Neutral Citation Number: [2019] EWHC 2351 (Admin)

Case No: CO/4493/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 September 2019

Before :

MISS ALISON FOSTER QC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

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

- -
- -

Mr Ranjiv Khubber (instructed by **Turpin Miller & Co.**) for the **Claimant**
Ms Hafsah MAsood (instructed by **Government Legal Dept.**) for the **Defendant**

Hearing date: 19 June 2019

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Approved Judgment

Miss Alison Foster QC :

Introduction

1. On the 5th July 2018 the Claimant DM, a national of Tanzania, was convicted at Wolverhampton Crown Court of exposure to a 13 and a 14-year-old girl, for which he was sentenced to six months' imprisonment. He was placed on the Sex Offenders Register for seven years and made subject to licence conditions expiring the 4th October 2018, including residence at an address approved by the supervising officer.

2. DM was born on the 17th August 1980, he entered the UK apparently on a Student Visa, in September 2001. The Secretary of State for the Home Department (the "SSHD") rejected his application to remain here, thereafter DM failed to leave and became an overstayer. Following his conviction, the SSHD deemed it conducive to the public good that DM be removed. The period of imprisonment had already been served on remand but, as from the 6th July 2018, DM was detained under Immigration Act 1971 ("IA 1971") powers. A Deportation Order was served on him on 26th July 2018. On the 26th September 2018, the First -tier Tribunal ("FTT") granted DM bail in principle, subject to residing in approved accommodation arranged by the SSHD.

3. By this Application for judicial review, the Claimant challenges the lawfulness of his detention under the IA 1971 between the dates of the 26th September 2018 and the 3rd January 2019, on which day he was released. He further challenges the delay in provision of suitable accommodation under Section 4 of the Immigration and Asylum Act 1999 ("IAA 1999"). That accommodation was eventually provided on 31st December 2018 and he was released to it two days later on 2nd January 2019.

4. On the 12th November 2018, this Application for Judicial Review, together with an Application for Interim Relief was lodged. Interim Relief was adjourned to a hearing on the 26th November 2018 by Order of Mr Justice Mostyn which included provision that the SSHD should show cause why the Claimant should not be released unconditionally-the hearing to be vacated if the SSHD had arranged for the Claimant to be accommodated by that date.

5. On the 28th November 2018, Mr Andrew Henshaw QC, sitting as a Deputy Judge of the High Court, ordered that DM be released from immigration detention into suitable accommodation pursuant to the 26th September 2018 bail grant, by 1:00pm, 13th December 2018; the SSHD was to provide a full written explanation as to why the release was impossible, the reasons for the delay, and what efforts had been made since the 28th November hearing to progress that provision of accommodation. Karen Monaghan QC sitting as a Deputy Judge of the High Court granted permission on the 25th March 2019 on the basis of arguably inadequate explanations provided for detention after grant of bail or for a period thereafter.

More detailed Background

6. The essential points in DM's history are as follows. The SSHD has no record of the Claimant's arrival in the UK, however he accepts a Student Visa was issued from 17th September 2001 to the 30th September 2002 for him. An Application for Further Leave to Remain as a student was rejected on the 20th November 2002. The next occasion on which he came to the notice of the immigration authorities was his arrest

for being drunk and disorderly in April 2013 in London, and on 20th October of that year he was encountered in Newcastle, again, according to the GCID, drunk, he approached an officer of Northumbria Police and told them he was an overstayer and was then arrested as such. No further action on this deportation was taken, apparently because it was impossible to serve and detain him within time limits.

7. In June of 2015, an asylum application was received on the basis that he was gay and homosexuality was illegal in Tanzania, however, the Claimant failed to attend interview. The claim was reiterated in January of 2016 when he came to notice again, but was refused on non-certified grounds, however, no appeal was made. A second asylum interview, booked in June 2016, was not attended, no explanation was given, nor response received, similarly in respect of a further invitation. The Claimant stated later that he was afraid he would be asked questions about his sexuality. The SSHD notes appear to show 3 separate arrests over his time in the UK, all of which involved alcohol, together with his admission in May 2017 on arrest that he was an alcoholic who was homeless and unemployed and dependent on friends and foodbanks. His only living family were in Tanzania.

8. Following DM's conviction for exposure at Wolverhampton Crown Court there was no appeal against conviction or the sentence of six months' imprisonment. Licence conditions imposing a residence requirement at an address approved by his offender manager expired on the 4th October 2018. DM's post-sentence supervision period, which, imposed a residence condition, expired on 5 July 2019. A decision to deport was served on the 6th July 2018 by the SSHD as conducive to the public good under Section 3(5)(a) of the Immigration Act 1971 on grounds of DM's criminality.

9. On 11th July 2018, DM signed a disclaimer stating he wished to return to Tanzania as soon as possible, and wished to consult a solicitor. He rescinded it on the 26th July, when the Deportation Order was served, reiterated his fear of return and of persecution on the basis of his sexuality and in due course, an asylum interview was conducted on the 13th September 2018.

10. The First Detention and Case Progression Review of DM's detention was held by the SSHD on the 2nd August 2018. It recorded the risk of absconding as high, citing the immigration history and the fact that DM had remained an absconder for around 12 years. The risk of harm was said to be medium, given he had been convicted of a sexual offence and the risk of reoffending was also listed as medium because the conviction was very recent. No barriers to removal were noted but further representations were expected.

11. It was stated that estimated timescale for obtaining the Emergency Travel Document ("ETD") was three months - and could be obtained without difficulty because information was held regarding DM's passport. It was not expected that he would leave voluntarily, having now spoken with his solicitor. The absconding risk was noted as the most significant, with a slightly lower risk of harm and reconviction; if representations were lodged it was recognised that detention might be prolonged. The ETD should be sought and progressed.

12. Bail was refused by the SSHD and later, also by the FTT on the 16th August 2018, on the grounds that the Judge was satisfied the Claimant's removal was reasonably imminent, because ETDs had been applied for – in fact on 6th August - with a three-

month turnaround anticipated. In the context of the Claimant's immigration history, three months was considered to be reasonable. The Judge stated, reflecting FTT Guidance, that three months was a substantial period and six months would be thought a long period, but imperative considerations of public safety could justify detention in excess of six months. He had no evidence as to the risk of re-offending, but found there were substantial grounds to believe DM would not comply with conditions because of his lack of support in the community and history of destitution and homelessness. This, coupled with a poor immigration history, showed there was no incentive to comply with bail conditions.

13. The August 2018 claim was initially rejected as a fresh asylum claim and under paragraph 353 of the Immigration Rules but on 30th August 2018 after the commencement of a judicial review, the SSHD agreed to treat them as such. The correspondence from DM's representative states that the claim was not processed under the fast- track Detained Asylum Casework work stream.

14. At the end of August Review, there was no change to the assessment of the various risks and three months was reiterated as the timescale for obtaining an ETD. Barriers included the asylum claim and forthcoming interview. The officer noted "*Please expedite this as at this point we could conclude within 3 months, but this could change if representations are made."* The authoriser noted that "*There are no AAR [Adult At Risk] factors in this case but should representations be lodged, and it looks as though detention may be prolonged, we should be prepared to review our stance and have a contingency plan to manage these risks in the community*". The risk of harm and absconding were judged to outweigh the presumption of release at that stage, detention was maintained.

15. On the 3rd September 2018, the Claimant applied for accommodation under Section 4, IAA 1999. After the asylum interview of 13 September 2018, his case was referred to the asylum team.

16. A further Bail Application was made to the FTT on the 20th September 2018. The Secretary of State opposed the grant, recording that DM's asylum application had been refused on the 14th August 2018 and that the reiterated claim could be refused within one to three months. The SSHD said there was little incentive for the Claimant to comply with conditions of bail, particularly in light of the seriousness of the offence. There were no recognisances or sureties and no incentive, it was said, to remain in touch with the authorities. The poor immigration history and lack of ties with the UK suggested he would continue to offend to support himself financially, (although it might be observed that the offence he committed was sexual, not pecuniary), and that he was likely not to comply. The SSHD assessed the risks of absconding and reoffending as high.

