Neutral Citation Number: [2014] EWHC 2249 (Admin)

Case No: CO/8155/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 July 2014

Before :

RHODRI PRICE LEWIS QC
(Sitting as a Deputy High Court Judge)

- -

Between :

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

- -
- -

Ms Stephanie Harrison QC (instructed by **Messrs Bhatt Murphy**) for the **Claimant**
Mr Tom Poole (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 8 & 9 April, 20 & 22 May 2014

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Approved Judgment

Mr Price Lewis QC:

Introduction

1. In these proceedings the Claimant challenges the lawfulness of her detention by the Defendant, the Secretary of State for the Home Department, following her arrival in this country by air from her native Guinea on the 7th April 2011. She came to join her husband who has refugee status in this country. She seeks a declaration that her detention was unlawful from its outset and in any event by October 2011 and thereafter until her release in September 2012 as a result of a breach of the Defendant's policy and of the *Hardial Singh* principles. She further contends that there were violations of her rights under Articles 3, 5 and 8 of the European Convention on Human Rights. She seeks damages for false imprisonment and compensation for violation of her rights under the ECHR. She also seeks a declaration that the Defendant's policy relating to the detention of the mentally ill is unlawful and a mandatory order requiring the Defendant to instigate an independent investigation into her treatment during detention.

2. Permission to bring this claim for judicial review was granted by Robert Jay QC, sitting as a Deputy High Court Judge (as he then was), on the 27th February 2013. He observed that the case "raises sufficiently serious and complex issues to warrant proceeding to a full hearing."

3. The Claimant began earlier judicial review proceedings on the 21st October 2011 against the Defendant's decision to enforce removal directions to return the Claimant to Guinea set for the following day. The basis of that claim was that the Defendant had not considered a medical report addressing the Claimant's mental health. Mr Justice Lindblom refused permission on the papers on the 4th April 2012 on the basis that the medical report had been considered by then. The Claimant renewed her claim for permission and an oral hearing was listed for the 11th September 2012. By then further medical evidence addressing the Claimant's mental health was available and on the 11th September 2012 the Defendant agreed to release the Claimant as soon as practicable and a consent order was made dealing with management of those proceedings. On the 22nd February 2013 and in the light of further medical evidence the Defendant withdrew her decision of the 7th April 2011 cancelling the Claimant's entry clearance and leave to enter the UK. Her leave to enter was reinstated until the 19th March 2014. Since her release on the 13th September 2012 she has been reunited with her husband and they have had a child born in this country.

4. This case raises the difficult issue of the detention of those who suffer or begin to suffer mental illness.

The Facts:

5. The Claimant was born in Conakry, Guinea in West Africa on the 10th December 1986. She is therefore now 26 and was 24 years old on her arrival in this country on the 7th April 2011. She did not attend school in Guinea and other than having had some tuition in Arabic scripture she describes herself as not formally educated. Her language is Fula but she does have some French. She spoke almost no English when she arrived in the UK in 2011.

6. She married Mr Alpha Bah in 2004. She had known him from them living in the same area in Guinea. He had a business in Guinea but he left in 2008 and came to the UK. He claimed asylum on the 2nd June 2008 because of the political situation in his country. In his claim for asylum he identified his wife by name and gave her correct date of birth. The Immigration Judge who considered his case found him to be a credible witness and held that he had a well-founded fear of persecution in his own country because of his imputed political opinions and so was in need of international protection as a refugee. Mr Bah referred to his wife in his evidence to the Immigration Judge. He was granted refugee status on the 19th March 2009. He wanted to find a job in the UK and somewhere for him and his wife to live before she came over to join him. He succeeded in those aims and in early 2011 the Claimant applied for a refugee family reunion visa at the British Embassy in Freetown, Sierra Leone. That was her first trip out of her home country. She provided her original passport, birth certificate and marriage certificate to the British Embassy. On the 8th February 2011 a refugee family reunion visa was issued to the Claimant valid for the same period as her husband's leave to remain in the UK as a refugee, namely until the 19th March 2014.

7. The Claimant arrived at Heathrow Airport on the evening of the 7th April 2011. She presented her Guinean passport containing the UK entry clearance endorsed "Family Reunion" issued at the British High Commission on the 8th February. She explained to the UK Border Agency ("UKBA") officers that she was in the UK to join her husband whom she named. However, in the UKBA Minute Sheet recording these events it is stated that she was unable to give the date of her marriage or her husband's age. Her passport gave her date of birth accurately as the 10th December 1986 but she appeared to the officer to be "noticeably younger" and when asked her age she said she was 17 years of age. The officer was not satisfied that the Claimant qualified for admission to the UK and suspended the visa giving her leave to enter.

8. Mr Bah was at the airport waiting for his wife and he was contacted on his mobile telephone by the UKBA. He explained that he had refugee status in this country and gave his address which was the address shown on the Claimant's entry clearance. He explained that he was waiting for his wife and gave the correct date of their marriage as 2004. He explained that he had been in the UK since 2008 and that that was the last time he had seen his wife. He was told that his wife had said she was 16 or 17 years old and he offered as a possible explanation that his wife was simply confused.

9. The Claimant was interviewed in French just before midnight. She confirmed her identity and accurately maintained her date of birth as the 10th December 1986. But she then went on to say she was 16 years old. She said inaccurately that she had married her husband in 2000. The officers then concluded that there was little point in continuing the interview "as she was making little sense." It seems that the officers were able to access a document relating to Mr Bah's asylum claim dated June 2008 in which they were able to see that he had explained that he was married to the Claimant who was named in that document and whose date of birth he had given accurately. That document was put on the file. Her detention then began. A document known as the IS.93 which sets out "Summary and Reasons for Initial Detention" was completed. Those reasons were that she had a genuine passport giving her date of birth as 10th December 1986 but she had stated she was 16 years old; that she had given her wedding date as 2000 which would make her 5 years old at the time, that there were genuine concerns that she was being trafficked and that she had no suitable or bona

fide sponsor in the UK and that she would be detained overnight while the office that deals with human trafficking cases was contacted. Attempts to contact that office were unsuccessful. On the written notice of the reasons for detention given to the Claimant the boxes were ticked which stated: "There is insufficient reliable information to decide whether to grant you temporary admission or release" and "You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries."

10. The following morning the Claimant was interviewed again in French with a responsible adult present because she had said she was 16 years old. However, in this interview she again gave her correct date of birth and stated correctly that she was 24 and explained that she had been afraid and panicked when she said earlier she was 16. She wrongly gave her date of marriage at first as 2007 but then corrected the date to 2004. She wrongly stated she had not seen her husband since 2002. This interview was ended because the French interpreter considered that she was not understanding the questions. Mr Bah, who was still waiting for his wife at the airport, was spoken to and he produced his driving licence as evidence of identification. He seems to have lost his temper - swearing and shouting - and said the officers were holding his wife illegally and she was not used to people like them.

11. The Claimant was interviewed again about lunchtime that day with a Fula interpreter. She gave her correct date of birth and correct date of marriage but said she was 13 when she married. She is recorded as being unable to describe her husband or to say where he lived or what he did but she was able to produce photographs of her wedding.

12. The officer then reviewed the case and recorded that he was not satisfied that the Claimant was 24 years of age, as claimed and that false representations had been made and material facts not disclosed in order to obtain her visa. He relied on her having said she was 16 years old and had married at 13. He recorded that it seemed that the Claimant was "being evasive about her age." On that basis a more senior officer authorised refusal of entry to the UK. The Notice of Refusal of Leave to Enter dated the 8th April 2011 given to the Claimant reported: "You have made various statements regarding your claimed age" and that "This therefore brings into dispute your claimed identity." Her entry clearance was therefore cancelled and the Claimant was taken to Yarl's Wood detention centre where she was to stay for over 17 months.

13. This gives rise to what Ms Harrison QC for the Claimant characterises as a contradiction. The Claimant was in fact an adult as accurately shown by her valid passport. The Immigration Officers appear to have been concerned that she might be a child because she had said she was 16 (even though she repeatedly gave her correct date of birth) and that this might be a case of a trafficked child. However, it must be that she was detained on the basis that she was an adult because if she had been or might have been a child the Defendant's policy was not normally to detain children and young persons under the age of 18 and then only in very exceptional circumstances: see the Defendant's Enforcement Instructions and Guidance at 55.9.3.1 and 55.10.

14. This possible contradiction became apparent to a Chief Immigration Officer who reviewed the case three days later on the 11th April 2011 and who formed the view that "the passenger may actually be a minor" but noted: "unfortunately, Terminal 4

have accepted her later claim to be whatever age the passport said she was and have placed her in detention, I am therefore concerned that there may be a minor in adult detention." An appeal was lodged by her husband. A review of her detention after 7 days looked to Bedfordshire Social Services, as the Yarl's Wood detention centre is in Bedfordshire, to carry out an age assessment. Representatives of social services came to the detention centre with a French interpreter. The Claimant said she did not speak French but maintained she was 24 years and a full age assessment was not carried out.

15. On the 20th April 2011 the same Chief Immigration Officer noted: "The refusal as it stands does not make any sense. If we are doubting the passenger's age, then she should not be in detention. If on the other hand, we are accepting her as a 24 year old, then what exactly are the grounds of refusal?" He decided that therefore the refusal of entry would have to be rewritten but that "the amount of discrepancies and lack of knowledge is probably enough to re-refuse but I am hoping that ongoing enquiries in Accra / Guinea come up with something more."

16. Her detention was reviewed at 7 day intervals and continued to be authorised. By the 4th May 2011 nearly a month after the Claimant's detention had begun an officer was recording that there was clear and credible documentary evidence that she was 18 or over – presumably a reference to her passport – and that her physical appearance very strongly indicated that she was significantly over 18. The first 28 day detention review the following day proposed that her detention be maintained throughout the appeal process on the basis that: "The passenger has shown no sign of being cooperative, forthright or honest in any of her details with UKBA and has consistently refused to give a satisfactory response to anything asked of her by either UKBA or Social Services. She is considered extremely likely to abscond if granted Temporary Admission. Her only UK sponsor is considered highly unsuitable." The same review document recorded that "her sponsor Mr Bah had a dubious immigration history" and that he had become "verbally abusive and aggressive". The first monthly progress report given to the Claimant told her: "Your case has been reviewed. It has been decided that you will remain in detention: because there is reason to believe that you will fail to comply with any conditions attached to the grant of temporary admission or release and to effect your removal from the UK. The decision has been reached on the basis of the following factors: You have used or attempted to use verbal/documentary deception to gain leave to enter/remain or evade removal and it is considered likely you will do so again. You do not have enough close ties to make it likely that you will stay in one place." That wording was effectively repeated in each such monthly progress report given to the Claimant.

