Neutral Citation Number: [2019] EWHC 1502 (Admin)

Case No: CO/1694/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2019

Before :

ANTHONY ELLERAY QC DEPUTY HIGH COURT JUDGE

- -

Between :

THE QUEEN (on the application of MA)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Ms Brewer (instructed by Duncan Lewis) for the **Claimant**
Mr R Kellar (instructed by The Government Legal department) for the **Defendant**

Hearing dates: 29 and 31 January 2019

JUDGMENT

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Anthony Elleray QC Deputy High Court Judge :

1. This an application for judicial review.

2. The Claimant is "MA". He is represented by Ms Brewer.

3. The Defendant is the Secretary of State for the Home Department ("the SSHD"). The SSHD is represented by Mr Kellar.

Background

4. MA is a national of Pakistan. He was born on 20 February 1989 and is now aged 30.

5. On 10 September 2012 MA arrived in the UK on a Tier 4 student visa which was valid until 14 April 2012.

6. On 14 April 2012 MA applied for further leave to remain as a student.

7. 7. On 4 July 2012 further student leave was refused.

8. On 7 September 2012 the Tribunal dismissed MA's appeal against the refusal of student leave. Permission to appeal that decision was refused on 25 September 2012. MA became appeals right exhausted on 5 October 2012.

9. On 8 March 2013 MA was granted temporary admission with reporting restrictions. He subsequently failed to report in accordance with the restrictions. He thereafter went to ground and made no attempt to regularise his status. He was documented as an absconder on the Home Office file. He remained in the UK unlawfully until on 29 August 2016 he was arrested for selling counterfeit goods and for immigration offences, in the Cheetham Hill area of Manchester.

10. On 29 August 2016 MA was detained under immigration powers pending removal from the UK. He was noted as saying he was not then taking medication and had no known medical condition.

11. A detention review at the time noted that MA was a persistent absconder. The review noted he could be removed on an Emergency Travel Document ("ETD") which might take four weeks to obtain.

12. On 30 August 2016 MA was transferred to Pennine House IRC. He was seen by a nurse.

13. On 2 September 2016 an application for an ETD was initiated. He was placed on the list for the Pakistani ETD interview scheme at Colnbrook IRC for 7 September 2016.

14. On 4 September 2016 MA was transferred to Harmondsworth IRC and was seen by a nurse.

15. On 5 September 2016 MA's detention was reviewed by the SSHD and maintained.

16. Further on 5 September 2016 MA claimed asylum on the basis that he feared to return to Pakistan because he was a convert to the Ahmadi faith.

17. On 7 September 2016 the ETD interview that had been booked was cancelled following the asylum claim. Further on that date MA was considered suitable for the Detained Asylum Casework ("DAC") scheme.

18. On 8 September 2016 MA was transferred to The Verne IRC. He was seen by a nurse.

19. On 9 and 12 September 2016 MA's detention was reviewed by the SSHD and maintained. The "7 day" review on 9 September 2016 stated that MA was in Dungavel IRC.

20. On 11 September 2016 there was a medical assessment of MA by a doctor.

21. On 12 September 2016 there was a 14 day detention review of MA by the SSHD and the decision to detain was maintained.

22. On 15 September 2016 MA was noted at The Verne as asking to see a doctor.

23. On 23 September 2016 MA was accepted onto the DAC.

24. On 24 September 2016 MA was transferred back to Harmondsworth IRC. He was seen by a nurse.

25. On 27 September 2016 MA's detention was reviewed by SSHD and maintained. On that day he underwent an asylum screening interview. MA confirmed that he was claiming asylum on the basis that he had converted to the Ahmadi faith whilst in the UK. He stated that his family and people "don't like Ahmadi Muslims" and that "There are laws against Ahmadi Muslims in the Penal Code."

26. On 28 September 2016 MA underwent a DAC induction interview. He notified the SSHD of his intention to seek private representation for his asylum claim. He was notified of the requirement to provide details of his private solicitors within 48 hours. MA subsequently confirmed that he was being represented by Buckingham Legal Associates.

27. On 7 October 2016 MA had his substantive asylum interview. He confirmed that he feared return to Pakistan on the basis of his conversion to the Ahmadi faith whilst in the UK. He also observed that he did not have a direct problem before leaving Pakistan but his friend (Abdullah) who was also an Ahmadi "was tortured on occasions because of his faith." He added that, "A couple of times I was with him people assumed I was of Ahmadi faith as they tortured me as well (twice)."

28. On 21 October 2016 the decision to review detention was delayed apparently to enable MA to obtain documentation "from the witnesses and the Ahmadiyya Association."

29. On 24 October 2016 MA's detention was reviewed by the SSHD and maintained.

30. On 10 November 2016 MA's asylum claim was refused by the SSHD.

31. On 11 November 2016 an application for an ETD was sent by the SSHD to the Pakistani High Commission. It was documented that the estimated timescale for an ETD was 14 working days from the date of the face-to-face interview with the Pakistani High Commission. His interview was subsequently booked for 21 November 2016.

32. On 22 November 2016 MA's detention was reviewed by the SSHD and maintained. He had been seen by a doctor that day for panic attacks and was prescribed Propranolol.

33. On 23 November 2016 MA attended Healthcare requesting to see a doctor and was told that he would be put on a waiting list.

34. On 28 November 2016 the Pakistani High Commission confirmed MA's identity and nationality and provided a provisional agreement to issue an ETD for him.

35. On 29 November 2016 MA was prescribed antidepressants by a doctor who recorded him as saying he had difficulty in sleeping, feeling low and short of breath.

36. On 12 December 2016 MA attended his asylum appeal. He was not legally represented. On 15 December 2016 his appeal was dismissed by the Tribunal. He had confirmed that he claimed asylum on the basis of his conversion to the Ahmadi faith on an unknown date whilst in the UK and that his family did not like Ahmadis and there were laws against them in the Penal Code of Pakistan. It was noted that he had been assaulted on two occasions in Pakistan in September 2007 and March 2008 when in the company of a friend who was of the Ahmadi faith. However, he confirmed that he did not seek to rely upon those instances as the basis of his claim for asylum. He invited the Tribunal to ignore all matters that pre-dated his arrival in the UK. The Immigration Judge stated:

> "I do not accept that the appellant is a genuine Ahmadi convert. His evidence was inconsistent, not credible nor plausible."

He further stated:

> "The appellant's claim was sur place activity being an Ahmadi convert since arriving in the UK is not accepted. His motive in my assessment of the evidence is to fabricate(d) a basis of claim in order to be granted refugee status in the United Kingdom."

The Tribunal Judge also observed:

> "He has lived in the United Kingdom for no more than six years. For the majority of that period, he was living here unlawfully and illegally."

37. On 20 December 2016 the SSHD received a report from a Dr Sayed under Rule 35 of the Detention Centre Rules. The account provided by MA to the doctor was as follows:

> "He was in Lahore, Pakistan in 2007 and 2008 - he was beaten by people of his neighbourhood - as his friend was of the Ahmadiyya Sect. He was mistakenly thought of as having changed to the same sect - himself being a Sunni Muslim. He denies having changed his faith. The men continued to accuse him of converted [sic] to the Ahmadi path. He was beaten with a stick and his ribs kicked. The Police refused to listen to his case. He decided to leave Pakistan due to perceiving the continuation of threats against him and arrived in the UK in 2010."

The doctor's examination findings were as follows:

> "On examination there is little of noted [sic] other than a left-sided brow swelling which may be due to the attack described. He continues to suffer with intermittent left-sided chest pain following attack to his ribcage."

38. On 21 December 2016 the Rule 35 report was considered by the SSHD. The SSHD concluded that it was appropriate to maintain MA's detention notwithstanding the Rule 35 report. SSHD appears to have relied on the following facts and matters:

    i) MA's immigration history showed that he could not be relied upon to comply with immigration requirements. He had previously absconded whilst on reporting restrictions and was encountered working illegally.

    ii) MA had unsuccessfully appealed the refusal of his asylum claim. Any further application for permission to appeal was likely to be disposed of within a short timeframe.

    iii) MA had no close family in the UK.

    iv) The doctor had not diagnosed any serious physical or mental health conditions that were likely to inhibit his ability to cope with the detained environment.

    v) MA would be removable on an ETD once he had exhausted his appeal rights. Depending on the availability of escorts and flights, it was likely that removal would be effected within eight weeks.

39. On 22 December 2016 MA's detention was reviewed by the SSHD and maintained.

40. On 3 January 2017 MA lodged an appeal to FTT.

41. On 10 January 2017 MA wrote to the SSHD informing her that he was gay and providing details of how he came to self-identify as gay.