17. On the 25th September 2018, in time for the FTT to consider, an email from the Probation Service stated that their risk assessment was not fully informed by official reports. Indeed there had been no OASys assessment nor a Pre-Sentence Report but, after consultation, they assessed DM as presenting a medium risk of serious harm to children and female members of the public. They saw no present risk of re-offending but pointed to further concerns that might exist about a threat at the time of the offence to expose himself to the victims' grandmother, about the initial denial of

committing the offence, and also about DM's reference during the interview to a further (denied) allegation of touching a young girl in 2017.

18. He apparently also stated he was banned from local licensed premises because of touching young girls. DM has no other convictions, but he had admitted he was an alcoholic, although he had stopped drinking. There was a report that he had slurred speech at the time of the index offence. Whilst assessed as at medium risk of committing a further sexual offence, given the aggravated features, the Probation Service believed DM would be managed initially as a high-risk case, were he to be released, and stringent checks would be required before approval was given to a proposed release address.

19. The grant of bail in principle was made the day after by the Tribunal judge.

20. The terms of the FTT conditional bail were that he reside at accommodation approved by his Offender Manager and not be released until such accommodation had been arranged.

21. When the Secretary of State came to review DM's detention on the 28th September, he said the risk levels had not changed, current barriers to removal were recorded as an asylum decision and the obtaining of an ETD from the Tanzanian High Commission for which a three-month timescale was expected. The officer authorising detention indicated progression but authorised detention "*to enable probation services to obtain an address"*. It was noted the matter would need to be continually chased because *"detention powers are now up against the grant"*. Detention remained appropriate because DM, the reviewer said, had shown a blatant disregard of UK laws, both criminal and immigration.

22. The same day as the grant of bail, the Claimant's solicitors wrote to the SSHD requesting they consider *any* possible statutory route to allow for the provision of accommodation as soon as possible, sending on the 1st October 2018, a Letter Before Claim which challenged the decision to detain and the ongoing delay.

23. On the 11th October 2018 the SSHD agreed that the Claimant was entitled to accommodation under Section 4(2) IAA 1999, and DM's solicitors pressed further over the ensuing week for some action regarding an acceptable address. The internal correspondence shows SSHD seeking a response from the Probation Service on 16th October 2018, CCAT emailed Serco to whom the provision of accommodation had been outsourced, asking that the property request in respect of DM be treated as a priority. The SSHD conceded that no accommodation had been sourced by that date.

24. When the SSHD came to review the detention on the 24th October 2018 Case Progression records CCAT promising to contact SSHD once an address had been sourced then pass it to the Offender Manager for approval. Using the same language as previously, the SSHD maintained the detention. The authorising officer said that the risks associated with release outweighed the presumption to liberty so he was content to maintain detention *"whilst the accommodation is being proactively sourced"*. The Claimant makes significant criticism of the decision reflected in this review which I will turn to later.

25. In the absence of any progress, on the 29th October a chasing email was sent to CCAT by the SSHD. Judicial review was initiated on 9th November 2018, and on the 12th November, Mostyn J fixed a hearing for the week of 26th November 2018, expressing his significant disquiet and making certain observations and Orders including that the SSHD show cause why the Claimant should not be released unconditionally.

26. A list of outstanding property requests was sent to the Service Delivery Manager for Serco on the 9th of November- including a property for DM - with a deadline of the 21st November 2018.

27. Philip Baker, an SEO within the Home Office CCAT, explains in a statement made in these proceedings on the 13th December 2018, that an address had been proposed by Serco and an email sent to the Probation Service requesting approval. This request had to be chased, once more urgency was requested citing the Court Order.

28. The Probation Service then said they had referred the address to the Police for consideration on the 16th November, but had been told that the relevant officer was returning only on the 20th. Mr Baker records that in fact, on the 26th November, CCAT were then advised that the current officer might be on extended leave of absence. CCAT then sent a further email to Probation.

29. The next Review - of which criticism is also made - took place on the 23rd November noting

> *"The ETD was sent to the Tanzanian High Commission on 06 August 2018 and timescales dictate a window of 3 months to issue said document. The Case owner should now contact RL with a view to obtaining an update from the HC. As it has already been 3 months a document may already be available. I note that following the grant of Bail on 26 September 2018 we are now awaiting confirmation from the Probation Service that the address proposed by CCAT is appropriate. We were advised on 19 November 2018 that Probation have forwarded the request to Police whom he feels are in a better position to conduct an assessment."*

The reviewer commented that the presence of an EDT might encourage a voluntary departure- "*should he choose to withdraw any outstanding representations we could remove him imminently*". The asylum decision together with judicial review were noted as still being barriers to removal and it was concluded "*Consequently, I am content to authorise detention until a suitable address is available*".

30. Further updating was requested by CCAT on the 26th November 2018 and, on that day, apparently, the Probation Officer contacted CCAT to say that they needed a contact so they could arrange an address check. They were at that point awaiting confirmation of a shared bedroom in a shared house. Mr Baker notes that CCAT "*escalated the case with HMPPS*" on 27th November 2018.

31. Andrew Henshaw QC sitting as a Deputy Judge of the High Court held an interim relief hearing on 28th November 2018 and ordered that the SSHD provide

accommodation to DM by the 13th December or else provide the Court with a written explanation of the failure to do so.

32. In the event the SSHD was obliged to make a statement to explain why there had been no provision of accommodation.

33. It appears from what Mr Baker says that CCAT "*escalated the case with HMPPS*" again on 29th, and, finally, a home visit was undertaken to inspect a property in the morning of the 29th November 2018.

34. The property was rejected by the Probation Service on the 30th.

35. It is apparent from materials in the bundle that the reason for its, perhaps obvious, unsuitability was its proximity to a garden with a children's playground. The SSHD deemed it inappropriate to release DM to this address because the Probation Service had not accepted it as suitable.

36. On 5th December 2018 CCAT made a further request to Serco for an address and again requested that this be treated as a priority, nonetheless, on the 10th December 2018 a chaser was required to Serco. It was thereafter that on at least two occasions in the following two weeks IT outages are reported and have been proffered as a reason contributing to the delay.

37. The SSHD's Amended Summary Grounds of Defence state

> *"The Defendant advises that there has been a delay in the provision of a decision to the asylum claim due to recent IT outages which significantly impacted the Defendant's ability to access his IT system and draft decisions for the period 11-14 December and 17 December 2018."*

38. The Order of Andrew Henshaw QC to house DM was not fulfilled. The SSHD, rather, served the statement of explanation which is before me, which is in truth, a chronology much as appears above.

39. In the Defendant's Detailed Grounds of Defence the IT outages are noted within the chronology dealing with the application for accommodation as affecting it also.

40. Eventually when considering his case at a Case Progression Panel on the 12th December 2018 a recommendation for release was made. The Panel reached the conclusion that there "*were barriers in place that frustrate removal*" was no current prospect of imminent removal, and removal within a reasonable timeframe "may not be possible". They recorded that there was an outstanding asylum decision, and no timescales for an ETD. Release with appropriate measures in place to mitigate risks was recommended.

41. As to accommodation, a further update was yet again sought from probation by CCAT who said, although a home visit had gone ahead, that no full assessment was possible until a response from the police had been received. On the 21st December it was confirmed that another visit, planned for the 19th had actually not gone ahead.

42. The 21st December assessment of detention reflected that an address sourced by CCAT had not been approved by the Offender Manager, that the JR team was contesting the claim in Court, and that the progress of the ETD ought to be monitored. It was further stated that the asylum representations were being prioritised and the Pre-action Protocol Letter answered. The authorising officer noted the history including the judicial Orders made.