17. By the 7th May the officers recorded that they no longer considered this " an age dispute case" and "every indication was that she was not a trafficked minor" but expressed concern about the accuracy and consistency of answers given by the Claimant and Mr Bah in relation to their marriage.

18. On the 9th May 2011 the Claimant was given a further notice of refusal of leave to enter explaining that her entry clearance and continuing leave to remain were cancelled on the basis that the UKBA were satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining the leave. The facts were summarised and reliance was placed on the Claimant having stated she was 16 years old and having given contradictory statements regarding her age. Reference was made to the Social Services' age assessment being stopped because the

Claimant said she was unable to speak French even though there had been two previous interviews in that language. The document stated that the Claimant had provided contradictory information about her marriage which led the author "to doubt that you are in a genuine, subsisting relationship" explaining that this was "because you have stated that you married Mr Bah in 2000 but in another interview you stated it was in 2007 then changed your answer to 2004. You were also unable to describe your husband or state his occupation or where he lived." It is recorded in the UKBA Minute Sheet for the 9th May 2011: "New refusal paperwork faxed to the detainee at Yarl's Wood IRC, request for a doctor to make an assessment of the passenger's health made to Yarl's Wood IRC." There is no record of anything having been done at Yarl's Wood in that regard.

19. The new decision was appealed to the First-tier Tribunal (Immigration and Asylum Chamber) and the appeal was dismissed on the 12th July 2011. The Immigration Judge found the Claimant to be lacking in credibility in her answers to questions about her age and her marriage. He did not believe Mr Bah. He was satisfied that the Claimant had made false representations when seeking leave to enter the United Kingdom as the wife of Mr Bah and he was not satisfied that the Claimant and Mr Bah were in a genuine and subsisting relationship either at the time she sought entry clearance or when they gave evidence before him. By this time it was being accepted on behalf of the Defendant that the Claimant's passport showed her correct date of birth. That date of birth had been given by Mr Bah in his application for refugee status some years previously.

20. Removal directions were set for August but were cancelled because the Claimant had sought permission to appeal the decision of the Immigration Judge but by the 23rd August 2011 her appeal rights were exhausted and removal directions were set again for the 28th August 2011.

21. By then she had been in custody for nearly 4 months. It was at that stage that she began to self-harm. She made superficial scratches on her chest and abdomen on the 26th August 2011. Similar incidents continued to take place. She was restrained, removed from association with other detainees and handcuffs were used to stop her harming herself. The Claimant self-harmed on at least eleven occasions between August and November 2011 including occasions when she cut her forehead with the top of a sardine tin, when she again cut her forehead and the right side of her face this time with pieces of china, when she tried to strangle herself using a mobile telephone cable as a ligature and placed a pillow over her head, when she banged her head against the wall, when she cut her neck using pieces of china and occasions when she cut her stomach, neck and arm.

22. During this period removal directions were set and then cancelled on seven occasions because of administrative or similar problems. The last such occasion was on the 10th October 2011 when the Claimant had not been given the 72 hours of notice that the Defendant's own policy required. On the 11th October 2011 the Defendant served further removal directions on the Claimant for her removal to Guinea on the 22nd October 2011.

23. In October 2011 the charity Medical Justice were contacted by the Claimant. They arranged for Dr. Rachel Bingham to see the Claimant at the detention centre. Dr Bingham was then a doctor training in general practice with a special interest in

psychiatry. She provided a report that was served on the Defendant on the 20th October 2011. She gave her opinion that "the onset of emotional and behavioural disturbance in a vulnerable individual following stressful life events suggests an adjustment disorder…These disorders characteristically involve depressed mood, anxiety and feeling of inability to cope or to plan ahead which feature heavily in (MD)'s presentation…The presentation of previously unreported behavioural disturbances after her detention suggests an acute deterioration in her mental health provoked by her recent experiences… Given (MD)'s apparent vulnerability to stressors and her current emotional instability, she appears to be at risk of further deterioration in her mental health and seems unlikely to cope with further removal directions at this time without exacerbation of her symptoms… (MD)'s labile mood, volatile emotional state and impulsive self-destructive behaviour clearly places her at risk of serious injury in the context of an ongoing stressful and unpredictable situation. "

24. The earlier judicial review proceedings were then lodged and the removal directions set for the 22nd October 2011 were cancelled. No further removal directions have been set. By then the Claimant had been detained for over 6 months. In the witness statement by Mr Keith Benton, a Chief Immigration Officer with particular responsibility for this case, he accepts that Dr Bingham's report was not fully addressed in the reviews of the Claimant's detention and nor was the policy of not detaining those suffering from a serious mental illness which could not be satisfactorily managed in detention explicitly considered in those reviews. Mr Benton's view is that at that stage there was no evidence that the Claimant had a serious mental illness and that in any event extensive steps were put in place to ensure that any mental illness could be satisfactorily managed in detention and that in any event there were very exceptional circumstances which justified continued detention in accordance with the Defendant's policy.

25. In February 2012 the Claimant was seen by Dr Jane Mounty who is an experienced consultant psychiatrist. She recorded in the Claimant's detention centre medical record on the 16th February: "She is suffering from Major Depression with psychotic features and Generalised Anxiety Disorder. A mildly sedating antidepressant would be advisable. She is not acutely suicidal but continues to have suicidal thoughts." Dr Mounty saw her again on the 27th February 2012 and provided a long and thorough report dated the 2nd May 2012. In the meanwhile permission was refused in the judicial review proceedings on the 4th April 2012 but the application for permission was renewed and was outstanding when the Claimant was released.

26. Dr Mounty diagnosed major depressive disorder including psychotic features and panic disorder. She looked at the medical records of the detention centre and concluded that the treatment there recorded was inadequate to treat the conditions troubling her. Her conclusion was that the Claimant was "unfit for detention because as far as can be determined she was mentally well prior to being held in detention and has become ill specifically because of being in the situation of confinement in (the detention centre)."

27. Mr Benton says that the concerns raised by Dr Mounty were considered in the reviews of the Claimant's continued detention, her health was continuously monitored and staff were at hand to ensure that she had access to appropriate medical assistance. There was however no explicit reference to the report or to the policy on the detention

of those with a serious mental illness in any of the reviews. In May and June there were further incidents of self harm including cutting her wrist with a broken saucer.

28. On the 9th July 2012 another very experienced psychiatrist Dr Ruth Sagovsky saw the Claimant and provided a report that was served on the Defendant on the 18th July 2012. She had seen all the relevant medical records and the earlier reports. She essentially agreed with the views of her colleagues that the Claimant was "in the range of severe depressive illness" and "confirmed Dr Mounty's diagnosis of panic disorder." It was her opinion that "her symptoms are unlikely to abate whilst in detention as her mental health problems are closely linked to her current situation and staff do not have the necessary skills to deal appropriately with her behaviour… It is a major concern that (MD) has not been assessed by a psychiatrist in order to diagnose and treat her serious mental illness… The lack of any local psychiatric assessment and a treatment plan is extremely concerning, especially as (MD) is at severe risk of suicide and nothing is being done to address the underlying illness. It is clear from their actions that the staff have made their own assessment choosing to ignore Dr Mounty's expert advice, whilst not seeking expert advice themselves."

29. Mr Benton acknowledges that this report was not brought to the attention of the caseworker responsible for reviewing the Claimant's detention but he asserts that if he had seen it he would not have found that it demonstrated that the Claimant was suffering from a mental illness that could not be satisfactorily managed in detention. He notes particularly that the Claimant had not consented to provide access to her medical records. He relies on the views of the staff at the detention centre and on very exceptional circumstances justifying her continued detention in any event.

30. There were two further incidents of self harm in July 2012. After the second of these incidents the Claimant was seen by Dr Leahy a consultant psychiatrist at the request of staff at the detention centre. His view was that she should be treated as having a depressive illness with antidepressant drugs and counselling. Mr Benton does not address this report.

31. On the 12th August 2102 this application for judicial review of the decisions to detain and to continue to detain the Claimant was lodged by the Official Solicitor. The Official Solicitor was involved because of her lack of capacity resulting from her mental condition. On the 11th September 2012 the earlier judicial review application was listed for an oral permission hearing. Directions were given and the Claimant was released on the 13th September 2012, after some 17 months and six days in detention, on condition that she lived with her husband and reported to an immigration officer fortnightly. Mr Benton's explanation for the decision to release her is that it was then considered that a pre-existing mental condition might explain her erratic behaviour and the contradictory answers she had given on arrival, that the Claimant had finally agreed to consent to providing her medical records and her removal could no longer be considered to be imminent.

32. The Claimant was seen by a further psychiatrist after her release who confirmed the earlier diagnoses of a severe depressive episode and panic attacks. Her mental state seemed to be improving since antidepressant therapy and she seemed to be making gradual but good progress. Reports earlier this year from Dr Wilhelm Skogstad conclude that the depressive illness suffered by the Claimant during detention was "precipitated by the experience of detention and …detention was experienced as a

trauma at the time and this has led to on-going symptoms of a Post-Traumatic Stress Disorder." His view is that "detention did not exacerbate a pre-existing mental disorder but caused the onset of the mental disorder that was subsequently manifest." It is his opinion that "the management and treatment of MD's psychiatric condition at Yarl's Wood was inadequate in a number of ways and not appropriate to her mental state and her severe suffering. In my view it contributed to the deterioration in her mental state in detention and the prolonging of her mental suffering."