42. On 16 January 2017 in a monthly progress report detention was maintained because of the adverse immigration history.

43. On 20 January 2017 MA was refused permission from the FTT to appeal the determination of 15 December 2016.

44. On 23 January 2017 MA was served with the decision refusing permission and he informed SSHD that he was worried because he had no legal representatives.

45. On 26 January 2017 MA made further representations to the SSHD alleging evidence of his Ahmadi faith via his social media account and confirming that he was gay. On that date he appears to have complained to the NHS that his Rule 35 application had been initially declined because of the previous definition of torture that applied. There was an increase that day in his antidepressants by a GP.

46. On 3 February 2017 MA became appeals rights exhausted.

47. On 8 February 2017 MA's current solicitors notified SSHD that they were now acting for him and stated that he now wished to make an asylum claim based on his sexuality. It was suggested it would take time to prepare documents and statements in support of his claim.

48. On 13 February 2017 MA's detention was reviewed by the SSHD and maintained.

49. On 14 February 2017 MA's solicitors wrote to SSHD requesting a response to the letter of 8 February and complaining that MA had not been served with any monthly progress reports.

50. On 17 February 2017 MA attended Healthcare to inform them that the anti-depressants were not alleviating his symptoms.

51. On 18 February 2017 MA was seen by a doctor and his anti-depressants were increased to the maximum daily dosage.

52. On 20 February 2017 MA's solicitors wrote to SSHD querying why SSHD had failed to consider the evidence submitted by MA as giving rise to a fresh claim for asylum. They referred to his anti-depressant medication. They made fresh claim submissions on both the Ahmadi faith and sexual identity and to his difficulty in securing evidence of his sexual identity while in detention.

53. On 2 March 2017 SSHD responded to representations for MA. It was observed that his previous account had been found to lack credibility by the Tribunal. He was given until 6 March 2017 to provide further evidence in respect of his new claim and to explain why he had failed to raise sexual orientation at an earlier stage of the proceedings.

54. On 6 March 2017 MA served detailed representations together with a witness statement purporting to explain why he had not claimed asylum earlier.

55. On 13 March 2017 MA's detention was reviewed by the SSHD and maintained. On the same day his detention was reviewed independently by a Case Review Panel and his detention was maintained.

56. On 21 March 2017 MA visited Healthcare wanting to see a GP as the anti-depressants were not helping and was referred to the GP for depression.

57. On 23 March 2017 MA's solicitors made further representations in which they stated he was not suitable for the DAC and asked that he be released from detention.

58. On 24 March 2017 MA's solicitors served a letter under the Pre-Action Protocol intimating judicial review proceedings for unlawful detention.

59. On 28 March 2017 when MA had apparently been vomiting during the night, Medical Justice were noted as having confirmed that they would assess MA and prepare a medico-legal report.

60. On 29 March 2017 a further asylum interview which had been scheduled for the purpose of assessing MA's late asylum claim was cancelled as he was apparently sick and had an appointment with Healthcare. It was noted that he had panic attacks and high cholesterol. He cancelled the scheduled asylum interview on the basis that he said he

was not fit and well enough to undergo an interview. On the same day, SSHD requested that Healthcare provide an assessment of his fitness to be interviewed. On 31 March 2017 Healthcare informed the SSHD that MA suffered from depression, panic attacks, gastric reflux and high cholesterol. However, it observed there was no medical contraindication to MA being interviewed for the purposes of his asylum claim.

61. On 6 April 2017 the judicial review proceedings were issued and MA obtained urgent interim relief from the Court which included an order that:

> "The Defendant be restrained from conducting the Claimant's substantive fresh claim asylum interview until the Medical Justices' report is filed and served."

62. On 10 April 2017 MA's solicitors informed SSHD that Medical Justice were going to interview him on 24 April 2017 and their report would be available three weeks later.

63. On the same day MA's detention was reviewed. It was stated that consideration should be given to his release. It was observed that he was Level 2 for the purpose of the Adults at Risk Policy, that he had been detained for 224 days and there was a possibility that a further medical report would increase the Claimant to Level 3.

64. On 11 April 2017 MA was released from detention.

65. On 24 May 2017 Rhodri Price-Lewis QC refused permission to apply for judicial review on the papers.

66. On 16 January 2018 John Cavanagh QC refused permission at an oral permission hearing.

67. MA subsequently appealed to the Court of Appeal. Permission was granted on the papers by Singh LJ on 22 July 2018. He considered that the six grounds advanced on behalf of MA were properly and reasonably arguable and that since some of those grounds would require detailed consideration of evidence he considered it best to remit the claim for judicial review to be heard in the normal way in the Administrative Court.

68. That SSHD had power to detain MA on 29 August 2016 pending removal from the UK is not in issue before me (I understand the relevant power would have arisen under Schedule 2 Part 1 of the Immigration Act 1971).

Rules

69. The Detention Centre Rules 2001 have provisions relating to healthcare which are in point before me.

70. Rule 33 provides:

> "(1) Every detention centre shall have a medical practitioner, who shall be vocationally trained as a general practitioner and a fully registered person within the meaning of the Medical Act 1983 (who holds a licence to practice).

(2) Every detention centre shall have a healthcare team (of which the medical practitioner will be a member), which shall be responsible for the care of the physical and mental health of the detained person at that centre.

(3) Each member of the healthcare team shall (as far as they are qualified to do so) pay special attention to the need to recognise medical conditions which might be found among a diverse population and the cultural sensitivity appropriate when performing his duties.

(4) The healthcare team shall observe all applicable professional guidelines relating to medical confidentiality.

(5) Every request by a detained person to see the medical practitioner shall be recorded by the officer to whom it is made and forthwith passed to the medical practitioner or nursing staff at the detention centre.

(6) The medical practitioner may consult with other medical practitioners at his discretion.

(7) All detained persons shall be entitled to request that they are attended by a registered medical practitioner or dentist other than the medical practitioner or those consulted by him under Paragraph (6), so long as –

(a) the detained person will pay any expense incurred;

(b) the manager is satisfied that there are reasonable grounds for the request; and

(c) the attendances and consultation are with the medical practitioner.

(8) The medical practitioner shall obtain, so far as reasonably practicable, any previous medical records located in the United Kingdom relating to each detained person in the detention centre.

(9) The healthcare team shall ensure that all medical records relating to a detained person are forwarded as appropriate following his transfer to another detention centre or a prison or on discharge from the detention centre.

(10) All detained persons shall be entitled, if they so wish, to be examined only by a registered medical practitioner of the same sex, and the medical practitioner shall ensure that all detained persons of the opposite sex are aware of that entitlement prior to any examination.

> (11) Subject to any directions given in the particular case by the Secretary of State, a registered medical practitioner selected by or on behalf of a detained person who is a party to legal proceedings shall be afforded reasonable facilities for examining him in connection with the proceedings."

71. Rule 34 provides:

> "(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with Rule 33(7) or (10)) within 24 hours of his admission to the detention centre.
>
> (2) Nothing in Paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.
>
> (3) If a detained person does not consent to an examination under Paragraph (1) he shall be entitled to the examination at any subsequent time on request."

72. Rule 35 provides:

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

Enforcement Instructions and Guidance

73. The SSHD has issued Enforcement Instructions and Guidance ("EIG").

74. Chapter 55.1.1 provides:

> "The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, whenever possible, alternatives to detention are used (see 55.20 and Chapter 57). Detention is most usually appropriate:
>
> - to effect removal;
> - initially to establish a person's identity or basis of claim; or
> - where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release …"

75. Chapter 55.3 provides:

> "1. There is a presumption in favour of temporary admission or temporary release - there must be strong grounds for believing the person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 2. All reasonable alternatives to detention must be considered before detention is authorised.
>
> 3. Each case must be considered on its individual merits, including consideration of the duty to have regard to the needs to safeguard and promote the welfare of any children involved.
>
> 4. Please also refer to the guidance in … Chapter 55b - Adults at risk in immigration detention."

76. Chapter 55.8 provides:

> "Initial detention must be authorised by a CIO - HEO or Inspector - SCO (but see Section 55.5). In all cases a person detained solely under immigration powers, continued detention must as a minimum be reviewed at the points specified in the appropriate table below. At each review, robust and formally documented consideration should be given to the removability of the detainee. Furthermore, robust and formally documents consideration should be given to all other information relevant to the decision to detain.
>
> Monthly reviews shall be conducted using the detention review template … Additional review may also be necessary on an ad hoc basis, for example, where there is a change in the circumstances relevant to the reasons for detention …"

77. Chapter 55.10, dealing with adults at risk provides:

> "Please refer to the separate guidance in Chapter 55b - Adults at risk in immigration detention."

