Neutral Citation Number: [2015] EWHC 377 (Admin)

Case No: CO/5121/2014

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

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
CF10 1ET
Date: 19/02/2015

Before :

MR JUSTICE GILBART

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Between :

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

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- -

Charlotte Kilroy (instructed by **Hoole and Co, Solicitors of Bristol**) for the **Claimant**
Mona Bayoumi (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 15th-16th January 2015 (at Bristol Civil Justice Centre)

- -

Judgment

MR JUSTICE GILBART:

1. In this matter the Claimant , by Amended Detailed Grounds of 14th November 2014, seeks the following relief

   i) a declaration that his removal from the United Kingdom by the Defendant was unlawful;

   ii) a declaration that his detention was unlawful from 24th June 2014 until 19th August 2014;

   iii) damages for his unlawful detention and removal;

   iv) an order requiring the Defendant to return him to the United Kingdom.

2. Given the circumstances which are alleged justify the Claimant's claim for asylum, I shall refer to him as H. I shall deal with the matter under the following heads

   i) Chronology in brief

ii) Overview of the respective cases

iii) The Detention Fast Track system and the *Detention Action* litigation

iv) History of the Claimant's detention and of his claim for asylum

v) The cases before the Court

vi) Ground 1; was the removal on 19th August 2014 unlawful?

vii) Ground 2: was the Claimant's detention unlawful?

viii) What relief should be given?

a) Damages for unlawful detention and their measure

b) Exercise of discretion as to removal

c) Should the Court order that the Claimant be returned?

It should be noted that under section (viii) I shall consider the effect of the alleged flaws in the DFT processes as applied to the Claimant's case.

Chronology in Brief

3. What follows are the bare bones of the events in issue. I shall at a later stage consider the details of what occurred, upon which I heard a considerable amount of argument.

4. The Claimant, who is a 57 year old Afghan, had visited the United Kingdom from Pakistan in early 2014 on a visitor's visa. He has a son who lives in Manchester. He left the UK on 13th March 2014. On 24th June 2014 he arrived by aeroplane at Manchester Airport and claimed asylum. He was detained at the airport. On 25th June 2014 he was given a screening interview and accepted into the Detention Fast Track ("DFT") process. He was kept in detention, but then transferred to Harmondsworth in Middlesex. On 1st July 2014 he was given his substantial asylum interview, and kept in detention. He was then given a further interview on 3rd July 2014.

5. On 8th July 2014 his asylum claim was refused. He appealed against the refusal. On 16th July 2014 he appeared before Judge Walker of the First Tier Immigration and Asylum Chamber. On 17th July 2014 the Judge handed down his decision dismissing the appeal. On 22nd July 2014 Judge Woodcraft of the First Tier in a written decision refused permission to appeal. After the submission of further grounds on 24th July 2014, Judge Chalkley of the Upper Tribunal refused permission to appeal.

6. The Claimant's appeal rights were exhausted on 28th July 2014. He remained in detention. On 7th August 2014 he was served with removal directions stating that he would be removed on a flight from London Heathrow on 19th August 2014 at 23.30 hours.

7. On 5th August 2014 his new solicitor Mr Khalid Khashy of Hoole and Co (instructed on 21st July 2014) wrote to the Home Office submitting a fresh claim for asylum. On 7th August 2014 Mr Khashy asked for a decision by 8th August, and warned that if it

was not received, judicial review proceedings would be issued. He referred to the decision of Ouseley J in the *Detention Action* litigation (see below).

8. On 12th August 2014 Hoole and Co wrote a pre action letter in accordance with the pre action protocol. It attached a copy of the order made by Ouseley J in the *Detention Action case* at [2014] EWHC Admin 2525, made on 25th July 2014.

9. On 18th August 2014, the Claimant served an application for Judicial Review, in which he sought

   i) A quashing order of the removal directions;

   ii) A declaration that the DFT process culminating in the dismissal of his asylum appeal was procedurally unfair, and that his subsequent fresh claim could not be dismissed as "clearly unfounded";

   iii) A mandatory order requiring the Defendant to take steps to remedy the unfairness, which may include re-interviewing the Claimant, giving him an opportunity to obtain independent medical evidence on his mental state and removing him from the DFT process.

10. On 19th August at 9.30 am HH Judge Bidder QC sitting in the Upper Tribunal refused permission to apply for judicial review and refused mandatory relief. The Claimant was removed that evening. The Defendant contends that on that date her officers served a letter on the Claimant, dated 18th August 2014, in which a reply was given to the letters of 5th, 7th and 12th August 2014. It rejected the claim for asylum, and did not treat it as a fresh claim. There is a substantial dispute as to whether that letter was served on the Claimant.

11. On 4th September 2014 the Claimant's solicitor made a renewed application for permission to apply for judicial review. On 5th November 2014 HH Judge Cotter QC granted permission relating to the ground that the Defendant failed to respond to the fresh claim for asylum. He also granted permission to amend the claim to include a new ground relating to the legality of the detention and as a result also transferred the matter to the High Court

12. On 5th December 2014 HH Judge Lambert sitting at Bristol granted permission to apply on Ground 2 (the detention ground), refused an application for interim relief, and made orders relating to the filing of evidence. The Defendant was given until 24th December 2014 to file any detailed grounds of defence or any written evidence, and the Claimant was given until 6th January 2015 to file any reply or evidence in response. He also ordered disclosure by 24th December 2014 in answer to the Claimant's requests.

13. I should point out at this stage that there are several important factual disputes relating to the conduct of officials within SSHD which affect the whole issue of the detention of the Claimant, as well as the service or otherwise of the letter of 18th August 2014, which in turn affects the legality of the removal on 19th August 2014. It became increasingly apparent during the hearing before me that the way in which the Claimant's case had been dealt with, and the records kept about it within the Defendant's department, left a great deal to be desired. At times during the hearing

one could only feel sympathy for Ms Bayoumi, as instructions she had received were simply not borne out by what appeared in the records.

14. The consideration of those factual issues means that it has been necessary to deal in detail with the documents produced. I regret that this has required a judgment of greater length than I would wish.

Overview of the respective cases

15. On behalf of H, Miss Kilroy argues the following

    i) The Claimant should not have been dealt with under the DFT process because the use of DFT in his case was unfair and/or inappropriate

        a) he was not represented by lawyers at the time of his substantive interview, although it had been agreed that he should be. That occurred because an official of the Defendant decided to interview him without his lawyer, and did not follow the guidance set out in the policy of the SSHD;

        b) to the knowledge of the Defendant's officials he suffered from conditions which affected his ability to take part in the interview;

        c) the Claimant relied on three documents, which were not translated fully at the interview, and not checked by the official;

        d) the decision refusing asylum was affected by the inadequacies of the substantive interview, and relied on assessments of credibility based upon it;

        e) the appeal was brought on too quickly to enable the case to be conducted by his lawyers on the basis of adequate instructions;

        f) the First Tier Immigration Judge relied on the inadequate substantive interview and the erroneously translated documents;

        g) the process suffered from the vices identified in the *Detention Action* litigation.

    ii) As to the letter rejecting the second claim

        a) it was never served on the Claimant, and is therefore of no effect;

        b) therefore the Claimant had an undetermined claim outstanding when he was removed;

        c) his removal was therefore unlawful;

        d) In any event, the terms of that letter are infected by the vices of the first letter and of the flaws in the DFT procedure as applied to the Claimant;

e) In any event, service (if it took place) was at the earliest on 19th August 2014, which was on the day of his removal and prevented him having a reasonable opportunity to have access to justice;

iii) So far as the detention of the Claimant is concerned

a) it is for the Defendant to show that she had reasons to detain him and that he was properly informed of them;

b) the original detention was on 24th June 2014 for reasons which could not justify his detention. The reasons later claimed by the Defendant to have been given to the Claimant upon his detention were not given;

c) if he was not properly put into the DFT process, then he was not lawfully detained;

d) it is conceded by the Defendant in the light of the judgment of Beatson LJ in *Detention Action* (below) that the Claimant's detention from 8th July to 28th July 2014 was unlawful, but the Claimant argues that it was unlawful anyway, because proper reasons were not given;

e) from 28th July 2014, when his appeal rights were exhausted, his removal was not imminent and was not justified;

f) He is entitled to damages, which should not be nominal only;

iv) If I uphold his claim on the first ground, Miss Kilroy contends that the court should order the Defendant to take steps to achieve his return to the United Kingdom.

16. Miss Bayoumi for the Secretary of State contends that

i) his detention was lawfully authorised on 24th June 2014;

ii) he was a proper candidate for the Detention Fast Track process. While it is conceded that he was to have been interviewed with a lawyer present, there is no reason to think that he was disadvantaged by the process adopted, nor by any medical condition;

iii) the treatment of the three letters gives no cause for complaint;

iv) there was sufficient time for his lawyers to be properly instructed for the purposes of the Appeal. The Immigration Judge reached proper findings that were open to him on the evidence, including adverse findings on the credibility of the Claimant. The application to appeal against that decision has been refused by the Upper Tribunal, and there has been no application before this Court to seek to challenge the decision of the Upper Tribunal to refuse leave;

v) the Removal Directions were lawful;

vi) he has made a second application, which was rejected by letter of 18th August 2014, which was served on him. The Secretary of State, as she was entitled to under Rule 353, determined that it did not constitute a fresh claim;

vii) He had the opportunity on 19th August 2014 of seeking to have his removal delayed;

viii) she concedes that one period of detention (8th July 2014 to 28th July 2014) was unlawful, but only by reason of the observations of Beatson LJ (below);

ix) after 28th July 2014 his detention was lawful as his removal was imminent;

x) any breaches were public law breaches only;

xi) She had no instructions on whether any damages should be nominal or substantial, and contended that the issue should be adjourned for determination. In relation to the first period of detention, it was submitted that the Defendant would have detained in any event on the basis of her general statutory powers to detain.

Detention fast track (DFT) system and the <u>Detention Action</u> litigation

17. It is necessary to refer to this litigation. The DFT process is described in the judgement of Beatson LJ in (*R* (*Detention Action) v SSHD* [2014] EWCA Civ 1634, on appeal from Ouseley J, who gave judgment on 9th July 2014 in the Administrative Court (*R* (*Detention Action) v SSHD* [2014] EWHC 2245 (Admin), and then made orders after another short judgment on 25th July 2014 ([2014] EWHC 2525 (Admin). The DFT system and its provenance are described in some detail in the judgments of Ouseley J in his main judgment (R *(Detention Action) v SSHD* [2014] EWHC 2245 (Admin)) and by Beatson LJ (with whom Floyd and Fulford LJJ agreed) in the Court of Appeal at [2014] EWCA Civ 1634. I refer to paragraphs 23-41 of Beatson LJ's judgment for an account of the policy of the SSHD in what is now known as "DFT *Guidance"* which has applied since 11th June 2013. The following description is taken from the judgment of Beatson LJ at paragraph 27 ff

"*IV. Policy Guidance: the OEM, the EIG and the DFT Guidance*

27. Since 2008 the policy governing the DFT process has been set out in a document, since March 2013 the "DFT Guidance" to which I have referred, and before then named DFT & DNSA – Intake Selection (AIU Instruction). The material parts of earlier policy documents are, however, part of the background, and I first summarise them. Between 2003 and 2008 the policy on what is now the DFT process was in chapter 38 of the Secretary of State's Operational Enforcement Manual ("the OEM"), the document setting out her instructions to her caseworkers. In 2008 the OEM was re-named the Enforcement Instructions and Guidance ("EIG"). Detention and temporary release, including what I have referred to as the "general detention criteria", are dealt with in chapter 55.
28. (a) The OEM: Before the September 2005 edition of the OEM, what is now dealt with by the DFT process applied to applications for asylum which met what were known as the "Oakington Criteria" because the claim appeared straightforward

and capable of being decided quickly. Those who met the criteria were detained "for a short period of time to enable a rapid decision to be taken on an asylum/human rights claim": see, e.g., §38.3.1 of the July 2005 edition of the OEM.

29. The September 2005 edition of the OEM referred to the ministerial statements made on 16 September 2004: see §§38.1 and 38.4. The opening paragraph of §38.4 referred to detention "where it appears that…claims are capable of being decided quickly" and "detention for a short period of time to enable a rapid decision to be taken…" The second sub-paragraph referred to the introduction of a fast-track process at Harmondsworth in April 2003 "which includes an expedited in-country appeals procedure" and states that "[c]laimants in the latter detained fast-track process may be detained only at sites specified in the relevant statutory instrument…", a reference to the 2005 Tribunal Fast Track Rules. This section of the document also identified Oakington and Harmondsworth as designated places of detention and stated that any person "could be detained there under immigration powers for any of the published reasons for detention". It is also stated that detention "other than for fast-track processing" must be arranged via the normal process. There are no material differences in the April 2006 and August 2007 editions of the OEM.
30. Other than the reference to the inclusion of an expedited in-country appeals procedure in the fast-track process at Harmondsworth, there is no indication in these editions of the OEM that detention after the decision on the asylum/human rights claim and pending an appeal was to occur other than by the application of the general detention criteria. Indeed, the heading to §38.3, which stated "Factors influencing a decision to detain (excluding pre-decision fast-track cases)" and appeared as §55.3 in the OEM from the September 2005 edition, before the creation of a separate document for DFT policy, and was unchanged in the March 2008 edition or at the time of the hearing below, also suggested that it was only those fast-track cases before the Secretary of State's decision which were taken out of the general detention criteria.
31. (b) The EIG: The general detention criteria are set out in §§55.1.1 and 55.1.3. 55.1.3. They state that "detention must be used sparingly, and for the shortest period necessary" and that "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". §55.1.4 states inter alia that detention must be for one of the statutory purposes for which the power to detain is given and must accord with the limitations implied by domestic and ECHR case law, and "must also be in accordance with stated policy on the use of detention". I have stated that until recently (and at the time of the hearing before the judge) the heading to §55.3 was the same as that in OEM §38.3, i.e. "excluding pre-decision fast-track and CCD cases." §55.3 states that "there is a presumption in favour of temporary admission or temporary release", "there must be strong grounds for believing that a person will not comply with the conditions of such admission or release for detention to be justified", and "all reasonable alternatives to detention must be considered before detention is authorised".
32. The factors which must be taken into account when considering the need for initial or continued detention under the general detention criteria are set out in §55.3.1. Decision-makers are asked to consider all relevant factors but a number are listed. These include the likelihood of the person being removed, and, if so, the timescale, any evidence of previous absconding or failure to comply with

conditions, the risk of the person offending or harming the public, whether the person has taken part in a determined attempt to break the immigration laws, ties to the United Kingdom, and physical and mental health. A factor relied on by Ms Lieven is the statement in §55.3.1 concerning "the individual's expectations about the outcome of the case", where the decision-maker is asked to consider whether there are factors "such as an outstanding appeal, an application for judicial review or representations which afford incentives to keep in touch". This reflects the more general statement in EIG §55.1.3 that a person who has an appeal pending might have more incentive to comply with restrictions if released than one who is removable. The DFT process is dealt with in §55.4. Sub-paragraph (2) of this states that the process "includes an expedited in-country appeals procedure". The last sub-paragraph of this section of the EIG states that the policy concerning the suitability of applicants for detention in fast-track processes is set out in the DFT Guidance. It is common ground that before 2008 the EIG did not refer to detention pending appeal: Simm, first witness statement, §9.