The Grounds of Claim

33. The claim is brought on five grounds as follows:

i) That the initial decision making from the 7th April 2011 was flawed by public law errors including irrationality;

ii) From on or after the 22nd October 2011 after the first judicial review was lodged and thereafter the detention was unlawful because it breached the *Hardial Singh* principles 2 and /or 3;

iii) The detention was incompatible with the Defendant's general policy on detention in Chapter 55 of the Enforcement Instructions and Guidance (EIG) specifically under Chapter 55.10 relating to the mentally ill from

a) October 2011 and the assessment of Dr Bingham;

b) February and /or May 2012 and the assessment of Dr Mounty;

c) July 2012 and the assessment of Dr Sagovsky;

d) July 2012 and the assessment of Dr Leahy.

iv) The policy in Chapter 55.10 was in any event unlawful as incompatible with section 149 of the Equality Act 2010;

v) The detention and /or conditions of detention were incompatible with the Convention rights of the Claimant under Article 5 of the ECHR and in respect of Articles 3 and/or 8 EHCR on the material dates set out above under paragraph (iii)(a)-(d).

The Legal Framework:

The Power to Detain:

34. Part 1 of the Immigration Act 1971 deals with the regulation of entry into and stay in the United Kingdom. Section 4 deals with the administration of that control and sub-section (2) provides that Schedule 2 shall have effect with respect to "… (b) the examination of persons arriving in the United Kingdom by air, (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully and (d) the detention of persons pending examination or pending removal from the United Kingdom."

35. Paragraph 2 of Schedule 2 gives immigration officers the power to examine any person arriving by air for the purposes of determining inter alia whether the person has been given leave to enter which is still in force, whether that person should be given such leave or whether they should be refused leave. Paragraphs 8 to 10 confer powers to authorise the removal of persons refused leave to enter the United Kingdom. Paragraph 16(1) gives the power to detain a person subject to examination and pending a decision to give or refuse leave to enter and Paragraph 16(2) gives the power to detain pending removal.

36. Under the Immigration Rules Part 9 paragraph 320(7A) it is a ground to refuse leave to enter "where false representations have been made or false documents have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application."

37. The Claimant was detained on the 7th April 2011 under Schedule 2 paragraph 16(1). She was refused leave to enter on the basis of alleged false representations and she was detained thereafter under Paragraph 16(2) until her release on the 13th September 2012.

The tort of false imprisonment and Article 5 ECHR

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

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

39. Detention for immigration purposes is imprisonment in fact. The issue in the present case is whether detention was unlawful for some or all of the period.

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

> Article 5—Right to liberty and security

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

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

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

> "46. There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in Re Hardial Singh [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in Tan Te Lam v Tai A Chau Detention Centre [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment ... the following four principles emerge:
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> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
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> 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;
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> iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.
>
> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.
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> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

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

> "23 ... As regards the first principle, I consider that Woolf J was saying unambiguously that the detention must be for the purpose of facilitating the deportation. The passage quoted by Lord Phillips PSC includes, at para 262, the following: "as the power is given *in order to enable the machinery of deportation to be carried out,* I regard the power of detention as being impliedly limited to a period which is reasonably necessary *for that purpose* " (emphasis added). The first principle is plainly derived from what Woolf J said.

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

44. In **R (Mahfoud) v SSHD** [2010] EWHC 2057 (Admin) Hickinbottom J gave a very helpful explanation of the *Hardial Singh* principles in seven propositions:

> "[6] … (i) The power of deportation exists for the purpose of deporting the relevant person ("the deporteee')
>
> (ii) The power exists until deportation is effected: but it can only be exercised to detain the deporteee for a period that is reasonable in all the circumstances.
>
> (iii) Whist in some cases a reasonable time will have expired already and immediate release will be inevitable, in most cases the crucial issue will be whether it is going to be possible in the future to remove the deportee within a reasonable time having regard to the period already spent in detention. In considering such prospects, it is necessary to consider by when the Secretary of State expects to be able to deport the deportee, and the basis and degree of certainty of that expectation. Where there is no prospect of removing the deportee within a reasonable time, then detention becomes arbitrary and consequently unlawful under Article 5, and the deportee must be released immediately.
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> (iv) There is no red line in terms of months or years, applicable to all cases, beyond which time detention becomes unreasonable. What is "reasonable time" will depend upon the circumstances of a particular case, taking into account all relevant factors.
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> (v) Those factors include:
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> (a) The extent to which any delay is being or has been caused by the deportee own lack of cooperation in, for example, obtaining an emergency travel document ("ETD") from his country of origin.
>
> (b) The chances that the deportee may abscond (which may have the effect of defeating the deportation order).

> (c) The chances that the deportee if at large may reoffend. If he may reoffend, of particular importance is not simply the mathematical chances of reoffending but the potential gravity of reoffending if it were to occur.
>
> (d) The effect of detention on the deportee, particularly upon any psychiatric or other medical condition he may have. The conditions in which the deportee is detained may also be relevant, although less so if he is required to be detained in particular conditions (e.g. in prison estate as opposed to a detention centre) because of his own behaviour.
>
> (e) The conduct of the Secretary of State, including the diligence and speed at which efforts have been made to enforce the deportation order, including obtaining an ETD.
>
> That list of factors is not, of course, exhaustive.
>
> (vi) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative. There is no "trump card." Therefore even when there is a high risk of reoffending and/or absconding, nevertheless there may still be circumstances in which Article 5 requires a deportee's release.
>
> (vii) The burden of showing that detention is lawful lies upon the Secretary of State."

45. In **Lumba** Lord Dyson JSC held at [121] that:

> "The risks of absconding and reoffending 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."

46. Lord Dyson also explained that time spent pursuing legal challenges is not excluded from the assessment of the reasonable period and the court must assess the underlying merits of the challenge: see [115-121].

47. In **Das v Secretary of State for the Home Department** [2007] EWCA Civ 45 the Court of Appeal addressed the circumstances in which a person who the Defendant has power to remove from the United Kingdom and intends to do so but who has a mental illness may be detained. Lord Justice Beatson observed:

> "It is clear from the decisions on the *Hardial Singh* principles that the state of a person's mental health will affect the determination of what is a reasonable period for which to detain that person: see Baroness Hale in *Lumba's* case at [218] and Dyson LJ in *M v Secretary of State for the Home Department* [2008] EWCA Civ. 307 at [39]…Dyson LJ stated that where

> detention has caused or contributed to a person's suffering mental illness that is a factor which 'in principle' should be taken into account in assessing the reasonableness of the length of the detention. But he also stated that in such cases "the critical question… is whether facilities for treating the person whilst in detention are available so as to keep the illness under control and prevent suffering."

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

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

Policy

49. In **Das,** Lord Justice Beatson observed ([15]):

> "In *Lumba's* case Lord Dyson stated (at [22]) that the *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose and reasonably in the *Wednesbury* sense. But he also stated (at [30]) that they are not exhaustive, and do not therefore preclude the operation of the public law duty of adherence to published policy. Chapter 55.1.1 of the policy is to the same effect. It states that "(t)o be lawful detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy." It should be noted that in *Lumba's* case Lord Dyson went further than stating that published policy must be adhered to. He stated (at [34]) that "immigration detention powers need to be transparently identified through formulated policy statements" (emphasis added). Such policies are therefore required and operate as restrictions on the broad language of the 1971 Act over and above the *Hardial Singh* principles. Failure by the Secretary of State to have regard to a material policy concerning detention would, it was held, render the detention unlawful and a false imprisonment, even when it was

> certain or inevitable that the person detained could or would have been detained had the power been exercised lawfully…But, if detention was certain or inevitable, while the Secretary of State will have committed the tort of false imprisonment, the person detained will only be entitled to nominal damages."

50. The Defendant has a general policy on detention and temporary release in Chapter 55.1 of her Enforcement Instructions and Guidance. There is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used: 55.1.1. Detention must be used sparingly, and for the shortest period necessary. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable: 55.1.3; and see 55.3 which sets out in similar terms the approach to decisions to detain.

51. In **Das** the Court were considering the same policy formulation to cases where mental health is in issue as is relevant here, namely the policy in Chapter 55.10 of the Secretary of State's *Enforcement Instructions and Guidance* as reformulated in August 2010. It states in so far as is relevant:

> "**55.10 Persons considered unsuitable for detention**
>
> The following are normally considered suitable for detention in only very exceptional circumstances…
>
> …
>
> - **those suffering serious mental illness which cannot be satisfactorily managed within detention**…"

52. In the context of the detention of those with serious medical conditions it has been accepted by the Court of Appeal that the reformulation of the policy was a more explicit statement of existing policy rather than representing a policy change: see **R (MD Angola) v Secretary of State for the Home Department** [2011] EWCA Civ. 1238 at [17] and see **Das** at [19].

53. The Detention Centre Rules 2001 seek to assist in adherence to the policy by providing that all detention centres shall have a health team including a general practitioner (Rule 33), that every detained person is to be given a physical and mental examination by a medical practitioner within 24 hours of admission (Rule 34) and that the medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention. (Rule 35). Chapter 55.8A of the policy states that the purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention.

