Neutral Citation Number: **[2021] EWHC 2995 (Admin)**

Case No: CO/575/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2021

Before :

MR JUSTICE SOOLE

- -

Between :

THE QUEEN
(on the application of ANDRE BABBAGE) **Claimant**

- and -

Defendant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

- -
- -

Phil Haywood (instructed by **Deighton Pierce Glynn**) for the Claimant
Jonathan Lewis (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 27, 29 April; 30 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SOOLE

Mr Justice Soole:

1. The Claimant is a Zimbabwean national, now aged 35. He was detained by the Defendant on 27 February 2020 pursuant to the Immigration Act 1971 and thereafter remained in detention until released on bail in the week in April 2021 when this hearing began. In consequence his claim for release fell away. He seeks declarations that his detention was unlawful by reason of breach of the Hardial Singh principles and/or public law error relating to delay in the provision of accommodation pursuant to s. 4 Immigration and Asylum Act 1999 ('section 4'); and consequential damages.

2. On the day after the close of argument (30 April), Morris J handed down his judgment in AO v. The Home Office [2021] EWHC 1043 (QB). Having considered its analysis of the Defendant's powers and duties under section 4, the parties agreed that it was necessary to have a further hearing on that aspect of the claim.

The law

3. There is no dispute that the relevant principles for each ground of the claim are summarised in the judgment in AO, which I gratefully adopt:

Hardial Singh

[11] *'The principles to be applied in determining the length of time for which a person may be so detained under the 1971 Act were established by Woolf J in* R v Secretary of State for the Home Department, ex parte Hardial Singh *[1984] 1 WLR 704. These well-known principles, as stated by Lord Dyson in* R (Lumba) v Secretary of State for the Home Department *[2012] 1 AC 345 at §22, are as follows:*

(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose ("Hardial Singh 1");

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances ("Hardial Singh 2");

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention ("Hardial Singh 3");

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal ("Hardial Singh 4")."

[12] *As regards the question, under Hardial Singh 2 and 3, of how long is a reasonable period, the list of relevant circumstances include: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences. See* Lumba *§§104 and 105, citing* R(I) v SSHD *[2002] EWCA Civ 888 at §48.*

> [13] *As regards the risk of re-offending, the magnitude of the risk includes both the likelihood of re-offending and the potential gravity of the consequences. The purpose of the power to deport is to remove a person whose continued presence would not be conducive to the public good. As regards the risk of absconding, the likelihood should not be overstated. It is not "a trump card":* R(I) *at §53 cited at* Lumba *§123.*
>
> *…*
>
> [15] *As regards Hardial Singh 3, the question is whether it is "apparent" that deportation will not be effected within a reasonable time. That does not cover the situation where the prospect of removal is "merely uncertain". There must be a "sufficient prospect" of removal to warrant continued detention and what is sufficient is a question of balance in each case. There can be a realistic prospect of removal without it being possible to specify or predict the day by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all:* R (Muqtaar) v Secretary of State for the Home Department *[2012] EWCA Civ 1270 at §§36-38.*
>
> *Hardial Singh 4*
>
> [16] *As regards Hardial Singh 4, it is not enough that, in retrospect, some part of the statutory process is shown to have taken longer than it should have done. It is necessary to demonstrate unlawfulness going beyond mere administrative failing and to show a specific period during which, but for the failure, he would no longer have been detained:* R (Krasniqi) v Secretary of State for the Home Department *[2011] EWCA Civ 1549 at §12.*

Generally

> [18] *Finally, it is for the court to determine whether the detention has breached the Hardial Singh principles (and not merely for the court to review the Secretary of State's decision on Wednesbury grounds), and to do so on the basis of the material available at the time. However, in so doing, the court may recognise that the Secretary of State is better placed than itself to decide incidental questions of fact and the court will take such account of the Secretary of State's views as may seem proper:* R(A) v Secretary of State *[2007] EWCA Civ 804 at §62.*
>
> [19] *As the period of detention gets longer, the greater the degree of certainty and proximity of the removal required to justify detention:* R (on the application of MH) v Secretary of State for the Home Department *[2010] EWCA Civ 1112 at §68(v).*

4. The burden is of course on the Defendant to justify the detention, e.g. to show that there was no breach of Hardial Singh principles. As to evidence: *'Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a 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 that 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… "to co-operate and to make candid disclosure, by way of affidavit, of 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": R (Das) v SSHD [2013] EWHC 682 (Admin) per Sales J (as he then was) at [21]; and cited with approval on appeal: [2014] EWCA Civ 45; [2014] 1 WLR 3538 per Beatson LJ at [80].

5. Further, even when there comes a time when the detainee should be released, the Defendant is entitled to a 'grace period' in order to make any necessary arrangements: R (AC(Algeria)) v SSHD [2020] EWCA Civ 36.

6. Returning to AO:

Public Law Error and *Lumba*

[20] *In* Lumba *the Supreme Court went on to consider the position where a decision maker fails to follow a published policy or makes any other public law error. The position is as follows:*

(1) *A decision maker must follow his published policy unless there are good reasons for not doing so:* Lumba *§26.*

(2) *Breach of published policy or any other public law error will render detention unlawful only where the breach or error "bears upon" and is "relevant to" the decision to detain. The error must be "capable of affecting" the decision to detain or not to detain":* Lumba *§68.*

(3) *Where detention has been vitiated by a public error, the claimant will be entitled to nominal damages only, if detention could and would have been maintained, in the absence of the public law error:* Lumba *§71. The court must consider whether, had the public law error not been made, (i) could the Secretary of State have lawfully detained the claimant and (ii) can the Secretary of State demonstrate, on the balance of probabilities, that she would have detained the claimant in any event: Element (i) falls to be determined on Wednesbury principles i.e. could a decision maker reasonably have detained the claimant. Element (ii) is a question to be determined on the facts, on the balance of probabilities. See* R (VC) v Secretary of State for the Home Department *[2018] 1 WLR 4781 at §62.*

7. **Section 4**

By section 4(2) of the Immigration and Asylum Act 1999:

'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.

8. In AO the Court was considering the (now repealed) provisions of s.4(1)(c) which concerned the provision of accommodation for persons released on bail from detention under any provision of the Immigration Acts; but it is agreed that Morris J's observations apply equally to s.4(2).

9. Having considered conflicting authority at first instance, he preferred the conclusion that to render the detention unlawful the alleged public law error must bear on the decision to detain by the Secretary of State, not another body, e.g. the FTT: *'…in the case where bail has been granted in principle, the relevant decision to detain remains that made in the detention review'*; and *'Detention will only be unlawful where it is the decision of the person detaining that is capable of being affected by that person's public law error'*: [233]. On the facts and issues in this case it is agreed that this conflict at first instance needs no further consideration.

10. It is also common ground that the Defendant has duties (i) to consider and make a decision on a s.4(2) application within a reasonable period of time; and if the application is granted (ii) to source accommodation within a reasonable period of time. As to (ii), see the like concession in R (DMA and others) v SSHD [2020] EWHC 3416 (Admin) at [178].

The facts

11. I have received and considered witness statements from the Claimant (7.4.21, 26.4.21, 27.7.21); his solicitor Dr Connie Sozi (16.2.21); and Pierre Makhlouf (12.2.21: Assistant Director, Bail for Immigration Detainees); and from Mr Timur Dellaloglu (22.3.21: Country Manager, Returns Logistics Operations, Country Liaison and Documentation Team 1) on behalf of the Defendant.

Mr Dellaloglu

12. Mr Dellaloglu is the Country Manager of the Team whose responsibilities include facilitating travel documentation through effective diplomatic engagement and co-ordinating country return strategies for East, Central and Southern Africa. He was not a decision-maker in respect of this Claimant or any detainee; and there is no evidence from any such person. He makes his statement *'after reviewing* [Home Office] *records and with the benefit of information provided to me by my colleagues within Returns Logistics Operations.'*

13. He states that as a result of an agreement reached with the Zimbabwe government to post an immigration official to its embassy in London, the Defendant has since September 2018 been able to return its nationals who do not want to leave the UK voluntarily. The posted official's duties involve documentation interviews in order to verify nationality and identity with a view to issuing Emergency Travel Documents (ETDs) to facilitate the return of both voluntary and involuntary Zimbabwean nationals.