Policy

78. On 1st August 2016 the Secretary of State issued policy on the process of asylum claims in detention under the heading "Policy Quality Statement". Its introduction referred to the introduction of the Detained Asylum Case Work Team ("DAC"). It noted at Paragraph 1.3:

> "To align asylum and detention policies, and to ensure that those who claim asylum in detention are detained for the shortest possible period and have their claim processed fairly, an interim instruction - 'Detention: Interim instructions for cases in detention who have claimed asylum, and for entering cases who have claimed asylum into detention (Dii) was published on 16 July 2015. The instruction reminds DAC case workers of the need to consider detention in accordance with published detention policy and that the ability to conclude the claim fairly within a reasonable timeframe will have an impact on the suitability of detention.
>
> The instruction to case workers is to review immediately the suitability of detention for an asylum claim to consider whether there are any factors - such as the length of time it will take an individual to prepare to present their claim or any of the vulnerabilities listed in Chapter 55.10 which cover many of the protected characteristics that might be impacted by the processing of an asylum claim in detention - that would render any detention unsuitable.
>
> A screening interview will take place as soon as possible after an individual claims asylum, either in detention or prior to being detained. Various questions are asked during the screening that are of direct relevance to determining the suitability of the individual for detention as well as the suitability of the asylum claim for consideration and attention. Key information obtained at this stage include points around age, health, pregnancy, disability, basis of asylum claim, documents to submit then or subsequently, and preferences for interviewing officer gender."

79. Under Paragraph 3.2 ("Disability") it provided:

> "…Chapter 55 of the EIG sets out the policy relevant to the detention of those who are disabled (or who may have illnesses that might be indicative of disability). In particular, the following are normally considered suitable for detention and only in very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:

- those suffering from serious medical conditions which cannot be satisfactorily managed within detention;

- those suffering from serious mental illness which cannot be satisfactorily managed within detention. In exceptional cases it may be necessary for detentions and their IRC or prison to continue while individuals are being or are waiting to be assessed, or are awaiting transfer under the Mental Health Act;

- people with serious disabilities which cannot be satisfactorily managed within detention.

> The DII makes clear that decisions to detain or maintain detention of those who have claimed asylum must take account of the nature of the asylum claim in all the circumstances of that individual. Particular attention should be paid to many vulnerabilities, including disability, that have been raised which may affect not only an individual's suitability for detention, but also their ability to properly present their asylum claim in detention. If for any reason the asylum claim is likely to be significantly delayed, for instance by the needs of the applicant to obtain further evidence, detention must be reviewed …"

80. The relevant guidance at Paragraph 3.2.3 made reference to Rules 34 and 35 of the Detention Centre Rules. At Paragraph 3.2.4 it was provided, amongst other matters, that:

> "In respect of physical and mental health disability, Chapter 55.10 of the EIG states that an individually will usually be unsuitable for detention if their conditions cannot be effectively treated in detention. In general terms, this can be expected to act as an exclusion from detention of those with the most severe mental or physical illness or disability, but would not exclude someone with such a condition at a lower threshold.
>
> However, if an individual where the physical or mental condition is not already excluded from detention by detention policy criteria, the imperative for fairness set out in the asylum policies means that if their condition will have a negative impact on their ability to present the asylum claim fairly, there would either be adjustments made (in an environment where they are assured .legal representation to advocates and where timely and/or flexibility are provided where necessary), or if a fair decision were to require significantly protracted consideration timetables, the review or detention due under Chapter 55 of the EIG would likely to result in release,"

"Adults at Risk"

81. In August 2016 the SSHD issued under the Immigration Act 2016:

"Guidance on adults at risk in immigration detention."

Within that guidance at Paragraph 6, main principles underpinning the guidance were set out. Those included:

> - The intention is that fewer people with a confirmed vulnerability will be detained in fewer instances from that, where the detention becomes necessary, it will be for the shortest period necessary.
>
> - There will be a clear understanding of how the Government defines 'at risk' and how those considerations are weighed against legitimate immigration control factors to ensure ready transparency about who is detained and why.
>
> - Individuals should leave the UK where they have no permission to enter or stay in the UK. The Government expects individuals to leave the UK on the expiry of any valid leave they may have, and to comply with any requirement or instructions to leave the UK.
>
> - For the purpose of removal, individuals can be detained if there is a realistic possibility of removal within a reasonable timescale and there is evidence which suggests that the individual would not be likely to be removed without the use of detention …"

82. Paragraph 9 of that Guidance identified in relation to an individual identified as being at risk the need for consideration to 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 detained for the period identified as necessary to effect their removal. Evidence level 1 was identified in relation to a self-declaration of being an adult at risk and is a matter that should be afforded limited weight. Evidence level 2 related to circumstances where there was professional evidence (eg from a social worker, medical practitioner or NGO) or official documentary evidence which indicates the individual is an adult at risk which should be afforded greater weight. Level 3 is said to arise where there is professional evidence (eg 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 the condition that led the individual to be regarded as an adult at risk which "should be afforded significant weight".

83. Paragraph 11 dealt with "indicators of risk" and bullet-points included:

> - Suffering from a mental health condition or impairment. (This may include more serious learning difficulties, psychiatric illness or clinical depression, depending on the nature or seriousness of the condition);

> - Having been the victim of torture. (Individuals with a completed medico-legal report from reputable providers will be regarded as meeting Level 3 evidence, providing the report meets the required standards.)"

A footnote to the reference to torture referred to the definition in Article 1 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").

84. A further version of the "adult at risk" in immigration detention was published on 6 December 2016. Materially, under the heading "Mental Health Conditions" amongst other matters a bullet-point relating to having been the victim of torture referred to the following:

> "as established in the case of Regina (EO and Others) v. Secretary of State for the Home Department [2013] EWHC 1236 (Admin):
>
> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for the act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.'
>
> This may emerge from a Rule 35 report or from a medico-legal report supplied by Freedom from Torture or the Helen Bamber Foundation."

The guidance in relation to assessing risk is again repeated with level 1, level 2 and level 3 assessments of evidence.

Manual

85. The SSHD has had an "Operation Services Manual" which has been updated from time to time. Under "Admission/Discharge" as issued in February 2004, Paragraphs 6 and 7 expressly sets out what is required under Rule 34. Under the heading "Healthcare" and a sub-heading "Suicide, self-harm and torture" at Paragraphs 29 to 31 it dealt with the requirements under Rule 35.

Application

86. The Detention Services Order 17/2012 referred to the "application of Detention Centre Rule 35." Paragraph 4 set out:

> "This DSO sets out Home Office policy regarding:
>
> a. The preparation and submitting of Rule 35 reports by medical practitioners; and
>
> b. The process to be followed by Home Office staff in response to a Rule 35 report."

87. At Paragraph 11 it provided:

> "Where a medical practitioner working at an Immigration Removal Centre considers that one or more of the criteria in Rule 35 are met … he/she must complete a clear and legible report using the template provided at Annex A of this DSO and submit it without delay to the on site Home Office Immigration Enforcement Contact Manager, copied to the Removal Centre Manager. A copy must also be placed on the detainee's medical record, and provided to the detainee free of charge."

88. Paragraph 21 provided:

> "The medical practitioner has no obligation to report an allegation from a detainee if this allegation does not cause a medical practitioner him/herself to be concerned, in the context of the overall medical examination, that the person may be a victim of torture. However, if an allegation does cause the medical practitioner to be concerned, then he/she should report it. The medical practitioner should set out clearly if his/her concern is derived from an allegation with no or limited medical evidence in support."

89. Paragraph 25 provided:

> "A Rule 35 report is a mechanism for a medical practitioner to refer on concerns, rather than an expert medico-legal report, so there is no need for medical practitioners to apply the terms and methodologies set out in the Istanbul Protocol. Medical practitioners are not required to apply the Istanbul Protocol or apply probability levels or assess relative likelihood of different causes, but if they have a view they should express it."

90. Paragraph 32 provides:

> "In rare cases, the Home Office responsible officer may respond that the Rule 35 report contains insufficient content to understand the medical concern and meaningful consideration of the report is not possible. In such circumstances:
>
> a. The responsible officer will immediately inform the on site Home Office Immigration Enforcement Contact Management Team of this circumstance by phone;
>
> b. Within 24 hours of receiving this phone call, the on site Home Office Immigration Enforcement Contact Management Team should obtain sufficient information from the medical practitioner for a meaningful consideration of the report to be possible;

c. The on site Home Office Immigration Enforcement Contact Management Team must then forward this additional information to the responsible officer within 24 hours of receipt;

d. The response timescales and processes explained in Paragraph 29 will apply once a report with a meaningful context has been received."