54. Lord Justice Beatson explained the objective of the policy in these terms:

> "In the light of the purpose of immigration detention… that is enabling lawful removal pursuant to an effective immigration policy, the policy seeks to ensure that account is taken of the health of the individuals effected and (save in very exceptional circumstances) to prevent the detention of those who, because of a serious mental illness are not fit to be detained because their illness cannot be satisfactorily managed." [47]

55. So the mere fact of suffering from a mental illness even a serious one does not suffice to come within the terms of the policy. The effects of the illness on the particular individual, the effect of detention on him or her and on the way the person's illness would be managed if detained must be considered: see **Das** at [57]. The court went on to make the following general points on the policy:

i) It is necessary for the Secretary of State to consider whether the policy in 55.10 applies to the case of the individual whose detention is being considered and that involves taking reasonable steps to inform herself sufficiently about the individual's mental health so as to be able to make an informed judgment about whether the policy applies: [66]

ii) The threshold for the applicability of the policy is that the mental illness must be serious enough to mean that it cannot be satisfactorily managed in detention and the Secretary of State through her officials should consider matters such as the medication a person is taking and whether his or her demonstrated needs are such that they can or cannot be provided in detention: [67]

iii) Account should be taken of the facilities available at the centre at which the individual is to be detained and the expected period of detention before he or she is lawfully removed: [67]

iv) Where the policy does apply there is a high hurdle to overcome to justify detention. Mere liability to be removed and refusal to leave voluntarily cannot constitute the "very exceptional circumstances" required or the policy would be denuded of virtually all its operation:[68]

v) Detention cannot be justified by reference to that person's own well-being (such as to prevent suicide attempts) either in general or as an exceptional circumstance: [68].

vi) Where there are cogent grounds for believing that removal will take place in a very short time, detention will be justified because a short period of detention of that character is not likely to raise questions of "satisfactory management": [68]

vii) In assessing whether to detain a person known to have a mental illness particular care is needed. The Secretary of State, through her officials, should consider whether, if the decision is taken to detain, particular arrangements will need to be made for the detainee's welfare and to monitor him or her for signs of deterioration: [69]

viii) The Secretary of State is not entitled to abdicate her statutory and public law responsibilities to the relevant health authority or clinicians but where she has conscientiously made reasonable enquiries as to the mental health of the person who is being considered for detention, has obtained relevant reports and considered the implications of the policy for the detention of that person she should generally be entitled to rely on the responsible clinician: [70].

ix) It seems that satisfactory management of mental illness is achieved when deterioration is prevented rather than it being necessary to show that improvement in the condition is taking place - although that point was not definitively decided by the court: [71].

56. If the Claimant's detention became unlawful as a breach of this policy, then if the Defendant is able to show on the balance of probability that the Claimant would have been detained any way because of very exceptional circumstances, any damages awarded would be nominal, applying the guidance given by the Supreme Court in **Lumba** at [90], [91] and [95] and see **R (EO) v Secretary of State for the Home Department** [2013] EWHC 1236 at [70] to [74].

Detention Conditions and Human Rights:

57. I have addressed Article 5 earlier in this judgment.

58. The principles relating to Article 3 in this context were summarised by Singh J in **R (HA)(Nigeria) v Secretary of State for the Home Department** [2012] EWHC 979 Admin at [173-178] by reference to the decision of the European Court of Human Rights in **Kudla v Poland** [202] 35 EHRR 11, as follows:

i) Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour [90];

ii) However, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the nature and extent of the treatment, the manner and method of its execution, its duration, its physical or mental effects and in some instances, the sex, age and state of health of the victim [91];

iii) The Court has considered treatment to be inhuman because, inter alia, it was premeditated, was applied for hours at a stretch, and caused either bodily injury or intense physical or mental suffering [92];

iv) It has deemed treatment to be degrading because it was such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them [92];

v) On the other hand the court has consistently stressed that the suffering and humiliation must go beyond the inevitable element connected with a given form of legitimate treatment or punishment [92]. Measures depriving a person of liberty may often involve such an element [93];

vi) It cannot be said that Article 3 lays down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to receive a particular type of medical treatment [93]. Nevertheless, the state must ensure that a person is detained in conditions which are compatible with his dignity and that the manner and method of execution of measures used do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by amongst other things, providing him with the requisite medical assistance [90].

59. Singh J went on to explain:

> "175. Although the primary obligation in Article 3 is a negative one, the Court has also recognised that a positive obligation to protect individuals from ill-treatment may also arise under it. In particular, as the Claimant points out, detained persons have frequently been said by the Court to be "in a vulnerable position" and "the authorities are under a duty to protect them": e.g. **Edwards v United Kingdom** [2002] 35 EHRR 19, para.56. This includes persons in administrative detention for immigration purposes: **Slimani v France** [2006] 43 EHRR 49.
>
> 176. Furthermore, an obligation may even arise under Article 3 where there is no ill-treatment from the state or from other people. As the court put it in **Pretty v United Kingdom** [2002] 35 EHRR 1, at paragraph 52:
>
> 'The suffering which flows from *naturally occurring illness*, physical or mental, may be covered by Article 3. Where it is or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures for which the authorities can be held responsible. (Emphasis added)
>
> 177…
>
> 178 As **Keenan v United Kingdom** [2001] 33 EHRR 38, paras.110-115 illustrates, the distinction between negative and positive obligations is not always clearcut when a person with mental health problems is in custody and there may be a combination of factors, both acts and omissions, which lead to the overall conclusion that there has been a breach of Article 3. In **Keenan** the following factors led the Court to make a finding of inhuman and degrading treatment in breach of Article 3: inadequate medical records; lack of recourse to specialist psychiatric input; the imposition of seven days of segregation, and punishment in the form of an additional period of 28 days imprisonment for an assault on officers."

60. I agree with what Mr David Elvin QC said in **R (S) v Secretary of State for the Home Department** [2011] EWHC 2120 (Admin) after reviewing the authorities on

the positive duty under Article 3 that in the case of serious mental illness there must be in place effective monitoring of the detainee and the obtaining of suitable expert advice as to how that person should be dealt with (see [202]) and in applying the positive duty under Article 3 it is not appropriate to "wait and see" what occurs if there are grounds for harm occurring which would pass the Article 3 threshold but to take an informed decision to prevent such harm occurring: [208].

61. In **Barilo v Ukraine** Application number 9607/06 (16 May 2013) at [68] the Court further explained the duty owed to detainees in these terms:

> "The authorities must ensure that, where required by the nature of a medical condition, supervision is regular and systemic, and that there is a comprehensive therapeutic strategy aimed at curing the detainees' diseases or preventing their aggravation, rather than treating them on a symptomatic basis."

62. The reference to a strategy aimed at curing the disease rather than preventing deterioration seems to go further than the Court of Appeal's interpretation of the Defendant's policy in **Das**: see above.

63. Treatment which does not reach the severity of Article 3 treatment may nevertheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity: see **Bensaid v United Kingdom** [2001] 33 EHRR 205 at [46]. Mental health is regarded as a crucial part of private life associated with the aspect of moral integrity: ibid [47]. So the preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life. The Claimant alleges that the conditions of her detention amount to a breach of Article 8 as a disproportionate interference with her right to moral and physical integrity and the preservation of her human dignity. Unlike Article 3, the rights under Article 8 are qualified and may be justified as being in accordance with law and necessary for reasons of inter alia national security, public safety or the economic well-being of the country. Detention may be maintained for the legitimate aim of implementing an effective immigration policy.

64. I turn now to consider the grounds of claim in the light of that legal framework.

Ground 1- Was the initial decision to detain lawful?

65. A preliminary issue arises here in that although the Claim Form at Section 3 giving details of the decision to be judicially reviewed stated " Decision to authorise the Claimant's detention from 7 April 2011 and continuing to date" and the Grounds for Judicial Review attached to the Claim Form identified as the first substantive relief sought " a declaration that the detention of the Claimant was unlawful from the outset and in any event by October 2011 and at all material times thereafter, as a breach of stated policy and *Hardial Singh* principles", it did not set out any arguments directed at the lawfulness of the initial decision to detain, as were set out in the Claimant's skeleton argument. The Defendant submits that permission to argue this ground is therefore needed and should be refused. The Claimant submits that there was late disclosure of documents by the Defendant and that because of that it only became possible to formulate the arguments addressing the legality of the initial decision when the skeleton argument was being drafted. It is further contended that the burden

of establishing the lawfulness of that decision is in any event on the Defendant and no prejudice has been suffered because the relevant arguments were set out in the skeleton argument lodged on the 27th March 2014 for the hearing beginning on the 8th April 2014.

66. In my judgment it was necessary for the court to be fully appraised of the events surrounding the initial decision to detain and all the documents relevant to the lawfulness of that initial decision would have had to have been before the court in any event. The Claim Form put in issue the lawfulness of that initial decision and no prejudice has been suffered by the Defendant in having to address the arguments set out very clearly in the Claimant's skeleton argument. Whilst I do not condone any failure to comply with procedural requirements and I do not consider that the late disclosure of documents prevented this Ground from being pleaded earlier, I am satisfied that in this case where the liberty of the individual is in issue it is right that the court should consider carefully the lawfulness of that initial decision. I therefore grant permission for this first Ground to be argued.

The Claimant's submissions:

67. The Claimant submits that the decision to detain was irrational because of the inconsistent approach that was being taken by the Defendant's officials to the Claimant's age: if she was or might have been a minor then she should have been referred to Social Services in accordance with the Defendant's own policy. If on the other hand she was an adult and her passport gave her correct date of birth then there were no false representations to justify her detention. She points out that this inconsistency was recognised by the Defendant's officials and led to the further notice of refusal of leave to enter cancelling her entry clearance and continuing leave to remain on the 9th May 2011.

68. She further submits that the Defendant through her officials acted irrationally in detaining the Claimant when the right of appeal had been exercised, the initial decision was being withdrawn so a new appeal would be lodged and so removal could not be said to be imminent. It is claimed that therefore the presumption of liberty in the policy was not applied and the appeal was not treated as an incentive to comply with restrictions which could be imposed on release, as the policy indicated it should be.

The Defendant's Submissions:

69. The Defendant submits that the reason the Defendant decided to cancel the Claimant's leave to enter was not because she believed the Claimant was a minor or because the Claimant maintained she was a minor but because she was "being evasive about her age" as the contemporary record for the 8th April showed. Therefore it is submitted the policy in relation to minors was not engaged. She had also not given coherent or consistent dates relating to her marriage and she was not able to describe her husband or what he did or where he lived. Therefore the officers reasonably believed that the Claimant had made false representations or submitted false documents when seeking leave to enter the UK and so she was refused leave to enter under paragraph 320(7A) of the Immigration Rules. It was consistent for the officers to treat her as an adult and detain her and it was only because of uncertainty that an age assessment was sought from social services. In any event whether or not the subject is under 18 is only one of

the factors relevant under the policy. It is submitted that the Claimant did not have ties with the UK and there was a high risk of absconding. There was a reasonable belief that removal would be within a reasonable timescale and detention was justified.

70. The further decision refusing leave to enter on the 9th May 2011 was on the basis that the Claimant and Mr Bah were not in a genuine, subsisting relationship because of their earlier inconsistent answers. That view was supported by the Immigration Judge on the 12th July 2011 after hearing evidence from the Claimant and Mr Bah.

