Neutral Citation Number: [2015] EWHC 5 (Admin)

Case No: CO/11709/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/01/2015

Before :

THE HON MR JUSTICE WILLIAM DAVIS

- -

Between :

The Queen (on the application of AMG by his litigation friend Doreen Jane McPherson)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Mr G Ó Ceallaigh (instructed by **AAAS**) for the **Claimant**
Ms C McGahey (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing date: 8 December 2014

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Judgment

Mr Justice William Davis:

Introduction

1. The Claimant ("AMG") is a Jamaican national. Between the 17th May 2012 and the 3rd June 2013 he was detained by the Defendant ("SSHD") pursuant to her powers under the Immigration Act 1971, AMG having been served with a deportation order.

2. AMG now applies for judicial review of the initial decision to detain him and the decision to maintain such detention at various points thereafter. Permission was granted on the 20th November 2012 for judicial review of the period of detention up to that date. On the 25th September 2014 permission was given to amend the Grounds of Claim to cover all periods of immigration detention.

3. The amended Grounds of Claim set out three grounds on which the decision of the SSHD is challenged. First, the detention was in breach of the SSHD's policy in relation to those suffering from mental illness and in consequence unlawful. Second, the detention from the 4th October 2012 onwards was unlawful because from that point it was apparent that AMG could not be removed within a reasonable period: the Hardial Singh ground. Third, the SSHD failed to have regard to relevant matters under Section 149 of the Equality Act 2010 so as to render the detention unlawful from the outset. The single judge who gave permission to amend the Grounds said that he was "unimpressed" by the third ground but noted that permission had been given to pursue it by the judge who had considered the matter in November 2012.

Factual background

4. AMG was born in 1984 in Jamaica. He arrived in the UK in 1999 to join his mother who already was settled in this country. Having been granted limited leave to remain when he first arrived, in May 2000 he was granted indefinite leave to remain as his mother's dependent relative. In 2001 he appeared four times before Youth Courts in South London for various offences including robbery and possession of an offensive weapon. More than once in the course of those various proceedings he failed to answer to his bail. In 2003 he was convicted of two offences of possession of Class A drugs for which he was made the subject of a community punishment order. In 2006 he was convicted of offences of dishonesty. He was conditionally discharged for 2 years. He breached that conditional discharge within a matter of months when he supplied Class A drugs to undercover police officers. In due course he was sentenced to a period of two years' imprisonment for those offences. Whilst those proceedings still were pending and he was on bail AMG robbed a lady of her handbag in the street forcing her to the ground in order to do so. He was sentenced to two years' imprisonment for that offence of robbery. The two sentences were ordered to run consecutively i.e. a total sentence of 4 years' imprisonment running from December 2007.

5. As well as the criminal convictions set out above, AMG was arrested twice in 2004. No convictions followed those arrests because on each occasion he was

made the subject of an order under Section 3 of the Mental Health Act 1983. A pragmatic decision clearly was taken not to prosecute in those circumstances.

6. On the 15th June 2009 the SSHD issued a notice informing AMG that he was liable to be deported and requiring him to make any representations as to why he should be allowed to remain in the UK. At the expiry of the custodial part of the term of imprisonment as set out above, AMG was detained by the SSHD pursuant to her powers under the Immigration Act 1971. In August 2009 he was released on bail with a condition of twice weekly reporting. In the same month the SSHD issued a deportation order against AMG. She set out her reasons for doing so in a letter dated 1st September 2009. One issue considered at length in the letter was AMG's mental health. The SSHD noted that he suffered from paranoid schizophrenia for which he was then being treated although she concluded that removal to Jamaica would not involve any breach of his Article 8 rights by reference to his mental illness. AMG appealed against the deportation order on the 17th September 2009.

7. By the end of 2009 AMG's mental health had deteriorated. On the 14th December 2009 he was detained at Hackney Centre for Mental Health under an order made pursuant to Section 3 of the Mental Health Act 1983. He absconded from that centre in February 2010. In April 2010 AMG was recalled to prison after he was arrested after allegations of assault and criminal damage at his mother's home. Those allegations were not pursued but AMG remained in custody serving the balance of his sentence of 4 years' imprisonment. It was considered that he was incapable of abiding by any conditions of licence under that sentence.

8. In June 2010 AMG set fire to bedding and papers in his prison cell. He said that he did this because he was "pissed off". Unsurprisingly this led to assessment of him by two psychiatrists, each of whom concluded that he required hospital admission. On the 25th August 2010 the John Howard Centre agreed to admit AMG pursuant to an order under Section 47 of the Mental Health Act 1983. Although the evidence is not clear on the topic, this Centre must have been a medium secure unit. Although AMG's admission was agreed, it did not take place because of lack of bed space. He was placed on a waiting list. AMG remained unwell. He was said to be showing signs of psychotic behaviour. Due to the delay in obtaining a place at a medium secure unit, AMG was assessed for a placement at a low secure unit in Battersea. He was transferred to that unit in March 2011. At the completion of his sentence in July 2011 he remained in hospital with his care now being undertaken at units in Hackney. The basis of his admission was described in medical reports as being "Section 47/notional 37" i.e. references to the relevant sections of the Mental Health Act 1983.

9. The risk assessment carried out by NOMS shortly before the expiry of AMG's sentence assessed the risk of him re-offending in a manner involving violence within 2 years of release at 47%. There was said to be a medium risk of him causing serious harm to members of the public in the community at large. Whether the author of this assessment was aware of all of the material available from the relevant psychiatric units is not clear.

10. AMG notionally remained in a mental health unit in Hackney from July 2011 to May 2012. However, there were at least three occasions when he absconded from the unit. He repeatedly used cannabis and possibly sold cannabis to other patients on the unit. His behaviour both to staff and other patients was "challenging" (to use the word of his treating clinician). On two occasions he had to be transferred to a psychiatric intensive care unit due to his behaviour.

11. For technical reasons the deportation order issued in 2009 was revoked in October 2011. A fresh order was made on the 28th October 2011. By this time the SSHD had written to AMG's treating clinician to ask inter alia "whether following his release from hospital care, detention in an immigration removal centre would have an adverse effect on (AMG's) health". Dr Gupta replied to this request for information on the 15th August 2011. He reported that AMG at that point was mentally stable and it was hoped that he would be discharged from hospital within 4 to 6 weeks. The proposal was for AMG to be discharged subject to a Supervised Community Treatment Order. In respect of the specific question, Dr Gupta said this:

> "It is difficult to say definitively whether detention in an immigration removal centre would have an adverse effect on (AMG's) mental health. We do not know what health care (specifically mental health) provisions are available to detainees."
>
> The "we" in that passage must have been a reference to Dr Gupta and his colleagues. The SSHD obviously knew what health care provisions were available in any given immigration detention centre.