91. Its "Background" provided:

> "Some asylum claims are based on a fear of persecution relating to sexual orientation. For many, discussing such matters may be unfamiliar to them and having to do so in an asylum interview may prove additionally daunting. The asylum interview is a key part of the asylum process because it is the main opportunity for the claimant to provide relevant evidence about why they need international protection and for case workers to test that evidence. It is important that the claimants disclose all relevant information at this stage and the case workers fully instigate the key issues in a courteous, professional and sensitive approach to questioning, particularly as some evidence may relate to sexual violence. Such evidence is crucial in making sure that:
>
> - Asylum claims are properly considered;
> - Decisions are sound;
> - When protection is granted, it is granted to those who genuinely need it;
> - Protection is refused to those who do not need it."

92. The "Policy Objectives" included:

> - To provide an opportunity for the claimant to put forward sufficient evidence to establish their case;
> - To encourage full disclosure of all relevant facts, allowing the case worker to investigate and consider the evidence about a particularly sensitive topic to identify and protect those who would face persecution if returned to their country of origin;
> - In the case of claims based on risk of persecution for being lesbian, gay and bisexual (LGB), to establish whether a claimant is in fact LGB and the relevance of that to the asylum claim."

93. The Policy in relation to preparing for interview referred to LGB specific issues to consider. Those included "stigmatisation or shame and secrecy, painful self-disclosure,

incapacity to present a claim." It set out "Key Considerations". The Policy in dealing with "Conducting the Interview" set out in reference to "discharging the burden of proof" that the claimant would need to establish their case to a reasonable degree of likelihood that they are or are perceived to be of the sexual orientation in question.

Interim Process Map

94. An Interim Process Map was issued by the Home Office for cases that are processed whilst being detained. It was an interim instruction circulated to staff in the DAC process. It gave guidance in relation to an induction interview and an asylum interview.

The Rule 34 Ground

95. I turn to the first ground of challenge made before me by Ms Brewer for MA (in fact, Claim Ground 2). It concerns the failure of the SSHD to carry out a Rule 34 mental and physical examination of MA by a doctor within 24 hours of MA's detention.

96. Whilst conceding that such was not carried out, Mr Kellar has contended that on the facts there was no material or causally relevant breach of Rule 34.

97. For reasons to which I now turn, I consider that breach is made out and Mr Keelar's points go to the question of whether the breach has caused substantial damage.

98. In ***R (EO and Others) v. SSHD*** **[2013] EWHC 1236**, Burnett J (as he then was) heard five cases which were listed together. They were each concerned with alleged breaches of public law policy relating to victims of torture. The failures were alleged to amount to breaches of public law which "bore upon and were relevant to the decision to continue detention" (***EO,*** **para.1**). The focus of the attacks on the acts of SSHD were through Rules 34 and 35 and Chapter 55 of the EIG (***EO,*** **para.3**).

99. Burnett J at Paragraph 21 distilled two propositions from the majority decisions of the Supreme Court in ***R (Lumba) v. SSHD*** **[2012] 1 AC 245**:

> "(1) A breach of public law duties when exercising a discretionary power to detain renders the subsequent detention unlawful (ie it amounts to the tort of false imprisonment) if the breach bears on and is relevant to the decision to detain;
>
> (2) Whilst it is no defence to a claim for false imprisonment to show that the claimant could and would have been detained lawfully, if such were established the claimant would be entitled to nominal damages only."

100. The first proposition ("bears on and is relevant to the decision to detain") must rely on Paragraph 66 of the judgment of Lord Dyson in ***Lumba***.

101. At Paragraph 49, Burnett J began discussing legal issues relating to non-compliance with Rule 34. He observed:

> "The 2001 Rules are concerned with the regulation of the management of detention centres. They have no direct bearing on the power of the Secretary of State to detain. A failure to

> comply with those rules does not render the detention unlawful; neither does it give rise to a private law claim for breach of statutory duty. Rule 34 of the 2001 Rules is designed to ensure that new arrivals are medically examined. That medical examination is in addition to the medical screening which is routinely conducted on admission by nursing staff. In the case of an immigration detainee the Rule 34 examination need not be conducted by the appointed medical practitioner, but can be done by a doctor chosen and paid for by the detainee. It is necessary for new arrivals to have a medical screening and examination to ensure their medical needs are catered for in detention. Whilst Rule 35 is concerned with mental illness and other conditions which might make detention inappropriate, as well as with torture, the information provided at or by a Rule 34 medical examination will generally be concerned with the rather more prosaic. In ensures that those in need of medication receive it and those with any illnesses or ailments are provided with appropriate care and treatment."

102. At Paragraph 50, Burnett J set out his reasons for considering that the Rule 34 medical examination within 24 hours was material to the decision of continued detention. At Paragraph 51, he set out his conclusion that a failure to carry out the Rule 34 medical examination would amount to a public law failure which bore upon and was relevant to the detention decision.

103. At Paragraph 52, Burnett J rejected an argument that it was for the claimant to prove that the failure would have made the difference between detention and release. He held that:

> "Causation is relevant to the question of whether the claimant should be entitled to compensatory damages. It is not relevant to the question of whether the detention was lawful."

He respectfully declined to follow two earlier first instance decisions to the extent that they suggested otherwise.

104. One such decision was that of Haddon-Cave J (as he then was) in ***R (Betkasim) v. SSHD*** **[2012] EWHC 3109 (Admin)** and his conclusions that the claimant must prove causation because Rule 34 (and Rule 35) were concerned with conditions of detention rather than the legality of detention (Paragraphs 121 to 125). However, Haddon-Cave J in ***R (DK) v. SSHD*** **[2014] EWHC 3257 (Admin) at 197** observed:

> "On the law, I can say without hesitation that, having had the benefit of reading and studying Burnett J's magisterial analysis in **EO** of *R (Lumba) v. SSHD* [2011] UKSC 12 and *R (Kambadzi) v. SSHD* [2011] UKSC 23 and Rules 34 and 35 … I respectfully agree with his conclusion that breach of Rule 34 renders a detainee's detention unlawful because it 'bears on' the decision to detain in the sense dictated by the majority in *Lumba*. I also respectfully agree with him that my decision on this point in [*Betkazim*] that breaches of Rules 34 and 35 without more do not

> render detention unlawful and the detainee must prove causation, is wrong. As Burnett J correctly observed at [52], causation is relevant to the question of whether a claimant should be entitled to compensatory damages but not the *anterior* question of the lawfulness of detention itself."

105. ***EO*** was cited in the Court of Appeal in ***R (VC) v. SSHD*** **[2018] 1 WLR 4781**, but its reasoning did not fall into question in the leading judgment of Beatson LJ (Paragraph11).

106. The detailed Grounds of Defence at Paragraph 61 refer to the decision of Blake J in ***R (LMC) v. SSHD*** **[2016] EWHC 2016** in support of a contention that the "procedural mishap" of want of a Rule 34(1) report did not render the detention of the claimant unlawful. I understand that to be a reference to Paragraph 68 of that judgment. The Learned Judge in that case went on to explain his factual reasons for concluding that the absence of the Rule 34(1) report by a medical practitioner had no impact on the particular detention. The Learned Judge had just cited at Paragraph 67 ***DK*** and ***EO***. In concluding that a medical practitioner rather than simply a nurse had to carry out the Rule 34(1) report, it may be that the Learned Judge was of the view that the relevant failure in that case was not material to and did not bear on the failure to remove the relevant claimant from the DFT (Fast Track) process. Insofar as this decision is to be read as suggesting that it is for the claimant to establish that the failure caused continued detention, that would appear to be contrary to the persuasive weight of the authorities that I have been discussing. A failure to carry out a Rule 34(1) examination would be unlawful unless the failure did not bear on and would not be relevant to the decision to continue detention.

107. In ***EO*** at Paragraphs 70 – 74, Burnett J gave reasons based on regard to aragraph 23 of the judgment of Richards LJ in ***R (OM) v. SSHD*** **[2011] EWCA 999** and passages from the majority judgments in ***Lumba*** for finding that the onus was on SSHD to establish that a claimant would have been detained anyway if seeking to reject a claim for compensatory damages for false imprisonment. Beatson LJ in ***VC*** **at 6** respectfully agreed with the approach of Burnett J in parts of Paragraphs 71 – 73 concerning burden. The decision of Burnett J on burden is not challenged before me and I respectfully follow it.

108. In ***VC*** the Court of Appeal allowed in part an appeal of a claimant. In particular, it allowed an appeal from a finding that the claimant would have been detained anyway during a relevant period even if the SSHD had made an error which bore on the decision to detain (in that case a misinterpretation of ERG 55.10) in concluding the claimant's illness could be satisfactorily managed within detention.