33. *"(c) The DFT Guidance:* Save where otherwise stated, I refer to the current version of the guidance which has applied since 11 June 2013, when what the then Head of Asylum Policy at the Home Office described as clarifications were made. Section 2 of the guidance sets out the policy for determining the suitability of a case for entry to and continued management within the DFT, including screening processes and operational considerations which may prevent a case being treated as a DFT case or which would justify the removal of a case from the DFT process. §2.1 states:

    "An applicant may enter into or remain in DFT/DNSA processes only if there is power in immigration law to detain, and only if on consideration of the known facts relating to the applicant and their case obtained at asylum screening (and, where relevant, subsequently), it appears that a quick decision is possible and none of the detained fast-track suitability exclusion criteria apply.

    DFT/DNSA suitability has no requirements as to nationality or country of origin and no other bases of detention policy need apply (see chapter 55 of Enforcement Instructions and Guidance (EIG)). There is no requirement that an application be late and opportunistic."

    §2.1.2 states that states that assessment of suitability of a case for the DFT process must take place at the time of referral and "at all stages of ongoing case management within DFT".

34. The criteria for assessing whether a quick decision is possible are set out in §2.2 of the policy. It is stated that the assessment is a fact-specific one and "must be made based on the facts raised in each individual case". The policy sets out examples of cases where a quick decision may be possible, but makes it clear that this is a list of examples and that a quick decision may be possible in other cases. The examples are where: (a) it appears that no further enquiries by the Home Office or the applicant are necessary in order to obtain clarification, complex legal advice or corroborative evidence; (b) it appears likely that any such enquiries can be concluded to allow a decision to take place within the normal indicative timescales; (c) it appears likely that it will be possible to fulfil and properly consider the claim within normal indicative timescales; (d) it appears likely that no translations are required in respect of documents presented by an applicant, or that translations can be obtained to allow a decision within normal indicative timescales; and (e) the case is one that is likely to be certified as "clearly unfounded" under section 94 of the 2002 Act.

35. The criteria for determining whether individuals are unlikely to be suitable for entry or continued management in the DFT process are in §2.3 of the policy. The persons who are unlikely to be suitable are: (a) women who are 24 or more weeks pregnant; (b) family cases; (c) children whose claimed date of birth is accepted by the Home Office; (d) those with a disability which cannot be adequately managed within a detained environment; (e) those with a physical or mental medical condition which cannot be adequately treated or managed in such an environment; (f) those who lack the mental capacity or coherence to understand the asylum process and/or cogently present their claim; (g) applicants about whom a competent authority has decided that they are a victim of trafficking or that there are reasonable grounds for regarding them as a potential victim of trafficking; and (h) those in respect of whom there is independent evidence of torture.
36. Under the heading "timescales, §2.2.3 of the policy gives the indicative timescales from entry to the DFT process in the appropriate Immigration Removal Centre to service of the decision. It states these are "usually … quicker" than around 10 – 14 days, but they are not rigid. §2.2.3 also states that they must be varied when fairness or case developments require it, and that cases receiving uncertified refusal decisions in the DFT process are subject to a fast-track appeal process which is governed by the 2005 Tribunal Fast Track Rules, the timescale for which is summarised at [20] above. The last sub-paragraph of §2.2.3 states:
"[a]pplicants whose appeal rights are exhausted or lapse in the DFT process and do not qualify [for any form of leave] will be liable for removal. Any decision to maintain detention pending removal must be in accordance with law and policy, and must be subject to regular review (See Chapter 55 of [EIG]".
37. Section 3 of the guidance sets out the process for referring cases for consideration for the DFT process and describes the screening process and section 5 deals with the operational considerations which may mean that a case which is in principle suitable for the DFT process is not entered into it. The operational considerations in section 5 include the availability of detention space, whether obtaining travel documentation is likely to be a lengthy process, and where there is a legal bar to the removal of the individual because, for example, the individual is from a country to which enforced removals are suspended. One of the sub-sections of §5.2.1 of the guidance has the heading "Travel Documentation for Removal". The first sub-paragraph of this sub-section states that "it is not necessary for removal to be imminent or for there to be an absconding risk to detain for DFT …" The third sub-paragraph states that if "an asylum claim is unsuccessful (a DFT case becoming appeal rights exhausted, or a S94 refusal decision being served)", detention may continue "under the general detention policy". These matters, and the consideration of potential DFT cases after screening, were summarised by the judge at [43] – [52].
38. In the 2008 and 2009 versions of the DFT policy (then called *DFT & DNSA – Intake Selection (AIU Instruction)*, in section 5, also under the heading "Travel Documentation for Removal", it is *inter alia* stated:

    "Once a decision has been made however, detention policy requires that removal be imminent. The decision may be regarded as including the time during which an individual has extant appeal rights … "

39. At this stage it is convenient to refer to two matters. The first is the 2008 Best Practice Guide on the Detained Fast-Track Process produced by the Immigration

Law Practitioners' Association, which states "an appeal will only take place in fast-track if your client meets the general detention criteria."[7] This was relied on by Ms Lieven to show the general understanding of practitioners in the field. The second is the request made by the European Commission to the United Kingdom authorities in 2012 and the response to it. The request is in a letter dated 28 August 2012 from Stefano Manservisi, a Director General in the European Commission's Home Affairs Directorate. He stated that he considered that there was a general presumption in the Secretary of State's policy that all cases were suitable for "fast-tracking" and expressed concern about the adequacy of the examination of the application in such cases. The concern arose because of the very short time limits and the fact that the criteria for including an applicant in the DFT process and detaining that person were subject to a large margin of interpretation. Mr Manservisi asked for the observations of the United Kingdom authorities as to how the DFT process ensured compliance with the obligations resulting from EU law. He referred in particular to Articles 6 and 52(3) of the Charter of Fundamental Rights and the provisions of Directives 2005/85/EC (the "Asylum Procedures Directive") and 2003/9/EC (the "Reception Conditions Directive").

40. The Director of the National Asylum Command at the UK Border Agency replied to this request in a letter dated 5 November 2012. He stated that the *DFT Guidance* clearly stated that cases would only be subjected to the DFT process if the evidence demonstrated that a quick decision would be possible. Accordingly, individuals were not detained only because they claimed asylum. The letter set out the criteria for entry to the DFT process and for monitoring cases within it. In a letter dated 30 May 2013, following a meeting between the Head of Asylum Policy at the Home Office and the Director of the EU Commission's Directorate on Migration and Asylum the United Kingdom authorities provided further information about asylum processes. Neither letter referred to detention in the DFT after the decision refusing asylum, and pending an appeal against it.

41. As a result of the EU's concerns, the policy was clarified in the June 2013 version of the *DFT Guidance*. At about the same time, in a letter dated 18 June 2013, the Head of Asylum Policy at the Home Office wrote to the relevant Director at the EU, stating that less than 12% of asylum applications were "routed into the DFT/DSNA process". The letter was mainly concerned with the Commission's concerns about timescales. It is relevant to the issue before this court because it stated:

> "The indicative timescales in the policy only relate to the time of entry into the process until the time of [sic] the decision is served on the applicant. We wanted to clarify this more in the policy, <u>because it is not entirely clear that the DFT process includes a fast-track appeals process</u>. This means that the overall timescales of the whole process is longer when you take the appeals into account, but is still much shorter than the normal timescales in the non-detained process." (emphasis added)

The letter also stated that the government had sought to clarify in the policy that when an applicant exhausted all his or her appeal rights, he or she is then subject to removal and that "detention after that point is outside the DFT/DNSA process…"

18. I would refer also to the description by Ouseley J at paragraphs 40-67 of his judgment.

19. Ouseley J, having given judgment ((*R*(*Detention Action) v SSHD* [2014] EWHC 2245) made an order (at [2014] EWHC 2525(Admin)) that

> "as at 9th July 2014 the manner in which the DFT was being operated, as set out in the judgment, created an unacceptable risk of unfair determinations for those vulnerable or potentially vulnerable applicants, referred to in paragraphs 114, 198 and 221 of the judgment, who did not have access to lawyers sufficiently soon after induction to enable instructions to be taken and advice to be given before the substantive interview and was to that extent being operated unlawfully."

20. Paragraph 114, 198 and 221 read, insofar as it is relevant here:

> "114 The way in which the vulnerable categories unlikely to be suitable for inclusion are considered was of some controversy in this case. Ms Hewitt's contention, with the support of UNHCR's detention guidelines, was that certain groups should not be in the DFT: victims of torture and other serious violence, and if detained, they should receive regular reviews; ……those with long-term physical, mental, intellectual and sensory impairments should not be detained. This begs two general questions. First, the applicant for asylum may not be willing to reveal these vulnerabilities at the screening stage; indeed that is a common point made by the legal representatives, that time is very commonly required before those who claim to have a basis for international protection in those circumstances are willing to reveal that as the basis for their claim. Second, it assumes that all such claims are true in fact, significant to the claim, make it unsuitable for a quick decision by reason of complexity, and make detention in the DFT unsuitable.
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> 198 It will be for the SSHD to organise the system so that the period of inactivity is better utilised in the allocation of lawyers. If that requires changes to the LAA system, that is for the Government to organise. If that requires further rooms, the same applies. This would then assist in the identification and removal of torture, trafficking and other potentially vulnerable cases, which the screening process is not well equipped to do for the range of cases not now excluded by other criteria, and for which other safeguards do not work, as in the case of Rule 35, or work as they should, in the case of referrals to other bodies. It is those who may be vulnerable applicants, rather than other applicants, to whom this applies because of their potential greater difficulties in presenting their claim fully without greater care and consideration from lawyers, and for whom safeguards are of greater importance. It appears less likely to apply to women in view of the greater time available to lawyers at Yarl's Wood. But I judge that there is an unacceptably high risk of unfairness in a sufficient number of cases that remedial action is required beyond what is available in the individual case through the decision of the FTT. I do not think that this requires the exclusion in principle from the DFT of particular categories of claims or applicants currently not excluded in principle.
>
> 221 I am satisfied that the shortcomings at various stages require the early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview. This is the crucial failing in the process as operated. I have concluded that it is sufficiently

significant that the DFT as operated carries with it too high a risk of unfair determinations for those who may be vulnerable applicants."

21. An appeal by the Claimant in that litigation, limited to the extent of the relief granted, was dismissed by the Court of Appeal on 9th October 2014 ([2014] EWCA Civ 1270 per Longmore, Patten and Ryder LJJ). A differently constituted Court (Beatson, Floyd and Fulford LJJ heard the substantive appeal of the Claimant on 16th December 2014, on the issue of the legality of detention in the DFT system ([2014] EWCA Civ 1634).

22. At paragraph 63, Beatson LJ reached a conclusion on the power of the SSHD to detain those within the DFT process:

> "Accordingly, despite the elusive way this emerges from the text of the *DFT Guidance*, I have concluded that, until a person's appeal rights are exhausted, if he or she continues to satisfy the "quick processing criteria" the policy empowers the Secretary of State to detain pursuant to those criteria rather than the general detention criteria. For these reasons, despite the force of the submissions on behalf of Detention Action, I have concluded that where the "quick processing criteria" continue to be met, post-decision DFT detention pending appeal does not breach the Secretary of State's policy in the *DFT Guidance*."

23. He then addressed the question of "does the practice of detaining all those who satisfy the "quick processing" criteria pending their appeal meet the *Lumba* requirements of clarity and transparency?" The "*Lumba*" requirements were set out by him at paragraph 14, namely

> "14 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 For present purposes, it suffices to state that the detention must be for the statutory purposes of making or implementing a deportation order and for no other purpose; and that in any event the detention cannot continue for longer than a period which is reasonable in all the circumstances. In *Lumba's* case Lord Dyson JSC stated (at [34]) that "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised" to detain a person. Transparency involves clarity, and Lord Dyson emphasised (at [36]) the particular importance, where personal liberty is at issue, of such policy statements being formulated in a sufficiently defined manner to enable individuals to know the criteria being applied to detain them."

24. He concluded at paragraph 70 that the answer was "No." At paragraphs 71 ff he then considered the next question, namely "Is there a lawful justification for the policy of detaining all those who satisfy the "quick processing" criteria pending their appeal?" He went on in paragraph 71

> " In view of my conclusion on (c), it is not necessary to decide this question. As there has been full argument on the matter, I deal with it. I have stated that at both common law and under Article 5 of the ECHR any deprivation of the fundamental constitutional right to liberty is prima facie unlawful and requires justification.

Justification is, as the judge stated, a matter of evidence not submission. The approach of the Supreme Court in Lumba's case shows that in the context of the right to liberty, although the court does not review the merits of the policy or of a decision to authorise detention, the approach to justification involves a greater intensity of review than in other contexts. In the light of the principles in the *Hardial Singh* (*R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704) line of cases as encapsulated in I's case (*R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888*) and in *Lumba's* case which I have summarised at [14] above, the question is whether it is reasonable to detain a person who poses no risk of absconding in the period between the Secretary of State's decision and the dismissal of his appeal.