14. On 28 November 2019 there was such an interview between the officer and the Claimant. Following verification checks *'an ETD agreement was received from* [him] *on 12 December 2019'*. However removal directions were not set immediately as the Zimbabwe government had temporarily paused the issuing of ETDs *'until the HO*

addressed their requests for bespoke reintegration for returning Zimbabwean nationals'. This led to further negotiations between the two governments, which in March 2020 made it possible to proceed with enforced returns.

15. However he then refers to the global impact of Covid-19 and states that this *'…resulted in temporary difficulties such as: an ability to obtain agreed ETDs due to the closure of the Zimbabwe Embassy in London*'; and restrictions and disruption to international air travel.

16. He continues that *'in and around June 2020, despite our ability to obtain agreed ETDs and routing to Zimbabwe (albeit still limited) being available, the British Embassy in Harare advised against conducting enforced returns to Zimbabwe at this time…As a result, only voluntary returns were being considered from that point. However, we continued actively to monitor the situation.'*

17. He continues that on 1 October, the Zimbabwe government opened its borders to non-residents *'…and as a result escorts were now able to enter Zimbabwe*; but that on 22 October the British Embassy in Harare continued to advise against conducting enforced returns *'due to compliance concerns'*, but stated that *'if we were to conduct enforced returns that they should be considered on a case-by-case basis and be subject to the COVID-19 requirements of both the Zimbabwean government and suitable airlines.'* On 8 December, the British Embassy relayed the same message, *'advising against conducting enforced returns at this time due to compliance and quarantine concerns'*.

18. He continues that since mid-January 2021 it has not been possible to conduct escorted returns *'due to our escorting contractor's unwillingness to fly into Zimbabwe due to the presence of the South African COVID-19 variant in the region'*; the situation was being monitored closely; and that the escorting contractor had *'confirmed that they will resume operations to Zimbabwe when cases decrease in the region.'* However in the same paragraph he states *'We are currently able to conduct both voluntary and enforced returns to Zimbabwe, providing returnees comply with COVID-19 protocols'*.

Defendant's records

19. The detail of the following factual summary is gleaned from the Defendant's disclosed notes and records and agreed chronologies. In particular these extract statements from the Defendant's 'detention reviews' and the recommendations of Case Progression Panels (CPP).

CPP

20. As required by the Defendant's policies, the Claimant's detention has been reviewed on a monthly basis. The review is undertaken by a reviewing officer and is then considered by an authorising officer. In addition the case is considered at 3-monthly intervals by a CPP. By the relevant policy document (Detention Case Progression Panels, Version 4.0 (May 2020)) the CPP has two primary objectives: to review continued detention and to evaluate case progression. Its functions include ensuring a consistency of process and approach to reviewing detention and case progression across the immigration system; and thereby provide a forum to review all cases where individuals have been detained for more than a prescribed period and to standardise a

review methodology which balances application of Hardial Singh principles and any associated risks attached to release.

Adults at Risk

21. The detention review and the CPP must also take into account the policy for 'Adults at risk [AAR] in immigration detention' (Version 5.0, March 2019). AAR of course includes those suffering from mental health conditions. For the purpose of the assessment, three levels are identified. Level 1 involves a self-declaration (or one made by a legal representative) of being an AAR. This *'...should be afforded limited weight, even if the issues raised cannot be readily confirmed.'* Level 2 is where there is professional evidence which indicates that the individual is or may be an AAR. This *'...should be afforded greater weight. Such evidence should normally be accepted and consideration given as to how this may be impacted by detention.'* Level 3 does not arise in this case, but is where professional evidence states that the individual is at risk and that a period of detention would be likely to cause harm: *'Such evidence should normally be accepted and any detention reviewed in light of the accepted evidence'*.

22. More generally, the policy states that an individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained. This will be a highly case-specific consideration taking account of all immigration factors: *'In each case, however, there must primarily be a careful assessment of the likely length of detention necessary and this should be considered against the likely impact on the health of the individual if detained for the period identified given the evidence available of the risk to the individual. The likely length of detention prior to removal should be quantified in days, weeks or months and this predicted timeframe should be recorded when making detention decisions.'* Further, *'In all cases, every effort should be made to ensure that the length of time for which an individual is detained is as short as possible and, as stated above this should be quantified in days, weeks or months. In any given case, it should be possible to estimate the likely duration of detention required to affect removal'*.

Accommodation

23. Policy on accommodation on immigration bail, applicable also to s.4(2), identifies three different levels of accommodation. Level 1 is 'initial accommodation' in high, multiple-occupancy accommodation. The Defendant was assessed at Level 2, i.e. 'standard dispersal accommodation, mostly high multiple-occupancy, individual accommodation but often with shared common spaces, lone adult males do not share accommodation with families or lone females'. Level 3 (complex bail dispersal accommodation) provides for FNOs (Foreign National Offenders) who meet the 'harm criteria'.

Narrative from records

24. The Claimant originally entered the UK with his sister and mother on 5 April 2003 and on the basis of UK ancestry was successively granted leave to remain until 23 June 2012.

25. In the period September 2008-February 2020 he received 20 convictions for 27 offences including offences against the person, theft, public order, breaches of Court orders and

drug-related offences. These included a conviction for robbery on 27 May 2011 resulting in a custodial sentence of 30 months. In his sentencing remarks the Judge described it as *'…a nasty robbery against a person who was in his own home and who had very little opportunity to escape from the attack and the action of these two confident defendants'*.

26. On the basis of that conviction the Defendant initiated deportation proceedings pursuant to the automatic deportation provisions in the UK Borders Act 2007. A deportation order was signed on 27 June 2013. He was detained under Immigration Act powers from September 2013 until December 2015. In this period he made an application for asylum (5 December 2014) which was refused on 20 July 2015.

27. On 15 December 2015 the Court ordered his release: [2016] EWHC 148 (Admin). The judge (Garnham J) found that throughout his detention since September 2013 there had been a real risk of his absconding if released and that a significant risk remained [51]; that there was a real risk that on release he would continue offending [57]; that he would pose a significant risk to the community once released [58]; and that he had never given his agreement to return to Zimbabwe [84].

28. He continued that *'the risk of re-offending and the risk of absconding, amplified as it is by the refusal to return voluntarily, are of paramount importance when the court considers the justification for continued detention* [88]. However, in the light of Lumba, those risks were not bound to be decisive: *'Those risks go to, and may have a very significant effect upon, what is to be regarded as a reasonable period of detention prior to the proposed removal. But the acid test is always whether there is a realistic prospect of effecting a return'* [90].

29. On the facts at that time, the Judge found that *'…it cannot be said that there is any realistic, foreseeable prospect of returning the Claimant to Zimbabwe'*; and accordingly ordered his release. In respect of his asylum claim the Claimant became 'appeal rights exhausted' in April 2017.

30. Following a short custodial sentence imposed on 25 September 2019, the Claimant was detained again between 22 October and 4 December 2019. A note dated 2 December records that *'the Zimbabwean Embassy in London has refused to issue any ETDs until an extension to the returns programme has been formally finalised. Therefore RL* [Returns Logistics], *the FCO and Post are currently working to resolve the matter as quickly as possible. We are still reassessing the situation.'* He was then released on 4 December, a note of that date stating that the officer was *'satisfied that he was compliant with the ETD interview process'*.

31. On 17 December 2019, an entry in the notes states *'ETD agreement received'*. A file note on the following day states that the Claimant *'has an ETD agreed 17 December 2019, the only present barrier is the issuing of the travel document from the Zimbabwean authorities.'* As eventually clarified by the Defendant in correspondence, no ETD was ever issued.

32. On 7 February 2020, the Claimant received a short custodial sentence for breach of a community order. Upon his release (27 February) he was detained again under Immigration Act powers. This is the detention which continued until 29 April 2021.

33. The initial detention review (21 February) assessed the risks of absconding, harm and re-offending as 'high' (rather than 'medium' or 'low') in each case. That assessment was unchanged in each successive detention review.