12. In February 2012 AMG's appeal against the deportation order made in October 2011 was dismissed by the First Tier Tribunal. On the 21st March 2012 the First Tier Tribunal refused his application for permission to appeal. On the 27th March 2012 the SSHD again asked Dr Gupta for his view about whether AMG's mental state would be affected by his being placed in an immigration removal centre. Dr Gupta reported by a letter of that date that AMG's mental state then was "very stable" and that the current plan was discharge to low support community accommodation once a suitable place became available. He went on to say this:

> "The impact of being in a detention centre on his mental state needs consideration. It will no doubt be an added emotional stressor (as with any person in such a situation). Clinically stressful situations are a known contributor to relapse of psychotic disorders in some cases. This can be off-set, at least partially, by appropriate treatment with antipsychotic treatment, emotional support and close monitoring of his mental state and risks. Stoppage of the use of cannabis can also reduce the risks of relapse."
>
> Dr Gupta asked for early warning of the SSHD's decision "so we can support (AMG) accordingly".

13. The initial minute of the decision to detain AMG was prepared on the 2nd April 2012 by Eileen Bailey. A witness statement from Ms Bailey is part of the evidence in these proceedings. Ms Bailey's minute rehearsed the history of AMG's case. In the course of that rehearsal she said that it was "not considered that detention will have an adverse effect on his mental health". However, she later quoted directly the views expressed by Dr Gupta in his letter of the 27th March 2012 and as set out above. She noted AMG's history of absconding and the fact that, when he absconded, his mental health deteriorated. With such deterioration came an increased risk of re-offending. She observed that AMG was pursuing an appeal to the Upper Tribunal which, as she put it, "could take some time to resolve" and that any proposed detention needed to be considered with reference to the time he was likely to be detained. She referred to the SSHD's policy in relation to the detention of those suffering from mental illness as follows:

> "With regard to Chapter 55.10 of the EIG. Certain persons are normally considered suitable for detention in only exceptional circumstances this includes those suffering from serious mental illness. The risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention."

It was in the context of this consideration that Ms Bailey quoted verbatim the views of Dr Gupta. Two other more senior officials acting on behalf of the SSHD considered the case in the light of the detailed minute prepared by Eileen Bailey. They concluded that AMG's history militated against any release even with conditions. The decision to detain was made on the 5th April 2012.

14. On the 2nd May 2012 Ms Bailey wrote to AMG informing him that it had been decided to detain him. Her letter made reference to his mental health history although it did not set out in terms the nature of his illness. A further letter in almost identical terms was provided to AMG on the 17th May 2012 because the first attempt to detain him had failed for some administrative reason. He was transferred to Harmondsworth IRC.

15. On the 8th June 2012 AMG was granted permission to appeal the decision of the First Tier Tribunal by a judge of the Upper Tribunal. By this time he was already refusing to co-operate with the mental health team at Harmondsworth. On the 30th May 2012 he declined to attend the psychiatric clinic where he was due to have his first injection of antipsychotic drugs since his detention began. On the same day as the Upper Tribunal gave permission to appeal AMG was seen in his cell by a psychiatric nurse. He was smoking and the nurse believed it was cannabis. The nurse tried to persuade AMG to undergo his treatment. AMG refused although he agreed to be monitored by the healthcare team.

16. AMG continued to refuse to co-operate with the psychiatric services at Harmondsworth. They did not have the power to compel AMG to undergo treatment. On the 3rd July 2012 a psychiatrist named Dr Samuels saw him at the request of his solicitor. AMG refused to engage in the assessment even though the solicitor explained that it was in AMG's interest to do so. However, Dr

Samuels did suggest close monitoring of AMG as he appeared to be exhibiting "early signs of relapse".

17. On the 6th July 2012 the first review of AMG's detention was carried out. By now the day to day responsibility within the Home Office for consideration of his case had passed to Martin Atkins. He also has made a witness statement in these proceedings. The minute prepared by Mr Atkins was in almost the same terms as that submitted by Eileen Bailey when detention first was authorised. He commented that AMG "is currently stable as long as he continues to take his medication". Mr Atkins's supervising officer approved continued detention. His comment was that AMG was "currently receiving the appropriate treatment whilst detained and…his condition is stable".

18. On the 9th July 2012 the psychiatric nurse with particular responsibility for AMG noted in his medical notes that AMG continued to refuse to engage with the mental health team. He also reported that there had been no reports at that stage of any "bizarre or worrying behaviour" and there were "no risks reported". On the same day the nurse (Leslie Dube) telephoned the SSHD's Criminal Casework Directorate. That unit recorded the nurse as raising "a concern that prolonged detention may have a detrimental effect on (AMG's) mental health". The nurse was given the contact details for Martin Atkins.

19. On the 27th July 2012 Dr Burrun, the visiting consultant psychiatrist at Harmondsworth, wrote to Dr Gupta. He told Dr Gupta that AMG had been refusing to take his medication "despite a lot of persuasion from members of our mental health staff". He considered that AMG was exhibiting "early warning signs of relapse of his psychotic illness" such as to require admission to hospital and he asked Dr Gupta to assess AMG as a matter of urgency. AMG was assessed by Dr Gupta on the 8th August 2012. He considered that there was a relapse of the psychosis and advised that he needed hospital treatment urgently. At about this time AMG was moved from the main area of the IRC to a segregation unit. The on-site manager acting on behalf of the SSHD was concerned that he was in this unit and suggested that he should be moved to the healthcare unit. The healthcare team at Harmondsworth advised that AMG's behaviour could best be managed on the segregation unit supported by staff from the mental health team. On the 16th August 2012 it was agreed by the healthcare team that AMG could be accommodated on the healthcare unit. When this was suggested to AMG, he refused to leave the segregation unit. In fact he then was returned to the general area of the IRC.