71. In relation to the claimed breach of policy, it is submitted that the policy identifies that detention is "most usually appropriate" where it is "to effect removal" or "where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release." Those were the circumstances in this case. The fact of an appeal pending does not mean that the person should not be detained where other factors weigh in favour of detention. The detention reviews show that the Defendant had in mind how long an appeal could take. Even where removal is not imminent detention may be appropriate when consideration is given to the risk of absconding and consideration of the person's family ties with the UK is relevant to this risk. So the detention was lawful and not in breach of policy given the finding that the factors in favour of detention, in particular the high risk of absconding, outweighed the presumption in favour of release.

Discussion:

72. In my judgment there was no irrationality in the Defendant's decisions through her officials on the 7th and 8th April 2011 when the Claimant entered the country. On her arrival she wrongly gave her age as 17 years. Later that evening she said she was 16. She gave the date of her marriage as 2000 when she had in fact married in 2004. The following morning she wrongly gave the date of her marriage as 2007 before correcting it to 2004. She stated that she had not seen her husband since 2002 whereas her husband correctly had said they last saw each other in 2008. She later said she was 13 when she married whereas she had been 17. She was not able to describe her husband or say where he lived or what his occupation was. This last interview was with the benefit of a Fula interpreter. In these circumstances it was reasonable for officers to conclude that false representations had been made in order to obtain her visa. I accept that no conclusion was reached that the Claimant was a child but the view was that she was being evasive about her age. That in turn cast doubt on the genuineness of her relationship with Mr Bah and that concern formed an important part of the basis for the further notice cancelling her entry clearance on the 9th May. I take into account that the Immigration Judge who saw the Claimant and Mr Bah and heard their oral evidence in July was not satisfied that they were in a genuine and subsisting relationship.

73. I further accept that there was no breach of policy here. The Defendant's policy does allow for detention in order to effect removal where it is expected that will be achieved within a reasonable period. Once the Defendant's officials were not satisfied of the genuineness of her relationship with Mr Bah then there were no ties in the UK and the risk of absconding was seen as high. The fact of an appeal being lodged and indeed of a further and delayed appeal being necessary because of the further notice cancelling the entry clearance given in May did not mean in the terms of the policy that detention would be in breach of that policy. The time likely to be taken for an

appeal was kept in mind by the Defendant's officials. They were entitled to weigh up the risk of absconding against the presumption in favour of release and to decide therefore to detain and continue the detention.

74. Ground 1 therefore fails.

Ground 2: Breach of the Hardial Singh principles 2 and/or 3 from October 2011

The Claimant's Submissions:

75. The Claimant submits that her detention became unlawful as incompatible with the *Hardial Singh* principle 3 or 2 on or after the 22nd October 2011 when the first application for judicial review was lodged as that acted as a legal bar to removal until the proceedings were concluded. Expedition of the application was not sought by the Defendant and it was not known how long the proceedings would take. The Claimant had by then been detained for more than 6 months and so removal could not take place within a reasonably foreseeable period in all the circumstances of the case. These judicial review proceedings were not concluded by the time the Claimant was released some 11 months later.

76. The following factors in this case are relied upon by the Claimant as showing that detention had already gone beyond a reasonable period or in the light of the further indeterminate period would become unreasonable:

i) The Claimant had no criminal convictions;

ii) She had no history of absconding or going to ground;

iii) Her immigration history was limited to the refusal of entry which was under challenge;

iv) The application for judicial review was not without merit and had not been expedited;

v) The Claimant did have close personal ties because she was married to a refugee and he was actively supporting her and was willing to accommodate her and stand as surety;

vi) The Claimant was suffering serious adverse effects of continued detention as evidenced by her unstable and disturbed behaviour which had been assessed by Dr. Bingham to constitute a serious mental illness and which had resulted in 3 months of incidents of self-harm and acute distress and which was likely to continue to deteriorate if detention continued;

vii) The report of Dr Bingham cast new light on the Claimant's conduct at the time of entry and supported the Claimant's case that she was not a deliberate liar but a confused and vulnerable individual with a strong propensity to distress when under pressure;

viii) The Defendant had acted irrationally and/or unreasonably in treating the Claimant's self-harming as attempts to frustrate her removal when in fact it

was evidence of serious mental illness and in any event the failed removals were in whole or largely the result of administrative failure;

ix) The Defendant had available to her extensive powers to impose, if necessary, strict conditions of bail including residence requirements, electronic tagging, and reporting requirements in order to meet any risk of absconding there was assessed to be.

77. The Claimant further submits that if those factors are not sufficient to establish that the detention was unlawful by October 2011 then it became so once the assessment by Dr Mounty became available in February 2012 to May 2012 in which the Claimant was diagnosed as suffering from major depressive disorder with psychotic features and panic disorder. This information was not properly taken into account by the Defendant even though it described deterioration in the Claimant's mental state as had been anticipated by Dr Bingham. The report of Dr Mounty was also relevant to the initial decision to refuse entry as it addresses her difficulties in interview expecting that she will be "panicky and extremely lacking in confidence in the interview situation." The Claimant submits that the Defendant was wrong subsequently to dismiss Dr Mounty's report on the basis that it rested on " an uncritical acceptance of the account of the Claimant" when it is plain that the report was based on the medical notes, approved psychiatric tests, objective and clinically significant presentation and Dr Mounty's accepted psychiatric expertise. In any event the Claimant's account of her mental state was consistent with the Defendant's own records.

78. The application for judicial review was still pending and there was no prospect of imminent removal.

79. The Claimant further submits that if detention was not by then unlawful it became so on or after the 13th July 2012 on receipt of the report of Dr Sagovsky which confirmed the Claimant's serious mental illness and the severe adverse effects of continued detention upon her. Its findings were also relevant to the initial decision to refuse entry. It is accepted by Mr Benton on behalf of the Defendant that detention was not reviewed in the light of this report. On the 26th July 2012 the diagnoses of Dr Mounty and Dr Sagovsky were confirmed by Dr Leahy but this assessment is not addressed in the evidence of Mr Benton and does not seem to have been taken into account.

80. At this time the judicial review was still outstanding and the grounds had been amended to address the Defendant's decision dated the 25th June 2012 in response to the representations relying on Dr Mounty's report. The Claimant had by now been detained for 15 months and there was no prospect of imminent removal. It is therefore submitted that continued detention was incompatible with the second and third *Hardial Singh* principles.

The Defendant's Submissions:

81. The Defendant submits that detention was maintained pending removal because (a) the Claimant had shown no signs of being co-operative, forthright or honest in any of her dealings with the Defendant and had consistently refused to give a satisfactory response to anything asked of her by the Defendant or by social services; (b) she was considered extremely likely to abscond if granted temporary admission; and (c) her only UK sponsor was considered highly unsuitable. Mr Bah did not offer to be a

surety at the time of her bail application in May 2012 and she was not then proposing to reside at his address.

82. The Defendant relies on the views of the mental health nurse at Yarl's Wood detention centre as to the Claimant's condition and fitness to fly.

83. The Defendant made efforts to speed along the judicial review by writing to the court asking that the case be considered quickly because of the Claimant's detention. An application for judicial review is not a legal bar to removal although it is the Defendant's policy in EIG Chapter 60.4.1 normally to defer removal where an application has been properly lodged.

84. Bail was refused on the 6th February 2012 and the 10th May 2012 on the basis of the high risk of absconding.

85. In the circumstances it is submitted that throughout the period of detention there remained a reasonable prospect of the Claimant's application for judicial review being determined within a reasonable period, which would have allowed removal to take place. The logical implication of the Claimant's position is that no person with an outstanding application for judicial review can be detained and that is clearly wrong. The Defendant took the view that the setting of removal directions was a trigger for the Claimant's disruptive behaviour which was an attempt by her to frustrate her removal.

86. There remained throughout a high risk of absconding.

87. Dr Bingham's report is an equivocal report. It recognised that any mood disturbances "may equally be a normal reaction to a very upsetting situation" and concerns that had been raised about the Claimant's mental health had been flagged to the detention centre staff and the Claimant was receiving monitoring and appropriate treatment. The Claimant would not give consent to give access to her medical records. On the 2nd December 2011 the Claimant's medical representations were considered but rejected.

88. Appropriate monitoring of her health and management of it were provided at the detention centre. Mr Benton addressed Dr Mounty's report.

89. Dr Sagovsky's report was noted in the Claimant's medical records but did not prompt a Rule 35 report because those within Healthcare had no concerns that the Claimant's health could not be satisfactorily managed within detention. A variety of detention staff remained on hand providing 24 hour support to ensure that the Claimant had access to appropriate medical services. When her mood was low or she was disruptive she was placed on constant supervision to ensure her safety and the safety of those around her. So continued detention was justified.