34. Under the AAR the Claimant was assessed at Level 1. This was on the basis that he had *'..claimed to suffer from depression and anxiety, but no further medical evidence has been provided.'* Assessment at this Level continued until the detention review of December 2020 when it was raised to Level 2.

35. As to the standard question (8) on barriers to removal including timescale for removal, the reviewing officer stated *'An ETD agreement was reached on the 17 December 2019 and the only barrier to removal is the issuing of an ETD, The Zimbabwean officials are currently not issuing ETDs however an update is expected next week regarding this issue'*. The identical answer was given to the following question (9) which asked *'Is a travel document available? If so, where is it held? If not, when do we expect an Emergency Travel Document/EU letter to be issued?'*

36. Balancing the presumption of liberty against the risk factors, detention was recommended *'to progress Mr Babbage's case towards removal within a reasonable timeframe.'* The authorising officer stated: *'The only barrier to deportation is the Zimbabwean authorities producing a granted ETD. Discussions are to be held by the Zimbabwean authorities on 25 February 2020 in the hope to rectify the matter. Therefore, it is anticipated that an ETD will be produced shortly after the discussions'*.

37. The decision letter dated 21 February recorded the reasons for detention to like effect.

38. On 14 March the records show that removal directions had been set for 29 March; and that the Claimant would be accompanied by *'4 escorts and a medic'.* However on 19 March, removal directions were cancelled *'due to the Covid situation'.*

39. On the previous day (18 March) there was an e-mail exchange between the British Embassy in Harare and Mr Dellaloglu. The Embassy stated: *'I know you will be looking at this but the Zimbabwean government is also saying all but essential travel for people entering the country (and they are not as advanced as UK in terms of Co-vid - as there have been no confirmed cases here yet). However whilst these measures are in place we cannot return people from the UK – attempting to do so could have the potential to derail the whole process an* [d] *upset our returns relationship.'* Mr Dellaloglu's reply included *'...returns are being looked at on a case by case basis. However it seems unlikely that we will be conducting any enforced or escorted returns for at least the next couple of weeks.'*

40. On the first detention review (23/26 March), the reviewing officer noted the cancellation of the removal directions for 29 March; stated that an ETD was agreed and available and that there were no outstanding barriers or legal challenges: *'I therefore recommend detention to progress Mr Babbage's case towards removal within a reasonable timeframe'.* The authorising officer approved but qualified this with the observation that *'However enforced returns are currently paused to Zimbabwe and so release needs to be considered in this case. Further detention is authorised whilst a release referral is prepared and submitted'.*

41. On the second detention review (20/23 April), the authorising officer stated *'There are no barriers to removal and I am content that deportation remains a realistic prospect within a period which is proportionate the to* [sic] *risks posed by Mr Babbage. We remain optimistic that flights to Zimbabwe will resume in the near future.'*

42. On 24 April the Claimant applied to the First-tier Tribunal (FTT) for bail, his mother offering £1000 as a financial guarantee. On 6 May the FTT granted bail in principle, subject to a requirement that a suitable release address be provided within 14 days, in the absence of which the grant of bail was to lapse.

43. On 11 May 2020, the Defendant contacted probation to ascertain whether the Claimant's mother's home would serve as a suitable release address. This was considered unsuitable because his mother did not want him to live with her because of his earlier breaches of conditions, misuse of drugs, and because she was seeking a guardianship order for his daughter: note of 15 May.

44. In the meantime, an email dated 12 May from the British Embassy in Harare states *'Given the difficulties in travelling through Addis and the situation of anyone coming into Zimbabwe (government quarantine for 21 days – which would include any handlers) I strongly recommend that we do no returns at the moment. If they were voluntary and they knew the situation on return then maybe but anything else would be extremely difficult to negotiate with the government.'*

45. In the absence of a suitable address, the Claimant's bail lapsed on 20 May. At about this time he made an application for accommodation pursuant to s.4(2).

46. At the third review (18/21 May), the authorising officer noted these developments; stated that there were no barriers to removal; and in authorising further detention concluded: *'I remain satisfied that deportation could be initiated within a reasonable timescale as flights to Zimbabwe could resume soon'*.

47. On 25 May 2020, a CPP made a recommendation for the Claimant's release. In weighing up the factors in favour of detention and release it included that *'there are factors which suggest that removal within a reasonable time frame, in the particular circumstance of this case, may not be possible'.*

48. On 26 May 2020 the Defendant advised the Claimant that his section 4 application could not be processed until it had been resubmitted via Migrant Help. This was effected and receipt confirmed on 1 June.

49. On 4 June a release referral was submitted but refused by an Assistant Director on the same day. The note refers to the recommendation from the CPP but concludes that detention should be maintained. As to removals to Zimbabwe, *'…there remains hope that the situation may change in the coming weeks or within the next few months. In my view the timescales associated with removing Mr Babbage are proportionate to the risks he poses if released.'*

50. On the fourth detention review (16/19 June) the authorising officer continued the detention, noting *'An ETD has been agreed and removal can be effected in a reasonable timeframe.'*

51. On 23 June, the Claimant was again granted bail in principle by the FTT, again subject to the condition that a satisfactory release address be provided (by no later than 21 July).

52. On 30 June, the section 4 application was allocated to a caseworker. It was noted that even if the application was granted, it might not be possible to provide accommodation by 21 July because of pressures on the accommodation estate arising from Covid-19.

53. On 1 July, the Defendant granted the section 4 application. In consequence on 2 July, the Defendant requested accommodation from the accommodation provider Clearel. The note of that date states *'I have requested accommodation with Clearel'*.

54. On 9 July the Claimant's name was included on a 'chase spreadsheet' sent to accommodation providers Clearsprings. There followed emails 'chasing an update' from Clearsprings on 13, 15, 21, 24, 28 July; 5, 11 August; 3, 11, 18, 23 September; 1, 8, 14 and 21 October; 2, 11, 18 and 30 November; 10, 31 December; 14 January 2021.

55. In the meantime, on the fifth detention review (14/17 July), in recommending continued detention the reviewing officer noted that *'Currently no enforced returns are being sort* [sic] *as advised by Returns Logistics'*. The authorising officer noted that *'…CCAT* [Criminal Casework Accommodation Team] *are currently sourcing a suitable property in order for him to be released.'* The officer authorised continued detention *'…based on the clear risk of harm and reoffending which I consider outweigh the presumption of liberty and until a suitable address is provided.'*

56. The CPP convened on 11-12 August and recommended release: *'After considering the evidence from all the information presented on the day, the panel consider that there are factors which suggest that removal within a reasonable timeframe, in the particular circumstances of this case, may not be possible'*. Its reasons included that *'…the ETD agreement has expired, the ZWE embassy are only agreeing ETD for vol departure. Due to COVID 19 flights are limited and are only for Vol dep. The panel agreed that removal is not imminent and recommend release with mandated actions.'* Those were identified as an update on the Claimant's healthcare *'and to consider release to NFA* [No fixed abode] *as an alternative to detention'*.

57. On the sixth detention review (11/14 August) the authorising officer noted the CPP recommendation and that CCAT was awaiting an address: *'As soon as an address is available a release referral will be submitted to Strategic Director for approval. In the meantime, detention is authorised based on the risk of harm and absconding which I consider outweighs the presumption of liberty and whilst a release address is provided by CCAT'*.

58. On 21 August, a release referral was rejected by the Director, Georgina Balmforth. In response to the CPP's recommendation, she stated *'After careful consideration I should prefer to maintain detention for now – the situation with removals could look quite different in one to two months. I am concerned about the multiple counts of battery and domestic violence and the assessment of his harm and the flight situation is the only barrier to removal.'*

59. On 21 August Returns Logistics commented on removals to Zimbabwe: *'The Zimbabwe Embassy in London is closed but still working to a very limited capacity and can issue ETD's for voluntary cases. COVID-19 has impacted on returns to Zimbabwe resulting*

in limited routing options - Ethiopian Air (ET) are flying via Addis but will only accept voluntary cases. Our preferred carrier Kenyan Airway have recently resumed operations flying to Harare but will not deal with Immigration cases at present. Airlines are however reviewing destinations as services start to resume. The British Embassy (BE) in Harare have advised against conducting enforced returns to Zimbabwe at this time and against escorts flying in. This is due to both the country situation and the compulsory quarantine measures currently in place. We are liaising with the BE in Harare to find a solution and hope that this will change in the coming weeks as both travel and lockdown restrictions continue to be relaxed around the world'.