20. In order to effect AMG's transfer to a hospital pursuant to Section 48 of the 1983 Act it was necessary for a second medical opinion to be obtained. One of Dr Gupta's colleagues, a Dr Lyall, attended Harmondsworth on the 20th August 2012. Ironically Dr Lyall was not able to conduct any real assessment of AMG because he refused to speak with Dr Lyall. AMG said he was "well" so there was "nothing to talk about". Nonetheless, by reference inter alia to the information given to him by the health team at Harmondsworth Dr Lyall was able to support a transfer under Section 48. That occurred on the 31st August 2012. AMG went to the psychiatric intensive care unit where on occasion he had been treated prior to his detention. Just prior to transfer there was a further review of AMG's detention. On this occasion Martin Atkins's supervisor stated that "(AMG) has

serious mental health issues which are currently being handled sensitively; we are now awaiting the transfer of (AMG) to a mental health hospital…"

21. By the 19th September 2012 AMG's treating clinicians recommended that he should be transferred back to the detention centre. By then he was stable and had made steady progress. The report of Dr Danny White of the same date recommended that AMG be transferred back to Harmondsworth. That recommendation was made with the support of the team at the intensive care unit and in line with AMG's express wishes. Dr White observed that it would be "very helpful if his deportation proceedings are expedited otherwise there is an increased risk of him relapsing again". Dr White said that he had been assured by AMG that he would engage with the mental health team at Harmondsworth.

22. On the 4th October 2012 AMG's appeal to the Upper Tribunal was heard. Although the decision was not promulgated until the 12th October 2012 the result of the appeal was known on the day of the hearing. The SSHD's presenting officer accepted at the hearing that the findings made by the First Tier Tribunal were inadequate such that the original determination could not stand. A re-hearing before a different constitution of the First Tier Tribunal was ordered.

23. Meanwhile AMG had been seen on the 1st October 2012 on his return to Harmondsworth by Leslie Dube, the same nurse who had dealt with him earlier in the year. AMG told the nurse that he no longer needed to take any medication and he refused to sign the consent form for treatment. The nurse continued to monitor AMG closely during the month of October. AMG's attitude to treatment did not change although he displayed no apparent signs of psychotic behaviour or other relapse. On the 31st October 2012 a Dr Giordano visited Harmondsworth in order psychiatrically to assess AMG after AMG's solicitor had requested such an assessment. AMG refused to speak to Dr Giordano. Dr Giordano advised the mental health team at Harmondsworth about the types of behaviour that could indicate the early signs of relapse and that such signs would require an urgent Mental Health Act assessment (with a view to hospital admission). He also suggested that AMG's case should be transferred to mental health services local to Harmondsworth.

24. The request made by AMG's solicitor followed the provision of a detailed report dated the 12th October 2012 by Dr Gupta. Dr Gupta noted the following issues:

- There was a very high likelihood that AMG would suffer a recurrence of acute psychotic symptoms if he continued to refuse treatment.

- The psychiatric outreach services in Hackney could not provide care and support for AMG given the location of Harmondsworth IRC.

- AMG needed an experienced psychiatric team able to monitor his psychiatric condition and to ensure adherence to treatment.

- AMG had the right to refuse treatment given his status. Were he to be released from immigration detention, he would be very likely to suffer a

> relapse. Such a relapse would carry with it associated risks which then would lead to hospitalisation under the Mental Health Act.
>
> - A prolonged stay at a detention centre would be detrimental in view of the level of psychiatric care available there.

AMG's solicitor sent a pre-action protocol letter to the SSHD on the 19th October 2012. That letter requested the immediate release of AMG from immigration detention and raised the same matters as now are relied on in the amended Grounds. Dr Gupta's report was enclosed with the letter. The SSHD responded on the 25th October 2012. She declined the request made in the PAP letter. In relation to his mental health her letter said as follows:

> "(AMG) has been released from hospital (on the 1st October 2012) into the care of Harmondsworth IRC given that he was complying with his medication regime and showed no signs of relapsing."

Given the response of the SSHD the initial claim for judicial review was lodged on the 1st November 2012.

25. Leslie Dube reviewed AMG's case on the 9th November 2012. AMG continued to refuse to take his medication but he remained free of apparent psychotic symptoms. The nurse noted the need for an emergency referral in the event of any deterioration. There were some concerns expressed by officers on AMG's wing on the 12th November 2012 which were investigated by the nurse. Referral at that stage was not considered necessary. Within 2 days the situation had changed. AMG had forced his way out of the particular unit within the wing in which he was housed and had threatened violence to others with a shower rail he had removed from the shower area. Leslie Dube immediately made an emergency referral to a psychiatrist with a view to compulsory treatment of AMG. He followed this up on the 16th November 2012 with at least two telephone calls in which he emphasised the urgency of the situation.

26. On the 14th December 2012 AMG was transferred to the same psychiatric intensive care unit at which he had been treated on two previous occasions. The transfer was pursuant to an order under Section 48 of the 1983 Act. I have no direct evidence as to why it took just short of a month to effect the transfer. The papers before me are silent as to AMG's state of health in that period, what (if anything) Leslie Dube did or observed and what (if any) treatment AMG underwent. Since the previous transfer took about a month due to the need to obtain the view of two psychiatrists to satisfy the terms of Section 48 of the 1983 Act, it is reasonable to infer that most of the delay occurred for similar reasons. There is evidence in the papers of problems with appropriate transport arrangements being available but they were resolved within 48 hours.

27. There were three detention reviews between the 1st October 2012 and AMG's transfer to hospital. On the 26th October 2012 his recent medical history was noted. His mental state at that point was described as "stable with no psychotic symptoms". Detention was authorised for a further 28 days i.e. the standard

period between reviews. On the 22nd November 2012 the mental health problems identified by Leslie Dube were rehearsed in the review. Detention was authorised only for 14 days or until further information became available about those problems, whichever came the sooner. On the 5th December 2012 it was noted that AMG was awaiting assessment with a view to transfer to a secure hospital for suitable treatment. Detention was authorised again only for 14 days or until transfer to hospital, whichever occurred first.

28. AMG never returned to Harmondsworth or any other IRC. The re-hearing before the First Tier Tribunal was listed on the 9th January 2013. That hearing date had to be adjourned. The re-hearing eventually took place on the 16th April 2013. AMG's appeal against the deportation order was allowed both on human rights grounds and under the Immigration Rules. The SSHD applied for permission to appeal. Permission to appeal was refused. The deportation order was revoked on the 3rd June 2013 at which point AMG ceased to be detained under the Immigration Act 1971. However, he remained an in-patient in hospital until March 2014. I have no direct evidence of the basis for his continued in-patient status. Given his previous history it is reasonable to infer that he was not a voluntary patient.

29. Throughout AMG's detention the reasons given for his continued detention were the risk of absconding and the risk of re-offending causing harm. These risks were linked by those reviewing his detention to the likelihood that, if he were released, he would not co-operate with the necessary and appropriate medical treatment.