109. The want of evidence from SSHD helped inform the decisions of the Court of Appeal in ***VC*** that it was not rationally open to SSHD to conclude the claimant's mental illness could be satisfactorily managed in detention or to conclude that "very exceptional circumstances" justified the relevant detention or to satisfy the Court on a balance of probability that detention would have continued in any event (Beatson LJ at Paragraphs 62, 81, 97 and 99). At Paragraph 68 in ***VC*** Beatson LJ observed:

> "In *Das* [2014] 1 WLR 3538, a case similarly concerned with an immigration detainee suffering from mental illness who alleged

> that a detention was unlawful, the Secretary of State also chose to submit no evidence to explain her decision making in respect of the decision to retain. In my judgment, in that case at Paragraph 80 I agreed with the following statement of Sales J, the judge at first instance in that case [2013] EWHC 682 (Admin) at (21):
>
> > 'Where a Secretary of State fails to put before the court witness statements to explain the decision making process and the reasoning underlying the decision, they take a substantial risk. In general litigation, where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against the party … The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision (in the words of Lord Water of Gestingthorpe in *Belize Alliance Conservation Non-Governmental Organisation v. Department of the Environment* [2009] UKPC 6 at (86)) "to co-operate and to make candid disclosure by way of affidavit, on the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings." …'
>
> I remain of the view that this is the right approach. It follows that the approach of the judge below in this case was overgenerous to the Secretary of State. I now turn to the questions set out at Paragraph 62 above."

110. In relation to liability for non-compliance with Rule 34, Ms Brewer cites, as I have done, from ***EO*** and ***DK***. She invites me not to follow ***LMC***. I have already analysed my conclusions from those authorities. Ms Brewer also cites from the decision of Cranston J concerning asylum seekers in detention in ***R (Hossain) v. SSHD*** **[2016] EWHC 1331 (Admin**) **at 11, 13, 24, 118 and 150**. As Ms Brewer puts it, the Rule 34 and Rule 35 mechanisms as articulated in the DCR and cited policy are cornerstones ensuring the detention is exercises lawfully by the SSHD. She also submits that Rule 34 and Rule 35 were intended to operate together, often with Rule 34 acting as the trigger to the Rule 35 assessment point I have already accepted.

111. On admission on 30 August 2016 to Pennine House IRC, MA was seen by a nurse (Mr Jacques Sunshion). His record of the appointment includes the following notes:

> "See at DP's (Detained Person) request. Raised no immediate medical concerns. Pleasant and settled. DP denies any medical or mental health issues and no surgical intervention required. Advised that can attend HCp (Healthcare) as required. Urdu healthcare sheet given to keep and read.
>
> Torture: Non-disclosed …
>
> History of self-harm: Detained Person denies any act or thought of self-harm.
>
> Mental health: Detained Person denies any mental health problem."

112. In early September 2016 MA was again seen by a nurse (Mrs Sheila Edwards) at Pennine House IRC who noted:

> "D/P re-admitted. Reassured on arrival. Denies any current thoughts of DSH or any medical problems or where to ask to see H.C DPG and that support is available … Consent to clinical assessment/examination."

MA states that he had two days in Dungavel House IRC which would explain the reference to re-admittance by Mrs Edwards at Pennine House IRC.

113. On 4 September 2016 MA was transferred to Harmondsworth IRC. He was seen by a nurse (Mrs Urmila Schadev) who noted:

> "No thoughts of deliberate self-harm … Prisoner had not tried to harm themselves … No suicidal thoughts … Prisoner does not feel like Self-arming or suicide … No current medical issue and not on meds. Not on meds."

114. Whilst it had been planned to transfer MA to Cornbrook IRC for the Pakistan EDT interview on 7 September 2016 that was cancelled following the asylum claim on 5 September 2016. That claim was on the basis of a fear of a return to Pakistan by MA because he was a convert to the Ahmadi faith. On 7 September 2016 he was considered suitable for the DAC scheme.

115. On 8 September 2016 MA was transferred to the Verne IRC. He was seen by a practice nurse (Charlotte Tshibangu). She noted amongst other matters:

> "Declined referral to Mental Health Assessment … Victim of torture - NO … Not on medication … Personal history of mental disorder … No … No suicidal thoughts."

116. On 15 September 2016 MA applied to see a doctor for reasons noted as "Depression, can't sleep, requesting sleepers, headache and kidney problem … Booked next available."

117. On 23 September 2016 MA was accepted onto the DAC but did not attend his doctor's appointment with "Doctors Room".

118. On 24 September 2016 MA was transferred back to Harmondsworth IRC. He was again seen by a nurse (Primrose Mapani). She notes amongst other matters:

> "COMPLAINING OF INSOMNIA…not received medication for mental health problems…Mental health problem - Nil … No thoughts of deliberate self-harm … Prisoner has not received treatment from a Psychiatrist outside prison."

119. On 7 October 2016 MA saw a GP, a Dr Jabbar, and was given some cream for skin problems.

120. On 13 October 2016 and 27 October 2016 MA was seen by a GP, Dr Naveed Ali, who noted "Rule 35" to MA on each occasion, but it does not appear that any Rule 35 report was then engendered. As I have earlier noted, MA at his substantive asylum interview on 7 October 2016 had observed that he did not have a direct problem before leaving Pakistan, but his friend (Abdullah) who was also an Ahmadi was tortured on occasion because of his faith. He added that "A couple of times I was with him people assumed I was of Ahmadi faith as they tortured me as well (twice)."

121. On 9 November 2016 MA was again seen by a nurse. He was noted as complaining of being woken up in the night from his sleep with a fast heart beat and that he had first had those symptoms two years previously which he had treated with aspirin but had not seen any doctor about. The symptoms had disappeared after three months and he had stopped the aspirin. He was complaining to the nurse on 9 November 2016 that some three weeks ago the palpitations had resumed both day and night, but mostly in the night. The nurse planned for him to be booked for an ECG and a GP to prescribe aspirin if appropriate.

122. On 22 November 2016 MA was seen by a GP, Dr Irfan Sayed, who noted:

> "Pain on eating and vomiting afterwards. Usually in the evening. Burning sensation. Cannot sleep. Also having panic attacks at night."

He was prescribed Propranolol.

123. On 29 November 2016 MA was again seen by Dr Sayeed. He noted he had not had an ECG:

> "Difficulty sleeping - Feels low and feels short of breath at times … Put on ECG list … Review in two weeks' time. Started on Mirtazapine."

124. On 4 and 6 December 2016 MA was noted as not attending session appointments with the GP apparently booked because a blood test had proved abnormal. On 7 December 2016 he did see a GP, Dr Saeed Ahmad, and the blood test was discussed. He was noted as being "not keen for medication" and being advised on "lifestyle changes".

125. As I have noted, on 12 December 2016 MA attended his asylum appeal. The Judge noted him saying that he had been assaulted on two occasions in Pakistan in September 2007 and March 2008 when in the company of a friend who was of the Ahmadi faith.

However, he confirmed to the Judge that he did not seek to rely on those instances as a basis of his claim for asylum and invited the Tribunal to ignore all matters that predated his arrival in the UK.

126. MA, however, was noted by the surgery at Colnbrook on 14 December 2016 as not attending for a session appointment with Rule 35. On 20 December 2016 he was at Harmondsworth and being seen by Dr Irfan Sayed. Dr Sayed did then make a Rule 35 report to the SSHD on 20 December 2016. Dr Sayed noted:

> "He was in Lahore, Pakistan in 2007 and 2008 - he was beaten by people of his neighbourhood - as his friend was of the Ahmadiyya sect. He was mistakenly thought as having changed to the same sect - himself being a Sunni Muslim. He denies having changed his faith. The men continued to accuse him of converted [sic] to the Ahmadi path. He was beaten with a stick and his ribs kicked. The police refused to listen to his case. He decided to leave Pakistan due to perceived continuation of threats against him and arrived in the UK in 2010."

Dr Sayed's clinical findings in his Rule 35 report are as follows:

> "On examination there is little of note other than a left sided brow swelling which may be due to the attack described. He continues to suffer with intermittent left side chest pain following the attack to his ribcage."

That report was considered promptly by the SSHD on 21 December 2016.

127. The facts I have been discussing make it plain that there was not a Rule 34 examination by a GP when MA was transferred to the Pennine House IRC on 30 August 2016 or to Harmondsworth IRC on 24 September 2016 or at any IRC to which he had been transferred in the meanwhile including Harmondsworth IRC on first transfer there on 4 September 2016.

128. The want of such Rule 34 examinations plainly, in my view, amounted to breaches of Rule 34 and the guidance I have cited. The issue appears to me to be whether such breach caused substantial damage.