25. His conclusion on this issue appears at paragraph 96, and his overall conclusion at paragraph 97:

> 96. Although, as Lord Wilson stated in *Quila*'s case" (*R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621), "justification involves an evaluation "which transcends the matters of fact", it requires a basis in fact, evidence or expertise. I stated (at [71] above) that in the light of the principles in the *Hardial Singh* line of cases as encapsulated in *I's* case and in *Lumba's* case summarised at [14] above, the question is whether it is reasonable to detain a person who poses no risk of absconding in the period between the Secretary of State's decision and the dismissal of his or her appeal. For the reasons I have given in respect of the individual factors, I do not consider the evidence in Mr Simm's seventh statement and Mr Smith's post-hearing statement suffices to show that the approach and reasoning in *Saadi's* case" (*R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131) "means that, after the refusal of an application for asylum and pending an appeal against that decision, detention of a person who does not meet the general detention criteria by the application of the "quick processing" criteria is justified and reasonable in the *Hardial Singh* sense. Accordingly, had it been necessary to decide the question of justification, I would have concluded that, whether by application of heightened *Wednesbury* principles or by reference to Article 5 of the ECHR, the evidence put before the court does not justify the policy at the appeal stage.
>
> **VII. Conclusion**
>
> 97. For the reasons in section VI, I have concluded that detention in the fast-track by the application of the "quick processing" criteria, after the Secretary of State's decision and pending appeal is not objectionable in principle and does not breach the *DFT Guidance*. I have, however, also concluded that it does not satisfy the requirements of clarity and transparency. Had it been necessary to decide the point I would also have concluded that, on the evidence before the court, it cannot at present be said to be justified. The order of Ouseley J therefore needs to be varied to reflect this decision on a matter on which he did not rule."

26. It follows from the above that inclusion of an asylum seeker in the Fast Track does not justify detention of itself pending appeal. Further there is no freestanding power to

detain between the SSHD's decision and the appeal. At that stage there have to be reasons for detention under the general detention criteria set out in Chapter 55 of the "Enforcement Instructions and Guidance".

27. I should refer also to aspects of the guidance of the Defendant to her officers in "Detained Fast Track Processes-Timetable Flexibility." I have included those passages which are relevant.

> "Introduction
> 1.1 Audience
> This instruction is aimed at all Detained Fast Track Processes officers.
> All officers must be familiar with the entirety of UK Border Agency (UKBA) policy on DFT/DNSA suitability, laid out in the Detained Fast Track Processes instruction.
> 1.2 Purpose
> This instruction explains the circumstances in which it might be appropriate for the
> Detained Fast Track Processes timetables to be extended, or for an applicant to be removed from the processes altogether.
> Because the circumstances calling for flexibility or removal from process will always be specific to the facts of a case, this instruction is not intended to be an exhaustive and rigid instruction as to mandatory actions where flexibility or removal from process must in all circumstances be practised. Instead it is intended to outline the most likely issues to arise and suggest approaches which must be followed in those circumstances.
> 1.3 Background
> The considerations regarding flexibility apply mainly to the stages up to and including the asylum decision. Where in-country appeals apply, the timescales applied to the processing of the case are determined by the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (incorporating subsequent amendments).
> Regardless of the stage of the application and the currency of any appeal rights, overall suitability for the DFT or DNSA process (see Detained Fast Track Processes) must be reviewed on an ongoing basis, as information relevant to suitability may emerge and develop throughout the life of the case.
> This consideration applies whether at the request of applicants and/or representatives, or as part of the proactive reviews required of case owners (see also 2.5 Detention Reviews)
>
> 2 General Points
> 2.1 Key Principles
> The DFT and DNSA timetable is intended to deliver decisions in up to 7-14 days after entry to the process, depending on the type of decision and normal developments in the case.
> It is important that this timetable is maintained as far as is reasonably possible, and that the time an individual is detained is kept to a minimum. However, the DFT and DNSA processes are built on an overriding principle of fairness, and as a consequence, timetable flexibility or removal from the DFT and DNSA processes must be considered in all situations where fairness demands it.

3 Illness
An individual will enter DFT/DNSA processes only if, at the time of referral, the information available indicates that they are suitable for DFT/DNSA according to the DFT/DNSA entry policy, which includes criteria relevant to health.
Individuals are also medically screened within 24 hours of arrival at the IRC (Rule 34 of the Detention Centre Rules).
Rule 35(1) requires medical practitioners to report on cases where they are concerned that ongoing detention would be injurious to health. Rule 35 reports require a written response by case owners. (See Rule 35 of the Detention Centre Rules).
3.1 Illness Claimed
If an applicant claims ill-health, case owners must briefly investigate the nature of the illness and ask the applicant if he/she feels well enough to proceed with the interview at the time booked (without delaying access to medical care where the need is urgent).Case owners must not make clinical judgements as to the applicant's fitness for interview.
In all cases, applicants must be offered the opportunity to access the healthcare facilities, and in the first instance be assured that their attendance at the healthcare facilities will not affect the decision on their case.
3.1.1 Applicant States They Are Fit for Interview
Notwithstanding the complaint of ill-health and the offer to access the healthcare facilities, an applicant may decide to proceed with the interview. This should ordinarily be respected, and the interview allowed to proceed, unless there is some obvious reason why the stated wishes of the applicant should be regarded as unreliable (for example, if the wishes are expressed against a background of obviously confused or irrational thought or behaviour).
3.1.2 Applicant States They Are Unfit for Interview
With the offer of the opportunity to access healthcare facilities, the applicant must be clearly informed that there will be no further delays to the interview for health complaints unless they have been certified by a medical practitioner as being unfit for the interview.
3.2 Fitness for Interview
An applicant's fitness for interview is a judgement to be made by IRC healthcare staff only. If healthcare staff do not certify the applicant as being unfit for interview, the interview should recommence immediately on the same day or as soon as is reasonably practicable and without undue delay.
If healthcare staff certify the applicant as being unfit for interview, care should be taken to ascertain whether the applicant is likely to be fit for interview within DFT timescales. Suitability for DFT Processes must be reviewed.

5 Representatives are notified of interview dates and times in advance and are given full contact details for the relevant DFT/DNSA office.

5.1 Representative fails to attend interview
If a legal representative is properly notified of an asylum interview but fails to attend, the case owner must attempt to make contact with the appropriate legal firm to ascertain the reason for non-attendance.
If the legal representative's non-attendance is due to problems unrelated to the applicant, the situation must be fully explained to the applicant, who must then be offered the options of either conducting the interview without the legal

> representative, or of delaying the interview (taking into account the reasons and the need for reasonableness and fairness) but normally for no more than two working days……."

History of the Claimant's detention and of his claim for asylum

28. I start by identifying the witness evidence before the Court

    i) a witness statement from the Claimant of 24th July 2014

    ii) witness statements from Mr Khalid Khashy, the Claimant's solicitor since 21st July 2014: 27th October 2014, 4th November 2014, 12th November 2014, 6th January 2015

    iii) at a very late stage (after lunchtime on the second day of the hearing) a witness statement of 16th January 2015 was filed on behalf of the Defendant, from James Knapper, a "Team Leader in Detained Fast Track."

29. The Court has also received copies of documents provided to the Claimant by Home Office officials. In one case in particular there is a dispute about whether that occurred. The Court has also received records kept within the Home Office. There is no evidence from the Defendant or called on her behalf about the making of the records, or dealing with some of the real factual difficulties that they throw up.

30. I shall therefore set out the facts, and indicate where there are disputes. I shall identify the evidence available on those issues, and in due course set out my findings of fact.

Period 1: Arrival at Manchester Airport until screening interview

31. It is agreed that the Claimant arrived at Manchester International Airport at about 19.00 hours on 24th June 2014. He was fingerprinted and photographed. At 22.10 hours a telephone call was received from a man saying he was his son. He was detained overnight. The record is shown as made by a G Shukie at 23.25. A "Notice to Detainee" was used. It is a standard form, numbered IS 91R and contains tick boxes. It states that "Detention is only used when there is no reasonable alternative available. It has been decided that you should remain in detention because (tick all the boxes that apply)." The first part sets out the reasons why detention has been ordered, and the second the factors taken into account in reaching the decision, again with the instruction to "Tick all boxes that apply."

32. It then stated that the decision had been reached on the basis of the following factor (having stated "tick all the boxes that apply")

> "On initial consideration, it appears that your application may be one which can be decided quickly."

33. It was signed by G Shukie and dated 24th June 2014. G Shukie also made a declaration that s/he had explained it to the Claimant in English. That included the word "English" written in manuscript capitals. No-one disputes that the document described above is genuine.

34. Given what happened later, and what is said in the *Detention Action* litigation, it is necessary to note that no other boxes were ticked. Those not ticked in the first part included the one saying that he was likely to abscond if given temporary admission or release, and the one that there was insufficient reliable information to decide on whether to grant temporary admission or release.

35. When the Defendant filed her Acknowledgement of Service, it was accompanied by a large bundle of documents. One document included within the Detention Records is an undated form IS 91RA part A (bundle p 383). It is entitled "Risk Factors". Having identified the Claimant, and the fact that he arrived at Manchester Airport, it identifies the office at Manchester as the one dealing with the case (and gives a Manchester telephone number). It then, against a list (PNC Check, Special Branch, National Security, Police LIO, and Fingerprints, identifies that the results indicated No Risk. A list of other matters follow which could give rise to risk (p 385). None are ticked. The "Notice to Detainee" (p 387) which is dated 24th June 2014, and sets out the reasons for detention, identifies none at all.

36. When the Defendant filed her summary grounds of defence, she also attached what purports to be a file copy of the Detention Notice given on 24th June 2014. It is marked "File Copy", and is dated 24th June 2014. However it is signed by someone "p.p S Milne" and there is an illegible signature in the declaration on the second page. The word "English" in manuscript capitals does not appear. In the tickbox section, an additional box has been ticked, namely that there was insufficient reliable information to decide on whether to grant temporary admission or release. It is patently not a copy of the form given to the Claimant as described above.

37. Now the evidence shows that there is an officer called S Milne. An officer called Suzanne Milne is shown as dealing with the case on 25th June 2014. Another officer's note shows that the case was referred to an officer called "Suzi" on 25th June 2014 at 18.45 p.m., with a view to the Claimant being accepted into the Fast Track. The first entry made by "S Milne" is at 19.50 p.m. on 25th June 2014. It includes an entry that another officer had requested a copy of the original form IS91R. The note shows that a fax was sent. That entry at 19.50 on 25th June 2014 is the very first time that S Milne appears on the detention record as handling the case. However her name also appears on the record of screening interview, which took place at 15.25 pm on 25th June.

38. There is another Home Office Fast Track Detention Record dated 25th June 2014. It says that the Claimant was first detained at 19.36 hrs at Harmondsworth (Fast Track) on 24th June 2014. That too is patently inaccurate, because his screening interview did not take place until 15.25 hours on 25th June 2014 at Manchester and he was not sent to Harmondsworth (which is in Middlesex) until late on 25th June 2014. It says that "Continued detention is deemed appropriate for (the Claimant) to be substantively interviewed about his claim." That is different from either of the other two records.

39. Thus one has an original top copy filled in by G Shukie on 24th June 2014, who is shown on the records as dealing with the case, and a "File Copy" bearing that date, but with a different entry, and filled in in the name of an officer not shown as having dealings with the Claimant until the afternoon of 25th June 2014. Another record compiled in Manchester also gives no reasons for detention. Despite the obvious

discrepancy with the "File Copy" purportedly signed by S Milne, upon which the Defendant places such reliance, the Defendant has submitted nothing to explain how it came about. One then has a third inconsistent record which contains another very obvious error. I am not going to speculate why there is a different copy of the Notice, not least because the officer concerned has not been asked to account for it, but I am quite unable to accept that the "File Copy" is a true or genuine copy of the actual Notice. I have one, and one only, contemporaneous document, signed by someone shown on the log to have been dealing with the Claimant, and another contemporaneous but unsigned document which is consistent with it.

40. It follows that my first finding on a disputed issue is that on 24th June 2014 the Claimant was only given one reason for his detention, namely

> "On initial consideration, it appears that your application may be one which can be decided quickly."

41. There was also a medical examination, which I consider below.

42. On 25th June 2014 the Claimant had a screening interview at 15.25 pm (Bundle p 418). The Claimant said that he spoke mainly Peshto and Dari, although he spoke a little English. In that interview he said that his son lived in Bolton (i.e. within Greater Manchester), and gave his telephone number. He said that his daughter also lived in the United Kingdom. He was asked if he had any medical condition. He said that he had a pin in his foot, so that sometimes he had to use a stick. He said that the doctors had told him that the bone was enlarged. He said that he had raised cholesterol. He denied having any disability.

43. He was asked to explain "briefly" (underlined and in capitals on the pro forma used by the interviewer) why he could not return to his own country. He said that, because he was working for Fedex helping Afghans get visas to travel to Europe, the USA and Canada, the Taliban wrote to him saying that he had a case to answer and must meet with them. He did not do so, and received another letter at his home address on 18th June. He said that the Taliban had sent intelligence to their Peshawar office to arrest him, and that if he resisted they would kill him.

44. He denied that he had ever been involved in any terrorist activity. He said that he had documents or other evidence in his belongings which supported his claims.

45. He remained in detention after that interview.

Period 2; screening interview to interviews of 1st and 3rd July 2014, and the medical assessments

46. After that interview the decision was made by the Defendant's officers to deal with him via the DFT system. A form with an illegible title (bundle page 415) shows that Suzanne Milne did so at 18.30 p.m. on 25th June 2014. It recorded his claims about the Taliban, and the leg condition and use of a stick. He was then transferred from Manchester to Harmondsworth on the evening of 25th June 2014. The records show that he arrived there on 26th June, although that appears to be because late night arrivals were booked in the following day. On 27th June 2014 the records show that he was "inducted into the fast track process."

47. On 27th June 2014 he was served with a form in English explaining the fast track process. He also signed an induction form and a form authorising the release of medical information. A copy of the form for the induction interview (bundle p 435-6) shows that it was conducted in English. He was asked if he wished to instruct a duty solicitor. He said that he did not, and would instruct a solicitor privately, whose details would be faxed by 28th June 2014. It recorded that he wished to rely on documents in support of his application, namely "3 letters, witness statements, college letters." I shall return to what happened with regard to his interview once I have dealt with the medical and related examinations he underwent.

48. He had been examined medically. An assessment at Manchester Airport on 24th June 2014 was conducted by a concern called Tascor, whom I am told assess those detained. It recorded that he had medication for pain and poor sleep, and that he had used some antibiotics occasionally. It recorded his stating that his current medical conditions were ("? gout, and still takes painkillers at times. Also M/O for poor sleep and anxiety past 1 ½ months……. Been taking Bromazepam ….at times if unable to settle sleep. …….Has stated manage stairs with support of rail, but has brought his stick in case needed……."

49. Under psychiatric history it records "Denies any history, but states poor sleep at times and anxiety past 1 ½ months. Has been taking mild sleeping tablets at night to help if needed. Denies any thoughts OSH" (of self harm) "past or currently." He was described as orientated to time and place.