60. On the seventh detention review (8/11 September), the reviewing officer noted *'…we are now awaiting a release address from them. As soon as an address is available a release referral will be submitted to Strategic Director for approval…Please can the case owner closely monitor the section 4 address with CCAT and escalate to AD* [Assistant Director] *if an address is not forthcoming'.* Also *'The police and probation will be notified prior to any release to help mitigate any vulnerability any safeguarding concerns'*. As to AAR, the officer continued to categorise him as level 1 on the Adults at Risk policy. This was now based on an updated report from Healthcare received on 17 August which included that he was taking 30 mg mirtazapine for depression. The officer concluded that this provided no further information to justify deviation from the previous assessment at Level 1. However a subsequent detention review in December 2020 based on the same evidence assessed him at level 2. In approving continued detention the authorising officer *'remain*[ed] *optimistic that we will see progress in Mr Babbage's case soon and will be in a position to deport him within the next few months.'*

61. Notes on 23 and 28 September referred to the ongoing accommodation issue and that *'CCAT had chased with Clearsprings but have not had a response'.*

62. In the eighth detention review (7/9 October) the reviewing officer stated that *'…we wait for enforced returns to Zimbabwe to recommence'.* The authorising officer stated that *'…RDs can be set as soon as enforced removals recommence to Zimbabwe which is expected within the next couple of months'.*

63. On 4 November, Returns Logistics informed Criminal Casework that *'We are in a position to obtain agreed ETD's from the Zimbabwean Embassy. However, the pandemic is resulted in limited routing options. Ethiopian airlines are currently flying but will only accept voluntary/compliant enforced cases. At this moment in time we are not dealing with any cases that require escorts due to limitations with COVID-19…Complex cases are involved in any returns but as I said at present these are mainly voluntary due to the fact that we are not using escorts'.*

64. On 5 November, a CPP recommended release, because *'As at current there is no prospect of removal'*; and *'…the panel consider there are factors which suggest that removal within a reasonable time frame, in the particular circumstances of this case, may not be possible'.* It had noted the risks upon release; and recommended appropriate measures to be in place to restrict the risk factors, such as reporting to the police, *'curfews due to high risk domestic violence',* approved accommodation or tagging.

65. In the ninth detention review (3/6 November) the reviewing and authorising officers each stated that they were waiting for enforced returns to recommence.

66. On 2 December, the case was referred to 'Complex cases', to set removal directions *'for as soon as possible'*.

67. This was recorded in the tenth detention review (2/4 December), the authorising officer stating that the referral had been made *'…in the hope of being able to make arrangements to deport him. This provides for a realistic prospect of removal within a reasonable period. However, if they are unable to progress arrangements for a flight, release should be considered.'* This review increased the AAR to Level 2, based on the Healthcare report of 17 August; and that Level was maintained thereafter.

68. On the eleventh detention review (29 December), the authorising officer stated that *'Given there are no barriers to removal it remains possible to secure removal within a reasonable period of time and for this reason I deem the risks associated with release to outweigh the presumption of liberty at the present time'*. Also, that the Complex cases team *'…has been engaged to develop a plan for removal'*.

69. On 8 January 2021, the Claimant's solicitors sent a Pre-action letter challenging his ongoing detention and the failure to provide him with a release address to enable him to obtain the bail which had twice been granted in principle by the FTT.

70. By letter of response dated 20 January the Defendant stated that the Claimant had been provided with an ETD on 17 December 2019. This had subsequently expired, but could be revalidated *'…when a flight becomes available for the Claimant to return to Zimbabwe'*. In a subsequent letter dated 13 April 2021 the Government Legal Department (GLD) corrected this by stating that the ETD had been agreed but never issued, so that revalidation was not required. The Defendant's 20 January letter set out the particular difficulties in obtaining accommodation during the pandemic and the steps taken, including procuring an additional 50 hotel sites (5000 beds). It advised that the decision to detain the Claimant was maintained *'whilst appropriate accommodation is sourced…'* and that *'Consequently the decision to provide the Claimant with support under Section 4 is maintained.'*

71. On the twelfth detention review (21/22 January), the reviewing officer noted that *'We now await the resumption of enforced returns to Zimbabwe. I recently had an update from Returns Logistics colleagues to suggest that they intend to test the route within the next month or so. Once returns commence again, we'd push for Mr Babbage to be deported at an early stage'*. Further, both grants of bail had expired before suitable accommodation could be sourced for him; and *'We continue to work with accommodation providers to ensure that an address is in place should there be a further application for bail'.* The authorising officer on that date recognised the need for a realistic prospect of removal within a reasonable timescale, *'however what is a reasonable timescale will depend on the individual circumstances of the case'.*

72. By a 'Dispersal notification letter' dated 25 January, the Defendant advised the Claimant that arrangements had been made to provide him with accommodation at an address in Newham, London E7. It added that *'Should a decision may be taken* (sic) *that you are no longer entitled to the support provided under Section 4…'* he would receive formal notice to that effect.

73. On 26 January, a member of the accommodation team in the FNO Returns Command (formerly Criminal Casework) noted the lapse of the Claimant's bail *'since August*

2020' and that it would normally send out a reconsideration letter removing the grant of support. The note continues: *'I will leave the address for him until the 28 January 202*[1]*, if he is granted bail and released on 28 January he will be able to us* [sic] *this address. If he is not* [released] *on 28 January…he will lose this address and I will send him a reconsideration letter removing* [the] *grant of support as he no longer has bail. He will need to reapply for support once he has been granted bail.'*

74. On 27 January the CPP recommended the maintenance of detention *'but with mandated actions as there is a prospect of removal'.* The 'mandated actions' were the panel's recommendation *'that the case working team provide time scales of removal by liaising with the complex cases team'.*

75. By letter dated 1 February headed "Reconsideration of application for asylum support" the Defendant stated that from a review of his case it had been noted that the Claimant no longer had immigration bail and was still detained at Harmondsworth IRC. In consequence *'You are now not currently considered to be destitute. Your application has been re-considered and a decision made that you are not currently entitled to support under* [section 4]. *This decision now replaces the Home Office letter of 01 July 2020.'* Details of the right of appeal were provided.

76. On 3 February, the Claimant lodged a notice of appeal with the Asylum Support Tribunal.

77. On the thirteenth detention review (18/19 February), the detention review noted that a timescale for removal was still awaited from Complex Cases. A reviewing officer recommended detention *'until safe and appropriate accommodation is sourced, or if removal directions are obtained'*. The authorising officer noted that *'…we should ensure that we continue to liaise with RL colleagues in relation to timescales as directed by the* [CPP]*'.*

78. On 25 February, Returns Logistics stated that *'…they are having to defer any ZWE cases due to concerns with the escorts going into the region. There is no viable return option for them to safely return back to the UK. We will keep the situation under review but I wouldn't expect us to be able to attempt to return to ZWE for at least a few weeks'*.

79. Deterioration in the Claimant's mental health due to his prolonged detention was noted on 4 March 2021.

80. On 6 March 2021 it was noted that Zimbabwean officials were not currently issuing ETDs: *'However, an update of this is expected next week regarding this issue'.*

81. On the fourteenth review (16/19 March) the reviewing officer noted that escorted returns were being deferred *'…but it is anticipated that* [these] *will recommence very soon.'* The authorising officer noted *'I am aware that Returns Logistics continue to investigate the possibility of resuming schedule flights and that they are also in the early stages of planning a Charter to Zimbabwe. With this in mind, I'm content that removal is a realistic prospect within a period which is proportionate to the risks Mr Babbage poses if he were to be released'*.

82. On 23 March, a Tribunal Judge, Asylum Support, dismissed the Claimant's appeal against the refusal/discontinuation of section 4 support.