43. Finally, on the 31st December 2018 Probation confirmed the address had been assessed as suitable. On the 2nd January at 7.30 at night that DM was released from detention.

44. DM's asylum claim was refused on 21st March 2019, which he has appealed, and by an Order of the 25th March Karen Monaghan QC sitting as a Deputy Judge of the High Court granted permission to bring Judicial Review.

Legal Framework

Immigration Detention

45. The SSHD has power to detain a person against whom a decision to make a deportation order has been made as set out in Schedule paragraph 2(3) of Schedule 3 to the Immigration Act 1971 ("IA 1971").

46. It is well established that the SSHD's power so to detain is not unlimited but subject to the *Hardial Singh* principles, first described in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 as explained by Dyson LJ (as he then was) in *R (I) v SSHD* [2003] INLR 196 where the *Hardial Singh* principles were described by Dyson LJ thus:

> *"46.*
>
> *(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*
>
> *(ii) the deportee may only be detained for a period that is reasonable in all the circumstances;*
>
> *(iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;*
>
> *(iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.*
>
> *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 is 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 had not yet expired.*
>
> *48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he would abscond; and the danger that, if released, he will commit criminal offences."*

47. The first principle reflects the proposition that the power to detain must be used for the statutory purpose of detention pending deportation. To use it for an ancillary purpose would be outwith the "Padfield purpose" of the statute and unlawful. Part of the challenge made by Mr Khubber falls under this head

48. Further important elucidation as to approach is to be derived from ***R(MH) v SSHD*** [2010] EWCA Civ 1112 at paras 64 and 65:

> *"64. … there must be a 'sufficient prospect of removal' to warrant continued detention, having regard to all the other circumstances of the case … What is sufficient will necessarily depend on the weight of the other factors: It is a question of balance in each case.*
>
> *65. … [there is no legal requirement] that in order to maintain detention the Secretary of State must be able to identify a finite time by which, or period within which, removal can reasonably be expected to be effected. That would be to add an unwarranted gloss to the established principles. … of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to*

> *whether and when removal can be effected will affect the balancing exercise. There must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors. Thus in A (Somalia) itself there was "some prospect of the Home Secretary being able to carry out enforced removal, although there was no way of predicting with confidence when this might be" (per Toulson LJ at para 58); and that was held to be a sufficient prospect to justify detention for a period of some 4 years when regard was had to other relevant factors, including in particular the high risk of absconding and of reoffending if A were released:*
>
> *66…. "some" prospect in this context plainly means a realistic prospect."*

49. As set out in the *locus classicus* of detention case law, *R(Lumba) v SSHD* [2012] 1 AC 245, per Lord Dyson at para 121:

> *"The risks of absconding and re-offending are always of paramount importance, since, if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one"*

50. Further, in *R(Sino) v SSHD* [2011] EWHC 2249 at 62-64, with regard to the third Hardial Singh principle, it was emphasised that it is "*never sufficient merely to consider whether the time for which an individual has been detained is reasonable"*. It is also necessary to consider "*what the prospects for removing an individual are*" and whether, given any period which that individual has already spent in detention, there is a realistic prospect they will be deported in a reasonable time.

51. As it is expressed by Mr Khubber for the Claimant (and agreed on behalf of the SSHD), the "key over-arching question with regard to Hardial Singh principles (ii) and (iii) is whether there is a sufficient prospect of removal within a reasonable time". Although it is helpful to bear in mind the words of Jay J in *AXD v SSHD* [2016] EWHC 1116 para 180 to the effect that

> *"[i]f there is simply no prospect of removal within a reasonable time, it seems to me these risks [of absconding and reoffending] are irrelevant. However, many cases occupy a grey area, and to my mind the concept of "sufficient prospect" must to some extent be a flexible one, accommodating all the circumstances of the case… these cases are all heavily fact sensitive … it [is] necessary to quantify the risks and to weigh them in the balance against everything else."*

52. For this reason, as was observed by Jay J at para 181 of *AXD*, the risk of reoffending, whilst relevant, may be of less importance than the absconding risk. The latter frustrates the very purpose of the detention, namely deportation; as to the former, the purpose of immigration detention is not indirectly to facilitate the policy and objects of the criminal law.

53. It is also well established that it is for the Court to assess whether the period in contemplation was a reasonable one in all the circumstances; the Court does not apply a *Wednesbury* review, but must make the judgement on the basis of the facts as they were (whether as part of his reasoning or not), before the Secretary State (*R(A) v SSHD* [2007] EWCA Civ 804 per Toulson LJ at para 90, and *R(Fardous) v SSHD* [2015] EWCA Civ 931.)

54. The Court does recognise, however, that certain issues are nonetheless more within the expertise of the executive than of the judiciary. This may extend to judging, for example, the risks of a detainee absconding (per Jay J in *AXD* at para 176.)

55. It is further the case, of course, that any period of detention requires justification.

56. In *R (Krasniqi) v SSHD* [2011] EWCA Civ 1549 at para 12 Lord Justice Carnwath encapsulated the matter thus:

> *"12. The Hardial Singh principles, although approved as such by the Supreme Court, are not the equivalent of statutory rules, a breach of which is enough to found a claim in damages. As I understand them, they are no more than applications of two elementary propositions of English law: first that compulsory detention must be properly justified, and, secondly that statutory powers must be used for the purpose for which they are given. To found a claim in damages for wrongful detention, it is not enough that in retrospect, some part of the statutory process is shown to have taken longer than it should have done. There is a dividing-line between mere administrative failing and unreasonableness amounting to illegality. Even if that line has been crossed, it is necessary for the claimant to show a specific period during which, but for the failure he would no longer have been detained."*

57. Furthermore, detention does not necessarily become unlawful from the moment that it becomes non-compliant with the principles set out above. There is an opportunity, a period of grace, for the Secretary of State to take stock and make arrangements for release assuming this regard, by way of example, *FM v SSHD* [2011] EWCA Civ 807 at paras 60-64.

Accommodation under the IAA 1999

58. Section 4(2) of the Immigration and Asylum Act 1999 provides, relevantly:

> *"The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if –*

(a) He was (but is no longer) an asylum-seeker, and

(b) His claim for asylum was rejected."

59. The statute, by section 4(5), makes provision for regulations to specify the criteria to be used in determining whether or not to provide accommodation or arrange for its provision under the IAA 1999, and the *Immigration and Asylum (Provision of Accommodation) to Failed Asylum seekers Regulations* 2005 SI 2005/930 make such provision. They provide materially for present purposes as follows:

> *"**3. Eligibility for and provision of accommodation to a failed asylum- seeker***
>
> *(1) ... the criteria to be used in determining the matters referred to in ... respect of a person falling within section 4(2) ... of that Act are:*
>
> *(a) that he appears to the Secretary of State to be destitute and*
>
> *(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.*
>
> *(2) Those conditions are that –*
>
> *...*
>
> *(e) the provision of accommodation is necessary for the purpose of avoiding a breach of the person's Convention rights, within the meaning of the Human Rights Act 1998."*

60. The grant of Section 4 accommodation has been considered in several recent cases.

61. The question of delays in providing accommodation under s.4 IAA 1999 was addressed by this Court in *R (Sathanantham) v SSHD* [2016] 4 WLR 128. In that case the court rejected a challenge to the statutory scheme as a whole but held that, on the facts of that case, the s.4 bail system just did not work for high risk offenders and that in the cases before the court there had been unacceptable delay. Failure to determine an application for accommodation within a reasonable period of time breached the SSHD's duty to determine applications fairly and rationally.