Legal Framework

30. The SSHD has issued extremely detailed policy guidance in relation to enforcement of immigration rules under the title Enforcement Instructions and Guidance. The guidance runs to 62 chapters. Chapter 55 deals with detention policy. The relevant part of Chapter 55.10 is as follows:

"55.10. Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

In criminal casework cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:

…….Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in criminal casework cases, please contact the specialist mentally disordered offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act.

…..If a decision is made to detain a person in any of the above categories, the caseworker must set out the very exceptional circumstances for doing so on file."

31. In R (on the application of Das) v SSHD [2014] EWCA Civ 45 commencing at paragraph 66 the Court of Appeal gave some guidance on the proper application of the policy:

> "……it is possible to make a number of general points. The authorities show that 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. In this case the judge found that she did not consider it adequately because she did not take reasonable steps (either before or during Ms Das's detention) to inform herself sufficiently about Ms Das's mental health so as to be able to make an informed judgment about whether the policy applied to her. The stark example of this is that, notwithstanding the awareness in general terms of a psychiatric report about Ms Das at the time she was detained and its receipt by those responsible for her detention towards the end of November (see [33] above), her frequent attendance at the health centre, and that the medication she was prescribed included Risperidone, an anti-psychotic drug, the reviews of her detention did not (see [35] above) consider or review her psychiatric condition.
>
> The authorities also show that the threshold for the applicability of the policy is that the mental illness must be serious enough to mean it cannot be satisfactorily managed in detention. As to satisfactory management, at the time detention is being considered, the Secretary of State, through her officials, should consider matters such as the medication the person is taking, and whether his or her demonstrated needs at that time are such that they can or cannot be provided in detention. 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. R (OM) v Secretary of State for the Home Department [2011] EWCA Civ. 909 at [33] shows that some of those suffering significant adverse effects from mental illness may be managed appropriately in detention. OM had attempted

suicide by hanging herself. She was diagnosed as having recurrent depressive disorder and emotionally unstable personality disorder which was not suitable for treatment under the Mental Health Act 1983. The views of the experts were divided but Richards LJ stated that the balance of expert advice was that her illness could be managed appropriately in detention.

Where the policy does apply, there is, as shown by *Anam's* case (see [52] – [54] above) a high hurdle to overcome to justify detention. It is self-evident that the 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: see *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ. 521 at [34], per Rix LJ. Similarly, AA (Nigeria)'s case suggests (see [2010] EWHC 2265 (Admin) at [40]) that the detention of a person cannot be justified by reference to that person's own well-being (in that case to prevent suicide attempts) either in general or as an exceptional circumstance.[3] But the balancing process described in Anam's case may, particularly where the case concerns a foreign national prisoner who poses a serious risk to the public, for example a person who poses a high risk of killing someone else, or where there are cogent grounds for believing that removal will take place in a very short time, mean that detention will be justified. In the case of a person who poses a high risk of killing someone else, this will be because the circumstances can be regarded as 'very exceptional' so that detention pursuant to the policy of ensuring the firm and fair application of immigration controls is justified. 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', as Miss Rose accepted.

I add that, whether or not the policy is strictly engaged, as part of the operation of the Hardial Singh principles (see [16] above), 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."

This guidance was given in the context of a detainee who had applied unsuccessfully for asylum and whose claim had

been certified by the SSHD as clearly unfounded. At paragraph 79 of the judgment Beatson LJ said:

> "Ms Das is not an offender, and so the particular policy factors applicable to many foreign national prisoners which tilt the balance towards detention do not apply to her."

32. The policy in Chapter 55.10 relates only to detention in dedicated immigration accommodation or prisons. It does not apply where the detainee is being detained in hospital pursuant to Section 48 of the Mental Health Act 1983. That proposition derives in part from the clear words of the policy and thereafter from the consideration of those words in IM (Nigeria) v SSHD [2013] EWCA Civ 1561 where commencing at paragraph 35 of the judgment Lloyd-Jones LJ said as follows:

> "The appellant submits that the clear effect of the words used in Chapter 55.10 is that, if a detainee falls within one of the categories set out in bullet points in that paragraph, then unless there are very exceptional circumstances (which must be adverted to and expressly recorded by the respondent in her decision) he is unsuitable for detention and cannot be detained. Thus, it is submitted, Chapter 55.10 is a statement of policy by the respondent that, save in very exceptional circumstances, those suffering from serious medical conditions which cannot be satisfactorily be managed within detention must be released from detention.
>
> However, it seems to me that this submission proceeds on a false basis. The policy stated in EIG Chapter 55.10 does not address the continuation of detention generally but the continuation of detention in an IRC or prison. The particular bullet points on which Miss Laing relies have to be read in the context of the whole of Chapter 55.10. This makes clear that the passage is addressing detention in dedicated immigration accommodation or prison. It says so in the opening paragraph of Chapter 55.10 and a second time in the words prefacing the bullet points on which the appellant relies. The introductory words govern what follows. The references to "detention" in the bullet points which follow therefore have to be read subject to this limitation.
>
> As the judge held, Chapter 55.10 is clearly directed to the normal circumstances in which the policy is required, i.e. detention in removal centres and prisons. When read in this way, the consequence of the applicability of the policy is not that those to whom it applies become unsuitable for

> detention anywhere simply because their conditions are unsuitable for treatment in a removal centre or prison. Its effect is not that, in the absence of very exceptional circumstances, continued detention is unsuitable but that the detention in the removal centre or prison is unsuitable. As both Ouseley J. and Stewart J. observed, the result is not that a detainee must be released unless there are very unusual circumstances but that the detainee must be moved to a suitable place of detention. A person may be fit to be detained in hospital even if not fit to be detained in an IRC.
>
> The judge went on to observe that it would be odd if someone whose medical condition made him unsuitable for detention in an IRC or prison but who could readily be treated in hospital whilst still remaining in detention had to be released from all detention on temporary admission even though the unsuitability for detention related only to detention in an IRC or prison. (at [45]) I entirely agree. The failure of the policy to make express provision for those who require removal to hospital but who should otherwise remain in detention is, as the judge observed, because it was so obvious as to be not worth saying that those who need medical treatment not available in an IRC or prison would pursuant to the proper application of the policy be transferred to hospital in detention. Furthermore, any failure to state in a published policy that those not suitable for detention in an IRC should be removed in detention to hospital where their medical needs could more suitably be met does not limit the exercise of the power conferred on the respondent. She does not need to announce a policy covering a particular situation or to act in accordance with it in order to make the exercise of her powers lawful."

33. Prima facie a breach of public policy which relates to a detention decision will render the detention unlawful: Lumba v SSHD [2011] UKSC 11; R (LE Jamaica) v SSHD [2012] EWCA Civ 597. The policy in issue in this case is Chapter 55 of the Enforcement Guidance and Instructions. However, if the decision to detain in any event would have been made after lawful application of the policy, the detainee will recover only nominal damages: LE (supra).