50. At reception on 26th June there was a "first night reception screen," but it is not stated what the qualifications or status were of the person conducting the screening, nor is the language of the screening interview identified. The person compiling it recorded him as having the following conditions:

    i) under "serious illness": Tinnitus (2-3 weeks). The other entries in that box are illegible;

    ii) under "medication" he said that he took Esomeprazole, betahistine dihydrochloride, Bromezepam and two other illegible medicines;

    iii) he was said to have a good level of English, and to be "calm and appropriate;"

    iv) he is recorded as saying that he did not consider he had a disability.

51. The author stated that he "has problems with Taliban back home" and said that he had ongoing medical problems and should see a GP.

52. The Reception Staff also completed a "Disability Questionnaire" which said that H had no disability. One of the tickboxes below included "mental health issues," which was left blank.

53. At 10.25 am on 26th June 2014 Tascor prepared another record- a discharge summary. It reiterates the previous notes of the Tascor examination. He was described as "Fit for Transfer" and "Fit for Release."

54. On 27th June 2014 he was seen by a Dr Maniar, who stated after seeing the Claimant that he was not confused or disorientated. The same doctor wrote notes on the same day as follows

    i) "Chronic vertigo: been prescribed betahistine dihydrochloride in Pakistan. Was given NSAID and PPI (illegible) for intermittent Joint Pain. Well otherwise"

    ii) "Plan and Safety Netting: Ct (continue?) Betahistine, Brufen, Omeprazole PRN.

55. A record of prescriptions prepared later shows that on 27th June 2014 he was prescribed Betahistine Dihydrochloride for "Vertigo," Ibuprofen and Omeprazole as PPI cover with NSAIDS (i.e. the standard protection for the digestive tract if Ibuprofen or another NSAID is taken). The first was obtained on 30th June 2014 and provided to him on 2nd July 2014.

56. I should just observe that this judge is aware of betahistine dihydrochloride. It (often under the brand name Serc) is proscribed for the ear condition which produces vertigo (including rotational vertigo) and tinnitus.

57. We come now to his substantial interview, and to reasons why the Claimant was interviewed without a lawyer being present. It will be recalled that he had been asked if he wished to have a duty solicitor present, and had stated that he would get his own solicitor. That was recorded on the Case Record Sheet in an entry on 27th July 2014.

58. I have already set out the note the policy of the Defendant, in the instructions given to all Detained Fast Track Officers "Detained Fast Track Processes- Timetable Flexibility" at section 5.

59. On 27th June 2014 the Case Record sheet shows that an officer had sought to arrange an interview on 1st July 2014 at 10.00 am, with the Claimant being represented by a firm called Howe and Co, who would be paid for from Legal Aid.

60. On 30th June 2014 the case record shows that Howe and Co emailed Harmondsworth to say that they were not representing the Claimant, and that his son had said that a private firm was being instructed. On 30th June 2014, a firm called Prestige Solicitors in Eccles in Greater Manchester wrote to the Defendant's department, enclosing an authority for the Claimant to sign. It was sent to a fax number in West London. They had been contacted by his son. He signed it on 30th June 2014, from which I infer that the letter had been sent by fax or email. I did not receive evidence on whether the firm received it. An attempt was made to telephone the son, and then this entry appears (my italics) on 1st July 2014:

> "Referred case to bookings co-ordinator. CO will need to speak to applicant to find out details of private solicitor *so that we can rebook interview. Advised CO accordingly."*

61. Notwithstanding that, and notwithstanding the clear terms of the Defendant's instructions, at 10.16 an officer called Samantha Jackson interviewed the Claimant in the presence of a Pushtu interpreter, but without any lawyer being present. The

interviewer named his solicitors as Prestige Solicitors and stated on the form "Not Attending." The name of the solicitor at Prestige Solicitors is noted along with the telephone and fax number. There is no record of any steps being taken to contact them, nor anything on the record to/ show why there was a departure from the decision noted on the record.

62. In the *Detention Action* litigation evidence was given by Mr Anthony Simm, (who is Head of Detained Asylum Casework at the Home Office) on 27th August 2014 on behalf of the Defendant concerning the time that should elapse between allocation of a solicitor and the substantial interview. In it he said this

> "I can say that every applicant is given at least four working days between the time at which he had the opportunity to instruct a lawyer (following induction) and their asylum interview."

63. That is a helpful yardstick. It is plain that some opportunity for instruction, consideration and preparation must be permitted. It was not suggested before me that the approach should be departed from. If one applies it to this case, the day of the interview (1st July) was a Tuesday. It follows that the day 4 clear working days before then was Tuesday 24th June. It is good evidence that the interview was arranged too early, even if the representatives had been present.

64. The lack of attention to detail is exemplified by the fact that at one point in this litigation, the Defendant was contending that the Claimant had had the services of both Prestige Solicitors and of Howe and Co – see paragraph 51 of the Summary Grounds of Defence (repeated at paragraph 36 of Ms Bayoumi's skeleton argument).

65. The officer conducting the interview on 1st July 2014 completed a "Statement of Evidence Form" about the interview, which is endorsed by a signature. However the officer is required to sign a declaration on the "NINO Control Sheet". The NINO control sheet disclosed by the Home Office contains no such declaration, and in any event, there is nothing in the documents which would amount to a statement of truth which would accord with paragraph 2.1 of the Practice Direction supplementing CPR 22.

66. During the course of the interview the interviewer noted the answers received (via the interpreter) on a form. At no stage is there any note that the Claimant was asked if he was willing to continue the interview in the absence of his legal representatives. Nor is there any indication on the form or on the case record that any attempt was made to contact the representatives.

67. It follows, and I so find, that there were at least two, and possibly three breaches of the instructions set out above

    i) there is no evidence or record that the officer attempted to contact Prestige;

    ii) in the absence of any suggestion that their non-attendance was due to the Claimant's default (and none is noted) she continued with the interview without explaining the situation to him and inviting him to choose between continuing the interview or delaying it until they could be present;

iii) (the possible third breach) there is no record that Prestige were notified of the interview dates and times in advance.

68. It follows also that the answers given in that interview, on which much reliance was later placed, must be read in the light of clear and obvious breaches of the instructions. I remind myself also of the importance placed by Ouseley J on proper access to independent legal advice.

69. During the interview (near the end) the Claimant was asked if he was on any medication, and replied

> "I have brought some medication with me, but they took it from me and now I am in trouble. I feel dizzy."

He is also recorded as saying that he was feeling fit and well. Through the interpreter he was recorded as saying that he understood all the questions put to him. He was also recorded as saying that he understood everything the Home Office interpreter had said.

70. I turn now to the issue of the documents the Claimant had identified, The instructions of the SSHD to her officers on "Detained Fast Track Processes" contains at paragraph 2.2 in the section headed "Policy" and the subheading "Quick Decisions" the following

"The assessment of whether a quick decision is likely in a case must be made based on the facts raised in each individual case. Cases where a quick decision may be possible may include (but are not limited to)

- …….
- ……
- Where it appears likely that no translations are required in respect of documents presented by an applicant, which are material to the consideration of his claim; or where it appears likely that the necessary translations can be obtained to allow a decision to be made within normal indicative timescales;
- ……..."

71. Later at paragraph 3.1.1 this appears with regard to screening interviews

"The applicant must be …….. asked if they have any documents, statements or other evidence relevant to their claim, family life or other person al circumstances which they wish to submit whether at that instant or in the future. Where there are such documents held or to be submitted, the specific nature of the documents (including language) must be ascertained and recorded."

72. There is obvious commonsense in that. If a document is not read as a whole and accurately, mistakes can be made by those who might draw inferences from its contents. The Claimant's case is that that is what has happened here.

73. During the course of the interview he was asked about the documents he was producing, including the letters he said he had received from the Taliban. The interpreter translated his replies as

    i) "the first letter was given to me by my son in law on 5th June 2014, and the others I have no idea which date it was originally issued by them."

    ii) Q: What date did you receive the other two? A: The second letter I received on the 12th June 2014, the third one was dropped at my house door on 18th June 2014."

    iii) Q; document 11-why are you submitting this document? A: In the third letter the Taliban addressed me that I was providing Afghan boys and girls visas and facilities to go to England. ……"

74. In the detailed grounds of the amended claim, it is argued that the letters contain dates which were not translated during the interview. Subsequent official translations (not challenged by the Defendant) show that the three letters were dated respectively 19th April 2014, 28th May 2014 and 17th June 2014. It is to be noted that subsequently the First Tier Immigration Judge refused to accept the letters as genuine, in part because of what he saw as their proximity in time.

75. At a later stage in the interview the Claimant said that he had no problems before 5th June 2014.

76. In the interview he set out the basis for his claim for asylum. In short terms it was that

    i) he was an Afghan national;

    ii) he had worked for a political party in Pakistan called HEI (also referred to as HIG)

    iii) he had worked as a typist. Part of his work involved typing letters addressed to the Afghan Refugee Commissioner, who dealt with the issue of identity cards to those who were Afghan refugees in Pakistan;

    iv) he had then become a member of HEI/HIG, and was involved in assisting Afghan refugees in getting food and Pakistani visas;

    v) he left the HEI/HIG when the Taliban came to power in Afghanistan;

    vi) as to the letters he did not know when the first letter was given to his son in law to pass to him. It was given to a friend of his son in law in Laghman province. As to the second letter that too was given to his son in law, and received by him on 12th June 2014. It said that there were rumours about him and he should attend "to clear yourself" and that his case would be determined under Sharia law. He then left Afghanistan for his home in Pakistan because he was in fear. The third letter was sent to his Pakistani address, arriving on 18th June, and referring to his helping boys and girls get to Europe, which would help Jews and Christians. It said that he had not attended the Taliban court despite the invitation, and threatened him with being arrested or shot. He went into hiding. He said that the Taliban were interested in his case because

he was from a Mujahid family, known to be so because of his late brother's activities;

vii) he said that he was in fear of being killed should he return to Afghanistan.

77. I need not refer to other parts of the interview at this stage. There was subsequently another interview on behalf of another branch of the Home Department. In that officers asked him about his involvement with HEI/HIG, and referred to the fact that it had terrorist connections. There is a copy of the interview disclosed, but no equivalent endorsement to that relating to the earlier interview. (I stress that that forms no part of the Defendant's case for refusing asylum).

Period 3: 3rd July 2014 to 28th July 2014, including FTT appeal and subsequent applications

78. On 8th July 2014 the Defendant refused the application for asylum. The refusal letter includes the following

i) his claim to have been a member of HEI/HIG was not accepted, because he was considered to have a poor knowledge of facts relating to that party and its leadership, that his account of his family's role in it was inconsistent, and that the documents he produced about the HEI/HIG were not credible;

ii) his passport did not contain entry stamps showing him to be present in Afghanistan during June 2014 when he was supposed to have received the first two letters from the Taliban;

iii) the translations of the letters (by his son) were not certified, and thus no weight could attach to them;

iv) the first letter was not credible as if true the Taliban had waited for 10 years from the time that the Claimant had worked with visas to take the matter up;

v) as to the third letter it was not credible that the Taliban would have delivered the letter rather than caught or arrested him;

vi) he had referred to two rather than three letters in the first screening interview;

vii) it was not considered that he would be at risk if he returned to Laghman province;

viii) even if his claims were true, sufficient internal protection was available within Afghanistan;

ix) he would be able to relocate internally within Afghanistan;

x) his claim to be a genuine refugee was unfounded;

xi) he did not meet each of the criteria for Humanitarian Protection in paragraph 339 C of the Immigration Rules. In particular he did not meet the third criterion ("criteria" in the letter) because of the sufficiency of protection available to him;

xii) no evidence was found to justify a claim under Articles 2 and 3 of ECHR;

xiii) any claim under Article 8 was rejected. It was not suggested before me that this was objectionable;

xiv) consideration was given to whether there were any exceptional circumstances, and rejected.

79. No notice of any kind was served to give him notice of any reasons to detain him after 8th July. He remained in detention. On that date his Fast Track Detention Record simply notes that he had been detained on 24th June, and says that there is no indication that he is unfit for detention. It records the dismissal of his claim and says

> "If the subjects (sic) asylum claim is refused and he becomes ARE" (Appeal Rights Exhausted) "he will be removed on his valid passport……"

80. However on 22nd December 2014 the Treasury Solicitor disclosed a bundle of documents relating to the refusal of his asylum claim, served on the Claimant on 8th July 2014. The "Notice to Detainee" setting out the fact that he was to be detained, which is signed, gives no reasons for his detention. None of the form's tickboxes are ticked.

81. His appeal was heard on 16th July 2014 by Judge Walker, with the decision being promulgated the next day. The claimant was represented by counsel, instructed by Prestige Solicitors. No-one seems to have made any reference to the *Detention Action* judgement, handed down by Ouseley J on 9th July 2014.

82. There was a witness statement filed by the Claimant for the purposes of the appeal. It set out his case, and requires no rehearsal in full here. It does include a statement that the Claimant said that "I suffer health problems and suffer depression and problem" (sic) "with my foot."

83. The Judge made strong adverse findings on the credibility of the Claimant:

i) he drew attention to the Claimant not answering questions directly, and giving answers that did not answer the questions properly. When warned that the judge might consider that he was purposefully avoiding answering the questions, the judge says that "the Appellant's answers did improve somewhat;"

ii) the Judge made an adverse finding on his credibility because his witness statement differed from the answers in interview about his knowledge of HEI/HIG saying that "he was given every opportunity in interview to answer the questions but failed to give accurate answers;"

iii) he found the account of his involvement with HEI/HIG inconsistent. He considered that he may only have had a minor role with the party;

iv) the judge was very critical of his evidence about the Taliban. He started by pointing out that the translations (provided by the Claimant's son) were not formal nor full, did not contain the dates, references or the wording of the stamps, nor the signatures;

v) they were in his view not plausible or credible. He did not consider it plausible that the first two letters would have been given to others to pass on when the Taliban knew of his address in Pakistan. He also found the difference in tone between the first and second letters when they had been received only seven days apart, and the author of the second would not know if the first had been received;

vi) the judge said that his evidence before him, that he took little notice of the first letter ("he considered it to be not more than an invite"(sic)) was inconsistent with what he had said in interview;

vii) the author of the third letter would not know if the first two had been received;

viii) he thought it implausible that if the Taliban objected to his activities, they had not carried out their threat, when they knew where he lived;

ix) he also thought his evidence incredible on his evidence that he was not in contact with others in his family in Afghanistan. Had he been threatened by the Taliban he would have been concerned for his family. He concluded that he had received no threatening letters from the Taliban, and was not at risk of return to either Afghanistan or Pakistan;

x) he concluded that in any event, if he did have concerns about any particular part of Afghanistan he could relocate within Afghanistan or Pakistan;

xi) he held that the Claimant had not discharged the burden of proving that he was a refugee. He also concluded that his claim for humanitarian protection must fail, and that there would be no breach of Articles 2 or 3 of the European Convention on Human Rights. He noted that there was no Article 8 claim before him.