62. Importantly, it was there held that there was no easy way to determine in each case at which point the processing of the s.4 application had gone on so long that it became unlawful. The Court held the following:

> *"69. I ... conclude that the statutory power in s.4(1)(c) is a power coupled with a duty. It is unnecessary to decide whether the duty extends to the existence of a policy of the kind I have been describing because there is one. The policy itself is not challenged as being unlawful. In my judgment, as [counsel for the SSHD] was inclined to accept, there is a duty to operate that policy fairly and rationally. That involves a duty to*

> *determine applications fairly and rationally and to apply the relevant policy. … This must extend to all the parts of the process for which the SSHD is responsible."*

And further:

> *"76. Delay in processing an application whose outcome will affect the liberty of the applicant may require the intervention of the court. R v SSHD ex parte Phansopkar [1976] QC 606, 626B-G per Scarman LJ is authority for this, if any were needed. This is a principle of the common law. That was a case where the right to family life under Article 8 was engaged rather than the right to liberty, but the common law has always protected the right to liberty. Habeas corpus and bail are creations of domestic law in England and Wales. In R (Noorkoiv) v SSHD [2002] EWCA Civ 770; [2002] 1 WLR 3284 the Court of Appeal held that the obligation to avoid delay in determining a person's right to be released is a more intense obligation than the duty to try criminal within a reasonable time. Lack of resources and administrative necessity do not justify such delays. This was a decision framed in terms of Article 5. It is authority for the need for public authorities to have effective systems for taking steps which are designed to affect [sic] the release from detention of any person."*

63. *Sathanantham* was a case in which a bail application could not itself actually be made until an address had been forthcoming under s.4 IAA 1999. Accordingly, factored into consideration in those cases was the possibility that a claimant might not have achieved bail, even with the benefit of a s.4 address. The present case is, obviously, different insofar as conditional bail had been granted. That is to say, DM is entitled to be released on the provision of approved accommodation.

64. In the present case, Mr Khubber for DM submits of course, that in effect, the only real reason for DM's detention in this case, after the 26th September grant of bail, is the SSHD's culpable failure to provide accommodation.

65. In the case of *R (Kedienhon) v SSHD* [2017] EWHC 3373 Robin Purchas QC sitting as a Deputy Judge of the High Court had occasion to consider a period of detention that extended from 3rd July 2015 until 13th September 2016 (considerably longer than in the present case). Bail in that case was granted on 13th September 2016 but it was accepted that, by the 15th June 2016, it was apparent that the SSHD could not remove the claimant within a reasonable time, accordingly he ought at that point to have been released. The issue then became the provision of a suitable address. It was the claimant's case that his detention after 15th June until the September of his release was unlawful.

66. The court determined that until the 15th June 2016 the detention had been lawful. However, the detention of the claimant from one week after that date, namely from the 23rd June until his release on the 13th September 2016, was unlawful. The court described a grace period to enable suitable accommodation to be found and that, in

the absence of special circumstances such a period should be short. The court indicated, where the period was in excess of a few days it would be reasonable to have evidence from the SSHD to explain the steps that had been taken and why it was not reasonably possible for the accommodation to have been found earlier, and why the balance of the relevant factors continued to justify the claimant's detention for the period. The absence of evidence in that particular case produced a decision from the court that the SSHD had not demonstrated she had acted proactively or with any sense of urgency or at all to find suitable accommodation over a period of July, August and the first two weeks of September. It noted however, that probation had been able to identify a suitable address 24 hours after the grant of bail.

67. The characteristics of note in that case were that the claimant, born in Belgium to Nigerian parents, had arrived in the UK with his mother. Her asylum claim was refused as was her further application for leave to remain including for the claimant. He had been convicted of numerous offences including robbery, attempted robbery, assault and theft in 2005 and 2006. He was served as liable for deportation in 2006 but no further action taken. Further convictions for drugs that were acquired in 2007 and in 2010 he was convicted of supplying Class A drugs and wounding with intent for which he was sentenced to a total of 8 years in custody. A further liability for deportation letter was served on him. Disputes arose as to whether he was Belgian or Nigerian and applications were made to various authorities for ETDs. A custodial sentence ended in September 2013. He broke the conditions of bail given in May of 2014 and was detained from July 2015.

68. *Sathanantham*, and indeed each of the authorities, emphasises the fact -sensitivity of decisions in this context. Further, that case also observes that the system of property allocation in s.4 cases is "*inevitably cumbersome and vulnerable to delay even without maladministration which may occur in individual cases from time to time.*" (See paragraph [31]).

69. In *R(Molon Baraka)* v SSHD [2018] EWHC 1549 (Admin) the court considered a s.4 IAA 1999 case in which the claimant had been in detention for 10 months awaiting an offer of suitable accommodation. That claimant was convicted of abduction and sexual assault with intent to rape and sentenced for four years imprisonment. His licence expired on the 6th January 2020, he was assessed as posing a high risk of harm to the public due to the nature of the offence and lack of responsibility taken for it. An initial bail application was withdrawn, although made after four months of detention, because no bail address had been forthcoming. The Judge in that case considering the initial bail matter before its withdrawal had indicated his view that the failure of the Service to approve an address after four months, for whatever reason, was indefensible. ([10]). In that case the court said the following:

> *"25. In forming a judgment as to whether the second step in carrying out the defendant's duty of seeking potentially suitable addresses has been taken fairly, rationally and with reasonable expedition it is right to bear in mind that 'there is a very limited supply of Complex Bail Accommodation' as the policy guidance document explains. Also, to be borne in mind are the further stringent requirements for accommodation to be suitable for the claimant which stem from his offending history,*

the risk assessments that have been carried out on him and the conditions that have been set for his licence."

70. The court examined each step taken to seek to identify appropriate accommodation, asking itself whether or not the delay had become unreasonable or the step could be categorised as irrational against the background of the difficulties of finding suitable accommodation in the context of the facts of the case.

71. In that case the court found that the defendant's actions were not unreasonable, irrational or unlawful. The case worker properly assessed the risks and following from that assessment identified the kind of accommodation that might be suitable for the claimant. There were false steps but not irrational ones. Most of the delay was the result of the police and probation service having to assess the properties in that case, apart from a short period of delay identifying another property which were not the fault of the SSHD.

72. It should be noted, that this case was brought at a time when no accommodation had yet been found. A mandatory order was asked, but was refused. The defendants stated in that case that they could not "magic up" accommodation within a set number of days. The court found the defendant had not acted unlawfully or that the delay had been such as to justify any order in that case.

73. Finally, my attention was drawn to ***R (Diop) v SSHD*** [2018] EWHC 1934 in this case there was an allegation of unlawful detention between the 10th November 2017 and the 5th December 2017. The claimant had been convicted of 8 serious and violent criminal offences all relating to domestic violence, two of which had been in the presence of children, and thereafter offences of assault and vandalism. He was sentenced to 8 months imprisonment, and to 22 months and 18 days imprisonment. The actual request for s.4 bail accommodation was made on 11th October 2016 and thereafter various asylum and other claims were made. The SSHD had submitted that after a second application for bail accommodation had been made in August 2017, he had taken reasonable steps to secure accommodation but no address was available. A contrast was pointed with *Sathanantham* where detention in the three cases averaged more than 18 months.

74. In *Diop* the date of the grant of bail in principle on the 10th November 2017 was said to be the start of the period of unlawfulness. The court held that failing to take effective steps of expedition before September 2017 knowing the difficulties that a valid offender requiring level 3 accommodation would pose, constituted unlawfulness. The activities went beyond maladministration and the bail accommodation, which had been applied for, ought to have been in place by the time the bail application was granted on the 10th November 2017.

75. It is trite to observe that the cases are highly fact sensitive. They also reflect a the application of a set of rules or principles that contains elements that are sometimes in tension and hard to reconcile. For example, it is the case that a lack of resources and administrative necessity do not justify delays that may inhere in releasing a person from detention, yet it is also well-recognised that there is a dearth of suitable bail accommodation, and in particular in respect of those on the Sex Offenders Register that must be taken into account when considering how the ***Hardial Singh*** principles

apply in any particular case. The SSHD has however developed Guidance reflecting the essential principles.