83. Following a hearing on 7 April, in the FTT (Judge Neville) granted bail in principle; but on this occasion in terms that bail would commence *'upon accommodation being made available to the applicant in accordance with the respondent's statutory powers and duties'*. His reasons stated that this course was taken to defeat the current deadlock; and described the Defendant's position as follows: *'The respondent's present position is that the applicant should not be granted bail until he has somewhere to live, and he should not be found somewhere to live until he has been granted bail. Such circularity would appear to have been the only reason for detention for the past few months, and is the only real reason put forward why I should refuse to make a third grant of bail with a commencement condition…I decline to perpetuate such a state of affairs…'*

84. By Judge Neville's Directions (7 April) the Defendant was required to provide the following information: *'(a) Whether the respondent accepts that she is under an obligation to provide the applicant with accommodation and, if not, why; (b) Whether accommodation is being sought for the applicant and, if so: (i) The steps taken so far, with dates; (ii) The expected timescale until accommodation is provided, with reasons.'*

85. The Claimant thereupon made a fresh application for section 4 support. This was granted by the Defendant's decision letter dated 15 April.

86. In the meantime, by letter dated 13 April the GLD answered the Claimant's request for information in respect of ETDs; in particular (i) *'In order to obtain the ETD, Returns Logistics would need to notify the Zimbabwe Embassy of the Claimant's removal directions (date of travel and flight details), allowing 10 clear working days' notice. Returns Logistics would then arrange for a courier to collect the requested ETD and transport it to the port of departure prior to the return date.'*; and that (ii) 3 ETDs had been issued and collected since March 2020; one in November 2020 and two in February 2021, all of which were voluntary cases; and that of the 11 returns in 2020 (6 enforced; 5 voluntary) all the enforced returns were in the first quarter of 2020.

87. By a Dispersal notification letter dated 26 April (the day before this hearing began) the Defendant advised that arrangements had been made to provide the Claimant with accommodation within postcode CR7. He was released from detention on 29 April.

Claimant's submissions

Hardial Singh

88. The Claimant alleges breach of Hardial Singh principles 2-4, with a particular emphasis on principles 2 and 3. As it developed by the time of oral submissions, Mr Haywood's primary case was that the Claimant's detention was unlawful at the latest by 29 March 2020, the cancelled date of removal. At that point the Defendant was in breach of principles 2 or 3. In the alternative, the detention was unlawful by no later than 25 May 2020 when the CPP made its recommendation for release.

89. Acknowledging that the Claimant had been assessed as presenting a high risk of absconding, reoffending and harm, Mr Haywood submitted from authority that those considerations did not provide a 'trump card' for the maintenance of detention. When assessing the weight to be given to the history of offending, there had been no repeat of the offending with the gravity of the 2011 robbery, nearly 10 years ago. The records also commented on the possibility of his management in the community and that *'the*

police and probation will be notified to mitigate any public safeguarding concerns', as an alternative to his remaining in detention.

90. As to evidence, Mr Haywood emphasised the absence of a witness statement from the Claimant's 'case owner' or from any official responsible for his detention or with direct management of his case. Mr Dellaloglu had no such role; and his statement gave a limited and unsatisfactory account. For example, his statement that *'It therefore became possible for us to return Zimbabwean nationals who were refusing to leave the UK voluntarily from March 2020'* could not be reconciled with the documentary records. As finally established from the GLD's letter of 13 April 2021, there had been no enforced returns, nor therefore ETDs issued in non-voluntary cases, since March 2020. All the six enforced returns in 2020 were in the first quarter of that year, prior to his detention.

91. At the time of cancellation of the removal directions for 29 March and at each successive review there had been no sufficient basis to conclude that the Claimant would be removed within a reasonable period. As early as 18 March 2020 the British Embassy in Harare had advised against implementing enforced returns. Albeit that redacted email was exhibited to Mr Dellaloglu's witness statement, his reference to the first such advice from the Embassy was *'in around June 2020'.*

92. As to ETDs, whilst agreement had been reached in the Claimant's case by December 2019, the Defendant had never made an application for the document. The only inference from the failure to make such an application was that there was no prospect of the return of an involuntary person. In consequence the repeated phrase in the reviews that there was 'no barrier to removal' was misleading. Whatever the additional problems, the primary barrier to removal was the absence of request from the Defendant for the issue of his ETD, which in turn reflected the reality that throughout this period Zimbabwe was not accepting involuntary returnees.

93. As to the alternative case, the first review after the May 2020 CPP recommendation (16 June) made no reference to the CPP; described the Claimant as 'barrier free'; noted that the removal was cancelled due to the coronavirus; but stated that *'the Claimant has an ETD agreed and the ETD is available'*. As to the various questions posed in the standard format, there was no answer to that part of question (8) which asked for *'estimated timescale for resolution'*, nor to that part of question (9) which asked *'Is a travel document available?'*

94. The detention review by the reviewing officer (11 August) was to the same effect. The authorising officer (14 August) took account of the very recent CPP recommendation for release (11/12 August) but did not engage with it. The officer's focus was on the grant of section 4 accommodation and the wait for a release address.

95. The next detention review (8/11 September) continued to categorise the Claimant as Level 1 on the AAR policy. This was based on the updated report from Healthcare which included that he was taking 30 mg mirtazapine for depression. This was said to provide no further information to justify deviation from the previous assessment at that level. However a subsequent assessment in December 2020 assessed him at Level 2, having regard to that same new medical evidence. That worsened mental state resulted from his prolonged detention; and should have led to recategorization at Level 2 in the

September detention review. As the AAR policy made clear that should have been a highly material consideration when considering continued detention.

96. As the contents of the successive detention reviews demonstrated there was no substantial basis for their repeated and formulaic statements on the prospects of removal within a reasonable period; nor was there any real engagement with the further CPP recommendation for release in November 2020. Here Mr Haywood emphasised the established principle that as the period of detention gets longer, the greater the degree of certainty and proximity of the removal which is required to justify detention: R (MH) v. SSHD.

Section 4 accommodation

97. As summarised by Morris J in AO, the critical questions were (i) whether the Defendant was in breach of its legal duties in relation to section 4 accommodation and if so (ii) whether the breach 'bore upon' or vitiated the Defendant's decision to maintain detention.

Breach of duty

98. First, the Defendant had failed to consider and decide the application under s.4(2) within a reasonable period. The delay of one month between the resubmission of the application via Migrant Help (1 June) and its grant (1 July) was unreasonable. Secondly, the Defendant had failed to source accommodation within a reasonable time of the grant.

99. Mr Haywood pointed to R (DMA and others) v. SSHD [2020] EWHC 3416 (Admin), a case concerning an application for accommodation pursuant to s.4(2). The judgment recorded evidence on behalf of the Defendant that *'When an accommodation request is booked* [by the Secretary of State with an accommodation provider], *it is done as one for three possible priorities. The classification for these is A (24 hours), B (48 hours) and C (9 days). This is an informal system and not set out in policy. Priority A and Priority B* [are] *predominantly used for court orders where interim relief has been ordered or for family cases with dependent minors. Priority C being used in all other cases. Our provider aims to propose the property within the specified time frame.'*: [105].

100. In R (Humyntskyi) v. SSHD [2020] EWHC 1912 (Admin), a case concerning application for accommodation of a person on immigration bail (Immigration Act 2016, Schedule 10 paragraph 9) Johnson J at [179] referred to various authorities which indicated a reasonable period of 1-2 weeks and in the instant case concluded that a reasonable period was one week.

101. In this case the Defendant was in breach of that obligation. Only one accommodation provider was contacted. The Claimant was merely included in a circulated list of those for whom accommodation remained outstanding, with no evidence of prioritisation. The lists were simply circulated as a spreadsheet 'please find below the outstanding requests for Clearsprings'. The spreadsheets contain information in relation to each outstanding person, including level of accommodation required (2 or 3; the latter for

high risk offenders); the type of accommodation sought (shared room; single room; self-contained accommodation); and indicated whether the person was detained and the date of the original request for accommodation.

102. The Claimant was listed as requiring level 2 accommodation, i.e. was not being treated as a high-risk offender. A place in a shared room was likely to be easier to source and also indicated that there were no concerns which prevented the person from sharing accommodation. As he was not on licence conditions, the release address would not need to be approved by probation.