129. I need to record that a GP had failed to examine MA's mental and physical health within 24 hours of detention and accordingly had not learned anything that would have made him under an obligation to make a Rule 35 report whether by reason of injurious effect on health by continued detention or conditions of detention (Rule 35(1)) or on suicidal intentions (Rule 35(2)) or by reason of a concern that a man might be the victim of torture (Rule 35(3)). MA by his witness statements does not challenge the contemporaneous nursing notes of admission including his denial of mental health or torture. The Rule 35 report made by Dr Sayed on 20 December 2016 was a Rule 35(3) report in relation to concern that MA may have been the victim of torture. That report adopted the definition of torture made by Burnett J in ***EO*** and its interpretation in the version of "Adult at Risk" published by SSHD on 6 December 2016 replacing the definition in the guidance given in August 2016 noting Article 1 of UNCAT. I accept the submission of Ms Brewer that the consequent change in definition of torture in Rule

35(3) reports for GPs to complete may have led Dr Sayed to make his report on 20 December 2016 and the need in context to consider MA's account of being beaten on two occasions in 2007 and 2008, by people of his neighbourhood mistakenly believing that he had changed his faith to that of the Ahmadi sect. The August 2016 guidance involving considerations of State torture may have explained the want of Rule 35 reports in October 2016 (the notes of consideration by a GP of "Rule 35"), but the SSHD through Mr Kellar satisfies me on the balance of probability that had there been an earlier Rule 35 report by a GP in relation to torture the probability is that it would have been similar to that in fact given by Mr Sayed on 20 December 2016. The SSHD's response to that report on 21 December 2016 (Paragraph 38 above) is likely to have been precisely the same in response to an earlier Rule 35(3) report on torture.

130. MA as noted did report to GPs in the autumn of 2016 on panic attacks (22 November 2016) and on difficulties in sleeping, feeling low and shortness of breath (29 November 2016). He was prescribed antidepressants. Those were increased on 18 February 2017. None of the GPs considered that they had reason to make a Rule 35(1) or Rule 35(2) report. In the circumstances, I have concluded that the Rule 34 breaches should sound only in nominal damages.

131. At the outset of the hearing before me, Ms Brewer applied for the admission of a report from Dr Tandy, a Consultant Psychiatrist in Psychotherapy. He had had two consultations with MA in January 2018. His report was dated 12 February 2018 and signed on 06 December 2019. I declined to permit reliance on the report for three reasons put forward by Mr Kellar. First, the report was not before the SSHD during the course of the detention. It was not obviously relevant to what a GP would have found on a rule 34 examination or the legality of the detention. Second, the lateness of the application to rely on the report was not explained (there would seem chronologically to have been a change of mind). Third, the lateness of the application had prevented the SSHD from relying on its own expert evidence. His evidence has not therefore been taken into account in relation to the rule 34 Ground or other grounds.

The Rule 35 Ground

132. I turn to the second ground of challenge made before me by Ms Brewer for MA (in fact claim Ground 3). The contention is that the SSHD unlawfully delayed undertaking a Rule 35(3) assessment of a potential torture victim as a consequence of applying unlawful guidance. That is amplified by alleging that the Rule 35 report itself was deficient. In relation to the alleged delay in the Rule 35 report Ms Brewer takes three points.

133. First, she refers to Rule 34 and Rule 35 needing to operate symbiotically to be effective. She refers to the doctor undertaking the Rule 34 assessment within 24 hours of detention to the Detention Centre actively having to consider the Rule 35 criteria during the assessment. She contends that had the Rule 34 assessment been complied with in this case within 24 hours of detention it is more than likely that a Rule 35 report would have been raised. Thus the Rule 35 report would have predated the claim for asylum, DII policy providing that the existence of a Rule 35 report should normally indicate a case is not suitable for DAC.

134. Second, she refers to a letter MA had obtained from Central North West London NHS Foundation Trust on 26 January 2017. It refers to Dr Jabbar advising in relation to the

Rule 35 application that on 6 December 2016 there was a change in the definition of what constitutes torture within Rule 35, that change occurring after the initial Rule 35 consultation in which a Rule 35 application was initially declined. As a result of the new definition of torture being changed, his Rule 35 application can be accepted. Ms Brewer contends that it is unclear, but it should be presumed, that it was the SSHD who had declined and latterly accepted the Rule 35 report following the consultations by the clinicians. She contends that the delay in securing and considering the Rule 35 assessment was a consequence of the August 2016 published guidance wrongly referring to UNCAT rather than the wider definition to include non-State violence in the definition of Burnett J in ***EO***.

135. Third, she refers to the importance of Rule 35 as a safeguard having been noted on a number of occasions including in ***DK* at 50** and ***EO* at 59** and by Ouseley J in ***R (Detention Action) v. SSHD* [2014] EWHC 2245 (Admin) at 123, 133 and 136**. She contends that in a DAC detention claim concerning an asylum seeker a Rule 34 report serves two purposes. First, it identifies whether a detainee is vulnerable within the detention setting and assessing whether detention will have a deleterious impact on his health. Second, when the detainee is an asylum seeker, and as observed by Ouseley J in ***R (Detention Action)* at 157**, officials must explicitly consider whether mental health problems may prevent an applicant presenting his claim within detention as fairly as someone not suffering from such problems.

136. I reject the contention that had a Rule 34 assessment been complied with in this case within 24 hours of detention it is more than likely that a Rule 35 report would have been raised. It is, in my view, probable that a Rule 34 assessment would not have given rise to a Rule 35 report. MA would not have asserted torture or a mental health problem or suicidal intention. It is repeated that no Rule 35(1) or (2) report was made. The Rule 35(3) report was not made until 20 December 2016.

137. As to the second point, it does appear that the GPs at Harmondsworth IRC may have declined to make a Rule 35(3) report because of the guidance of SSHD in relation to torture given in August 2016 not being changed until 6 December 2016 to give rise to concern that (in short terms) violence from neighbours (rather than the State) could amount to torture. For reasons I have already discussed, it appears however it was a GP decision not to make a Rule 35 report in October 2016 and a GP who decided in December 2016 to make a report given the widening of the definition of torture. In that sense, I can see that the SSHD's guidance on what is torture may have delayed a Rule 35 report from October to December 2016. But the SSHD did promptly consider the Rule 35 report in fact received on 20 December 2016 and determined to maintain the detention for the reasons that I set out at Paragraph 38 above. Those included the immigration history and the likelihood that MA would not comply with restrictions if then released from detention. Further, they noted that the doctor providing the Rule 35 report had not diagnosed a serious physical or mental health condition that would be likely to inhibit MA's ability to cope with the detained environment during the short duration necessary to effect his removal and balancing his level of vulnerability against the negative immigration factors that applied in his case the balance lay in favour of continued detention. I consider it wholly improbable that a report by a GP under Rule 35(3) in October rather than December 2016 would have led to any other conclusion as to continued detention.

138. As to the third point, I accept the two principles cited and identified by Ms Brewer. But factually the issue is delay in informing the SSHD about the 2007 and 2008 complaints of violence from neighbours in Pakistan. But that, in my view, can hardly have led to a different conclusion than that there had not been diagnosed in the case of MA a serious physical or mental health condition that was likely to inhibit his ability to contend with a detained environment during the short duration thought necessary to effect his removal. Further, in relation to mental health problems there was simply no report to the SSHD under Rule 35(1).

139. Thus, I accept the submission of Mr Kellar that there was prompt engagement with the Rule 35 report when it was in fact made and the contention that there has been a breach of Rule 35 sufficient to render MA's detention unlawful is plainly wrong in my words, or without merit in the words of Mr Kellar. Mr Kellar is also correct that there was no Rule 35 report made in October 2016 albeit, as I have already found, because the definition in Rule 35 reports of torture had not been amended until December 2016. Mr Kellar is, in my view, correct to say that the SSHD cannot be imputed with knowledge of matters contained with confidential medical records. Nor can he be imputed with errors on the part of individual Healthcare practitioners (see ***DK v. SSHD* at 196-208**). Further, he is, in my view, correct that hindsight has no place in deciding unlawful detention claims (see ***DK* at 204** and ***Fardous v. SSHD* [2015] EWCA Civ 931 at 42-43**).