Guidance

76. The Secretary of State operates guidance contained in Chapter 55 of his Detention Policy reflecting the principles set out above. It deals in a section entitled "55.1.2 Criminal Case Work Cases" particularly with cases concerning Foreign National Offenders ("FNO's"). This provides materially:

> *"… the starting point in these cases remains that the person should be granted immigration bail unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attentions must be paid to their individual circumstances.*
>
> *In any case in which the criteria for considering deportation action (the "Deportation Criteria") are met, the risk of reoffending and the particular risk of absconding should be weighed against the presumption in favour of immigration bail. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria and/or because of the likely consequences of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However any such conclusion can be reached only if the presumption of immigration bail is displaced after an assessment of the need to detain in the light of the risk of reoffending and/or the risk of absconding."*

77. Further, under 55.1.3 the following appears:

> *"… substantial weight should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Or if the likelihood of the person re-offending and the seriousness of the harm if the person does reoffend, must be considered. Where the offence which has triggered deportation is more serious, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of granting immigration bail.*
>
> *In cases involving these serious offences, therefore, a decision to grant immigration bail is likely to be the proper conclusion only when the fact is in favour of release are particularly compelling. In practice, immigration bail is likely to be appropriate only in exceptional cases because of the seriousness of violent homosexual, drug related and similar offences. …"*

78. Under 55.1.4.1 the guidance requires decision makers to bear in mind, that in order to comply with Article 5 and domestic caselaw they should bear in mind:

> *"(a) The relevant power to detain must only be used for the specific purpose for which it is authorised. This means that a person may only be detained under immigration powers for the purpose of preventing his unauthorised entry or with a view to his removal (not necessarily deportation).*
>
> *…*
>
> *If before the expiry of the reasonable period it becomes apparent that the purpose of the power, for example removal, cannot be effected within that reasonable period, the power to detain should not be exercised …"*

79. Under the heading Application of the Factors in 55.3.1 the criminal casework cases, the following appears:

> *"Imminence*
>
> *55.3.3.4 In all cases, case workers should consider on an individual basis whether removal is imminent. If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks.*
>
> *…*
>
> *At risk of absconding*
>
> *55.3.2.5 If removal is not imminent, the case worker should consider the risk of absconding. Where the person has been convicted of a more serious offence then this may indicate a high risk of absconding. An assessment of the risk of absconding will also include consideration of previous failures to comply with immigration bail.*

Submissions of the Claimant

80. Against this background the Claimant argues as his primary case that his immigration detention was unlawful between the dates of 26th September 2018, the in-principle bail grant, until his release on the 2nd January 2019. Mr Ranjiv Khubber for DM argues that there is delay which falls foul of the *Hardial Singh* principles to the effect that, in his submission, the period during which the Claimant had been detained was unreasonable in all the circumstances of the case.

81. Further and alternatively under the third *Hardial Singh* principle, that it had become apparent that the SSHD was unable to effect deportation within a reasonable period

and could therefore no longer lawfully exercise the power of detention. He submits that the issue as to whether there was a "sufficient prospect" of removal within a reasonable time is central to the case, that is, he says, the extent of certainty or uncertainty is key.

82. Further he says that *Hardial Singh* principle (iv) makes clear that when using the power to detain, the Secretary of State is required to act with reasonable diligence and expedition to effect removal. If that cannot be said, following *Krasniqi*, the detention will be unlawful where the lack of expedition is more than mere administrative failure, and constitutes unreasonableness. If the lack of expedition causes detention to be longer than it otherwise would have been, the principle is breached. He refers to *Saleh v SSHD* [2013] EWCA Civ 1378. In that case fifteen months during which 12 months revealed little or no activity founded a successful submission that 8 months of the 12 months delay was unreasonable, rendering the detention unlawful (see paras 57-68).

83. He also submitted that the evidence reveals that there came a point at which the power to detain under the IA 1971 was not being exercised for an immigration purpose, namely to effect an imminent removal but, rather, improperly merely or, he argued, *predominantly* for a different, non-immigration purpose: to protect against the risk that he might reoffend. This had arisen because of delays in considering his application for s4 assistance and because the SSHD could not, for whatever reason, provide s4 accommodation to which, it was accepted, DM was entitled. This was an unlawful use of the power to detain and fell foul of *Hardial Singh*.

84. The Claimant asserts that even if the SSHD is not directly to blame for the delay he is not immunised against a finding that the delay renders the detention unlawful. Further, even where, as here there are risks to be balanced, the SSHD must at a certain point opt for the "lease worst option" and facilitate release. That time had come here-on his first case, as soon as the FTT granted bail in principle.

85. The essence of his submission is that during the material period there was a diminishing hope of removal, it becomes merely an aspiration - not anything that can properly be described as a realistic prospect.

86. By the 26th September 2018 it is submitted, the Secretary of State should have realised the Claimant's removal was not likely to be imminent or, as it is put in the Skeleton Argument, "even achievable within a reasonable time".

87. The second limb of the Claimant's challenge concerns delay in the provision of accommodation under s.4 IAA 1999 which impeded his release since the bail grant was conditional upon his release to a place approved by his Offender Manager.

88. The Claimant frames his case in the following way.

Hardial Singh Principle (ii) & (iii)

89. Further to *Hardial Sing*h (ii), detention under the IA 1971 is unlawful when the period of detention is unreasonable in all the circumstances. Under *Hardial Singh* (iii) if before the expiry of a reasonable period it becomes apparent to SSHD he cannot

effect deportation within a reasonable period, he may not seek to exercise the power of detention.

90. Necessarily, and reflected in the authorities, is the proposition that there is overlap between these two principles. What is critical to a judgment as to whether they have been infringed is an assessment as to whether there is a "sufficient prospect" of removal within a reasonable time in any case. The Claimant's case here is that, through time there was a decreasing chance of removal. It became only an aspiration, in the language of the claim, rather than a realistic prospect.

91. Mr Khubbah's first submission is that by the 26th September 2018 it was clear that the Claimant's removal was not likely to be imminent or achievable within a reasonable period and that this should have been apparent to the SSHD. There had been an asylum interview on the 12th September 2018, no decision had flowed from that interview by this time. It was also highly likely that the Claimant, who was represented, would appeal an adverse decision which necessarily connoted a more extended period including the chance that it was successful. Removal could not take place, in any event, until the asylum claim, and any appeal thereafter, had been properly considered. This would have meant, he said, that at least three months would pass from the date when the asylum decision was handed down. The SSHD had never gripped the reality of the asylum claim timetabling, and should have realised in September removal was not a realistic prospect within a reasonable time.

92. As to the relevant considerations of absconding and reoffending DM says that the asylum claim, and the outcome of the recent interview was a clear incentive against absconding and also the risk of reoffending was of lesser importance in the context of immigration detention. He points for support for the latter proposition to the words of Jay J in *AXD* (above). He submits that even a high risk of absconding is capable of being met by stringent reporting conditions and observes that a risk of absconding was no barrier to the grant of bail by the FTT on the 26th September 2018. DM points to the fact that he had been detained for 2½ months by the 26th September 2018 and at this point it should have been apparent to the SSHD that, in particular, the reactivated asylum claim meant there were likely, months of further delay. This meant that at this date it should have become apparent to the SSHD that there was no reasonable prospect of his removal within a reasonable time.

93. The Claimant says these factors have resonance for *Hardial Singh* (iii) as well as *Hardial Singh* (ii) because the length of detention was contrary to (ii), being unreasonable in all the circumstances of this case.

94. These factors says the Claimant also support a submission of breach of *Hardial Singh* (iv). The SSHD has failed to act with reasonable diligence and expedition as demonstrated by the failure to progress the asylum claim. He points to the fact that although there was no need for an interpreter, yet it took until the 12th September, almost a month after the asylum claim raised on the 14th August 2018 to organise an interview. No decision on the August application had been made even at the time that the judicial review was instigated (November 2018).