Discussion:

90. By the time the application for judicial review had been lodged on the 21st October 2011, the Claimant had been in detention for some six and a half months. It had become accepted by then that her passport was a genuine and valid document that gave her correct date of birth. It was known to the Defendant's officials from their own records that Mr Bah had identified the Claimant as his wife and gave her correct

date of birth when making his application for asylum in 2008 some three years before there was any question of the Claimant joining him in this country. The decision of the Immigration Judge granting him asylum was available to the Defendant's officials and that decision reported Mr Bah referring to his wife in his evidence. The Immigration Judge had accepted Mr Bah's evidence and found him a credible witness. The officials reviewing the Claimant's detention nevertheless characterised him as having a "dubious immigration history". In my judgment the facts that were available to the Defendant's officials in October 2011 did not justify that view. He had come to the UK, sought refugee status and after a full hearing had been granted it. I do not know how the Claimant and Mr Bah gave their evidence to the Immigration Judge determining her appeal but the recorded facts do not establish he had a dubious immigration history. It was conceded on behalf of the Defendant before me that there is no evidence of a poor immigration history. Furthermore, the detention reviews refer to the discrepancies in the Claimant's answers on her arrival being put to Mr Bah at the airport and that he "had chosen instead of clarifying them to become verbally abusive and aggressive." These factors were enough for the officials to consider Mr Bah "highly unsuitable" as her sponsor in the UK. In my judgment that was an unreasonable assessment. Mr Bah had travelled to Heathrow Airport to meet his wife off her aeroplane. Some three hours after her arrival she had still not joined him. He took the initiative and contacted the immigration authorities at the airport and he was then contacted on his mobile telephone by UKBA officials. He gave them his full name and date of birth and his full address in Leeds. He explained he had refugee status in the UK. He gave his place of employment and explained the nature of his work. He explained that he was meeting his wife and gave the correct date of their marriage. He accurately explained that he had last seen his wife in 2008 before he left Guinea for the UK. He was told that his wife had said she was 16 or 17 and Mr Bah said that "this could not be and offered a possible explanation as the passenger was simply confused." That record indicates to me a reasonable man responding fully and truthfully in stressful circumstances. He was then interviewed the following morning at 11.45am nearly 18 hours after he had been due to meet his wife off the aeroplane. He provided his provisional driving licence as proof of his identity. He then regrettably began to swear and said that the officials were holding his wife illegally and they had no right to do so "as she was not used to people like (the officials)." That may have been a reference to her lack of experience of the world and a follow up to his earlier proffered explanation for her giving the wrong age. He shouted that the police should be called. He had asked to see his wife but was told he could not and that she had been detained and was to be deported on the next flight. He was not allowed to speak to her on the telephone. After his wife had been transferred to Yarl's Wood detention centre he visited her every day for 10 days. They spoke on the telephone every day and thereafter he visited at first every week and then every two weeks. He had to travel by rail from Leeds to Bedford. All of this information was available to the Defendant's officials by October 2011. I have already decided that the initial decisions to detain had been reasonable in the circumstances at that time given the conflicting accounts that the Claimant had given but by October 2011 the true nature of the relationship between the Claimant and Mr Bah could have been discovered by the Defendant's officials from information they held. The erroneous description of Mr Bah as having a "dubious immigration history", and the repeated descriptions of him being "verbally abusive and aggressive" at the airport in what were very trying circumstances led to him being characterised unreasonably in my judgment as a "highly unsuitable sponsor". This in turn lead to

the view that the Claimant would fail to comply with any conditions attached to the grant of temporary admission or release because she did not have close enough ties to make it likely that she would stay in one place.

91. I am aware of the decisions of the Immigration Judges in this case dismissing the Claimant's appeal and refusing her bail on a number of occasions but whilst I take those decisions into account I am not bound by them as they were deciding different issues from those before me and in particular they were not determining the reasonableness of her detention in light of the *Hardial Singh* principles. Equally I am aware of and take account of the Defendant's officials' conclusions on these matters but as I am considering the lawfulness of the detention and within that issue the question of the reasonableness of its duration, in my judgment where those conclusions are unreasonable on the basis of the facts of the case I am entitled to form my own view on these matters.

92. So I accept the fifth factor put forward on behalf of the Claimant is a factor that must be put in the balance in determining whether the Claimant's continued detention was reasonable in all the circumstances: she did in fact have close personal ties with Mr Bah and the factors that were taken into account by the officials in deciding that he was a highly unsuitable sponsor did not on any reasonable objective view justify that conclusion. I do not know what led to it being recorded that Mr Bah was not offering to be a sponsor in May 2012 or that the Claimant not then proposing to live at his address but in his witness statement Mr Bah refers to that bail application and says: "If (MD) had been released, she would have come to live with me. I would have looked after her." In my judgment an objective view based on the undisputed facts shows that the Claimant did in October 2011 have close personal ties with Mr Bah who was lawfully in the UK. Whilst I do not decide this issue with the benefit of hindsight it is to be noted that on her release in September 2012 the Claimant did go to live with Mr Bah, they resumed their lives together and have had a child born in this country.

93. The first three factors relied upon by the Claimant are indisputably correct in that the Claimant has no criminal convictions, she has no history of absconding or going to ground and her immigration history is limited to the refusal of entry in the circumstances which I have described.

94. The fourth factor relied upon is that the application for judicial review was not without merit and had not been expedited. It is right that Mr Justice Lindblom refused the application on the papers but he did not say it was entirely without merit: rather he observed that the medical evidence had been taken into account by the time he considered the matter. The renewed application for permission had not been determined by the time the Claimant was released in September 2012. It is the Defendant's policy normally to defer removal where an application for judicial review has been properly lodged and the Defendant had asked for the application to be dealt with promptly but on any view it would be some months before that judicial review would be finally dealt with.

95. The next four factors relied upon by the Claimant relate to the medical evidence produced by Dr Bingham. It is clear from the authorities I have referred to above that the state of a person's mental health will affect the determination of what is a reasonable period for which to detain that person (see Baroness Hale in **Lumba's**

case at [218]) and where detention has caused or contributed to a person's suffering mental illness that is a factor which in principle should be taken into account in assessing the reasonableness of the length of detention but the critical question in such cases is whether facilities for treating the person whilst in detention are available so as to keep the illness under control and prevent suffering: see Dyson LJ, as he then was, in **M v Secretary of State for the Home Department** [2008] EWCA Civ.307 at [39].

96. Dr Bingham describes six "episodes of acutely severe mental distress" involving self-harm during August, September and early October 2011. She reported that the Claimant's suicidal thoughts were persistent and not confined to the episodes of acute distress. She was not able to make a firm diagnosis but reported: "(MD)'s disturbances of mood, fatigue and sleep disturbance suggest depression; however, this may equally be a normal reaction to a very upsetting situation. Her volatile behaviour, labile mood and impulsive acts of self-harm suggest a profound emotional disturbance which may result from an acute stress reaction or from an underlying anxiety disorder. ... This (latter) diagnosis may also be suggested by her evident inability to cope with high pressure situations such as her initial immigration interview." She was of the view that "the onset of her more severe episodes of acute distress some weeks into her detention suggest that she is experiencing deterioration in her mental health provoked by her recent experiences. She does therefore appear to be at risk of further deterioration…her impulsivity and self-destructive behaviour clearly place her at risk of serious injury in the context of an ongoing stressful and unpredictable situation."

97. At the seven month detention review on the 10th November 2011 there is a reference to a medical report which is said to have been obtained by the Claimant's legal representatives and it recorded that the report "outlined that the passenger's continuing detention was contributing to her current medical conditions and that any further attempts to remove her could risk a further deterioration in her mental health." It was recorded that those concerns were flagged up to the detention centre and that the immigration officers had "been informed that the passenger is receiving adequate treatment and is being monitored by healthcare staff." It does not appear that the reports by Dr Bingham were seen by the officers reviewing the Claimant's detention. Mr Benton accepts that the reports were not fully addressed in the reviews of the Claimant's detention and that they "could have explicitly considered whether or not Dr Bingham's report demonstrated that the Claimant was suffering from a serious mental illness that could not be managed in detention." However, based on the content of the report itself, the views of a mental health nurse at the detention centre who had been of the view on the 2nd November 2011 that the Claimant was fit for detention and fit to fly and his own response to the report in his letter of the 2nd December 2011 to the Claimant's solicitors, he concludes that there was no evidence that the Claimant had a serious mental illness. He also says that the Claimant refused access to her medical records. Given that she had only arrived from Guinea in April of that year and since then had been in detention it is difficult to see what such records could have added. Further the Claimant points out that there is no contemporaneous record of any request for access to such records. There is a reference in a record of the 8th November 2011 to the Claimant not being willing to sign a disclaimer without speaking to her legal representatives but that does not expressly refer to medical records. The reference in the letter to the solicitors of the 2nd December 2011 to her refusing consent was not followed up. It is also difficult to understand why the Claimant would not agree to access to any medical records in that she agreed to see

the mental health nurse at the detention centre and saw all the doctors who were asked to see her.

98. I accept entirely the limitations of Dr Bingham's experience and relevant qualifications and the provisional nature of her conclusions but in my judgment given the episodes of self harming and the views that Dr Bingham was able to express there was enough material for the Defendant to have needed to take a full look at the continuation of the Claimant's detention in these circumstances. It is right that the crucial question is whether facilities for treating the Claimant in detention were available so as to keep any illness under control and prevent suffering but in fact as Dr Bingham predicted her condition did worsen during detention as the later medical reports show and that demonstrates that the facilities that were made available were not adequate to keep the illness under control and prevent suffering. There is no medical evidence before me on behalf of the Defendant and all the medical evidence I do have establishes that the Claimant developed a serious mental illness whilst in detention and her condition deteriorated. Furthermore, Mr Benton is wrong when he says that the previous attempts to remove the Claimant had been frustrated by her actions. The arrangements to remove her had all been cancelled for administrative reasons unconnected with the Claimant's actions. Indeed that was recognised in the 6 month detention review but by the 7 month review it was wrongly being alleged that the Claimant "had frustrated many removal directions".

99. Finally I accept that Dr Bingham's report did raise questions as to the way the Claimant had answered questions on her arrival and supported the Claimant's case that she was not a deliberate liar but a confused and vulnerable individual with a propensity to distress when under pressure.

100. The Defendant had available to her powers to impose strict conditions of bail on the Claimant and in my judgment taking into account all the above factors by the time the judicial review had been lodged on the 21st October 2011 her detention had become unlawful as by then it had become apparent that the Defendant would not be able to effect administrative removal within a reasonable period.

101. In the circumstances I do not need to go on to consider under this ground whether the later medical reports led to the period of detention becoming unreasonable although I note that the later reports confirmed Dr Bingham's provisional views and each concluded that the Claimant was suffering from a major depressive disorder with psychotic features and a panic disorder and that her condition was deteriorating during her detention. I consider the reports more fully under the next ground which alleges a breach of the policy on detention of the mentally ill.

102. This ground succeeds therefore in relation to the period from the 21st October 2011 to the 13th September 2102 and the Claimant's detention was unlawful for that period.

Ground 3: Breach of Policy in Chapter 55.10

The Claimant's Submission:

103. It is submitted that the medical reports should have made clear to the Defendant that the Claimant was suffering from a serious mental illness that was not and could not be satisfactorily managed in detention. It is further submitted that the medical reports

were not properly taken into account by the Defendant and that the policy in Chapter 55.10 was not expressly addressed by the Defendant.