34. Wherever a person is detained under the Immigration Act 1971 the SSHD is obliged to apply what are commonly referred to as the Hardial Singh principles as helpfully summarised by Lord Dyson in Lumba (supra) at paragraph 22:

> "It is convenient to introduce the Hardial Singh principles at this stage, since they infuse much of the debate on the issues that arise on this appeal. It is common ground that

> my statement in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196 para 46 correctly encapsulates the principles as follows:
>
> (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

35. Lord Dyson gave further consideration to (ii) and (iii) of the Hardial Singh principles commencing at paragraph 103:

> "A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place. As I said at para 47 of my judgment in R (I), there may be situations 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 period that is reasonable in all the circumstances, having regard in particular to time that the person has already spent in detention. I deal below with the factors which are relevant to a determination of a reasonable period. But if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful.
>
> How long is a reasonable period? At para 48 of my judgment in R (I), I said:
>
> *"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."*

So far as I am aware, subject to the following qualifications, the relevance of these factors has not been questioned. The qualifications are first that the relevance of the risk of offending on release is challenged on behalf of the appellants in the present case. Secondly, "the nature of the obstacles" begs two questions that have been raised on this appeal, namely what is the relevance, if any, of delays attributable to the fact that a detained person (i) is challenging the decision to deport him by appeal or judicial review and will generally not be deported until his challenges have been determined; and (ii) has refused to return voluntarily to his country of origin?

Risk of re-offending

Mr Husain accepts that, where there is a risk that the detained person will abscond, the risk of re-offending is relevant to the assessment of the duration of detention that is reasonably necessary to effect deportation. But he submits that, where there is no real risk of absconding, the risk of re-offending cannot of itself justify detention. Where there is no such risk, detention is not necessary to facilitate deportation, because it will be possible to effect the deportation without the need for detention. The underlying purpose of the power to detain is not to prevent the commission of criminal offences, but to facilitate the implementation of a deportation order.

I have some difficulty in understanding why the risk of re-offending is a relevant factor in a case where there is a risk of absconding, but not otherwise. It seems to me that it is possible to construe the power to detain either (more narrowly) as a power which may only be exercised to further the object of facilitating a deportation, or (more broadly) as a power which may also be exercised to further the object which it is sought to achieve by a deportation, namely, in the present case, that of removing an offender whose presence is not conducive to the public good. The distinction between these two objects was clearly drawn by the Court of Appeal in *R (A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804. Toulson LJ said at para 55:

> "A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view, that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because he has a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be

> a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

Para 78 of Keene LJ's judgment is to similar effect.

> I acknowledge that the principle that statutory powers should be interpreted in a way which is least restrictive of liberty if that is possible would tend to support the narrower interpretation. But I think that the Court of Appeal was right in *R (A)* to adopt the interpretation which gives effect to the purpose underlying the power to deport and which the power to detain is intended to facilitate. Perhaps a simpler way of reaching the same conclusion is to say, as Simon Brown LJ said in *R (I)* at para 29, that the period which is reasonable will depend on the circumstances of the particular case and the likelihood or otherwise of the detainee re-offending is "an obviously relevant circumstance".

But the risk of re-offending is a relevant factor even if the appellants are right in saying that it is relevant only when there is also a risk of absconding. As Lord Rodger pointed out in argument, if a person re-offends there is a risk that he will abscond so as to evade arrest or if he is arrested that he will be prosecuted and receive a custodial sentence. Either way, his re-offending will impede his deportation.

The risk of re-offending is, therefore, a relevant factor.

…….

Delay attributable to challenges to deportation

Mr Beloff submits that the time taken to resolve legal challenges brought by an individual against deportation should generally be left out of account in considering whether a reasonable period of detention has elapsed. He concedes that this general rule should be subject to two qualifications: (i) if the Secretary of State has caused delay in the resolution of the legal challenge, then that time may be taken into account; and (ii) the time during which a legal challenge is being resolved should be taken into account if removal is not possible for reasons unrelated to the legal challenge. I shall call this general rule "the exclusionary rule".

…….

I would reject the exclusionary rule. If a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his detention during the challenge should be given minimal weight in assessing what is a reasonable period of detention in all the circumstances. On the other hand, the fact that a meritorious appeal is being pursued does not mean that the period of detention during the appeal should necessarily be taken into account in its entirety for the benefit of the detained person. Indeed, Mr Husain does not go so far as to submit that there is any automatic rule, regardless of the risks of absconding and/or

re-offending, which would compel an appellant's release if the appeals process lasted a very long time through no fault of the appellant. He submits that the weight to be given to time spent detained during appeals is fact-sensitive. This accords with the approach of Davis J in Abdi and I agree with it. The risks of absconding and re-offending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one."

36. In cases where the lawfulness of a decision to detain is challenged, the construction of any relevant policy is a matter for the court rather than being subject to any Wednesbury test. Whether the Hardial Singh principles have been breached also is a matter for the court to determine. Subject to those matters, the power to detain is discretionary. The decision to detain in the particular circumstances of any given case is a true exercise of discretion in relation to which the court's role is supervisory. The court must review the decision in accordance with public law principles, including Wednesbury principles. These propositions are derived from LE (supra).

37. Section 149 of the Equality Act insofar as it is relevant to these proceedings reads as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to–
>
> ……
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> ……
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to–
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are

> not disabled include, in particular, steps to take account of disabled persons' disabilities."

One protected characteristic under the Act is "disability". This is defined in Section 6(1) of the Act as follows:

> "(1) A person (P) has a disability if–
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

The competing submissions

The Claimant

38. AMG asserts that the entire period of his immigration detention was unlawful. Before, during and after his detention he suffered from a serious mental illness. That illness was incapable of being managed satisfactorily in detention. Only in very exceptional circumstances should he have been detained at all. Such circumstances never existed. Therefore, his detention was unlawful because the SSHD did not apply her policy as she should have done. Had she applied her policy he would have been released into the community because, relying on the guidance in Das (supra) there is a strong presumption in favour of release where there is mental illness. AMG argues that there will be cases – of which his is a prime example – where there is clearly mental illness albeit not such as to require hospital treatment.

39. AMG argues that the SSHD was aware that he had significant mental illness yet she did not obtain all of the relevant information. This failure affected first the initial decision to detain because she did not make full enquiry as to how he would cope in an IRC despite the nature of the available medical evidence (which at best was equivocal). It then continued when the SSHD maintained his detention without proper evidence as to how he was in fact coping.