General public law grounds

95. The same reasoning DM says applies in respect of the submission that a public law error was made in that the SSHD has not acted consistently with his policy contained in Chapter 55 EIG. Detention was not used sparingly, as required under the policy, and the presumption against detention not given proper effect. There was further an inadequate approach to the issue of the barriers to removal and of the requirement for the asylum decision to be progressed and further decided upon.

Detention Contrary to Article 5 ECHR

96. Mr Khubber prays in aid the same reasoning to support a submission that the detention was contrary to Article 5 ECHR.

"Padfield Purpose" of the exercise of the power to detain

97. DM submits that the power to detain was not used consistently with the statutory purpose of the power to detain given by IA 1971 Act namely for detention pending deportation. Rather, in the present case, it was "detention pending the finding of suitable accommodation". He argues, in effect, that although factors such as an absconding risk and an offending risk were material in the context of this particular case they ought properly to have been regarded as of minimum importance. The continued detention demonstrates that the overriding purpose of the detention was the finding of suitable accommodation. It is further submitted that the Secretary of State cannot point to the fact that the bail grant was conditional as providing a complete answer to the Claimant's submission that there was a breach of *Hardial Singh* and the *Padfield* principles in this case.

98. At the time of the bail application DM was effectively destitute and had no accommodation to offer to the Tribunal in respect of his potential release. Accordingly, the application for accommodation under s.4 of the IAA 1999 was made promptly on the 3rd September 2018. Further information was not requested from DM until 3rd October (it was supplied to SSHD the same day) and in all it took over a month for the SSHD to decide that application: granting the right to accommodation only on 11th October 2018. Sourcing the accommodation itself, of course took months more.

99. The Claimant points to the chronology set out above as evidence of delay in management of the provision. The Claimant's submission is that the delay has thwarted the bail granted by the Tribunal over a number of months. Mr Khubber highlights the sequential approach of the authorities to the provision of accommodation: the SSHD's contractors obtain the property, it is then sent to probation, for a suitability check, possibly then passed on to the police, or passed back.

100. As set out above, DM says this was not a speedy route asylum claim, so there could be no suggestion that a quick removal was likely.

101. He relies, naturally, on the case progression recommendation on 18th December 2018 when the progression panel finally considered that there was no chance of imminent removal within a reasonable timeframe.

102. DM also submits, with some justification that any significant progress was made under the shadow of Court Orders and points to the strong language used by Mostyn J on the 12th November as reflecting an appropriate response to the absence of provision of accommodation by early November 2018. Even when ordered by Mr Andrew Henshaw QC on 28th November 2018 to accommodate DM appropriately by13th December or explain why, the SSHD did not. It did produce the chronological explanation before the Court now, however.

103. Mr Khubber said it is not possible to characterise what happened as merely maladministration. Here there is causation: the Claimant was detained longer than he would have been had this not happened as is reflected in the reasoning in *Sathanantham* and the case of *AC (Algeria)* which supports the proposition that there may come a time when action (release, or in this case provision of accommodation) should have been provided, in any event.

104. When weighing the impact of the asylum claim, he reflects that this was never said to be a hopeless case on the 12th September 2019, nor would that be an appropriate response. Accordingly it bears a significant weight when considering its relevance to the question of reasonable length of detention. Further, absconding although relevant, is not a trump card. He referred me in particular to the two passages from the case of MH, above as set out. In particular emphasising the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a <u>sufficient</u> prospect of removal to warrant continued detention when account is taken of all other relevant factors. When approached in this way, DM says, the answer to the question as to whether there was a realistic prospect of removal must be no. The prospect, such as it was, was not sufficient to warrant detention in the circumstances of this case.

105. By reference to the observation in *AXD*, as to the existence of a *"grey area"* DM submits that what happened in this case was that inadequate regard was had to the likelihood of removal, it was predominantly, and perhaps only, the risk of reoffending that was reconsidered. The essential reason for detention was not to support an imminent deportation, but rather the criminal justice purpose, as it might be called, to prevent the opportunity of reoffending.

106. Once bail had been granted, the SSHD should have been prepared to review their stance and have a contingency plan to manage any risks in the community. However, the consideration on the 28th September 2018, two days after the grant of bail, when dealing with removability noted the asylum decision as a barrier and also the ETD on which a three month timeframe had been given on the 3rd August. It also, says DM begins to reveal the unlawful approach of the SSHD where the power to detain is used purely to hold DM until accommodation is found.

107. Under the authorising officer's comments on 28th September the following is said [emphasis added]:

> *"I note the case has been referred as appropriate, there is clear progression however* ***given the recent bail grant I will authorise detention to enable probation services to obtain an address****. We will need to continually chase this as detention powers are now up against the grant. We will also need to be*

> *mindful prior to release as we need to inform the tribunal as per the grant notice.*
>
> *Nonetheless, I agree with C/O assessment above and detention should be maintained to mitigate risks and manage contact in the community. He has shown a blatant disregard for UK laws both criminal and immigration and therefore detention would remain appropriate."*

108. Criticism is made of the further detention review at the end of October. The consideration also reveals says DM, the inappropriate slant of this detention consideration, like the wording of the previous review. It reads:

> *"I agree that* ***detention is warranted pending the procurement of a suitable address*** *for which (sic) is an essential requirement for his release as per the grant of bail on principle.* ***Once this is secured and agreed by the Offender Manager, we can facilitate release with clear mitigation of risk in place in line with the Judges (sic) request.***
>
> *Whilst the section 4 accommodation is being sourced we have referred the case for consideration of the asylum further representations which are being prioritised at this time. We have responded to the PAP.*
>
> *The risks associated with release have been fully considered and do outweigh the presumption to liberty at this time. He is not an adult at risk who engages the policy.*
>
> *In light of the above,* ***I am content to maintain detention whilst the accommodation is being proactively sourced****."*

109. He submits there is a movement away from what should be the focus – in reality the likelihood of removal was reducing because of the asylum decision delay, but the focus of the SSHD was entirely on managing risk, this is reflected in the stated intention to detain until accommodation became available. The lack of action meant there could be no removal within a reasonable time: in fact it was going backwards.

110. These matters support each of the arguments under *Hardial Singh*, (ii), (iii) and (iv), it is submitted, the last of them concerning the lack of due diligence. There has been no real explanation says DM as to why it took so long to resolve. It is suggested that it would have been accomplished far more speedily due diligence been applied.

111. Whilst recognising, following *Sathanantham* there is no general obligation to provide accommodation, Mr Khubber for DM relies upon the SSHD's obligation to determine his application fairly and rationally, which in effect means he has a duty to make reasonable efforts to provide the accommodation. Further, if unconscionable delay results it is be possible to say that the determination was not carried out fairly or rationally.

112. The SSHD had sufficient information on the likely progress of the asylum application by the 13th September and the delay in context amounts to unreasonableness.

SSHD's Submissions

113. The SSHD submissions are straightforward. She says that the history and chronology speak for themselves and provide clear evidence supporting a rebuttal of the suggestion that there was any illegality. Miss Masood submits the detention for the whole period down to release can be clearly justified by the SSHD relying particularly, upon the long term disregard by DM of his obligations under the immigration laws, evidenced by the overstaying for almost 10 years and absence of regularisation of stay.

114. Further, his apprehension by the immigration authorities or the police was on each occasion when drunk and disorderly. He had a reporting restriction on one occasions and failed to report.

115. The SSHD looks with some scepticism at his assertion that he did not receive invitations to interview pointing to postal addresses obtained by the Claimant which, it was submitted undermined his suggestions that he had not received asylum documentation.

116. Further, and most importantly in the SSHD's submission, one must take proper cognisance of the circumstances of the index offence which involved two girls aged 13 and 14. It should be noted that DM's licence which expired on the 4th October 2018 also contained a condition regarding Probation approved residence. It could not be gainsaid, the SSHD submitted, that there was a significant risk of absconding and also of re-offending in the case.

