasonable adjustments to features of the various systems of review and appeal available to challenge immigration detention because they proceed on the basis that the Claimant could represent his own interests.

250. In order to resolve the issues in dispute it would be necessary to make a finding as to the nature of the Claimant's condition. That matter is in dispute. The resolution of that dispute would require consideration of evidence, including assessment of the medical and social work records. There has not been disclosure of that evidence.

251. Given that there is a substantive dispute as to the nature of the Claimant's condition, that the evidence required to resolve that dispute is not before the Court, I accept Mr Dunlop's submissions on this issue, I determine this ground of claim should not be considered in these proceedings.

Ground 8 – section 149 of the Equality Act 2010 -the public sector equality duty ("PSED")

The Claimant

252. Ms Weston submitted that the Claimant was at all times a person with a protected characteristic, namely disability, by reason of his mental illness, and that the Defendant did not comply with the PSED.

The Intervener

253. Ms Mountfield QC submitted that in order to comply with the PSED in connection with the need to ensure equal access to legal proceedings to challenge detention or deportation the Defendant should have due regard to the needs to avoid unlawful discrimination and to advance equality of opportunity both in formulating the relevant policy and in determining how to address the needs of those who lack litigation capacity in general and in considering the Claimant's own mental health condition and needs arising from it.

254. She submitted that any sufficiently serious attempt to advance equality of opportunity for detainees such as the Claimant who lack litigation capacity would have caused the Defendant to consider, both in relation to the general policy and the specific case of the Claimant:

i) What the specific disadvantages for those who lack litigation capacity are in the context of immigration detention (the first mandatory consideration under section 149(3)(a));

ii) How could those disadvantages could be removed or minimised (the second mandatory consideration under section 149(3)(a)); and

iii) What steps could be taken to address the particular needs of those who lack litigation capacity by reason of mental disability (the third mandatory consideration under section 149(3)(b) and section 149(4)).

255. Ms Mountfield QC further submitted that there was no evidence of any such consideration in the formulation of the Adults at Risk policy or in considering the Claimant's case. She submitted that the Claimant's lack of litigation capacity was not recognised or addressed by the Defendant until brought to her attention by Detention Action.

The Defendant

256. Mr Dunlop submitted that the PSED argument adds nothing as it is a duty to have regard to protected characteristics not to achieve a result.

Analysis

257. Section 149 imposes a duty to have due regard to the need to achieve goals, it is not a duty to achieve an outcome or result. The duty must be exercised in substance with rigour and with an open mind. It is for the decision maker to determine how much weight to give to the duty, the court has to be satisfied that there has been a rigorous consideration of the duty. (*Hotak* at paragraphs 74-78).

258. Given that the duty must be exercised in substance not form, it is not sufficient for a claimant to establish that a decision maker makes no express reference to section 149 or to the Equality Act 2010 itself.

259. The order made by Lavender J on 14th June 2017 precluded the Claimant from relying on an allegation that the Defendant's Adults at Risk guidance is defective in law. Given that ruling the Defendant adduced no evidence on that issue. I confine my analysis to the question of whether in making decisions in relation to the Claimant's case, the Defendant fulfilled the duty imposed upon her by section 149 of the Equality Act 2010.

260. The eighth point set out at paragraph 26 in *Bracking* includes the principle that the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not before them they will be under a duty to acquire it.

261. For the reasons, I have given in relation to Ground 1, at paragraphs [154] to [169] above, in this case, the Defendant did not make sufficient enquiries to gather the necessary information to enable her to properly take account of the Claimant's disabilities in the context of the decision to detain. As a result, the Defendant failed, in relation to the specific facts of this case, to comply with the requirements of section 149 of the Equality Act 2010. This breach does not add anything materially to the outcome of this case.

262. The Claimant succeeds on this ground of claim.

Damages

263. The unlawful detention of the Claimant gives rise to damages. This raises the question of whether damages should be nominal or substantive. As made plain in *Lumba* and in *Kambadzi* causation may be relevant to this question. If the Claimant would have been detained in any event, damages may be nominal only.

264. I have not heard argument on this issue, and if there is a dispute on the issue of whether damages should be nominal or substantive, I will hear further argument.

Conclusion

265. I have found for the Claimant on Grounds 1 and 8, and as a result the detention of the Claimant was unlawful from 4th November 2015 until 3rd February 2017.

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