84. It is right to say that

i) no complaint was made to Judge Walker that there had been inadequate time allowed before the interview, or that it had taken place in the absence of the representatives;

ii) Judge Walker did not have the advantage which this Court has had of seeing the records kept, and the failures to comply with guidance and the difficulties over his detention which they reveal.

85. On 21st July 2014 he appealed against that decision. He had by then dispensed with the services of his previous solicitors, and was now represented by Mr Symes of counsel and by Hoole and Co, who were instructed on that date. He now relied on the *Detention Action* judgement, and contended that:

i) he had had insufficient time to consult his representatives, and that they had not got independent translations of the Taliban letters;

ii) he had a real fear of admitting the extent of his involvement with HEI/HIG, and that the Tribunal should have taken into account that he needed advice from a lawyer of appropriate experience;

iii) his previous lawyers should have obtained corroborative evidence of his role in HEI/HIG. That and the shortage of time led to such a line of enquiry not being pursued.

86. Judge Woodcraft of the First Tier refused permission to appeal. He did so on the basis that his lawyers had been instructed some 5 days before his substantive interview, and noted that he was inducted into the DFT process on 25th June 2014. He said that the solicitors had had time to prepare the appeal, and that there had been no procedural unfairness.

87. I regret to say that I am unable to give that reasoning much weight. The induction into the DFT was not until 27th June 2014, although he was aware from the 25th June 2014 that he was to be placed in that process. He had certainly not seen his solicitors by 30th June 2014, because it was only on that date that the signed authority was faxed to them. The record shows no visit by them at all. It also appears that Judge Woodcraft was unaware of the decision of the officer to go ahead with the interview despite the absence of the representatives, and in breach of the Defendant's instructions.

88. There was then a further application for permission to appeal. In a lengthy witness statement (the copy in the bundle is dated 24th July 2014) he described the contact he had had with Prestige solicitors. All communications were made via his son. They never spoke to him while he was detained, and failed to attend the interview on 1st July. They were instructed to apply for bail on his behalf. (There is nothing which suggests that they ever did so).

89. The Claimant said that after receipt of the refusal letter of 8th July, his son again visited Prestige. The Claimant met them at the tribunal, when he was represented by a barrister who had been instructed the night before, and told the Claimant that he had not had time to prepare the case. His son asked the barrister to apply for an adjournment, who told him that an application would fail as the court would say that they had had sufficient time. The Claimant said in his statement that he thought he had been incompetently represented.

90. He referred to the second main interview, and said that as a result he was fearful that admissions of a role within HEI/HIG would lead to his being associated with terrorism.

91. He sought to rebut the adverse conclusions on credibility in the Refusal letter concerning his role in HEI/HIG.

92. It also addressed the issue of the Taliban, and complained that Prestige had failed to get certified translations of the letters. Among other matters he said that the Afghan Government could not give protection, and as a disabled man with a stick he could not afford to live in Kabul, and had been traced despite moving to Peshawar in Pakistan.

93. He went through Judge Walker's decision in detail, giving reasons why he did not accept the conclusions.

94. The grounds contended that the deficiencies in the representation by Prestige were partly due to the pressure exerted by the short DFT timescale, and partly due to their

inadequacies and lack of expertise. It repeated the previous grounds and their reliance on *Detention Action.*

95. Judge Chalkley of the Upper Tribunal refused permission to appeal on 28th July 2014, stating that the grounds showed no error of law, and that there had been no complaint to the solicitors or complaint to the Solicitors Regulation Authority. He noted that counsel had not said that he had not had sufficient time to prepare, and that there were no specific challenges to the adverse credibility findings of the appeal judge.

96. I find myself unable to give any weight at all to that decision;

i) I find the idea that there would have been a complaint within the month to the solicitors or SRA quite unrealistic;

ii) the lack of complaint by counsel was the source of a substantial complaint by the Claimant. The judge had to address its merits;

iii) there was a very specific challenge made to the credibility findings with regard to the membership of HEI/HIG, set out in the notice of appeal and in the evidence of the Claimant;

iv) Judge Chalkley never addressed the point about the shortness of the timescale in the *Detention Action* context;

v) he never addressed the questions raised about the fitness of the Claimant during the substantial interview and subsequently. Given the terms of the *Detention Action* judgment, they had to be addressed.

97. In fairness to Judge Chalkley, he too was not privy to the information now before the court on the failings and difficulties in the process as it had applied to this Claimant.

98. But it must also be said, and this is a point of no little importance, that there has been no application to quash the decision of the Upper Tribunal. It therefore stands as the last word within the appeal process on the Claimant's claim. The adverse findings of Judge Walker in the First Tier remain undisturbed by any challenge in this court.

99. Appeal rights were exhausted on 28th July 2014.

100. Meanwhile, the Claimant had remained in detention. On the 8th July 2014 he was given a notice saying that he was detained, but without any reasons being identified on the form (page 390-2). On 22nd July 2014 a document was written called "Monthly progress report to detainees." The copy in the Court bundle (p 399) is unsigned, but appears to have been written by a Hassain Shah. The following appears in the document with regard to the reasons for detention:

> "Your case has been reviewed. It has been decided that you will remain in detention
>
> - to effect your removal from the United Kingdom.
>
> This decision has been reached on the basis of the following factors
>
> - You do not have enough close ties to make it likely that you will stay in one place."

101. The document records that a copy was not sent to the Claimant's representatives. Ms Bayoumi conceded that there is no indication in the letter or other sign that it was given to the Claimant. The Fast Track Detention Record of that date (p 382), which shows H Shah as the reviewing officer, records that "there is no indication Mr (H) is unfit for detention. He does not meet any of the DFT exclusion criteria." There are internal records of reviews of his detention on 8th and 15th July (albeit with no reasons being given) but nothing relating to that date. The Case Record Sheet (p 457) records his being served with the decisions of the First Tier Tribunal on the 14th July, and the subsequent decisions, but there is no record of any decision to detain , or any reasons therefor, being taken at any time from 8th July 2014 until the date of his removal, the 19th August 2014.

Period 4: Events between 28th July 2014 and 19th August 2014

102. One now comes to the events of August 2014 relating to

i) Removal directions;

ii) the letters written on the Claimant's behalf by his solicitors to the Defendant, including what they contended was a fresh claim;

iii) the issue of judicial review proceedings;

iv) how the Defendant dealt with the correspondence, including what was said to be the fresh claim;

v) the refusal of interim relief in the judicial review proceedings;

vi) the removal of the Claimant.

103. On 5th August 2014 the Defendant issued Removal Directions for a flight at 23.20 hours on 19th August 2014 from London Heathrow Airport. It is common ground that he was served with the Directions on 7th August 2014.

104. On 5th August 2014, the Claimant's solicitor had sent a letter by Recorded Delivery entitled "Fresh Claim for Asylum" to Harmondsworth Removal Centre. A subsequent receipt shows that it was received on 6th August 2014. That letter

i) set out the history, including the fact that the previous solicitor had not visited the Claimant to take instructions, but had only spoken to his son;

ii) set out the history of the appeal to the FTT and UT, and recorded the giving of judgment by Ouseley J in *Detention Action* on 9th July 2014, and the subsequent judgment on the relief he was granting on 25th July 2014;

iii) summarised the Claimant's asylum claim. It contended also that during his second interview on 3rd July he had become very distressed, and "in the lack of legal advice his mental health deteriorated." It contended that the Home Office had rejected his claim because he had not discharged the burden of proof, and that the evidence contained in the letters from the Taliban was disregarded because they were not translated;

iv) referred to Immigration Rule 353 on the making of fresh claims, and reminded the Home Office that under Rule 353A an applicant who had made further submissions would not be removed until they had been considered by the Defendant;

v) submitted a lengthy witness statement, and argued that the Claimant had been deprived of the opportunity to put his claim on a proper basis, and had received no advice from the previous solicitor;

vi) submitted that sufficient time had not been given to the Claimant to prepare for the interview. He drew attention to the Home Office concession, relied on by Ouseley J that at least 4 clear working days should elapse, and that that had not occurred here. (It will be recalled from the earlier part of this judgment that the solicitors had to have been instructed on 24th June to give 4 clear days);

vii) the process had therefore been unfair, and the "implications of refusal decision of……..8th July, and the Determination and Reasons of the (FTT) should also be suspended. The client should be interviewed afresh with regard to his asylum claim;"

viii) it then set out a "Fresh Claim for Asylum." It argued that

a) 4 working days had not elapsed between solicitors being instructed and the interview, which led to the letters not being translated for the solicitors;

b) despite the Claimant's barrister telling him that he had insufficient time to prepare the case, the appeal was heard and dismissed;

c) the dismissal of the application to appeal the FTT decision could not stand in the light of the *Detention Action* decision, because only 1 day elapsed between the allocation of the lawyer and the interview;

d) the refusal of Judge Chalkley could not stand because the error by his counsel of not asking for an adjournment was independent of the Claimant;

e) the lack of proper translations of the documents was also caused by the absence of sufficient time;

f) the Claimant should be removed from the DFT procedure. He would be able to stay with his daughter or his son. His release would give him the opportunity to seek medical treatment and provide collaborative (sic) evidence in support of his claim. It noted that the FTT judge had noted that the Claimant had poor concentration;

g) reference was made to the Defendants guidance on "Detained Fast Track Process" and within it to the "Exclusion Criteria" at paragraph 2.3. Reference was also made to paragraph 114 of the judgment of Ouseley J in *Detention Action*. It was contended that the Claimant had suffered from PTSD (although not said when). It said that he was being

treated for depression before being targeted by the Taliban, and was dependent on anti-depressants and sleeping pills. It said that his medicines had been confiscated by the Home Office. It referred to his vertigo and its treatment with Serc during detention, and said that in Pakistan he had been told that it could be a sign of epilepsy. He had been prescribed medication for his lack of concentration. A medical report from a Dr Muhammad Masoom of Peshawar was attached, which referred to the Claimant complaining of sleep disorder, nervousness, sadness, palpitations and (?) myalgia. The doctor diagnosed a depressive state, neurosis (anxiety) and Neurasthenia. It also listed medication the Doctor had prescribed. The letter asked that time be given for a psychiatrist to be instructed;

h) it said that he was physically disabled, with a foot enlargement condition, that he walked with a stick (removed from him when he entered detention) that he took medication to control his cholesterol , and had hypertension;

i) it stated that a country expert was on standby to write an expert report and express an opinion on the risks the Claimant claimed to fear on his return to Afghanistan.

j) it asked that

> "For the reasons above, we request that the client's case is considered afresh. The adverse decisions in his case should be disregarded due to the high risks of unfairness that (they carry). The client should benefit from the remedial steps taken by the Secretary of State following the decision in (*Detention Action).* This client suffers from mental health conditions which renders his case unsuitable for DFT. We request that his case is removed from DFT and the client granted TA (temporary admission) to allow him opportunity to present his case on proper footing with collaborating (sic) and independent evidence from medical expert and country expert and to receive treatment."

105. The letter attached a witness statement from the Claimant and other exhibits, including copies and certified translations of what were said to be letters from the Taliban to which the Claimant had referred (the originals were with the Home Office). The witness statement from the Claimant (that of 24th July 2014) was a long detailed document, and contains far more information and detail than the one submitted to the original appeal hearing. But it too made errors about dates, stating for example that he had been at Harmondsworth since 25th June 2014, and that his screening interview was at Harmondsworth on that date. In fact he had had a screening interview at Manchester on the 25th June 2014, and his longer interview on 1st July 2014.

106. In that statement he said that he had not mentioned the condition of "Vertigo" in his screening interview. He said that he had Serc tablets for that (a proprietary form of Betahistine Dihydrochloride). An undated detention document (p 394-8) records him

having "Serc 24-Anti Vertigo" and also Stugeron, which is of course a well known anti-nausea medication. He said that he had tablets for his depression, but they had been taken from him. He said that he had asked- indeed begged- for sleeping pills, but none could be provided. He said that fatigue and his conditions of detention exacerbated his depression, and had affected his memory, concentration and understanding. He said that his foot was swollen and uncomfortable. His stick had been removed from him.

107. On 7th August 2014 the solicitor wrote again, again under the heading "Fresh Claim for asylum". He referred to service of the Removal Directions having occurred that day, and then reminded the Home Office that a fresh claim had been made on 5th August, then saying

> "As this remains a DFT case and removals have now been set, can we please have a decision on our client's Fresh Claim for asylum by tomorrow 8th August. If we do not receive your decision by Monday 11th August, we will apply for judicial review and liberty for a High Court order as referred to by Ouseley J in his decision of 25th July 2014 in (*Detention Action*)"

Nothing was received from the Home Office. On 12th August 2014 the solicitor wrote a letter headed "Pre-Action Protocol." It referred to the history and the letter of 5th August 2014, and stated that within 2 days from the date of this letter the Home Office was required to

i) remove the case from the DFT procedure as the Claimant was mentally and physically unwell;

ii) release him on temporary admission with conditions

iii) make a decision on the Fresh Claim for asylum made on 5th August 2014

iv) confirm that if the decision was that it was not a Fresh Claim, or that he should have leave to remain, he would be given the right of appeal to the FTT

v) it sought a reply by 5.00 pm on 13th August 2014.

108. On 18th August 2014 (after 6 clear working days) the Claimant issued an application for Judicial Review in the Upper Tribunal. It argued that

i) the preparation of the Claimant's case within the DFT process had been prejudiced by the lack of time his former representatives had had. Reference was made to the lack of 4 clear working days, which amounted to unfairness in the light of the second judgment in *Detention Action*;

ii) reliance was placed on what was said in *R (Refugee Legal Centre) v SSHD* [2004] EWCA 1481, that an applicant was entitled to a fair hearing in the FTT. If the interview had been obtained in unacceptably stressful or distressing circumstances, so that it contains inconsistencies and omissions from what the tribunal was later told, the damage may not be curable. In the Claimant's case

the inadequate procedure had contributed materially to the difficulties in his account, which should not be held against him;

iii) the unfairness was compounded by his former solicitors failing to secure professional independent translation of the documents. In particular, the Claimant had had more prominence in HEI/HIG than he had admitted because he had been fearful of the consequences had he done so, upon which he had required proper legal advice from a lawyer with the appropriate expertise;

iv) had the Claimant had more time he could have obtained corroborative evidence, which he could not pursue due to the inadequacies of his former representatives;

v) in reliance on *AA(Somalia) v SSHD* [2007] EWCA Civ 1040 and *LD (Algeria)* [2004] Civ 804, an FTT judge would re-evaluate any findings in the light of the failings in the original procedure;

vi) contrary to the approach of Judge Woodcraft, the incompetence of the representatives aggravated the procedural failings which existed anyway.