117. It is plain, in particular from the Probation Services' email of the 25th September 2018 that the nature of the offence was serious and, appropriately, taken seriously. It is the case that DM was to be managed initially as a high risk case were he to be released given the aggravating factors of his modus operandi.

118. The gist of the SSHD's reasoning on the accommodation claim and the suggestion that the *Padfield* purpose of the statute has been abrogated are not the central issues says Ms Masood. This was described by her as in essence a *Hardial Singh* principle (iii) case. The essential question is what is the reasonable point beyond which it was not lawful to detain DM?

119. In defence of the SSHD's position that it had not become apparent that the SSHD would not be able to effect deportation within a reasonable period, the Defendant points to the fact that the asylum claim was prioritised when referred to the local asylum team (as reflected in the detention review of the 24th October 2018). The DIA process estimated a timescale for resolution of three months further, events beyond the SSHD's control (including a number of IT outages) thwarted a more prompt resolution of the matter.

120. The SSHD submits, contrary to the Claimant's contention, that the detention reviews did appraise the progress of the asylum claim, and points to those occasions upon which it was mentioned in the notes. The SSHD relies upon the fact that detention

began only in July 2018, that the ETD process had been started, and DM had been assessed (defensibly) as posing a high risk of absconding.

121. She relies on what she describes as his poor immigration and compliance history and lack of ties to this country. This Claimant had previously claimed asylum on a number of occasions so the fact that a pending claim existed did not reassure concerning a potentially diminished absconding risk. He had previously failed to co-operate, which included failing to turn up for asylum interviews and had, to date, been unsuccessful in his asylum claims. Rather than lodging an appeal he had, in 2016, absconded. It does, as a matter of risk, deserve particular weight because that frustrates the deportation purpose of Immigration Act detention.

122. The SSHD, likewise, relies upon a real risk of harm and of reoffending evidenced particularly, by the 26th September 2018 Probation Service communication as persisting throughout the period of detention, which was not, in this context, to be judged as unreasonably long. It was important to recall that the bail granted was conditional.

123. Any suggestion that delay amounting to unreasonableness occurred is denied and as to the extent of the period during which lawful detention might take place, the SSHD points particularly to the difficulty that inheres in high risk cases of FNOs (Foreign National Offenders) who are subject to Multi Agency Public Protection Arrangements ("MAPPA"), where, as here, they might be more difficult to accommodate due to the restrictions of available suitable accommodation. The seriousness of the offence and the assessment of the Probation Service were also matters which fed into the detention period and militated against any finding in respect of the accommodation that there had been unreasonable delay or anything that could be characterised as worse than maladministration – which was not in any event conceded.

124. In particular Miss Masood points to what she describes as *"continued and sustained efforts"* made by the Secretary of State to secure approval of the first address and thereafter to source another property and secure its approval. None of this discloses failures of the order of those seen in the case law where breaches have been found, further they are not signs of any failure by the SSHD under the duties arising under the IAA 1999.

Consideration

125. In my judgement, the time came, well before 2nd January 2019, when it could not properly be said that there was any realistic prospect of DM's removal within a reasonable time. Therefore there did come a time when the SSHD was not able lawfully to exercise the power of detention in respect of the Claimant, and this breached the third *Hardial Singh* principle. By definition the Claimant was detained longer than a reasonable time, because he was not released until 2nd January 2019.

126. The period at which in my judgement it should have become apparent to the SSHD that there was no realistic prospect of removal was reached, doing the best I can, in early November 2018. I am content to take that date as 7th November 2018, that is to say five days before the Order of Mostyn J, and twenty-one days before the Order of Andrew Henshaw QC. The backdrop to this, on the ground, is the abortive attempts to get Serco to prioritise and, shortly thereafter, to get Probation and/or the Police to get

a move on - coupled with the difficulty in contacting whoever was supposed to be ascertaining suitability (see the earlier factual details).

127. I shall examine the factors that are important in my estimation, on the facts of this case.

128. I accept the suggestion on behalf of the SSHD that the factors which are relevant to a consideration of the *Hardial Singh* principles attaching to immigration detention are also relevant to deciding whether there has been unlawfulness in connection with the s4 IAA 1999 duty.

129. The pertinent features of this case start, firmly, with the presumption of liberty. This is not mere words, it is the essential starting point. Features of the case that might persuade one that the presumption has to be displaced must be examined critically, but it is central that the jealousy with which the court will guard the right to, and presumption of liberty must not be forgotten. The SSHD bears the burden of proving the lawfulness of this detention.

130. It seems to me that, necessarily, the attempts to find accommodation pursuant to the s4 grant, whilst founding an aspect of the case on unlawfulness put by DM, must also resonate first when considering the length and the lawfulness of DM's detention. It seems to me logically correct to begin with an analysis of the *Hardial Singh* points, indeed with the third rule in *Hardial Singh.*

131. In order to make the judgment as whether it should have become apparent to the SSHD that removal within a reasonable time was no longer a real prospect, a number of factors must be weighed up.

132. Dealing first with the absconding risk, this is undeniably important in the present context. Absconding assumes particular significance because a person who absconds defeats the very statutory purpose supporting the initial detention: namely his removal (*R(Lumba*) at para 121. If DM were to abscond, he would thwart the Deportation Order already made.

133. There was of course a risk that an FNO such as DM, without ties in the UK, used to living rough, by definition, as a s4 applicant with nowhere to go, and with a past history of having failed to report to the Immigration Authorities, might abscond and go to ground again. In this case however, in my judgement the circumstances were significantly different from earlier. Now, there was an asylum claim that was consistent with a claim he had raised but not pursued in the past. Now, DM had solicitors, who were guiding him through the necessary steps and advising him. This time round, with support, he had agreed to be interviewed and, as Mr Khubber pointed out, it had not been said that his claim was hopeless at any point; a refusal would likely carry with it an in country appeal. In my judgement this factor cannot be dismissed as insignificant nor automatically equated to the reference to time spent pursuing an "*unmeritorious appeal*" as referred to in the *Lumba* passage cited above. Whilst acknowledging the risk of absconding, the risk is not of such magnitude that in my judgement it can support the detention of DM for a period that extended more than 3 months beyond his grant of conditional bail.

134. Mr Khubber submitted in terms that the risk of reoffending is not of particular relevance here, nor to the application of *Hardial Singh* principles of detention. I disagree. This means I respectfully disagree with the assessment of Mr Justice Mostyn that in the present context the risk of reoffending is quite irrelevant. In my judgement it does have relevance. The passage already cited from *Lumba* makes clear that it is relevant to a detention of this nature. It must be, in my judgement, since DM is being deported as a result of his proven criminal behaviour which of itself posed a risk - judged to be medium - to others, particularly women and children. DM's deportation was deemed conducive to the public good- in other words it was in the public interest for him to be deported, and part of the concern on behalf of the public was necessarily that he might abscond and offend again before that deportation was effected.

135. It seems to me, if in truth, even taking account of the risks of re-offending, there was *no* prospect of removal within a reasonable time in all the circumstances, then, it would be the case that detaining a person purely to obviate any risk of re-offending would not be lawful. Once you have taken into account the offending risk in calculating the reasonable time, and once that reasonable time has passed, you cannot make detention beyond that point lawful by pointing to a risk of re-offending. But that is not the same as saying that, when assessing the length of the reasonable period of detention for the purposes of *Hardial Singh* principles (ii) and (iii), that a risk of re-offending is irrelevant.

136. It was thus relevant here to consider the extent to which there was a risk of re-offending. The authorities were however rather handicapped in this case, as there had been no sentencing report, and no OASys report to give a considered view from those involved as to the risks pertaining to DM. The Probation Service's comments and indeed those of the SSHD were very much on the "doing the best we can" basis. The Probation Service used information gleaned from sources unknown about apparent circumstances of the offences and other accusations that were incapable of verification or real challenge. That is not to say that they were wrong to do so- they had to do whatever they could to try to make a judgement, but it does mean that the unverified information gathered concerning what may have been said about the circumstances of the case does not bear as much weight as a report or formal verifiable finding would.