104. The Claimant submits that the management and procedure relied upon by the Defendant as showing that the Claimant's mental illness was being satisfactorily managed during detention were plainly inadequate and that the Claimant received no actual treatment until July 2012. It was not recognised that the incidents of self-harm were symptomatic of an underlying serious mental illness rather than being attempts to thwart removal. The Defendant's reliance on the Claimant's purported lack of consent to access to her medical records and a medical assessment is to be rejected. She was disturbed by her illness and self-harming from August to October 2011 so informed consent in those circumstances was not a straightforward issue even if it was properly explored with her of which there is no clear evidence. The Claimant did in fact co-operate with the doctors who were asked to see her.

105. The absence of any Rule 35 reports is not significant given the general failure to follow this procedure and their very absence in the circumstances of the Claimant's serious mental illness is a powerful factor demonstrating a systemic failure to safeguard and protect the Claimant from continued suffering.

106. There were no very exceptional circumstances justifying her continued detention.

The Defendant's Submissions:

107. The Defendant submits that the Claimant did not have the severe and complex symptoms that were exhibited in the other cases where there were shown to be breaches of this policy.

108. The policy provides that even if an individual is (i) suffering from serious mental illness which (ii) cannot be satisfactorily managed within detention, (iii) there may nonetheless be "very exceptional circumstances" which render the individual suitable for detention: see **R(S) v The Secretary of State for the Home Department** [2012] EWHC 1939 at [164].

109. The Court should review the legality of detention on traditional public law grounds (see **LE (Jamaica)** at [29] so that the question is whether, taking into account the stated policy on mental illness, the Defendant was entitled to come to the conclusion that the Claimant's detention was nonetheless lawful and justified.

110. It is submitted that the medical reports of Dr Bingham and Dr Mounty were taken into account but they did not establish that the Claimant was suffering from a serious mental illness or that her condition could not be satisfactorily managed in detention. The Claimant was monitored and arrangements were put in place to alleviate the risk of suicide or self-harm. The Claimant was referred to counselling to assist her symptoms.

111. Dr Sagovsky's report of the 18th July 2012 was not brought to the attention of the Claimant's caseworker but even if it had been the Defendant would have found that the Claimant did not have a serious mental illness that could not be satisfactorily managed within detention.

112. The Claimant refused consent to access to her medical records, precluding the Defendant from conducting an independent assessment.

113. Alternatively, even if the Claimant would have been found to be suffering from a serious mental illness which could not be satisfactorily treated in detention, the Defendant would have found that very exceptional circumstances justified continued detention. So any damages awarded should be nominal.

Discussion:

114. By the time Dr Bingham saw the Claimant after she had been in detention for over 6 months there had been six "episodes of acutely severe mental distress" involving self-harm so that by the 3rd October 2011 she was considered by the detention centre doctor to require constant watch. Dr Bingham expressed the view that the onset of emotional and behavioural disturbance in a vulnerable individual following stressful life events suggests an adjustment disorder which characteristically involves depressed mood, anxiety and feelings of inability to cope or to plan ahead and those symptoms featured heavily in the Claimant's presentation. She reported that the presentation of previously unreported behavioural disturbances after her detention suggested an acute deterioration in her mental health provoked by her recent experiences and that she appeared to be at risk of further deterioration in her mental health and at risk of serious injury. This report should have triggered a careful review of the whole question of the Claimant's detention which in turn should have recognised for the reasons I gave in relation to Ground 1 that detention was no longer justified and was in breach of the *Hardial Singh* principles. However, the report from Dr Bingham did not of itself establish that the Claimant was suffering from a serious mental illness that could not be managed satisfactorily in detention.

115. It did prompt the healthcare team at the detention centre on the 2nd November 2011 at the request of UKBA to set in train a psychiatric assessment. That was however cancelled on the 8th November 2011 "as the passenger is unwilling to sign the disclaimer". In her witness statement the Claimant explains that she was in a bad state at the time and the records show that she self-harmed on the 8th November by cutting her abdomen 5 times. She also states in her witness statement that if it had been explained to her that the Home Office wanted to arrange for her to be examined by a doctor for that doctor to provide a report to the Home Office to help them to decide whether she should be allowed to stay in the UK or whether she should remain in detention then she would have agreed. She points out that she agreed to see all the doctors who were sent to see her and agreed to their reports being sent to the Defendant. It is likely that she would have agreed to be examined if the question had been fully explained to her.

116. On the 16th February 2012 the Claimant was seen by Dr Mounty who formed the view and recorded in the medical records that she was suffering from major depression with psychotic features and generalised anxiety disorder and advised that she be given an antidepressant drug. When she came to write her report dated the 2nd May 2012 she noted that there had been one session of counselling and some painkillers and Kalms administered. Her view was that this treatment was inadequate to treat the conditions troubling the Claimant and in effect she was not receiving treatment despite her own recommendations and request that she be treated with antidepressants. The reviews of her detention on the 17th February and thereafter made no mention of the Dr

Mounty's diagnosis but each simply recorded under a heading of "Compassionate Circumstances" that " the subject has a history of erratic behaviour and self-harm; however, this behaviour appears to be a reaction to stressful situations (such as when removal directions have been served). The passenger's healthcare needs are being continuously monitored and detention staff are on hand to ensure that she has access to and receives appropriate medical care whilst in detention." The diagnosis of Dr Mounty a senior and distinguished consultant psychiatrist was not addressed at all in these reviews and nor was the policy in 55.10 referred to. Instead Mr Benton wrote to the Claimant's solicitors on the 25th June 2012 after receiving Dr Mounty's final report sent on the 17th May and claimed that Dr Mounty's conclusions "rely upon an uncritical acceptance of your client's credibility." In his witness statement he continued this theme saying that "expertise and qualifications do not require the Defendant to accept a doctor's views without question, particularly when reached on the basis of two short interviews and when predicated on an uncritical acceptance of an account given by someone who has been found to be entirely unreliable." Dr Mounty understandably took exception to these comments explaining that she had "based her conclusions on a combination of (the Claimant)'s self-reported symptoms, my observations during the assessments, a review of her medical records comprising the observations of clinicians at Yarl's Wood IRC and a number of well-recognised psychometric tools" which she went on to identify. She also disagreed with Mr Benton's assertion that the Claimants' condition was satisfactorily managed during her detention. She explained that Dr Bingham's report and her own report should have raised concerns about the Claimant's mental state and that the long delay in arranging psychiatric assessment meant she was not offered treatment for her depression until after Dr Leahy's assessment on the 26th July 2012. She pointed out that the need for such treatment was confirmed in all subsequent psychiatric assessments. She concurred with Dr Sagovsky's comment that the repeated use of force, restraint and separation was entirely inappropriate without the underlying mental illness being addressed. She explained that the stress of detention was the main causative factor of the Claimant's mental illness. She considered that it was unlikely that her condition could have been satisfactorily managed in detention so that even if she had received treatment for depression earlier it is likely that she would have continued to deteriorate. Dr Skogstad was of the opinion that from August 2011 to July 2012 the management of her developing and then severe mental illness was clearly inadequate. He observed: "It took two months for her to have an assessment by a mental health nurse whose advice was then ignored. Similarly the advice and opinion of examining doctors whether Dr Bingham in October 2011 or Dr Mounty in February 2012 were not followed. Instead the illness was allowed to continue untreated and deteriorate with serious suffering for MD."

117. I remind myself that in **Das** Lord Justice Beatson said that it was necessary for the Defendant to consider whether the policy in 55.10 applies to the case of the individual whose detention is being considered and that involves taking reasonable steps to inform herself sufficiently about the individual's mental health so as to make an informed judgment as to whether the policy applies. In my judgment the Defendant through her officials did not properly consider the information that was being provided to her by all these doctors and because of that the question of whether the Claimant had a serious mental illness that could be satisfactorily managed in detention was not properly addressed and an informed judgment as to whether the policy applied was not made. It is clear from the medical reports that what Dr Skogstad

characterises as her "severe mental illness" was not in fact satisfactorily managed in detention and as he explained "the management of her illness over a period of 11 months was highly inappropriate and contributed significantly to the deterioration of her mental state and the escalation of her symptoms and her suffering." The 11 month period refers to the onset of her symptoms in August 2011 until she was seen by Dr Leahy in July 2012 when antidepressant medication was started.

118. In my judgement as from the first visit of Dr Mounty in February 2012 and her diagnosis of severe depression with psychotic features and generalised anxiety disorder the Defendant was not entitled to conclude that the Claimant's detention was justified because she had failed properly to apply her own policy in relation to those suffering from mental illness by not taking reasonable steps to inform herself of the nature of the condition and whether it could be satisfactorily managed in detention. It was not in fact satisfactorily managed and her condition deteriorated and she suffered as a result.

119. The absence of any Rule 35 reports were symptomatic of this failure to recognise that the Claimant's actions and behaviour were as a result of her mental illness and not conscious attempts to thwart her removal. She continued to self-harm in May, June and July 2012 even though no removal directions had been set since October 2011.

120. I do not consider that the circumstances here were very exceptional so as to justify further detention. As was said in **Das** at [68] when the policy does apply there is a high hurdle to overcome to justify detention. There was no question of the Claimant posing a risk to the public. She has no criminal convictions. The medical reports that were available from Dr Bingham and Dr Mounty cast light on her inconsistent answers on arrival. The factors that were relied upon to form the view that her husband Mr Bah was a highly unsuitable sponsor did not reasonably justify that conclusion especially when by February 2012 it could be seen that he had been in very regular contact as a support to his wife throughout her detention. The application for judicial review was still outstanding.

121. This Ground succeeds therefore in relation to the period from the 16th February 2012 to the 13th September 2012 and the Claimant's detention was unlawful for that period on the basis of the breach of policy.

Ground (iv) The Lawfulness of the policy in Chapter 55.10 EIG:

The Claimant's Submissions:

122. The Claimant submits that the policy is unlawful as being incompatible with section 149 of the Equality Act 2010. The obligation under that section is to have due regard to the need to eliminate discrimination and promote equality of opportunity and this positive duty arises whenever a public body is carrying out its functions. It is submitted that the policy in 55.10 is unlawful because no or no lawful consideration has been given to that duty. The duty was engaged on the reformulation of the policy in August 2010 but it is in any event an ongoing duty which has not been complied with.