109. The claim sought

i) a quashing of the Removal Directions,

ii) a declaration that the DFT process culminating in the dismissal of the asylum claim on appeal was procedurally unfair, and that consequently the fresh claim could not be lawfully treated as " clearly unfounded,"

iii) a mandatory order requiring the Defendant to consider taking steps to remedy the unfairness, which may include re-interviewing the Claimant in the light of his witness statement, assessing his vulnerability and giving him an opportunity to obtain independent medical evidence on his mental state, and removing him from the DFT process;

iv) any other such order as the Court saw fit;

v) Costs.

110. An application was also made for urgent consideration, and an injunction to prevent his removal. On 19th August 2014 at 9.30 am, HH Judge Bidder QC, dealing with the matter on the papers, refused the application for permission and the application for interim relief on the following grounds;

i) in *Detention Action* Ouseley J did not say that a period of less than 4 clear working days from allocation of lawyer to interview would make the process unlawful. The interview had taken place after the solicitor was allocated, and there was no application to adjourn the interviews;

ii) referring to Ouseley J at paragraph 8 of *Detention Action*, it was for the Claimant to raise the point that the claim was processed too quickly for fairness. It was not raised before or during the DFT process or during the FTT hearing. Further the refusal was based on his answers on matters entirely

within his own knowledge. He too referred to the absence of complaint to his solicitors or to the Solicitors' Regulation Authority;

iii) it was not arguable that the DFT process was procedurally unfair;

iv) there was no serious question to be tried and interim relief was also refused.

111. As I shall come to, the unchallenged evidence before me from Mr Khalid Khashy, solicitor of Hoole and Co was that the Claimant had complained to his original solicitors twice: once on 28th July 2014, and again on 11th August 2014. Further, his evidence shows that the SRA rules prevent a complaint being made to it without a complaint to the solicitors first, and also require that a period of 8 weeks elapses before a complaint is made to it.

112. No letter in response to the Fresh Claim had yet been received, nor any response to the Pre Action Protocol letter. On 19th August 2014, after receipt of Judge Bidder QC's order, the solicitor wrote to the Home Office by fax stating, inter alia, that

i) there would be an application to have the application for permission reconsidered under rule 30(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008

ii) Judge Bidder QC had not designated the application as being totally without merit. The Fresh Claim should therefore be addressed on its merits and be considered for a decision;

iii) the Court of Appeal would shortly hear an appeal by the Claimant in *Detention Action* to seek a restraining order to prevent the removal of those in the Claimant's position;

iv) the Claimant's removal would be unjustified as his claim was not totally without merit, and if the appeal to the Court of Appeal succeeded, it was inevitable that the Claimant would be returned to the jurisdiction of the Court;

v) the Claimant should not be relocated to Kabul, where enemies of HEI/HIG (The Northern Alliance) had a dominant position

vi) the matter should be stayed until the *Detention Action* appeal had been heard.

113. A response was sent that day from a Mr David Rogers at the "Operational Support and Certification Unit (OSCU)" at Harmondsworth (page 201). It was a one page letter, which stated, inter alia, that the Claimant's asylum claim had been fully considered and that it had been concluded that it was safe for him to return to Kabul. Arrangements to remove him would proceed. It bore the reference H1246774. It will be noted that that letter is entirely silent on the subject of the Fresh Claim.

114. Another letter (also of one page) is also said by the Defendant to have been sent on 19th August 2014, and signed by a B Lawlor of OSCU National Removals, which was a letter (bundle p 534) which referred to the application for interim relief and said that removal would only be deferred if an injunction were granted. In its absence, the directions would remain. It also bore the reference H1246774. As I note below it is also disputed that that letter was sent.

115. The Claimant was removed on the evening of the 19th August.

116. The solicitor Mr Khalid Khashy of Hoole and Co, who it must be said is nothing if not careful and assiduous, has sworn a number of witness statements. In his statement of 27th October 2014 he said that the Defendant had never addressed the Fresh Claim made on 5th August 2014, or ever considered the complaint of unfairness.

117. After the Claimant had applied on 2nd September 2014 for oral consideration of the application for permission, the Defendant served an Acknowledgement of Service on 4th November 2014. Included within it was a contention at paragraph 23 that the Defendant had replied to the three letters of 5th 7th and 12th August 2014 by a letter of 18th August 2014. The words used in the Acknowledgement of Service are

> "The Defendants (sic) responded to all correspondence on 18th August 2014."

118. Mr Khashy's evidence in his second witness statement of 4th November 2014 states that neither he nor his firm had ever seen or received that letter. He pointed out that although the application for judicial review had referred to the making of the claim, no earlier response from the Home Office had referred to it. The Defendant did not suggest before me that Mr Khashy's evidence was wrong. Her case before me was that the reply was provided to the Claimant directly. However despite the obvious importance of the point the Home Secretary put in no evidence from any witness stating that that was what had occurred. Instead the court was invited to infer that that had happened from the entries in the Case Record.

119. On 22nd December 2014 the Treasury Solicitor wrote that he would be filing no detailed grounds of defence, and would rely on the summary grounds of 4th November 2014. It made the disclosure referred to above, which included the "B Lawlor" letter of 19th August 2014. On 6th January 2015, in accordance with Judge Lambert's order, Mr Khashy filed a further witness statement. Much of it dealt with the issue of the medical records, but he also dealt with the "B Lawlor" letter of 19th August 2014. He said that it had not been received, and pointed out that it contained no fax number or fax header confirmation slip.

120. The Record shows this for the 18th and 19th August 2014

i) Refusal letter emailed to DFT Harmondsworth and CROS Ops on 18th August 2014@12.03
(redacted)
OSCU, Returns Immigration Enforcement
Home Office
(Address in Croydon given)
SBORGONHA Unit RGOSCU date 18th Aug 2014

ii) Application for a JR has been received and forwarded to OSCU to be considered.
DIPORTEOUS Unit FTHARM date 18th Aug 2014

iii) The application for an injunction has been rebutted
Letter emailed to DFT (Harmondsworth) for service on the subject and (representatives, copied to CROS (Ops)
(Removal Directions) are maintained

B Lawlor OSCU
BLAWLOR Unit;- RGOSCU date 19th Aug 2014

iv) OSCU responses sent to reps and served to subject
(Removal Directions to be maintained)
S43ALI Unit:- FTHARM date 19th Aug 2014

v) OSCU response states
The subject's application for judicial review and a stay on removal has been refused by the Upper Tribunal
(Order attached)
Therefore (Removal Directions) for 19th August 2014 @23.30 hours are to be maintained.
Tribunal refusal letter has been placed on the (Harmondsworth) serving list
DIPORTEOUS Unit FTHARM date 19th Aug 2014

vi) Sub served (only 1 copy as couldn't (sic) get signed copy) OSCU letter
Sub was happy to be going on flight this evening as he would be reunited with his family
ADAD Unit FTHARM date 19th Aug 2014

vii) Letter from Hoole and Co solicitors sent to OSCU
A8JAMES Unit FTHARM date 19th Aug 2014

viii) JR application response served and signed for- placed in Nathan's linking
SPARVEZ Unit FTHARM date 19th Aug 2014

ix) Faxination (sic) received from OSCU to serve decision on Hoole and Co solicitors stating (Removal Directions) are maintained for tonight at 23.30 hrs (Charter Flight)
KBAILEY Unit CCU date 19th Aug 2014

121. The entry on which the Defendant relies is number (vi) above

> "Sub served (only 1 copy as couldn't" (sic) "get signed copy) OSCU letter
> Sub was happy to be going on flight this evening as he would be reunited with his family
> ADAD Unit FTHARM date 19th Aug 2014"

122. The letter which Ms Bayoumi contended was sent bears the date 18th August 2014. It is of 5 pages, printed on 3 folios, and said to be from "NRA. Operational Support and Certification Unit (OSCU)" and is addressed not to the Claimant, but to Hoole and Co. Although it bears a name and department at the end ("S Borgonha Operational Support and Certification Unit (OSCU) Returns, Immigration and Enforcement") it is an unsigned copy. It also bears the reference H1246774. It starts by referring to

> "your letters of 5th August 2014, 7th August 2014 and 12th August 2014, addressed to the Home Office at Harmondsworth Removal Centre, about your client's repeated request to remain on the basis of his fear of returning to Pakistan. Your client also wishes to remain because he has a number of medical and psychiatric problems. Your letters have been passed to this office for consideration and response."

123. After considering (and rejecting) the claim for asylum, it then continued at paragraph 17

> "We have noted that your letter (sic) is a Pre-Action protocol. However …….it is inappropriate in the cases of imminent removal"
> The letter then referred to a Home Office guide to Judicial Review and Injunctions, saying
> "We would only be prepared to take the substantial step of deferring your client's removal if an injunction preventing removal is obtained."

124. When the application to renew the application for judicial review was heard on 5th November 2014, the Amended Grounds of Claim contend that Counsel for the Defendant informed the court that there was a "screenshot" showing service on both the Claimant and the solicitors. Now that disclosure has taken place, all relevant entries are set out above. They are silent about service on the solicitors, and as far as the court is concerned do not persuade it that the letter was provided to the Claimant.

125. The evidence of Mr Khashy in his third statement (12th November 2014) is that he had spoken to his client by telephone in the light of the case put forward by the Defendant. He records the Claimant as saying that while he was in Harmondsworth he was served with no other document after the Removal Directions, but that while he was on the aeroplane his escort served him with a letter written in English of 1 or 2 pages at most. It informed him that he was appeal rights exhausted and that there was no bar to removal. Mr Khashy asked him if it was on 5 pages, but printed on both sides, so amounting to 3 in all. He said it was not, but that it was of one page with a different document which was also of one page. He then said that he checked it with another passenger who was more familiar with English, who confirmed his understanding of the document. He had left the document on the aeroplane tucked into the seat pocket, so that he would not be seen as an asylum seeker (i.e. within the UK) on his arrival in Pakistan.

126. It will be appreciated that that the letter from Mr Rogers was of one page, as was the one I have referred to as the one from B Lawlor.

127. I shall set out my findings about the events of 18th and 19th August 2014 in due course.

Events after removal on 19th August 2014

128. On 6th November 2014 HH Judge Cotter QC granted permission to apply for judicial review, on the basis that there was an argument that the fresh claim had not been addressed either in time or at all. The question of the legality of the Claimant's detention was also raised before him. Judge Cotter QC permitted amendment of the grounds (to include the grounds relating to detention) and transferred the matter to the High Court.

129. Amended Grounds were filed on 12th November 2014. A further witness statement from Mr Khashy of 12th November 2014 was also filed. The Claimant's solicitors also sought disclosure of the Defendant's file, and of the medical records of the Claimant held by the Defendant. While the former was provided (but, because of the date of the request, after the Amended Grounds were filed), the Defendant resisted the latter (on the basis that the Claimant's signature of authority should be obtained - i.e. from Pakistan, where he is residing) until the first day of the hearing before me, when I directed their production.

The cases before the Court

130. The Amended Grounds sought orders as follows:

i) a declaration that the Claimant's removal had been unlawful;

ii) the Defendant be required (both in the interim and as a final order) to return the Claimant to the UK;

iii) a declaration that the detention of the Claimant was unlawful from 24th June 2014 to 19th August 2014;

iv) damages for unlawful detention and removal;

v) costs.

131. The Grounds argued were

i) that the asylum decision was reached following a process which was incurably unfair due to the inherent unfairness of the DFT process identified in *Detention Action* and due to a series of failings in the claim which led to unfairness;

ii) the unfairness was brought to the attention of the Defendant in the fresh claim;

iii) in breach of

a) assurances given by the Defendant given to the High Court in *Detention Action* on 17th July 2014

b) in a policy of review of DFT cases instituted on 21st July 2014

c) Rule 353A of the Immigration Rules

the Defendant had failed to respond to the fresh claim, whereby the Claimant's removal before her consideration of it was unlawful;

iv) the detention of the Claimant was unlawful, because

a) he was only detained for the purposes of processing his claim in a process which carried an unacceptable risk of unfairness and was unlawful;

b) the decision making in this Claimant's claim for asylum was vitiated by a series of flaws and breaches in policy;

c) the detention pending appeal was unlawful because the Defendant had failed to consider whether the Claimant's appeal remained suitable for DFT in the light of her decision of 8th July 2014;

d) as his removal was unlawful, he could not be detained pending that unlawful removal.

132. It must be appreciated that the Amended Grounds were filed before full disclosure had occurred, and before the decision of the Court of Appeal in the second *Detention Action* appeal. I was invited to consider the case on the basis of all the evidence, including that which had been disclosed.

133. I should record that despite the claim for Damages being made in the Amended Grounds, Ms Bayoumi said (I am sure quite genuinely) that she had no instructions on the issue of whether the Claimant was entitled to ordinary damages (if I may call them that) for any unlawful loss of liberty, or should be entitled to nominal damages only. After the midday adjournment on the second day of the hearing (long after the Claimant's counsel had concluded her opening submissions) the Defendant put in a witness statement from Mr Knapper on this issue, seeking a postponement of the resolution of that issue while the Defendant considered her position in the light of the *Detention Action* judgement of Beatson LJ in the Court of Appeal. I was unhappy that the Defendant would think it proper to approach the filing of arguments and evidence in this manner, which seemed to me to be discourteous to the court, to the Claimant, and to her own counsel.

134. In any event I am not persuaded that the court should be dissuaded from forming its own judgment on a matter fairly put before it by the Claimant.

135. I shall now deal with the issues as follows

i) Whether the removal was unlawful

ii) Whether the detention was unlawful

iii) If either was unlawful what orders should be made.

In addressing (i) I will also address the issues of the alleged unfairness of the process insofar as it affects the legality of the removal. I shall also make findings in case either party appeals my decision.

Ground 1 : Was the removal on 19th August 2014 unlawful?

(a) Submissions of the parties

136. Ms Kilroy for the Claimant submits that:

i) the asylum claim made on 5th August 2014 was undetermined, and therefore the Claimant's removal was in breach of s 77 of the *Immigration and Asylum Act 2002*. It reads

> "77 No removal while claim for asylum pending
>
> (1) While a person's claim for asylum is pending he may not be—
>
> (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
>
> (b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section—

(a) "claim for asylum" means a claim by a person that it would be contrary to the United Kingdom's obligations under the Refugee Convention to remove him from or require him to leave the United Kingdom, and

(b) a person's claim is pending until he is given notice of the Secretary of State's decision on it.