103. In striking contrast to the delays which had occurred between July 2020 and April 2021, once the Claimant was granted bail by the FTT and the Defendant was required to update that tribunal on *'steps taken so far, with dates'* the response was *'The Respondent has chased the accommodation with the Service Delivery for Clearel in 16/04/21 asking for a proposal within 7 days. We have checked this morning and have yet to receive a proposal'.* Accommodation was sourced and then confirmed by letter dated 26 April.

104. In this case there was no evidence of any attempt to chase the provider or to make an individualised request. On the contrary, even as late as 28 January 2021, the e-mail request simply attached the list of all the outstanding requests, including the Claimant (Level 2/shared room) requested from 2 July 2020 with the generic statement *'Please find below the outstanding housing requests for Clearsprings'*. Mr Haywood contrasted the speed with which accommodation was found when the matter was prioritised in April 2021 following the Directions of Judge Neville in the FTT.

105. In this and all respects he emphasised the absence of any evidence on behalf of the Defendant and the associated observations in R (Das) v SSHD.

Bearing on decision to detain

106. This was apparent from the detention reviews. Thus before the grant of section 4 accommodation and when he had been granted bail in principle, reviewing officers repeatedly noted the significance of the absence of a suitable address. Then on the first review which noted the grant (14/17 July) the authorising officer concluded that detention was justified *'until a suitable address is provided'*. On the next review (11/14 August) the authorising officer stated that *'As soon as an address is available a release referral will be submitted to the Strategic Director for approval'*.

107. That statement was then repeated in the next review on 8 September; and in each successive review the recommendation was that *'…detention remains justified…as a suitable release address has not yet been provided…He has since been granted Section 4 accommodation support but we wait for suitable accommodation to be made available'*: 9 October – 21 January; and to similar effect the importance of an address, after the s.4 accommodation had been withdrawn by the letter of 1 February 2021: 18 February, 16 March.

108. Accordingly the failure to provide accommodation had a bearing on the decision to detain.

109. As to the claim for substantial (rather than nominal) damages, the Defendant (i) could not have lawfully detained the Claimant if the public law error had not been made, i.e. if accommodation been provided within a reasonable period and (ii) had provided no evidence to discharge the burden of establishing that release from detention would have been refused in any event.

110. Mr Haywood added that the accommodation issue was not limited to the claim of public law error. Under Hardial Singh principles 2 and 3, the failure to provide s.4 accommodation was a relevant consideration, particularly when detention had continued for a considerable time.

111. As a further ground of claim, Mr Haywood contended that the Defendant's letter of 1 February 2021 was unlawful both in its purported retrospective withdrawal of section 4 support and its contention that the Claimant, being in detention, was no longer 'destitute'. However the parties agreed that, if I were to conclude that the Claimant's detention had become unlawful before that date, it was unnecessary to consider those major questions. Given the conclusion which I have reached, I do not do so.

Defendant's submissions

Hardial Singh

112. By way of background and context, Mr Lewis emphasised (i) the Claimant's refusal to return to Zimbabwe voluntarily; (ii) the assessment, from the outset of his detention, that he was a high risk of absconding, harm and reoffending; (iii) the consideration given in the detention reviews to the CPP successive recommendations for release; also the subsequent (January 2021) CPP recommendation to maintain detention; (iv) the lapse of each of the two grants of bail in May and June 2020; and (v) the impact of Covid.

113. As to the risks, Mr Lewis pointed to the detention decision letter (21 February); and to examples from the records of the continuation of the Claimant's aggressive features. Thus the record on 20 July 2020 that he had that day *'made direct threats to hurt and kill another detainee…because he had been making derogatory comments about his mother.* [He] *was being aggressive and shouting and would not calm down'*; and a note on 4 February 2021 that he *'allegedly had a physical altercation'* with another detainee, however *'neither party would state what it was over'*.

114. As to Covid, this had led to the severe disruption of international travel. Enforced returns had been taking place until the pandemic. In its absence, the Claimant would have been removed.

115. The Defendant's primary case was that the entirety of the Claimant's period of detention was lawful. In the alternative, the majority of his detention was lawful, only becoming unlawful when the envisaged return to the pre-Covid status quo did not occur.

116. In accordance with the authorities, it was necessary for the Court to step into the Defendant's shoes at each detention review; and to determine (i) Hardial Singh 2 : whether the period of detention thus far was reasonable in the circumstances; (ii) Hardial Singh 3 : whether it had become apparent that the Claimant would not be removed within a reasonable period; (iii) Hardial Singh 4 : whether at all times the

Defendant acted with reasonable diligence and expedition. He emphasised that Hardial Singh 2 and 3 were to be considered without the advantage of hindsight.

Hardial Singh 2

117. Applying the relevant factors identified in the authorities and the paramount importance of the risks of absconding and reoffending (Lumba), the nature of the Defendant's crimes (multiple convictions of battery and breach of reporting requirements) were such that there could hardly be higher risks involved in his release. Whilst that did not permit indefinite detention, it did mean that a lengthier period of detention would be reasonable in the Claimant's case than a detainee who did not pose such risks. The Defendant had been in the invidious position of being fairly confident that his release would result in his disappearance and/or potential harm to the public but had struggled to remove him due to various circumstances (to some degree caused by Covid) both unexpected and beyond her control.

118. As to the period which had expired, he pointed to authorities where much lengthier periods had been found lawful: e.g. R v. MH [2010] EWCA Civ 1112 where the last two months of a total of 40 months were found to be unlawful, i.e. 38 months was not unreasonable in that case; also R (Mohammed) v SSHD [2016] EWHC 406 (Admin) where 19 ½ months detention was held to be not unreasonable.

Hardial Singh 3

119. As to the principles, Mr Lewis emphasised that there can be a realistic prospect of removal without it being possible to specify or predict the day by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all : R (Muqtaar) v. SSHD.

120. Mr Dellaloglu's witness statement established that since 2018 the Defendant had been able to effect involuntary removals to Zimbabwe; that an agreement for an ETD for the Claimant had been reached in December 2019, but at that point the Zimbabwean government had temporarily caused the issue of ETDs; that by February 2020 their issue recommenced and enforced returns began at the beginning of March; that the impact of Covid had been significant; that in June 2020 British Embassy in Harare advised against enforced returns; that this changed back in September 2020 when anyone could return subject to quarantine rules; and that the Zimbabwean officials changed their minds yet again in October 2020. It had technically been possible for enforced returns to take place for a few months but the Defendant could not do so because its contractor's escorts were not prepared to visit Zimbabwe due to the South African Covid variant.

121. He then turned to the successive detention reviews at each of which it was reasonably concluded that progress with removals was being made and that the Claimant's removal remained realistic within a reasonable period.

122. From this material, Mr Lewis submitted that at each review the Defendant had a solid basis for concluding that the Claimant could be removed within a reasonable period. Without the benefits of hindsight it appeared that the effects of the pandemic would recede and normal operations would return. In consequence there was no breach of Hardial Singh 3. He noted that the position of Zimbabwean officials changed on a number of occasions in response to changing Covid conditions. Nor was there any breach of Hardial Singh 4. The reviews demonstrated consistent attempts to remove the Claimant and keep the position under review.

123. Mr Lewis acknowledged that evidence from officials conducting the reviews and making decisions would be potentially helpful to the Court. However this was qualified by the very large number of cases which each official handled in practice and the consequent likelihood they would not be able to add much to what was set out in the notes.

124. As to the risks of absconding and reoffending and paramount importance, whilst this was not a 'trump card', these risks had to be given sufficient weight. In this case they deserved very considerable weight.

125. As to the reviewing and authorising officers' repeated references to there being 'no barriers to removal', was no more than a loose use of language. It was often the case that asylum seekers had lost their passports and hence needed an ETD. Obtaining an ETD that could be very difficult, including verification checks by the home country to satisfy them that it was one of its citizens. That process had taken place in the present case and the Zimbabwean officials had accepted that he was a citizen; hence the agreement of 17 December 2019, which was specific to the Claimant.

126. Conversely, it was not right to describe the failure to apply for the issue of an ETD as a barrier to removal. As the GLD letters of 13 April 2021 explained, the standard notice period for the issue of an ETD was 10 clear working days. The fact that the Defendant did not apply for an ETD reflected no more than that it was not thought that removal directions would be obtained within 10 days. However he acknowledged that it was necessary to look underneath as to why that was so.