140. Ms Brewer contends that Dr Sayed's report was "deficient". The Rule 35 pro-forma required the clinician to provide details of, amongst other matters, all scarring and psychological symptoms as well as any medical support the detainee had received or was receiving. Further, he was required to record any information of current mental health problems that may have been the result of having been tortured. He was required to provide the assessment of the impact of detention on him and why, including the likely impact of ongoing detention. Her contention is that the Rule 35 report by Dr Sayed did not set out any mental health assessment conducted or any analysis of his medical records and potential treatment for depression and panic attacks. It was a report which on its face did not consider or evaluate the impact of detention on MA as required. Ms Brewer contends that the SSHD should have remitted the deficient report back to the clinician as required by the Adults at Risk policy and unlawfully relied upon deficiencies in the report to justify ongoing detention. Ms Brewer also contends that there is evidence that SSHD had access to MA's medical records and was in contact with Healthcare, referring to a detention review on 22 December 2016.

141. I agree with the submission of Mr Kellar that the SSHD does not bear responsibility for a "deficient" Rule 35 report. There did not appear any material or obvious deficiency in Dr Sayed's report. Contrary to the suggestion of Ms Brewer, the SSHD did not have access to MA's medical records or contact with Healthcare. The review on 21 December 2016 does not, as I read it, suggest otherwise. Further, as Mr Kellar submits, the SSHD would not as a matter of public law be imputed with or liable for any deficiencies in the report (see ***DK* at 196-208**).

142. I accordingly reject the late or deficient rule 35 report ground.

The adequacy of detention reasons ground

143. The third contention of Ms Brewer (Ground 1 and/or 4) is that the SSHD failed to provide robust and sufficient reasons for detention. She contends that the SSHD has provided no evidence of enveloping within the detention decision four particular matters. The first is failure to have regard to MA's mental health. Ms Brewer cites ***DAS* [2014] 1 WLR 3538**. In that case the Court of Appeal allowed an appeal from Sales J (as he then was). The Court of Appeal considered that the Learned Judge had placed too high a threshold for the applicability of what was then Paragraph 55.10 of the EIG, in its reference to "those suffering from a serious mental illness which cannot be satisfactorily managed within detention" as persons who are only considered for detention in exceptional circumstances. The trial Judge had found illegality in the shape of the failure to take reasonable steps by the SSHD to inform herself sufficiently about the health of the Claimant so as to decide whether the policy applied. The particular claimant had had psychiatric treatment and psychotic medication of which the SSHD was apparently aware. Ms Brewer refers to the decision of the SSHD in this case on 22 December 2016. I think that is a reference to the decision on 21 December 2016 (Paragraph 38 above) made in response to the Rule 35(3) report concerning torture.

144. Ms Brewer's second point related to absence from the detention reviews of consideration of suitability for detention and whether MA could effectively present his asylum claim (particularly when unrepresented) and whether SSHD could examine and determine his claim having taken account of those points. She refers to the fundamental need to analyse the asylum claim and whether the claim can fairly be prepared and examined in a detention setting, particularly when MA was unrepresented.

145. Ms Brewer takes the third point of detention being a last resort and the requirement in Chapter 55.paragraph 55.3.1 of the EIG requiring active consideration of alternatives to detention including those which could have reduced the absconding risk including curfew, tagging, police reporting, conditions of release.

146. Ms Brewer's fourth point is that the reviews did not address any sexual identity and his suitability in context to be detained.

147. I reject the claim that the potential reviews were insufficiently "robust" or "adequate". It appears to me that the SSHD was plainly entitled to detain MA in the light of his poor immigration history and high risk of absconding. As I have noted already, MA had failed to comply with reporting conditions in 2013 and had gone to ground and was documented as an immigration absconder. He had made no attempt to regularise his status in the three years that followed until his 2016 arrest for selling counterfeit goods and immigration offences. MA did not claim asylum until after his arrest in 2016 and the claim was on the basis that he was an Ahmadi convert, not one related to sexual orientation. I have noted the dismissal of the Ahmadi claim by the Tribunal and the conclusion that the Ahmadi claim had been deliberately fabricated. It was only after the dismissal of that claim that MA raised his alleged sexual orientation as a basis for a (new) asylum claim. Further, as Mr Kellar also submits, chronologically there was always a sufficient prospect of removal to justify continued detention. The detention was on 29 August 2016. On 2 September 2016 the process of obtaining an ETD document was initiated. On 11 November 2016 a completed application for an ETD was sent to the Pakistan High Commission. The expectation was that an ETD outcome would be known within 14 days, with a face to face interview and that interview took

place on 21 November 2016. The Pakistan High Commission agreed a provisional ETD on 28 November 2016.

148. The poor immigration history and high risk of absconding were factors influencing the decision to detain under EIG Chapter 55, Paragraph 55.3.1. The "interim process map" refers to the need for release immediately if a decision to detain can no longer be properly maintained under the criteria set out in Chamber 55 of the EIG.

149. MA did not disclose his history of torture or any psychiatric concern when he entered detention. As I have already noted, the SSHD's "Adult at Risk" policy did become engaged when the Rule 35(3) report was made, but that did not relate to MA's mental health. I do not understand the basis on which Ms Brewer says that the SSHD considered detention and medical records in the decision of 21 December 2016 or contends that the SSHD had access to such records (which were confidential to MA). It does not appear to me that the SSHD can be criticised for failing to have regard to MA's mental health when she (at the time) was not given, whether by MA or through a Rule 35 report, evidence that MA had a material mental health problem. Though there was the failure to carry out the Rule 34 assessment (as I have already noted), the SSHD did not appear to have reason to question the ability through mental or other health problems to present his asylum claim based on his having become a member of the Ahmadi sect. As I have already noted, the risk of absconding was obvious and properly taken into account by the SSHD. In relation to the question of MA's sexual identity, Ms Brewer has cited ***OM v. Hungary*** and the failure by detention reviewers to address the suitability of (continued) detention by reason of the applicant's sexual identity. But in this case the SSHD was addressing the late alternative asylum claim and it was MA who cancelled his further asylum interview on 29 March 2017. The SSHD did review continued detention in light of information on 10 April 2017 from MA's solicitors that Medical Justice were going to interview MA and forecasting a period of five weeks until their report would arrive. The review suggested consideration should be given to the release of MA given the possibility that a further medical report might increase him to Level 3 for the purposes of the Adults at Risk policy

150. Ms Brewer contends that for the SSHD to prospectively evaluate removability, he or she had to take reasonable steps to acquaint himself with relevant information to answer or the question correctly. She criticises variously failures to engage with the nature of the asylum claim, sexual identity and to secure all information about physical or mental health that would impact on removability. I consider the complaints factually wrong or not made out. I repeat that the SSHD had no reason to question mental health or sexuality, when the Ahmadi Sect asylum claim was dealt with. There was no such reason after the rule 35 report or when the new sexual identity asylum claim was being considered. It was MA that cancelled that interview.

Failure to provide MA with Written Reasons for his Detention

151. There is common ground that EIG Chapter 55.8 sets out Rule 9(1) of the DCR requiring reasons for detention being provided to the detainee at initial detention and monthly intervals thereafter. The fourth complaint (not a particular Ground) was of a failure to disclose monthly progress reports for December 2016 and March 2017. Factually, it appears that there were indeed such MPRs then disclosed, though they were incorrectly dated. The complaint was not pursued at the hearing before me by Ms Brewer.

Procedural Fairness

152. MA through Ms Brewer's next challenge is to procedural unfairness (ground 3). The contention is that the allocation and retention of MA into DAC from 22 September 2016 until 11 April 2017 (6½ months) was marred by procedural unfairness which is alleged to have been "multifarious".

153. Ms Brewer makes three particular points. First, she contends that legal representation is a cornerstone of procedural fairness to asylum applicants who are detained during the progress of their claim, particularly those who have poor mental health (***R (Detention Action)* at 157** and ***Hussain* at 115, 140 and 155**). She complains that prior to the hearing of the Ahmadi sect asylum claim on 12 December 2016 SSHD was aware that MA was unrepresented and did not have a bundle or witness statement. The contention is that SSHD failed to address whether MA could effectively prepare and present his appeal unrepresented. The second point then made by Ms Brewer is that the mental health of MA was material and relevant to any credibility assessment made by a Judge (on the Ahmadi sect asylum claim). MA's treatment for depression and physical symptoms attributable to poor mental health or anxiety made him a vulnerable adult and the Judge if made aware of it should have assessed credibility in the context of MA's mental health difficulties and whether special measures were necessary to ensure his effective participation as a litigant in person. The third complaint is that SSHD was party to adversarial proceedings before the Immigration Judge when MA was unrepresented (see ***E v. SSHD* [2004] EWCA Civ 49, [2004] QB 1044 at 50 and 63**). It is contended that the failure of SSHD to raise and address with the Immigration Judge the matter of MA's poor mental health and outstanding Rule 35 assessment compromised the high standards of fairness required in this asylum appeal.