(3) In subsection (2) "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol.

(4) Nothing in this section shall prevent any of the following while a claim for asylum is pending—

(a) the giving of a direction for the claimant's removal from the United Kingdom,

(b) the making of a deportation order in respect of the claimant, or

(c) the taking of any other interim or preparatory action.

ii) removal while a claim was pending would also be in breach of the Immigration Rules, which read

Fresh Claims
353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered.
The submissions will only be significantly different if the content:
(i) had not already been considered; and
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
This paragraph does not apply to claims made overseas.
353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise"

iii) any administrative decision (such as the dismissal of asylum claim) is only effective if communicated to the person affected; see Lord Steyn, giving the

opinion of the majority, in *R(Anifrujeva) v Home Secretary* [2003] UKHL 36 [2004] 1 AC 604 at paragraphs 26-34;

iv) the right to be informed of the decision is illusory unless it gives sufficient time for the asylum seeker to obtain legal advice and any consequent access to justice- see *R(Medical Justice) v Home Secretary* [2010] EWHC 1925 and in particular the summary of authorities at paragraphs 50-54;

v) the evidence was very strong indeed that the letter was not sent;

vi) in this case the letter was, if the Defendant is correct, served on the day of removal, on a Claimant whose first language was not English. The unfairness was compounded by the agreed failure to send it to the representative. The Claimant was effectively deprived of any access to justice so far as any challenge to the letter was concerned.

137. Ms Bayoumi submits that

i) The letter was served on him, and he could have contacted his representatives to take advice and/or seek the quashing of the directions;

ii) He had in any event failed on the morning of 19th August to have the first set of removal directions quashed.

(b) Discussion and Conclusions on Ground 1

138. I am unable to accept that the letter put forward by the Home Office as late as November is a genuine copy of a letter of 18th August 2014 served on the Claimant. I do not have the evidence which would permit me to determine that it is not a genuine copy of a letter on the file, not least because the apparent author of the letter has not had the chance of dealing with the matter in evidence. But I am quite unable to accept the Defendant's case on it otherwise, for the following reasons:

i) the unchallenged evidence from Mr Khashy of Hoole and Co is that the letter, which was addressed to that firm, was never received;

ii) I have evidence, albeit the account of what he was told by the Claimant, from Mr Khashy which if true shows that the Claimant had not received a letter matching description of the letter in question;

iii) the Home Office, despite knowing since November that this factual matter was and is in dispute, has put in no witness evidence at all to show what happened. It has not even done so in the light of Mr Khashy's third witness statement of 12th November 2015. The Court has no idea what the provenance of Ms Bayoumi's instructions are. If the case record was unequivocal that might not matter, but when the record is anything but clear as to the subject matter of the entry, I can give no weight to those instructions. If they stem from the officers actually engaged, it is incomprehensible that a statement was not filed from at least one of them;

iv) it was apparently addressed to Hoole and Co, but not sent to them, unlike other letters sent on 19th August. I find it very difficult to accept that if it had been

written on 18th August and addressed to Hoole and Co, that it would instead have been served on the Claimant;

v) the Defendant says that other letters were sent from OSCU to Hoole and Co on 19th August. Why would those letters be sent but not this one if it existed on that date?

vi) if it were written, I find it very difficult to accept that neither Mr Rogers nor B Lawlor, the authors of the other letters, would ever mention the important letter of 18th August 2014 in their letters to Hoole and Co, when they worked in the same OSCU section, and when the letters which they wrote the following day bore the same file number. After all, if there had been a refusal of the Fresh Claim on 18th August, with the letter being put on the file, it would have been a very relevant matter for both Mr Lawlor and Mr Rogers to mention in their letters the following day ;

vii) I find it very difficult to accept that the officers concerned with issues of service would think that service on a man who needed an interpreter would suffice;

viii) if the Defendant is correct, there were at least two OSCU letters sent to Hoole and Co on 19th August. The entry at (vi) above could have related to either of them. The entry is at best inconclusive. The evidence of Mr Khashy, if the account of the Claimant was true, shows that he was served with one or both of the other letters.

139. I might be prepared to accept that a refusal letter was sent to Harmondsworth by OSCU at some point. I note that a "refusal letter" was emailed by S Borgonha on 18th August to Harmondsworth. But that is as far as I am prepared to go. I have no evidence as to whether it was this disputed letter or the original refusal letter. Given the absence of any reference to it in the subsequent letters of Messrs Rogers and Lawlor, I regard it as dangerous to conclude, even on the balance of probabilities, that the letter in question was this one.

140. So far as the "B Lawlor" letter is concerned, there is no evidence submitted by the Home Office to deal with the important point made by Mr Khashy. On the 19th August 2014, which was the day of removal, it would have been pointless to write a letter to Hoole and Co unless it was faxed. In any event, as Ms Kilroy pointed out, if this letter were handed to the Claimant, it was handed to him at a time when there was no realistic possibility of him having any opportunity to take legal advice upon it or to challenge it. If it was faxed, then the fax confirmation sheet is a discoverable document. Its absence raises the substantial inference that it was not faxed. There is nothing to rebut that inference.

141. The evidence of the record keeping and attention to proper procedures within the relevant sections of the Home Office gives some substantial reason to think that letters or forms which should have been completed or sent as the case may be were not. The way in which H's case was dealt with from 25th June onwards shows a regrettable lack of attention to compliance with procedures which exist to protect the interests of all, not least those seeking asylum, and also to protect the Home Secretary

in her task of ensuring that processes can be shown to have complied with law and policy.

142. Despite the very obvious difficulties with the issue of the service of the letter of 18th August, Ms Bayoumi was keen to place reliance on it. Ms Kilroy says that if it was not served, or was only served on 19th August, when no time remained for the obtaining of, and acting upon advice, no reliance can be placed upon it, or weight attached to it. In any event, it is infected by the failures in the process which had occurred before then.

143. It is in my view essential to the application of the principles in *Anifrujeva* that, if a decision is made, the recipient of an adverse decision has sufficient time to challenge it if he seeks to do so, or at least get advice on the point. Paragraphs 30-31 of Lord Steyn's speech are very much to the point

> "30. Until the decision in *Salem*" *(R (Salem) v Sec of State for Home Dept* [1999] QB 805 (CA)) "it had never been suggested that an uncommunicated administrative decision can bind an individual. It is an astonishingly unjust proposition. In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our public law. In *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787, Lord Diplock explained the position:
>
> > "Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision."
>
> Where decisions are published or notified to those concerned accountability of public authorities is achieved. Elementary fairness therefore supports a principle that a decision takes effect only upon communication.
>
> 31. If this analysis is correct, it is plain that Parliament has not expressly or by necessary implication legislated to the contrary effect. The decision in question involves a fundamental right. It is in effect one involving a binding determination as to status. *It is of importance to the individual to be informed of it so that he or she can decide what to do. Moreover, neither cost nor administrative convenience can in such a case conceivably justify a different approach*. This is underlined by the fact that the bizarre earlier practice has now been abandoned. Given this context Parliament has not in specific and unmistakeable terms legislated to displace the applicable constitutional principles." (My italics)

144. That is no less true in asylum cases, as shown by the passages in *R(Medical Justice) v Home Secretary* [2010] EWHC 1925 per Silber J. Paragraph 1 explains the context

> "1 This application is a challenge to the lawfulness of the policy of the Secretary of State for the Home Department ("the Secretary of State"), which came into effect on 11 January 2010 and which is set out in a document entitled "Judicial Review and Injunctions" ("the 2010 policy document"). This policy gives individuals, who fall into certain specified categories and who have made unsuccessful claims to enter or to remain in the United Kingdom, little or perhaps no notice of their removal directions, which are the specific arrangements made for their removal from the United Kingdom. This new policy to a large extent

constitutes an exception to its previous policy but it does repeat existing exceptions."

145. Silber J's conclusion on the issue of the adequacy of time is at paragraph 112

> "112 Even before the collapse of RMJ, the 2010 exceptions, unlike the standard policy of a minimum 72 hour time frame, failed to include provisions ensuring that there was access to the courts by those against whom it is and would be invoked and there was no safeguard for those subject to the 2010 exceptions so as to ensure that their right of access to justice was preserved. There is no requirement in the access provision or indeed anywhere else requiring that those subject to the directions should have access to the courts or that removal will not take place if it was impossible for the person concerned to have access to a lawyer in the limited period available or if the person concerned has made every conceivable effort but had nevertheless still failed to obtain legal advice in the time available between the imposition of reduced period of notice of removal and the actual removal. In addition, this is of crucial importance when considered together with the fact that access to a legal adviser is unlikely to be available in the limited period between the time for serving the removal directions and the time when they take effect. Thus the 2010 exceptions fail to ensure that when they are invoked, the persons subjected to them will have access to justice notwithstanding that experience has shown that standard removal directions are frequently stayed. It is unfortunate that the Secretary of State did not ensure that there had been any meaningful consultation process involving those who provide immigration law advice before introducing the 2010 exceptions. For that reason, this claim succeeds and the policy under challenge will have to be quashed."

146. En route to that conclusion, Silber J addressed the issue of the amenability of removal directions to judicial review at paragraphs 50-55, which encapsulate succinctly why adequate notice is required:

> *"(iii) The circumstances in respect of which removal directions may be amenable to judicial review*
>
> 50 The Secretary of State originally contended in a witness statement made by Mr Peckover that when removal directions are served, the only way in which the removal directions are "*ordinarily*" likely to be amenable to judicial review will relate first to issues relating to the safety of the route of return and second to decisions to remove being made notwithstanding there was then still an outstanding claim on the basis that he has made further representations that amount to a "*fresh claim*" under paragraph 353 of the Immigration Rules. I am unable to accept that because it seems clear that a decision to serve removal directions under the 2010 exceptions could and is likely to lead to at least four different types of claim, which arise in existing challenges to removal directions, as I will now explain.
>
> 51 The first category would comprise decisions to reject further representations and at the same time imposing removal directions taking effect very soon thereafter and this practice was the subject of criticism by Collins J in *R (Collaku) v Secretary of State for the Home Department* [2005] EWHC Admin 2855 when he was giving judgment in a case in which further representations had been

made in May 2004 which were rejected on 22 May 2005 when the claimant was also told that he was to be removed on the following day. He explained that:-

> "14. The Home Office practice involving delay in deciding a claim but then of arresting and serving the refusal at one and the same time with a view to removal within a day or two, often at weekends and frequently early in the morning, is one that is to be deplored this court has deplored it on many occasions. It leads to unnecessary applications to the duty judge. It has the effect of preventing those who are to be removed from seeking proper legal advice to which they may be entitled and, even if the Home Office takes the view that there is no conceivable merit to be both found in any possible challenge, this is not the way to go about it. A reasonable time must be provided to enable representations to be made, if any are to be made, certainly to enable advice to be sought if the person to be removed wishes to obtain it. Quite apart from anything else, the approach to the duty judge will almost inevitably result in an order preventing the removal until the matter can be sorted out, either the following day or the next working day, when an application can be put before the Administrative Court. The result is that the flight ticket has to be given up -- it is often more than one ticket because frequently an official will accompany the person to be removed -- so public money is inevitably wasted."

52 Munby J agreed with these comments in the subsequent case of *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 when the claimants had had made representations that they had "*fresh claims*" in 2001, 2003 and March 2004 but on 10 October 2004, the Secretary of State gave instructions to an airline that the claimants were to be removed at 7.40 am on 12 October 2004. The claimants were not informed until 8.30 pm on 11 October 2004 when they were arrested but fortunately, they were able to prevent removal. Both of these cases show a very disturbing practice before the 2010 document was issued but regrettably the practice has not ceased. In my experience, it was not uncommon for refusal letters to be served at almost the same time as removal directions when the standard directions were given but I am unsure if this was also the position when the 2010 exceptions are invoked.

53 In a witness statement from Mr Peckover made after the hearing he said that the service of any outstanding immigration decision will be delayed so as to coincide with service of removal directions where "*there is an exceptional reason"* which justified that approach but he did not say what that meant or when it would be appropriate to act in this way.

54 Second, removal directions may be subject to a challenge because, even though there may not have been any outstanding representation when removal directions were served and the statutory process has been concluded, removal directions will nevertheless still engage an individual's rights under the ECHR or under the Refugee Convention 1951. This situation may arise in many instances, such as because:-

> (a) …… ;
>
> (b)…… ;
>
> (c) the arguments against removal may not have been put forward earlier in the appeal process because many failed asylum seekers and others subject to removal will have received inadequate or no representation during the course of their initial application and the appeals process. By the same token, others will have had difficulty in obtaining publicly-funded

representation at all and in consequence important information has not been obtained. In my work, I have to read many decisions of immigration judges and it is striking how increasingly frequently claimants are not represented. Mr Stephen Symonds the Legal Officer of ILPA explains the difficulties of those subject to removal in obtaining access to publicly-funded legal advice and representation while Joanna Swaney the supervising solicitor at RMJ, which is now in administration, explains that her experience of providing legal advice to those subject to removal directions and those of other solicitors in her team is that they are frequently called on to represent people whose cases had been inadequately prepared and presented to the Immigration Judge or where further evidence has come to light, which undermines findings made against that person by the Secretary of State or by the Immigration Judge; and

(d) many of those subject to removal might well have had their claims fast-tracked and the difficulties of properly representing people subject to fast-track decisions in the appeals process is greatly increased. Indeed fast-tracking means as with all expedited hearings that there is inevitably an increased risk that important points might well have been missed and significant evidence might not have been adduced.

55 The third area in which those subject to removal directions might have grounds for challenging them is in relation to certification decisions under sections 94 and 96 of the 2002 Act or under Part 2 of Schedule 3 to the Asylum (Treatment of Claimants etc) Act 2004. The effect of certification is to remove an in-country right of appeal (see section 94 of the 2002 Act) or to remove the right to any decision on the claim at all under the Dublin Regulations. In these cases, the only remedy available to the person who receives such a certificate is to seek to challenge it by means of judicial review because there would have been no previous opportunity to obtain access to a court regarding an individual's asylum or human rights claim. It is for that reason that until January 2010, threats of judicial review were sufficient to lead to a deferral of removal directions in non-suspensive appeal or third country cases but not in ordinary cases."

147. It will be observed that two of the matters drawn attention to by Silber J apply here - the absence of representation at the application stage, and the difficulties in addressing points adequately in the fast track process.