137. I put into the balance that this conviction for exposure was a first offence, there is no evidence of repeat criminal offending of a sexual nature, nor a history of any other criminal conduct. Whilst the offence was most certainly serious, and involved vulnerable victims, it did not attract an extremely lengthy custodial sentence (although I note that the SSHD's notes contain a reflection that for such an offence it was a significant sentence). I also take account of the fact that by the 4th October 2018 the non-custodial element of DM's sentence had also expired.

138. I thus attribute some, but not supervene, significance to the risk factor of re-offending. It does not persuade me that the reasonable time for the purposes of *Hardial Singh* principles (ii) and (iii) extends up to 2nd January 2019, DM's release date, as submitted by the SSHD.

139. In this case, among the other likely relevant factors were, as indicated in *R(I)* at para 48, the length of time that DM had already been in immigration detention. DM's immigration detention began on 6th July 2018. As the Tribunal judge reflected (and as

is cited above) the FTT Guidance recognised that three months immigration detention might, absent special factors, be considered to be reasonable, whereas six months would be thought a long time. Whilst of course that is only the briefest of guides, in this case DM was granted bail in principle after about two and a half months, yet he spent in total almost six months in detention. Almost three months of that time was after he had been granted a right to s4 accommodation on 11 October 2018.That is a not insignificant amount of time. It has not been alleged, nor could it properly, that he has himself improperly contributed to it by his behaviour or lack of cooperation.

140. I recognise that in these cases one may be used to seeing really very lengthy spells in immigration detention, but that does not derogate from the fact that by early November 2018 DM had been detained for four months.

141. I acknowledge that DM was not an AAR, and that there was nothing in particular about his conditions that he claims exacerbated his detention for him. However there is one particular factor which the SSHD prays in aid, and I agree with her.

142. That factor is, that it is relevant that it was obviously difficult for the SSHD to provide, in a timely way, accommodation under s4 of the IAA 1999 that satisfied the requirements of sex offender. There is a dearth of such accommodation, it is clear. I do take into account that it takes more than a few days to provide such accommodation in this context. This lack of a ready supply of specialist FNO accommodation that is appropriate for a sex offender may not, however be taken so far as the SSHD in this case would wish, in order to excuse or explain the extraordinary delay between the grant of conditional bail, and the release of DM to his accommodation. Part of this delay was occasioned by the more than a month that it took the SSHD even to decide the s4 application. In my judgement that is too long a time. I do not hold that it constitutes evidence of unlawfulness, but it places an extra burden on the SSHD to get a move on once the decision is finally made, to bring it to fruition.

143. The rest of the delay presents a sorry tale of a deeply unsatisfactory "system" operating between the SSHD, his suppliers, the Probation Service and sometimes the Police. The chronology speaks for itself.

144. As was set out in *R(I)*

> *"Delay in processing an application whose outcome will affect the liberty of the applicant may require the intervention of the court. R v SSHD ex parte Phansopkar [1976] QC 606, 626B-G per Scarman LJ is authority for this, if any were needed. This is a principle of the common law. …*
>
> *… In R (Noorkoiv) v SSHD [2002] EWCA Civ 770; [2002] 1 WLR 3284 the Court of Appeal held that the obligation to avoid delay in determining a person's right to be released is a more intense obligation than the duty to try criminal within a reasonable time. Lack of resources and administrative necessity do not justify such delays. This was a decision framed in terms of Article 5. It is authority for the need for public authorities to have effective systems for taking steps*

which are designed to affect [sic] the release from detention of any person."

145. In this case there was a grant of bail on conditions. Those conditions proved extremely difficult to meet. The disturbing sequence of referral, and re-referral to Probation, checking, passing to the police, cancelling of visits and so forth speaks of a service that is breaking if not broken. This is the context for FNO's afforded accommodation under s4 powers. My understanding is that other statutory provision in this area of FNOs such as Schedule 10 accommodation, comes from the same pool of housing, which is limited.

146. There is clear evidence that the SSHD is aware of the failures of the system and that individuals within the Department, particularly when chased by Court Orders, did seek to speed up or at the worst, nudge the process along. In a case involving the liberty of the person, I do not accept that a "best endeavours" approach operates to mitigate delay or extend the reasonable time within which either deportation should be accomplished, or as here, within which release may be achieved. On the other hand, I am not persuaded that there was here unreasonableness that rendered the operation of s4 unlawful as was argued on behalf of DM. There was maladministration but I am just persuaded that there was not in fact unlawfulness in the operation of the s4 system.

147. One further element is of relevance. In my judgement the "period of grace" that the SSHD is allowed to give effect to a release from detention must, in the present context, be affected by the fact that the nature of the accommodation required places particular burdens upon the providers. It seems to me that the period of grace may be somewhat longer in this present case than in the usual case.

148. The effect of what I have decided is that, from the grant of conditional bail to release, a period of about 5 weeks at most could lawfully elapse before release had to be effected on the facts of this case. That is in my view a long time.

149. In my view the logical way of analysing the interplay of *Hardial Singh* and s4 IAA 1999, is to understand that the period of grace within which SSHD may execute the necessary administrative requirements for release has to be extended in circumstances such as the present. I am highly conscious that such authorities as have considered the point have confined such a period to days, not months; (see *Savanantham* and *FM*) and I believe this holding is at the outer reaches of what could ever be described as "grace".

150. If I am wrong about that analysis, I nonetheless am of the view that, if examining the s4 accommodation power separately from the *Hardial Singh* paradigm, in the context of other detainees, and of other facts, this 6 week time period may be at the outer reaches of lawfulness. For present purposes, I treat it as part of the context in which I judge the extent of a "reasonable time" for principles (ii) and (iii) of *Hardial Singh*.

151. It seems to me that Lord Dyson's analysis of the words of Woolf J in *Hardial Singh* (cited at paragraph 24 of *Lumba*) are apposite in this case:

> *"It is clear Woolf J was not saying that a person can be detained indefinitely provided the Secretary of State is doing all she reasonably can to effect removal."*

152. Moreover, I am of the view that, having been told in early August 2018 that there was a maximum three month time frame for an EDT, by the first week of November, three months later, when there had been absolutely no developments, and no EDT, the SSHD could not say that there was a realistic prospect of removal within a reasonable time – DM needed to use an EDT and he had already been in immigration detention since the 6th July 2918. The absence of an EDT after the elapse of three months constituted a barrier to removal. Indeed, as may be seen, just over a month later, by 12th December, when release was recommended, the detention reviewers record that there were no timescales in place for the EDT.

153. Likewise, the points made by Mr Khubber concerning the obvious deductions to be made from the asylum position have some merit. This was not an asylum case that, on any view by early November 2018, had an end in view in the near-term. A careful reading of the detention review notes after early November and through December 2018 does in my judgement betray the slight sense that a major reason for DM's detention was not because removal was in reasonable prospect, but that he was being held till approved accommodation turned up.

154. I agree with Mr Khubber that the handling of the asylum issue within the consideration of the SSHD led him into error. Although I am not here judging other than for myself, the SSHD did, as is alleged, in my view fail to grasp that as the weeks passed and the asylum interview had been conducted and still no decision produced, that with an appeal process, if necessary, still to be gone through once the decision arrived, the reasonable time for detention was rapidly slipping away. In so far the SSHD did consider it, she failed to appreciate the likely length of time the process would take.

155. It is a corollary of my judgement that detention after 7th November 2018 is not legally sustainable; I make no further finding on the violation of *Padfield* principles, or other error of law. Similarly, I do not believe that analysis by way of Article 5 ECHR, takes the matter further in this case.

156. Accordingly, I hold that the period of detention from 7th November 2018 to 2nd January 2019 was in breach of the second and third principles to be derived from *Hardial Singh* and was unlawful.