Section 4 accommodation

127. As to the time for determination of the section 4 application, the period of one month between application and grant was not unreasonable.

128. As to the time between grant and provision of accommodation, there were no hard and fast principles. However useful guidance was to be found in AO at [226] which referred to the observations of Edis J in R (Sathanantham) v SSHD [2016] 4 WLR 128 that *'lack of vigour or simple overlooking by the Secretary of State would not necessarily amount to anything more than maladministration, but where the delay is so significant, that will amount to a breach of the duty to act within a reasonable time'*. In that case accommodation had not been found for a period of over 6 months: [227].

129. In R (AC) v SSHD [2019] EWHC 118 (Admin) a delay of 6 months in finding accommodation was held not unreasonable on the particular facts; likewise in R (MR (Pakistan)) v SSHD [2019] EWHC 3567 where the period was 3 months.

130. Whether the Defendant could obtain accommodation was not within her power; but he accepted there was no evidence on this; nor as to how the matter had been dealt with so quickly in April 2021. However the internal records showed the repeated requests for accommodation from the provider: see also the note at 14 January 2021 *'Another urgent request due to litigation actions for the above Level 2 shared accommodation, originally submitted 02/07/20. Would appreciate if this can be prioritised as will also require HMPPS approval.'*

131. Covid had of course placed a particular and additional burden in the obtaining of accommodation, as explained in the GLD letter of 20 January 2021. All in all there had been no breach of the duty to source accommodation within a reasonable time.

132. Mr Lewis acknowledged that it was entirely unclear as to the basis on which the search for accommodation had continued after the lapse of bail. The policy in 2020 was that if the grant of bail had lapsed, the Defendant would reconsider the offer of accommodation under s.4. He accepted that, in the absence of any evidence of reconsideration prior to the end of January 2021 and the consequent letter of 1 February, it was open to the Court to conclude that there had been no reconsideration; and therefore to consider the reasonableness of the failure to source accommodation in that continuing period.

Bearing on the decision to detain

133. As to this second question, the relevant decision was that of the Defendant, not the FTT. In that respect, most weight must be given to the authorising officer, rather than the reviewing officer. In the July 2020 detention review the reviewing officer had been principally focused on the high risks of release, rather than the lack of an address. Thus *'...however due to the fact that Mr Babbage presents a high risk of absconding, reoffending and harm as well as the current stage of his case, I recommend that detention remains appropriate until safe and appropriate accommodation is sourced*'. The authorising officer also referred to those risks; albeit this was subject to the first sentence (*'I note that Mr Babbage has been granted bail in principle by the IJ and that CCAT are currently sourcing a suitable property in order for him to be released'*) and the final words *'and until a suitable address is provided'.* The same applied to the subsequent reviews.

134. Mr Lewis submitted that the high risks of absconding, offending and harm were much more important factors in their assessment. Accordingly any breach of duty to secure accommodation within a reasonable time was not capable of affecting the decision to detain.

135. Conversely, if that were established and the issue of substantial damages arose, Mr Lewis accepted that there was no evidence to state what the detention decision would have been if accommodation had been provided. He made no concession but advanced no positive case.

Analysis and conclusions

Hardial Singh

136. At every stage of his administrative detention commencing February 2020, the Claimant's historic conduct in my judgment gave rise to significant risk of his absconding and re-offending. Whilst the most serious offence had been in 2011, there had followed a continued pattern of re-offending, including repeated failures to comply with Court orders and bail conditions. The risk of absconding was enhanced by the Claimant's clear statements at all stages that he was unwilling to return voluntarily to Zimbabwe.

137. However, as Garnham J expressed it in his decision on the Claimant's case in 2016, the risks of absconding and reoffending *'…go to, and may have a very significant effect upon, what is to be regarded as a reasonable period of detention prior to the proposed removal.* ***But the acid test is always whether there is a realistic prospect of effecting a return****'* [90] (emphasis supplied).

138. That 'acid test' is central to consideration of Hardial Singh principle 3, which was rightly the primary focus of Mr Haywood's submissions. For that purpose I take particular account of five points of principle.

139. First, the burden on the Defendant to establish the lawfulness of the detention. Secondly, the importance of the significant risks of absconding and re-offending to the assessment of the 'reasonable period'. Thirdly, that *'As the period of detention gets longer, the greater the degree of certainty and proximity of the removal required to justify detention:* R (MH). Fourthly, that *'There can be a realistic prospect of removal without it being possible to specify or predict the day by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all:* R (Muqtaar). Fifthly, the duty on the Defendant to make candid disclosure of the relevant facts and (so far as not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decisions challenged: R (Das).

140. As to the latter, it has been a particular disadvantage to have no witness evidence from any of the relevant decision-makers. The witness statement of Mr Dellaloglu is of a strictly limited value. Although Country Manager for the co-ordinating team, he was not a decision-maker for the Claimant nor any other individual detainee. He has made his statement on the basis of a review of Home Office records and 'the benefit of information provided to me by my colleagues within Returns Logistics'. Furthermore, it contains statements which are not easy to reconcile with the apparent terms of the internal and contemporaneous documentation provided.

141. These statements include that the British Embassy in Zimbabwe *'In around June 2020, despite our ability to obtain agreed ETDs and routing to Zimbabwe (albeit still limited) being available, the British Embassy in Harare advised against conducting enforced returns to Zimbabwe at this time'*. On the face of the documents exhibited to his statement, the Embassy first gave such advice on 18 March 2020. Furthermore, his statement sits uneasily with the evidence (confirmed in the GLD correspondence) that there were no enforced returns, nor therefore applications for the issue of previously agreed ETDs in involuntary cases, after the first quarter of 2020.

142. Similarly, his statement in the same paragraph that *'…since mid-January 2021 we have been unable to conduct escorted returns to Zimbabwe due to our escorting contractor's unwillingness to fly into Zimbabwe due to the presence of the South African COVID-19*

variant in the region' sits uneasily with *'We are currently* [i.e. as at 22.3.21] *able to conduct both voluntary and enforced returns to Zimbabwe, providing returnees comply with COVID-19 protocols'*.

143. Further, and importantly, the statement provides no evidence as to the steps taken by the Defendant to source accommodation for the Claimant at any stage of this matter.

144. Whilst I make clear that the good faith of Mr Dellaloglu's account is not in question, in my judgment it provides no sufficiently reliable information on the decision-making process either generally or in the Claimant's particular case.

145. The Court has therefore been left in the position of having to study the contemporaneous documents, in particular the detention reviews, and interpret them as best as can be done. Whilst I see some potential force in Mr Lewis' point about the number of cases handled by individual officers, I do not accept (and certainly without evidence, rather than assertion) that it necessarily follows that no useful commentary or clarification could be given by the individual decision-makers.

146. A similar problem arises with the Defendant's letter of 20 January 2021 in response to the Claimant's pre-action protocol letter of 8 January 2021. As Mr Lewis rightly acknowledged, this is not the equivalent of evidence in the form of a verified witness statement. This is relevant when considering, e.g., the information which it contains and is relied on as to the extra pressures on accommodation because of the pandemic and the steps taken to provide additional hotel sites and beds.

147. Confidence in the letter is also diminished by its statement that *'The Claimant was provided with an Electronic Travel Document on 17 December 2019. The ETD has subsequently expired, however it can be revalidated when a flight becomes available for the Claimant to return to Zimbabwe.'* This evidently confused the obtaining of an agreement for an ETD in the Claimant's particular case (December 2019) with the process of applying for that ETD to be issued: compare the contrasting explanation in the GLD's letter of 13 April 2021.

148. All that said, despite the absence of verified witness evidence as to the general effect of the pandemic on removals to Zimbabwe or the sourcing of accommodation or as to the effect on the Claimant's particular case, I have concluded that it is appropriate to take account of and give some weight to the general problems and uncertainties which the pandemic induced in all areas of public and private life at the various stages of the Claimant's detention. That said, in the absence of witness evidence, such account must be limited.