40. AMG's case is that on the face of the first detention decision and the subsequent reviews the SSHD applied the wrong test i.e. "exceptional circumstances" rather than "very exceptional circumstances". Without more that error must vitiate the lawfulness of his detention.

41. AMG asserts that, notwithstanding the judgment in IM (supra), the policy requiring "very exceptional circumstances" to detain applied equally to detention in hospital as to detention in an IRC. He argues that IM did not consider earlier authority and that it has been superseded by the judgment in Das (supra). It is argued that AMG could have survived in the community as is evidenced by the fact that he is doing so now. Release into the community would have avoided the revolving door – successive periods of detention in an IRC followed by periods in hospital – which in fact occurred.

42. AMG's case is that the entire period of detention was unlawful because of the failure to apply the policy in Chapter 55.10 of the Guidance. However, even if that is not correct, his detention after the 4th October 2012 – the date on which the Upper Tribunal indicated that his appeal against the First Tier Tribunal's decision to uphold the deportation order was to be allowed – was unlawful on Hardial Singh grounds. As of that date it was or should have been apparent to the SSHD that she would not be able to effect deportation within a reasonable period. To detain AMG thereafter cannot have been for a period that was reasonable in all the circumstances. That objection would apply to detention whether in an IRC or a hospital.

43. Finally AMG argues that the SSHD failed to have due regard to the need to advance equality of opportunity between someone like him (with a mental illness such as to bring him within the definition of a person with a disability) and other detainees without that disability. The failure alleged is that the SSHD took into account AMG's risk of absconding and of committing further offences without having due regard to the fact that those risks did arise or may have arisen due to his mental illness.

The Defendant

44. The SSHD denies that she acted unlawfully at any stage. She was entitled to conclude that AMG's condition was manageable within a detention centre at the point at which he first was transferred to Harmondsworth. She had no reason to suppose that he would refuse to co-operate with any treatment despite the presence of well-qualified staff at Harmondsworth. Once the condition of AMG deteriorated she took steps to have him assessed for the purpose of hospital admission. Even if he fell then within the category of patient who could not be managed satisfactorily within the detention centre, it was necessary to detain him whilst he was assessed under the Mental Health Act 1983 and whilst he was awaiting transfer to a hospital. The SSHD argues that the failure by Ms Bailey and Mr Atkins to use the precise words of the policy does not vitiate AMG's lawful detention.

45. The SSHD asserts that the transfer from hospital back to the detention centre at the end of September 2012 was entirely appropriate. AMG's responsible clinician

at that point raised no issue about the viability of his management in Harmondsworth. As soon as it became apparent that the optimism expressed at the end of September 2012 was not well-founded, the medical team at Harmondsworth took proper steps to remove AMG from the detention centre.

46. The SSHD's case is that IM (supra) establishes that Chapter 55.10 of the Enforcement Guidance does not apply if the person concerned is detained in hospital. Therefore, any period spent in hospital cannot involve any breach of policy.

47. The SSHD accepts that, although AMG was detained in hospital from December 2012 onwards, this detention has to be judged in accordance with Hardial Singh principles. Her argument is that AMG was detained for a reasonable period and that at no point was it apparent that she would not be able to effect deportation within a reasonable period. Whilst the Upper Tribunal in October 2012 ruled that the First Tier Tribunal's decision adverse to AMG could not stand, it did not do so in terms that indicated that no reasonable tribunal could have made such a decision. Rather, it found that certain matters had not been considered properly by the First Tier Tribunal and that the case required reconsideration. Therefore, the SSHD was entitled to remain of the view that deportation within a reasonable period would be possible. She points to the fact that, in the first instance, the re-hearing was due to take place within 3 months of the Upper Tribunal decision. Moreover, the risks of absconding and further offending were such as to justify continued detention.

48. In relation to the claim pursuant to Section 149 of the Equality Act 2010 the SSHD invites consideration of whether AMG fell within the definition of "disability" within the Act. In any event the duty under the Act is to "have due regard to" taking steps to meet the needs of someone in AMG's position. It does not require her to ignore matters which otherwise would be relevant simply because they are or may be due to a disability.

Discussion

49. I apply the following principles which are drawn principally from Das (supra):

- Chapter 55.10 of the Guidance relates only to detention in an IRC or a prison. That is the clear meaning of the words of the policy. Were further authority needed, IM (supra) provides it.

- Chapter 55.10 applies when the proposed detainee's mental illness cannot be satisfactorily managed in detention. The policy anticipates that there will be mentally ill detainees who can be managed satisfactorily in detention. The general guidance given in Das (supra) proceeds on that basis.

- In order to decide whether Chapter 55.10 applies in a particular case, the SSHD must obtain sufficient information to allow her to reach an informed judgment.

- Whether a mental illness in a particular case can be managed satisfactorily in detention requires the SSHD to consider the nature of the treatment required and the facilities available in the relevant detention centre.

- If Chapter 55.10 does apply – the proposed detainee is suffering from a serious mental illness which cannot satisfactorily be managed in detention – the SSHD has a high hurdle to overcome if she is to justify detention.

- There are particular policy factors which apply to foreign criminals. These may tilt the balance in favour of detention notwithstanding the proposed detainee's mental illness.

- If detention is justified the SSHD must monitor the detainee for signs of deterioration in his mental illness. This requirement applies even if the detainee does not fall within Chapter 55.10. The requirement falls within the Hardial Singh principles.

- If a failure properly to apply Chapter 55.10 is established, the decision to detain AMG will be unlawful. However, if the decision to detain would have been in the event of lawful application of the policy, AMG will recover only nominal damages.

- When considering the question of the length of "a reasonable period" under the Hardial Singh principles, the risk of absconding and the risk of re-offending are relevant circumstances.

- Insofar as Section 149 of the Equality Act 2010 applies to the circumstances of this case, the statutory duty is to have due regard to the disability of the detainee.

- It is not necessary for a decision maker in the position of the SSHD to recite the precise terms of any policy which she is required to apply. What is necessary is for the decision maker to apply the policy.

With those principles in mind I shall consider the various stages of AMG's detention.