154. However, on 28 September 2016 when MA was undergoing a DAC induction interview he was to confirm that his solicitors were Buckingham Legal Associates in connection with the Ahmadi sect appeal. MA now explains in witness evidence his limited contact with the relevant solicitors and reasons for his dissatisfaction with them. He does not suggest that he informed SSHD at any time of problems with representation. Further, it is repeated that GPs at Harmondsworth IRC did not ever make a report under Rule 35(1) so as to alert SSHD that he had any mental problems. The SSHD had no reason to know that on 22 November 2016 and 20 November 2016 MA had seen GPs and been prescribed Propranolol and then anti-depressants. In short terms, there was no reason for the SSHD to question MA's choice not to have representation at his appeal hearing. Further, as Mr Kellar submits, the lack of representation did not materially affect the outcome of the Ahmadi sect asylum claim. In the course of Judge Keane's determination refusing permission to appeal on 17 January 2017 he observed:

> "… the Judge took pains to ensure the Appellant was able to communicate effectively at the hearing, was in possession of the relevant documents and he was afforded a reasonable opportunity to present his case … Mindful that the Appellant is unrepresented, I have considered the Judge's decision in order to ascertain whether it contained an arguable error of law. The Judge's decision was a comprehensive and painstaking decision."

Further, MA did instruct experienced immigration solicitors in early 2017 whilst he remained in detention who have represented him to date. When on 29 March 2017 MA cancelled the scheduled asylum interview because he said he was not fit and well to under an interview, the SSHD immediately requested that Healthcare provide an assessment of his fitness to be interviewed. On 31 March 2017 Healthcare informed the SSHD that the Claimant suffered from depression, panic attacks, gastric reflux and high cholesterol. However, according to the medical advice provided to the SSHD there was no medical contraindication to MA being interviewed for the purpose of his new asylum claim on the basis of sexual orientation.

155. I agree with the submission of Mr Kellar for the SSHD that there was nothing contemporaneously available to the SSHD to suggest that MA was incapable of engaging fairly with the asylum process whether due to mental health or lack of legal representation. The allegations of material "unfairness" did not, in my judgment, render MA's detention unlawful.

Discrimination

156. The final challenge to the legality of detention raised by MA (Ground 6) is a discrimination challenge (Article 5 read with Article 14).

157. MA says by witness statement he identified difficulties in articulating his sexual identity claim when in a detained setting detained amongst those who shared his cultural and/or religious background.

158. That would be consistent with the statement MA has obtained from Paul Dillane, the Executive Director of the UK Lesbian and Gay Immigration Group, a registered charity dedicated to supporting and advocating the rights of lesbian, gay, bisexual, trans and intersex people seeking asylum in the UK. He provides a statement to update the picture of his charity's experience of detained asylum cases/detained non-suspensive appeals. He sets out the view of his charity that there are serious concerns as to the standard of asylum decision making in respect of LGBTI claims, particularly regarding those claims processed by the detained accelerated procedures under DAC. He refers amongst other matters to a 2014 report conducted by the Independent Chief Inspector of Borders and Immigration as commissioned by the Home Secretary giving rise to specific concerns about decision making in the then operational Detained Fast-Track given the rate of appeal overturns in LGB claims compared to the general appeal overturn rate suggesting that civil servants had frequently failed to reach the correct decision at first instance. That led to the issue by the SSHD of a new asylum policy instruction on sexual identity claims in February 2015. He sets out reasons for the view of his charity that there had been increases in detention of LGBTI people for the purpose of asylum claims and as to the perfunctory nature of assessments of suitability for detention in relation to LGBTI people and concerns as to the vulnerability of the LGBTI community or group. The SSHD's API on sexual identity and DSO2 2016 Lesbian, Gay and Bisexual Detainees and the Detention Estate are said by Ms Brewer to be a recognition that LGB asylum seekers and LGB detainees require different treatment from that provided to heterosexual asylum seekers or heterosexual detainees. The policies recognise that LGB asylum seekers can and do have particular difficulties in articulating and securing evidence in regard to their protection claims made on sexual orientation grounds and further that LGB detainees have particular safeguarding needs

that need to be addressed while in detention being policies that require pre-emptive steps to be taken by the SSHD before a conclusion of the claim.

159. In fact MA says that he did not disclose his sexual identity to other detainees, particularly from Pakistan or generally because of their potential disapproval. He did say in answer to a question from a female officer in Dungavel IRC that he liked boys kissing boys. He says he did disclose to a female mental health nurse in Harmondsworth IRC that he was gay.

160. Ms Brewer submits, first, that the SSHD was not entitled to close his mind to MA's claim of sexual orientation throughout his detention until he or (later a Court) finally determined the credibility of his sexual orientation. It is submitted that at the time of detention the SSHD had not evaluated MA's sexual identity claim substantively. It is submitted that to ensure MA could have his fresh asylum claim fairly determined in detention the SSHD should have evaluated whether he would be safe in detention as a claimed gay man. It is contended that the SSHD ignored the claim of sexual identity when made known to him and thus offended Article 5 read with Article 14 and would disable any fair determination of his fresh asylum claim while in detention.

161. It is contended that the SSHD failed to consider his own policies (in particular the API on sexual identity and the DSO when determining the question of suitability for the detention of a claimed LGB detainee within the DAC).

162. It is further contended that the SSHD refused to engage with his own LGB policies which prevented MA from first disclosing that he was gay when he first claimed asylum. It is submitted that MA states that he was bullied in detention for being gay. References are made to the DSOs making provision to ensure that newly inducted detainees are made aware that it is safe to inform staff that they are gay. and that newly inducted detainees can safely and confidentially report any homophobic bullying. Further reference is made to the asylum guidance providing clear guidance as to why any detainee may only disclose their sexual identity late in the asylum process and stressing that in order to assist in what is recognised as a difficult disclosure (sexual orientation) the individual needs to feel in a safe environment.

163. I consider regard should properly be made by me to the chronology identified by Mr Kellar. First, MA did not inform the SSHD that he wished to rely upon his sexuality until January 2017 at which time he had already exhausted his appeal rights in relation to the Ahmadi asylum claim. On 2 March 2017 the SSHD sought further information and evidence including an explanation of why the claim had not been made at an earlier stage. The precise basis of the sexuality claim with evidence and support was not fully articulated by the Claimant's solicitors until 6 March 2017. In March 2017 the SSHD reviewed and maintained the detention. Bearing in mind MA's adverse immigration history, his risk of absconding and the lateness of his LGB asylum claim it was considered appropriate to maintain his detention at least until he had been interviewed about his recent and new claim. The SSHD expressly took into account that any refusal might not attract a right of appeal, if it was not a "fresh" claim within the meaning of Rule 353 of the Immigration Rules or it was certified under Section 96 NIAA 2002. Accordingly, there remained a prospect of removal within a reasonable timeframe. On 22 March 2017 MA's further asylum interview was scheduled for 29 March 2017. On 29 March 2017 MA alleges that he was unfit to attend the scheduled interview due to health issues notwithstanding that Healthcare confirmed subsequently that he was fit

for interview. MA issued Judicial Review proceedings, obtaining relief on 6 April 2017. MA was released on 11 April 2017 after MA confirmed through his solicitors that it would be at least five weeks before the Medical Justices' further medical report would be available for consideration.

164. I agree with Mr Kellar that the SSHD was entitled to investigate the veracity of MA's LGB claim, particularly given its timing and the serious adverse credibility findings already made by the Tribunal in respect of his previous account. Furthermore, given his adverse immigration history and high risk of absconding, the SSHD was entitled to maintain detention whilst the investigation took place. I agree with Mr Kellar that it was not unlawful or discriminatory to detain MA merely because he had made a late and uncorroborated claim for asylum based on LGB identity. Further, as Mr Kellar submits, even assuming the late asylum claim was credible there was no evidence before the SSHD during the course of his detention that MA was suffering any particular harassment or discrimination in detention or was otherwise unsafe in the detention setting by virtue of his sexuality. He had been asked in his asylum screening interview whether there was any particular reason why he should be detained whilst his claim was considered, and he answered "Nothing in particular." Contrary to a submission of Ms Brewer, I do not consider MA has stated that he was bullied in detention for being gay. I agree with Mr Kellar that there is simply no evidence that MA was the subject of serious or sustained bullying or harassment in detention on the ground of sexuality, still less as Mr Kellar submits was there any evidence that the SSHD was informed of that. Claims on a similar point were rejected by this Court in ***LMC v SSHD*** **[2016] EWHC 2016 (Admin)** and ***ZA v SSHD*** **[2018] EWHC 183 (Admin)**.

165. I do not consider that the discrimination claim has been made out.

166. I have found failures to carry out the rule 34 examinations but concluded that

167. They sound only in nominal damages. I otherwise dismiss the claims.