149. With all these considerations in mind, I turn to the various stages of the detention decisions.

<u>March/April 2020</u>

150. I do not accept Mr Haywood's primary argument that the Claimant's detention breached Hardial Singh principles at or about the time of the first detention review (March 2020) when it was known that the removal directions for 29 March 2020 had been cancelled. Whilst noting the advice from the British Embassy on 18 March 2020, in my judgment it was not apparent at the first (March) detention review that the

Defendant would not be able to effect deportation within a reasonable period which took account of the risks of absconding and re-offending. I reach the same conclusion in respect of the second (April) detention review.

Third review : May 2020

151. At the review of 21 May, the Claimant had been granted bail in principle (6 May) but he had yet to provide a suitable address. Given the fluidity of the situation and taking account of the risks, I again consider that the decision to continue detention was justified.

CPP recommendation May 2020

152. The Claimant's secondary case is that his detention became unlawful following the 25 May 2020 recommendation for release. The Assistant Director reached a different conclusion on the release referral (4 June); likewise the fourth detention review (16 June). As to the latter, I note its statement that the Claimant *'has an ETD agreed and the ETD is available'* which takes the matter no further in the absence of the availability of enforced returns and hence the reason to apply for the issue of the ETD for the Claimant. However, and taking account of the risks, I am satisfied that there remained a sufficient prospect of removal within a reasonable period.

Fifth review: July 2020

153. The review of 14 July 2020 took account of the 1 July grant of section 4 accommodation support and that CCAT was currently awaiting accommodation to become available. In the circumstances, and taking account of the risks, I again consider that it remained reasonable to continue detention.

The CPP recommendation: August 2020

154. The CPP recommended release (11 August) with 'mandated actions' as noted above. This was all considered in the sixth (14 August) detention review. The grant of section 4 accommodation was noted. It was clear from the comments of the authorising officer that the critical outstanding matter was the sourcing of a 'release address'; and that release would have been authorised if this had been received. On 21 August the Director had considered and refused the release referral, stating that *'the situation with removals could look quite different in one or two months'*. In all the circumstances, I am just satisfied that there was no breach of Hardial Singh 3 at this stage. However the reasons for optimism were wearing thin.

Seventh review: September 2020

155. By the time of this review (11 September), the following particular further information had been received. First, the required medical update from Healthcare which recorded the Claimant's state of depression and his treatment including Mirtazapine. His level on the Adults at Risk level was maintained at Level 1; but on the basis of the same evidence this was increased to level 2 in the December review. Secondly, Returns Logistics had commented on removability (21 August) in terms which included that the Zimbabwe Embassy in London was closed; that there was further advice from the British Embassy against conducting enforced returns; and that it (RL) was *'hoping that*

this will change in the coming weeks'. Thirdly, the continuing absence of section 4 accommodation. However the authorising officer remained optimistic *'that we will be in a position to deport him within the next few months'*.

156. In my judgment, the point had now been reached where, giving full weight to the risks posed by the Claimant, there was no realistic prospect of his removal within a reasonable period. Seven months on from the original detention, the available information gave no basis for any useful assessment as to when enforced removals might recommence. The opinion of RL was expressed in terms of hope, without any objective support for the reference to *'change in the coming weeks'* nor any indication as to what period of time was envisaged by *'the coming weeks'*. Likewise the authorising officer and the expression of optimism for removal *'within the next few months'*. There was no useful information about the search for section 4 accommodation.

157. In addition, and contrary to the previous position, there was now medical evidence from Healthcare which provided support for the Claimant's previous self-reporting of depression. On previous reviews he was assessed at Level 1 on the basis that he had *'...claimed to suffer from depression and anxiety, but no further medical evidence has been provided.'* Notwithstanding the Healthcare report, the reviewing officer maintained the assessment at Level 1 and the authorising officer simply stated *'I have noted the AAR level, but at this stage I am satisfied that his needs are being met and that his health is not deteriorating whilst in detention'.* In the absence of any witness evidence from decision-makers, there is no explanation as to why the Healthcare report caused no change of AAR assessment in this review; whereas the detention review of 2/4 December increased the assessment to Level 2 on the basis of the same professional evidence.

158. All in all and with all weight to the risks of absconding and re-offending, by this review (11 September) it was or should have been apparent that there was no realistic prospect of removal of this Claimant within a reasonable period. I would allow for a grace period of one week; and therefore conclude that the claimant's detention was unlawful through breach of Hardial Singh 3 from 18 September 2020.

159. I reach this conclusion on the assumption that there had been no public law error in respect of s.4 accommodation. Given the significant risks of absconding and re-offending, in my judgment the issue of whether such accommodation should have been obtained falls for separate consideration: see the similar reasoning in AO at [175] and [178].

160. In these circumstances it is unnecessary to reach conclusions on the subsequent reviews in any detail. By the next review in October 2020 there had been no advance on any front. There had been no update from Returns Logistics since that of 21 August; the relevant part of question (9) remained unanswered; and there was no further information as to accommodation. The reviewing officer's observations on the prospect of removal went no further than *'...we wait for enforced returns to Zimbabwe to recommence'.* The authorising officer commented that recommencement of enforced removals was *'expected within the next couple of months. I am therefore satisfied that Mr Babbage could be removed within a realistic timescale'.* In the absence of any supporting or explanatory evidence I can see no basis for that assessment. In general

terms none of the subsequent reviews provide any satisfactory basis for the conclusion that there was a prospect of removal within a reasonable period.

161. I reach my decision on the basis of breach of Hardial Singh 3 alone. As to Hardial Singh 2, I am satisfied that there was no breach before the September detention review; and it is unnecessary to decide whether there was breach at any time thereafter. I am not persuaded that there was a breach of Hardial Singh 4.

Section 4

Duty to consider and make a decision on the application within a reasonable period

162. I am satisfied that the period of one month between the (re)submission of the application (1 June) and the grant (1 July) was reasonable in the particular circumstances, which included the pandemic.

Duty to source accommodation within a reasonable period from the date of grant

163. In circumstances where the Defendant had continued to pursue the search for s.4 accommodation after the expiry of the Claimant's time-limited bail, I see no basis to take account of the subsequent reconsideration (letter 1 February 2021); and accordingly approach the matter on the basis that the duty continued until (at least) that reconsideration.

164. The Court is again faced with the disadvantage that there is no witness evidence on the search for accommodation. The documentary evidence is confined to the spreadsheets and intermittent emails in their limited terms, together with the unverified observations in the Home Office letter of 20 January 2021. Nonetheless in my assessment of what is a reasonable period of time, I again consider it appropriate to give some weight to the fact of the pandemic and to acknowledge an inherent likelihood that this caused particular and additional delays in the task of sourcing accommodation.

165. On the basis of the information from the Defendant as recorded in R (DMA), a target of 9 days is reasonable in normal times. I also note and take account of the evidence that, once the matter was prioritised in April 2021, accommodation was found in a matter of days.

166. All in all, I have concluded that a reasonable period of time to source accommodation in the circumstances of the pandemic was 1 month, i.e. by 1 August 2020.

167. In my judgment it is clear that the failure to source accommodation by that time bore on the decision to detain, in the sense that it was capable of affecting the decision on whether to continue the detention of the Claimant. That is apparent in particular from the comments of the authorising officer in the review of 14 August 2020 which noted the s.4 grant and that *'we are now awaiting a release address'* from CCAT; stated that a release referral would be submitted for approval *'as soon as an address is available'*; and authorised detention *'whilst a release address is provided by CCAT.'* Indeed the failure was more than merely capable of affecting the decision. In my judgment it is clear that the Claimant would have been released if a section 4 release address had been

provided by the time of this review. Accordingly the decision on 14 August to continue detention was vitiated by public law error.

168. In the absence of such error the Defendant could not have lawfully detained the Claimant. The Defendant has put forward no evidence to the effect that detention would have continued in any event. On the contrary, it is clear that the Claimant would have been released. Accordingly the Claimant is entitled to substantial (as opposed to nominal) damages for detention resulting from public law error.

Conclusions

169. As to section 4, the Claimant's detention was vitiated by public law error from 14 August 2020. As to Hardial Singh, the Defendant was in breach of principle 3 from 11 September 2020, subject to a grace period expiring 18 September 2020. On each basis the Claimant is entitled to damages for unlawful detention.