The initial decision to detain

50. At the time of the initial decision to detain the SSHD had requested the view of AMG's treating clinician as to his management within a detention centre on two separate occasions. That demonstrates that she had AMG's mental illness very much in mind. On the first occasion the clinician (Dr Gupta) was equivocal. In particular, he observed that he did not know what mental health facilities were available to detainees. The SSHD did know. At Harmondsworth the health care team included specialist psychiatric nursing staff and there was a visiting

psychiatrist. On the second occasion Dr Gupta set out the potential risks of being detained to someone such as AMG. Nothing he said should have led the SSHD at that stage to conclude that AMG's condition could not be satisfactorily managed within detention. Whilst part of the minute prepared in April 2012 was an inaccurate summary of Dr Gupta's position, Dr Gupta's full view was set out in that minute and I am bound to conclude that the SSHD acted on the basis of the entirety of Dr Gupta's opinion.

51. The minute of the original detention decision refers to Chapter 55.10 of the Guidance. It does so inaccurately in two respects. First, the minute states that detention is suitable for persons such as AMG in "only to the exceptional circumstances". The word "very" is omitted. Second, the minute does not qualify the reference to those suffering from serious mental illness with the phrase "which cannot be satisfactorily managed in detention". Thus, the author of the minute apparently applied a less rigorous test than should have been applied in relation to the exceptional nature of the circumstances but applied Chapter 55.10 without consideration of whether strictly it was relevant. It is not appropriate to engage in an exercise of close construction and analysis of the contemporaneous documents prepared by the decision maker. The issue is whether the decision was in accordance with the policy.

52. I am satisfied that the decision made in April 2012 and confirmed by the letter to AMG dated 17th May 2012 (which is the date he was transferred to Harmondsworth) was in accordance with the SSHD's stated policy. Given the material available to her she was entitled to conclude that AMG's mental illness was capable of being managed satisfactorily in a detention centre.

53. Even if the SSHD could not properly have reached that decision, there were very exceptional circumstances. AMG had a history of regular and persistent offending from a point not long after his first arrival in the UK. He had committed various offences up to the point of his conviction in 2007. The offences of which he was convicted then were serious and demonstrated that he presented a risk to the public. He breached the terms of the licence to which he was subject on more than one occasion which resulted in him serving the full term of his sentence. After the completion of his sentence he was detained under the Mental Health Act 1983. He absconded more than once from such detention. He committed acts which showed he was a continuing danger. The suggestion that he could be managed within the community hardly sat easily with all of those factors. They amounted to very exceptional circumstances within the terms of the policy. The decision maker set them out in the minute referred to above. However, I emphasise that none of this was necessary for the SSHD to make a lawful decision within the policy given the evidence about management of AMG's illness in a detention centre.

54. I do not need to consider the application of the Hardial Singh principles at this point of the decision making process. It is conceded on behalf of AMG that the SSHD in May 2012 detained him for a proper purpose and that it was not then apparent that deportation would not be possible within a reasonable period.

The events up to August 2012

55. As it transpired AMG's mental illness could not be satisfactorily managed within the detention centre in the period from May 2012 to August 2012. That was not because the detention centre lacked the necessary staff and facilities. Rather, it was because AMG refused to co-operate with his treatment and refused to take his anti-psychotic medication. The health care team monitored AMG properly but there was no basis for requiring him to co-operate with his treatment any more than there would have been in practical terms had he been in the community.

56. The first review of AMG's detention was carried out on the 6th July 2012. It is not clear from where the supervising officer obtained the information which led him to say that AMG was receiving the appropriate treatment whilst detained. Plainly that was not correct. The issue is whether that error vitiates the decision made on the 6th July 2012 so as to render detention from that point unlawful. The true position was that AMG was being closely monitored and was being encouraged to undergo treatment. Leslie Dube concluded on the 9th July 2012 that AMG then was not exhibiting any signs requiring immediate action. He did raise a concern that prolonged detention might affect AMG's mental health. This concern plainly assumed a continuing refusal by AMG to undergo treatment. Had the decision maker on the 6th July 2012 been made aware of the position reflected in the views expressed three days later by Leslie Dube what would have been the result? There would have been no change to the view of the SSHD in relation to the risks presented by AMG i.e. the risks of absconding and of re-offending. There would have been no immediate change in terms of the capacity of the detention centre and its staff to manage AMG's mental illness. That is because AMG was not at that stage exhibiting signs of a relapse and because the health care team at Harmondsworth were continuing to monitor the position. The mistaken factual basis on which the supervising officer authorised the detention did not constitute a breach of public policy. That officer believed he was applying the policy. Since knowledge of the true position would have led to the same result, the mistake did not vitiate the decision so as to render it unlawful.

57. By the 27th July 2012 the health care team at Harmondsworth had concluded that AMG now was exhibiting early warning signs of a relapse. There is no evidence that this conclusion should have been reached any earlier. Since AMG was being monitored on a regular basis by qualified staff, it is proper to infer that the position did not become apparent until late July 2012. Urgent steps were taken to assess him so as to allow an admission to hospital pursuant to Section 48 of the Mental Health Act 1983. Therefore, those responsible for AMG in detention had concluded that his mental illness no longer could be managed satisfactorily in detention and they took steps to transfer him to an environment where it could be managed under the powers given to the hospital. It took a little over four weeks to effect the transfer. That was not an unreasonable period. Such arrangements cannot be made overnight or even within a few days. A transfer under Section 48 was plainly the right course. It required two approved psychiatrists to confirm that the statutory criteria were met and it required confirmation of the availability of a suitable bed. I am satisfied that in late July 2012 all appropriate steps were taken.

58. The review of AMG's detention on the 3rd August 2012 did not reflect the action that was being taken in relation to AMG or his position as it then was. There can

be no argument but that the review was conducted on a false basis and that the decision was made on a false basis. What in fact was happening was that steps were being taken to transfer him to hospital which is an option referred to as a possibility in the review documents. Had the author of the review documents known of the true position, I am satisfied that he would have authorised detention but for a shorter period. I reach that conclusion on the basis that this is what occurred in November 2012 when precisely the same situation applied i.e. deterioration in AMG's mental health requiring a transfer to hospital with a delay pending assessment by the relevant clinicians. In those circumstances I do not consider that AMG's detention was unlawful. His detention remained appropriate for all of the reasons given in the detention review and the consequent notification to AMG. The situation required AMG's transfer to hospital but that was in fact being achieved. For the same reasons as given above the false basis of the review did not render the decision unlawful.

The return to detention – 1st October 2012

59. AMG's condition was stabilised very quickly after his transfer to hospital. The transfer took place on the 31st August 2012. By the 19th September 2012 AMG's responsible clinician was satisfied that he no longer needed hospital treatment. He recommended that AMG should return to Harmondsworth. That can only support the conclusion that the responsible clinician considered that AMG's illness could be managed satisfactorily in detention. In those circumstances the SSHD was entitled to reach the same conclusion.