The Defendant's Submissions:

123. The Defendant relies on **LE (Jamaica) v The Secretary of State for the Home Department** [2012] EWCA Civ 597 as establishing that there was no policy change in August 2010 as all that happened was that what had been implicit in terms of mental illness being "satisfactorily managed in detention" was made explicit by the rewording of the policy.

Discussion:

124. I am bound by **LE (Jamaica)** and on that basis s.149 is not engaged. A review of the operation of the policy on the detention of persons with mental health is currently underway. On the 24th January 2014 the Home Office began a consultation exercise as part of an equality assessment that forms part of that review. The closing date for responses to that review was the 21st March 2014. A ruling that the policy is unlawful would have wide implications for many cases and like Mrs Justice Lang in **R (S) v Secretary of State for the Home Department** [2012] EWHC 1393 (Admin) at [196-198] and in these circumstances I decline to make any such ruling. The Court of Appeal in **Das** considered **LE (Jamaica)** and the public sector equality duty in section 149 of the Equality Act 2010 [19-21] but gave no indication that the application of the policy in a particular case engaged the duty so as to render the policy unlawful.

Ground 4: Detention Conditions and Human Rights

The Claimant's Submissions:

125. A finding with respect to Article 5 goes hand in hand with a consideration of the domestic law governing unlawful imprisonment.

126. The Claimant relies upon the medical reports as showing that detention and the conditions of detention caused or contributed to a severe deterioration in the Claimant's mental health from which she could not recover whilst in detention.

127. She submits that the appropriate and necessary medical treatment was not available or in any event not provided to her in the detention centre. It is pointed out that even though the Claimant still faced removal on her release in September 2012 her condition significantly improved upon release.

128. She submits that her treatment caused or contributed to at least degrading treatment by (i) isolating and removing her from association with other detainees and transferring her into segregation when acutely distressed; (ii) subjecting her to the use of force including by male officers with no mental health expertise; (iii) subjecting her to persistent use of control and restraint techniques to "calm" her including the unacceptable use of handcuffing to stop her self-harming and administering pain. She refers to the views of Dr Sagovsky and Dr Skogstad on these techniques; (iv) she was subject to repeated attempts to remove her between August 2011 and October 2011 which were themselves distressing and which all failed because of primarily administrative but also legal reasons.

129. It is submitted that even if this treatment does not cross the threshold of an Article 3 breach, then the conditions of her detention amounted to a breach of Article 8 as a

disproportionate interference with her right to moral and physical integrity and the preservation of her human dignity.

The Defendant's Submissions:

130. Article 5 is to be approached in the same was as consideration of the lawfulness of detention under the common law.

131. The Defendant submits that the courts have repeatedly upheld the very high threshold which must be crossed to succeed in a claim under Article 3: to succeed the Claimant must establish an "affront to fundamental humanitarian principles". It is submitted that a deterioration in mental health does not satisfy this test.

132. In **HA (Nigeria)** where a breach of Article 3 was found the Claimant was suffering from paranoid schizophrenia while in detention; his behaviour was bizarre and included acts which violated his own dignity such as sleeping on the floor, often naked, in the toilet area; drinking and washing from the toilet and self-neglecting resulting in him being "grossly unkempt" on arrival at hospital. It is submitted that the condition of the Claimant in **HA (Nigeria)** was considerably more serious than that of the Claimant in this case. In **S**, [190-192] David Elvin QC, sitting as a Deputy High Court Judge, considered **Pretty v UK** [2002] 35 E.H.R.R. 1 in which the Court gave guidance as to the threshold of severity of treatment which engages Article 3 and concluded that "the exacerbation of existing mental illness by the conditions of detention may fall within Article 3" as may "the effects of detention itself in a sufficiently extreme case" and the Defendant submits this is not the extreme type of case so envisaged. As was said in **R (EH)** : "Plainly, the detention of the mentally ill does not itself necessarily constitute a breach of Article 3 as the mentally ill can be appropriately detained in prisons, immigration centres and mental hospitals."

133. The Claimant's episodes appear to have been caused by the prospect of removal. She was closely monitored and this was an important factor in determining the failure of the claim under Article 3 in **R(EH)**.

Discussion:

134. The Claimant arrived in this country on the 7th April 2011 as an inexperienced young woman of 24 who may have had a propensity for an emotional reaction to a situation she perceived as frightening (per Dr Bingham) but who was otherwise in good mental health. Within 5 months of the start of detention she was experiencing episodes of acutely severe mental distress and harmed herself six times over a five week period. To Dr Bingham this suggested an acute deterioration in her mental health provoked by her recent experiences. Those experiences were while she was detained. In October 2011 Dr Bingham thought she was at risk of further deterioration in her mental health. By February 2012 she was diagnosed as suffering from major depression with psychotic features and generalised anxiety disorder. Dr Skogstad's view is that " a major depressive disorder should be regarded as a serious mental illness." He reported: " It is clear from the development that the depressive illness MD suffered from during immigration detention was actually precipitated by the experience of detention … There is evidence that the detention was experienced as a trauma at the time and this has led to on-going symptoms of Post-Traumatic Stress Disorder."

135. He went on to report: " The fact that MD's symptoms persisted with at times quite severe incidents of distress, episodes of self-harm, considerable depressive mood and severe insomnia should have been taken as a clear sign that the way she was managed was inadequate. Instead, it seems the path once taken was continued. Even when assessed by mental health nurses, the nurses did not carry out a sufficiently thorough assessment of her psychological and social needs and her risk, as recommended by NICE guidelines, and the nurses' recommendations on management, remaining on ACDT" (Assessment Care in Detention and Treatment, the UKBA strategy for self-harm and suicide prevention) " and referring to counselling were insufficient."

136. He reported :

> "5.3.7 Frequently, her distress, self-harm and aggressive outbursts were responded to by removing her from association and isolating her. In my opinion, isolation is rarely an appropriate way of managing a highly distressed person, let alone someone as vulnerable, dependent and anxious as MD. Instead, someone like that is likely to get more anxious in isolation and so isolation is counter-productive.
>
> 5.3.8 On many occasions physical force was used in response to her distress. While such a response may sometimes be effective, I would think that this frequently increased her anxiety and was experienced as traumatic. The records indicate that physical force was used quite frequently, often by a number of male officers. I have significant doubts that this was necessary in most incidents and that she could not have been calmed down in other ways. Her remaining dissociative symptom of being grabbed from behind indeed indicates that this was experienced as traumatic.
>
> …
>
> 5.3.10 Overall, it is therefore my opinion that the management and treatment of MD's psychiatric condition at Yarl's Wood was inadequate in a number of ways and not appropriate to her mental state and her severe suffering. In my view it contributed to the deterioration of her mental state in detention and the prolonging of her mental suffering."

137. Dr Sagovsky considered "handcuffing is an unacceptable way of dealing with someone with mental illness except as a very short term measure while expert help is sought."

138. The Defendant has not produced any evidence from a psychiatrist to challenge these opinions and I accept them.

139. I am conscious of the high threshold set for a successful claim under Article 3 and that I should look at the circumstances which in my view were or ought to have been known to the Defendant. The Defendant was provided with copies of Dr Bingham's reports which predicted a deterioration in the Claimant's condition. That deterioration

occurred as was seen by Dr Mounty's diagnosis recorded in the Claimant's medical notes available to the Defendant in February 2012. Dr Mounty's report was provided to the Defendant in May 2012 and the later reports were also provided. I accept the doctor's opinions that detention did not exacerbate a pre-existing mental disorder but caused the onset of the mental disorder that was subsequently manifest. Dr Bingham's report and the Claimant's actions which led up to it should have brought home to the Defendant's officials that the Claimant was an individual whose condition should be reviewed as a matter of urgency to determine whether continued detention was likely to exacerbate her mental state. That was not adequately done. Her behaviour was seen as an attempt to thwart her removal and dealt with in that light and not as a symptom of an underlying deteriorating mental illness.

140. I also accept the doctors' opinions that such treatment as was provided was inadequate leading to the deterioration of her condition and her continued suffering.

141. I also accept that removal from association and isolation and restraint in its various forms whilst carried out without any intention to inflict suffering on the Claimant increased her suffering and was degrading because it was such as to arouse in the Claimant feelings of fear, anguish and inferiority likely to humiliate and debase the Claimant in showing a serious lack of respect for her human dignity. Such suffering went beyond the inevitable element connected with detention.

142. I find breaches of the positive aspect of Article 3 in that the Defendant did not have in place measures to ensure that the Claimant's mental health was properly examined and considered and such measures as were in place were not used effectively to diagnose and properly treat and manage her condition.

143. I have found therefore that the Defendant breached Article 3 and so it is unnecessary for me to consider whether there was a breach of Article 8.

144. This ground therefore succeeds in relation to the same period from October 2011.

145. I am not prepared to order an investigation into the circumstances of the Claimant's detention. They are well documented.

Damages

146. The unlawful detention of the Claimant gives rise to damages both at common law and by way of compensation under Article 5(5) ECHR, which reflects the common law position. There will need to be an assessment of damages in relation to the period of her detention from the 21st October 2011 to the 13th September 2012 which I have found to be unlawful. I would propose an order releasing that assessment to a master if there is no agreement as to the amount of damages.

Conclusion

147. In my judgment, the Claimant's detention was unlawful from the 21st October 2011 until her release on the 13th September 2012 by reason of a breach of the third *Hardial Singh* principle and from the 16th February 2012 until her release on the 13th September 2012 due to the failure of the Defendant to properly understand and apply her policy regarding the detention of those with serious mental illness to the

circumstances of the Claimant's case. So the Claimant's detention was unlawful both at common law and under Article 5 of the ECHR.

148. I have also found that the Claimant's treatment by the Defendant by detaining her in the circumstances I have set out above amounted to inhuman and degrading treatment in breach of Article 3 of the ECHR.

149. If a draft order cannot be agreed I will hear further submissions on the form of relief and the question of damages.