Detention from 1st October to 14th December 2012- Chapter 55.10

60. AMG was in Harmondsworth for about 6 weeks before his condition relapsed and urgent steps were taken to re-admit him to hospital. Once those urgent steps were taken I am satisfied that the SSHD was acting in accordance with her policy for the reasons given in relation to the earlier admission to hospital. She then had concluded that AMG could not be managed satisfactorily in the detention centre and she was taking steps to transfer him to hospital. As already noted Chapter 55.10 does not apply to detention in hospital. Was the SSHD failing to observe her policy between the 1st October 2012 and the middle of November? It is clear that the health care team at Harmondsworth continued to monitor AMG closely. As soon as there were signs of a relapse the appropriate steps were taken. The psychiatrist who tried to assess AMG at the end of October 2012 advised the health care team on the type of monitoring required. That clinician did not comment adversely on the capability of the on-site medical professionals. Those matters do not indicate an unlawful failure on the part of the SSHD.

61. What of the report of Dr Gupta dated the 12th October 2012? On a proper analysis his report did not require the SSHD to release AMG from detention forthwith. Dr Gupta recognised that AMG as an informal patient (which is what he would be in the community) would be very likely to suffer a relapse for exactly the same reasons as applied in the detention centre. Such a relapse would give rise to risks of danger to others which then would require compulsory hospital care under the Mental Health Act 1983. Though he did not say so in terms, it

must follow from his report and from the statutory framework that hospital admission could follow only when AMG became symptomatic. The SSHD was entitled to take the view that AMG's detention was justified by reference to the risks of absconding and re-offending. Dr Gupta's report tended to support the finding of the latter risk. The SSHD was further entitled to conclude that the health care team at Harmondsworth was capable of managing AMG's illness in the sense that the team was able properly to monitor his condition and to take urgent steps if he required hospital treatment.

62. The detention review documents in relation to this period do not take the matter any further. By the time of the second review after AMG's return to Harmondsworth, the health care team had put in train the steps required to transfer AMG to hospital. As already noted, the official responsible for authorising his continued detention specified a period of 14 days before a further review so that the position could be monitored properly.

Detention from 4th October 2012 – reasonable period

63. On the 4th October 2012 the SSHD knew that the decision of the First Tier Tribunal on which she placed substantial reliance for her belief that there were no obstacles in the way of deportation had been overturned by the Upper Tribunal and that a re-hearing before a differently constituted First Tier Tribunal would be required. Did the decision of the Upper Tribunal render continued detention of AMG unlawful by reference to Hardial Singh principles? I am satisfied that it did not.

64. As is clear from the judgment of Lord Dyson in Lumba (supra) there is no automatic rule requiring the release of a detainee "if the appeals process lasted a very long time through no fault of the (detainee)". As the judgment makes clear the weight given to the time waiting for an appeal (or in this case a re-hearing) is fact-sensitive and the risks of absconding and re-offending are the matters of prime importance. The relevant factors in this case are as follows:

- As at the 4th October 2012 AMG had been in immigration detention for less than six months.

- The significant obstacle in the way of the SSHD carrying out her deportation order at that point was the re-hearing before the First Tier Tribunal. She had no reason to suppose that this re-hearing would be subject to substantial delay. The case was listed for hearing in early January 2013 and the final hearing was in April 2013. There is no evidence that the initial listing was ineffective due to any default on the part of the SSHD.

- AMG was being detained in an IRC with a health care team capable of monitoring his mental health.

- After AMG's transfer to hospital he was being detained in a place where he received necessary and appropriate medical treatment.

- As soon as detention in Harmondsworth affected him adversely, immediate steps were taken to ameliorate the position.

- There was a clear and substantial risk that he would abscond if he were to be released from detention, that risk being evidenced by his past behaviour.

- There was a clear and substantial risk that, if released from detention, he would commit offences. That risk was evidenced not only by his past behaviour but by the various medical opinions available to the SSHD.

65. In view of all of those factors I am satisfied that the period of AMG's detention was reasonable. It did not become unreasonable when the Upper Tribunal allowed his appeal. The process ordered by the Upper Tribunal did not mean that it was or ought to have been apparent that the SSHD would be unable to deport AMG within a reasonable period.

The Equality Act 2010

66. The application of the Equality Act 2010 to someone in a similar position to AMG was considered by Charles George Q.C. sitting as a Deputy High Court Judge in R (D) v SSHD [2012] EWHC 2501 (Admin). However, the case as argued before him was that the failure to consider D's mental health issues properly or at all when deciding to detain and/or when maintaining the decision to detain meant that due regard had not been given to D's disability. The Deputy Judge on the facts of that case found that there had been a breach of the duty under Section 149 of the 2010 Act but did so for the same reasons as he found that there had been a breach of duty relating to Chapter 55.10.

67. AMG's argument goes rather further. He argues that the SSHD took account of the risks of absconding and re-offending when making her decisions – which clearly she did – but that she did not have regard to the fact that these risks were or might have been caused by his mental illness. Rather, she treated AMG in the same way as someone who deliberately decided to abscond. In doing so the SSHD did not have due regard to the need to minimise the disadvantage suffered by AMG which was connected to his mental illness.

68. The simple answer to AMG's complaint in relation to the Equality Act is that the SSHD did have due regard to the need to maintain equality of opportunity between AMG who had a mental illness and a notional detainee who did not. For all the reasons set out under the discussion relating to Chapter 55.10 and the decision making process both in relation to those reviewing AMG's detention and, more particularly, in respect of those responsible for AMG at Harmondsworth, I am quite satisfied that due regard was given to his mental illness. It may be true that the high risks of absconding and re-offending presented by AMG were due to

his disability. That does not mean that the SSHD was required to put them on one side when considering detention. She had to have due regard to their cause.

69. The argument of AMG as put in the skeleton argument lodged on his behalf is that "the risks (AMG) posed could have been reduced by adequate community care as suggested by his doctors". I do not consider that the medical evidence taken as a whole justifies such a conclusion. It is notable that AMG was detained in hospital for many months after the expiry of his immigration detention. There is no evidence that his continued detention in hospital was the result of the time he spent in Harmondsworth between October and December 2012. Even if the evidence did support the conclusion put forward by AMG, the SSHD was entitled to weigh the possibility that community care could have reduced the risks against the very significant prospect that it would not have done so and the consequent dangers that would have been caused thereby.

Conclusion

70. For all of the reasons set out herein, I am satisfied that no part of AMG's detention, whether in Harmondsworth IRC or in hospital, was unlawful. It follows that the claim for judicial review of the decision to detain him must be dismissed.