148. I therefore hold that the removal of the Claimant was unlawful, as there was an undetermined claim for asylum at the date of his removal, or if determined, one which had not been notified to him, either at all or at such short notice that he was deprived of the opportunity of dealing with it. It was therefore not a lawful determination of the fresh claim, and the removal was in breach of s 77 of the 2002 Act and of Rule 353A of the Immigration Rules.

149. However that is not the end of the matter. I must still determine whether or not I should order that the Defendant should take steps to return the Claimant to the United Kingdom. That issue raises the question of whether there is any realistic prospect of the fresh asylum claim succeeding. I shall consider that in due course when I address the question of relief. One of the matters which I will have to address is whether the issues relating to the process are such as to affect the weight I should give to the

conclusions reached in the first refusal letter of 8th July 2014, or if its purported successor, that of 18th August 2014.

150. It is therefore necessary to set out the contents of the letter of 18th August 2014;

i) it rejected the case about inadequate time for preparation, and translation of documents, on the basis that the solicitor was on record from 30th June 2014. It referred at length to Judge Walker's adverse findings on credibility with regard to the letters, and to membership of HEI/HIG;

ii) it relied on Judge Woodcraft's contention that 5 days had elapsed between the instructions of the solicitors (on 25th June) and the interview;

iii) it rejected the contention that 4 clear days had not elapsed, which would have enabled translation of the letters;

iv) it relied on the FTT's conclusions about internal relocation;

v) it addressed the medical issues, but only in the context of whether the Claimant was fir to return to Afghanistan;

vi) it rejected the claim, and stated that entry for humanitarian protection and discretionary leave were also refused;

vii) it concluded that it was not a fresh claim, and that any new matters created no realistic prospect of success. There was therefore no right of appeal.

151. I shall set out my views on the merits of the contents of the letter below.

Ground 2 : Was the Claimant's detention unlawful?

(a) Submissions of the parties

152. Ms Kilroy submits that:

i) it is axiomatic that detention must be justified by lawful authority, and that the reasons for detention must be given to the person detained;

ii) she makes reference to the Defendant's Guidance to her officers on "for officers dealing with enforcement immigration matters within the UK" which was published in December 2013. It includes the following (NB paragraph 55.4 was withdrawn in January 2015)

> 55. Detention and Temporary Release
> 55.1.
> Policy
> 55.1.1. General
> The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used (see 55.20 and chapter 57). Detention is most usually appropriate:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

In addition, a process under which asylum applicants may be detained where it appears that their claim is straightforward and capable of being decided quickly commenced in March 2000. This is known as the Detained Fast Track process (DFT).
The policy in relation to the suitability of applicants for detention in fast track processes is set out in the Detained Fast Track processes guidance.

To 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.

55.1.4.
Implied Limitations on the Statutory Powers to Detain
In order to be lawful, immigration detention must be for one of the statutory purposes for which the power is given and must accord with the limitations implied by domestic and ECHR case law.
Detention must also be in accordance with stated policy on the use of detention.

55.1.4.1.
Article 5 of the ECHR and domestic case law

Article 5(1) of the ECHR provides:
"Everyone has the right to liberty and security of person"

No one shall be deprived of his liberty save in the circumstances specified in Article 5(1) (a)
-
(f)
Enforcement Instructions and Guidance and in accordance with a procedure prescribed by law. Article 5(1) (f) states that a person may be arrested or detained to prevent his effecting an unauthorised entry into the country, or where action is being taken against them with a view to deportation or extradition.

To comply with Article 5 and domestic case law, the following should be borne in mind:

a) The relevant power to detain must only be used for the specific purpose for which it is authorised. This means that a person may only be detained under immigration powers for the purpose of preventing his unauthorised entry or with a view to his removal (not necessarily deportation). Detention for other purposes, where detention is not for the purposes of preventing unauthorised entry or effecting removal of the individual concerned, is not compatible with Article 5 and would be unlawful in domestic law (unless one of the other circumstances in

Article 5(1)(a) to (e) applies);
b) The detention may only continue for a period that is reasonable in all the circumstances for the specific purpose;
c) If before the expiry of the reasonable period it becomes apparent that the purpose of the power, for example, removal, cannot be effected within that reasonable period, the power to detain should not be exercised; and
d) The detaining authority (be it the immigration officer or the Secretary of State), should act with reasonable diligence and expedition to effect removal (or whatever the purpose of the power in question is).

Article 5(4) states that everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court.
This Article is satisfied by a detainee's right to challenge the lawfulness of a decision to detain by habeas corpus or judicial review in England and Wales, or by judicial review in Scotland.

55.4 Fast Track asylum processes

……Detention for a short period of time to enable a rapid decision to be taken on an asylum/human rights claim has been upheld as lawful by domestic courts and the European Court of Human Rights (Saadi v UK 13229/03)……..
……..The policy in relation to the suitability of candidates for detention in Fast Track processes is set out in Detained Fast Track Processes

55.6 . Detention forms
Written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals (in this context, every 28 days). Recognising that most people are detained for just a few hours or days, initial reasons should be given by way of a checklist similar to that used for bail in a magistrate's court.

The forms IS 91RA 'Risk Assessment' (see 55.6.1), IS91 'Detention Authority' (see 55.6.2), IS91R 'Reasons for detention' (see 55.6.3) and IS91M 'Movement notification' (see 55.6.4) replace all of the following forms (listed)

55.6.3. Form IS91R Reasons for detention
This form is in three parts and must be served on every detained person, including each child, at the time of their initial detention. The IO or person acting on behalf of the Secretary of State must complete all three sections of the form. The IO or person acting on behalf of the Secretary of State must specify the power under which a person has been detained, the reasons for detention and the basis on which the decision to detain was made.
In addition there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases. This should complement the IS 91R form, though is

separate from it. The detainee must also be informed of his bail rights and the IO or person acting on behalf of the Secretary of State must sign, both at the bottom of the form and overleaf, to confirm the notice has been explained to the detainee (using an interpreter where necessary) and that he has been informed of his bail rights.
It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are **always justified and correctly stated by the IO or person acting on behalf of the Secretary of State who is completing the form**." (Bold in original)
"A copy of the form (fully completed and signed on both sides) must be retained on the caseworking file. If any Enforcement Instructions and Guidance of the reasons for detention given on the form IS91R change it will be necessary to prepare and serve a new version of the form.
Again, any such changes must be **fully justified and correctly stated"** (Bold in original)" by the IO or person acting on behalf of the Secretary of State who is completing the form.
It is important that the detainee understands the contents of the IS91R. If he does not understand English, officers should ensure that the form's contents are interpreted.
Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers).

The six possible reasons for detention are set out on form IS91R and are listed below. The IO or person acting on behalf of the Secretary of State must tick all the reasons that apply to the particular case and, as indicated above, ensure that a fully justified explanation is retained on file setting out why the reasons ticked apply in the particular case:

- ♦ You are likely to abscond if given temporary admission or release.
- ♦ There is insufficient reliable information to decide on whether to grant you temporary admission or release.
- ♦ Your removal from the UK is imminent.
- ♦ You need to be detained whilst alternative arrangements are made for your care. Your release is not considered conducive to the public good.
- ♦ I am satisfied that your application may be decided quickly using the fast track asylum procedures

……

Fourteen factors are listed, which will form the basis of the reasons for the decision to detain. The IO or person acting on behalf of the Secretary of State must tick all those that apply to the particular case:

- ♦ You do not have enough close ties (for example, family or friends) to make it likely that you will stay in one place.
- ♦ You have previously failed to comply with conditions of your stay, temporary admission or release.
- ♦ You have previously absconded or escaped.
- ♦ On initial consideration, it appears that your application may be one which can be decided quickly.
- ♦ You have used or attempted to use deception in a way that leads us to consider that you may continue to deceive.

> ♦You have failed to give satisfactory or reliable answers to an immigration officer's enquiries.
> ♦You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK
> ♦You have previously failed, or refused to leave the UK when required to do so.
> ♦You are a young person without the care of a parent or guardian.
> ♦Your health gives serious cause for concern on grounds of your own wellbeing and/or public health or safety.
> ♦You are excluded from the UK at the personal direction of the Secretary of State.
> ♦You are detained for reasons of national security, the reasons are/will be set out in another letter.
> ♦Your previous unacceptable character, conduct or associations.
> ♦I consider this reasonably necessary in order to take your fingerprints because you have failed to provide them voluntarily.

iii) Ms Kilroy says that the instructions summarise the law properly- i.e. that detention may only occur for a proper lawful reason, and that the reasons must be identified, provided to the person detained, and noted. In the case of the Home Office, a form is provided for the purpose;

iv) she argues that the original detention on 24th June 2014 was for only one stated reason, namely that "on initial consideration, it appears that your application may be one which can be decided quickly." The claimed other reasons were not communicated to the Claimant. Indeed at no time were any other reasons given to the Claimant for his detention;

v) the reason actually given is not a reason capable of justifying detention pending appeal in the light of the Court of Appeal judgment (per Beatson LJ) in *Detention Action*, nor is it capable of justifying the detention of an individual before they have been screened for suitability for Fast Track in accordance with the Defendant's policy;

vi) the screening which did take place did not comply with the Defendant's policy as amended following the Court of Appeal's decision in *JB(Jamaica)* [2014] 1 WLR 836 because she did not ask the questions required about the documents the Claimant wished to rely on;

vii) the policy of the Defendant, consonant with general common law principles, is that a person should only be detained if there is no reasonable alternative;

viii) in any event after 8th July 2014, his detention is conceded to be unlawful in the light of the decision of the Court of Appeal (per Beatson LJ) in the second *Detention Action* appeal;

ix) after the appeal rights were exhausted, he could only lawfully be detained if his removal were imminent, and if there were no reasonable alternative.

x) he is entitled to the ordinary measure of damages, and not to nominal damages.

153. Ms Bayoumi argues that

i) he was lawfully detained on 24th June 2014. She relies on the File Copy of the form. She has no explanation why a different form was given to the Claimant;

ii) there was a risk assessment performed on 25th June 2014, although the document is unavailable;

iii) it was conceded that his detention was unlawful from 8th July to 28th July 2014, by reason of the Court of Appeal judgment. However from 28th July he was lawfully detained because his removal was imminent. Ms Bayoumi contended that no reasons were given on the notice of the Removal Directions;

iv) if his detention was unlawful, it was because there had been a breach of a public law duty. For that reason damages should not be of the ordinary measure. It was submitted that a breach of policy (such as serving a notice of detention) could not amount to a public law error in accordance with the principles set out at paragraphs 68, and 87-88 of the case of *Lumba*.

(a) Ground 2- discussion and conclusions

154. For the reasons set out above, I have found that the Claimant was given one reason, and one only, for his detention on 24th June 2014, namely that

> "on initial consideration, it appears that your application may be one which can be decided quickly."

155. If, of which I am far from satisfied, another form was filled out, of which the "File Copy" is a copy, I am satisfied that it was not provided to the Claimant. The reason actually given on the Notice actually given was not a sufficient reason to detain the Claimant, as is plain from the Defendant's own guidance, and from *Detention Action*. I have considerable doubts about the provenance of the "File Copy," but can make no conclusive adverse finding on its provenance in the absence of evidence from the Defendant which addresses the issue. It may be that the omission was realised, which explains the presence of the different "File Copy" which asserted reasons which fell within the guidance. But I must also record my great concern that the Defendant has disclosed no File Copy of the form signed by G Shukie and given to the Claimant on 24th June 2014.

156. It is for the Defendant to show that the detention was lawful. I am not satisfied that she has done so. It follows that the reasons she has since relied on for the Claimant's detention were not the actual reason for his detention. The actual notice of 8th July 2014 gave no reasons.

157. Turning now to the next document relied on, the document of 22nd July 2014, on which Ms Bayoumi places reliance, sets out the reason that

> "it has been decided that you will remain in detention- to effect your removal from the United Kingdom"

It says that the decision had been reached because

> "You do not have enough close ties to make it likely that you will stay in one place."

158. That is a new reason, never given before, and unsupported by any evidence from the Defendant. The Case Record, upon which Ms Bayoumi was frank that she placed great reliance, does not refer to it being served on the Claimant. The Fast Track Detention Record (page 381) of that date does not do so either. It is right of course that the factor given is one of those listed in the 14 factors in the guidance, but the reason relied on is *not* one of those given. It will also be noted that this was before the date of the Removal Directions, and before the appeal rights were exhausted

159. The document of 22nd July 2014 was said by Ms Bayoumi in her skeleton (paragraph 47) to confirm that he was to be removed from the UK. If that was said on instructions, it is good evidence of the unfortunate approach of the Defendant's officers. The decision of Judge Woodcraft was not given until that date, and there was still the question of an appeal to the Upper Tribunal, which was not determined until 6 days later on 28th July 2014. The Removal Directions were not given until 5th August 2014.

160. There is also nothing which suggests that any consideration was given to whether there was an alternative to detention. In particular, given the fact that he had son and daughter with settled addresses in the UK, there is nothing which addresses whether he could reside with one of them (as he had on his earlier visit) subject to conditions of residence and/or tagging. I am unable to accept that the Defendant has shown that this detention was lawful.

161. I turn now to the period from 28th July. As a matter of fact it was simply a continuation of what had gone before. However Ms Bayoumi argues that by that stage removal was imminent, and that therefore detention was lawful. In my judgement her argument cannot hold good until the date that the Removal Directions were given, namely 7th August 2014. But even then, there is no record of any reasons being given to the Claimant, save for those already given on 22nd July 2014, if they were in fact given.

162. I am prepared to accept, and do so, that as at 7th August 2014, one could properly say that removal was imminent, pursuant to Removal Directions, issued after a letter of refusal against which there had been an unsuccessful appeal. I am prepared to accept that it is probable that had the Defendant's officers applied her guidance properly, the Claimant would then have been taken into custody. But until that point I hold that the detention was unlawful. While it was unlawful after that point (in the absence of reasons) there was a reason which would have justified it, and any damages for that period should be nominal.

163. I confess to being puzzled by Ms Bayoumi's argument that in some way unlawful detention is less serious if caused by a breach of public duty. It smacks of the arguments unsuccessfully advanced in *Lumba* by the Home Secretary, and roundly rejected by Lord Dyson JSC. I do not consider that it reflects the approach of Lord Dyson JSC in *Lumba* (see paragraphs 67-8 and 86-88). This case is one where the illegality in question was directly relevant to the decision to detain (see *Lumba* paragraph 68). If this were a case where exemplary or aggravated damages were being claimed, I could understand the point being made. But a loss of liberty is a

serious matter, whether one is dealing with a UK citizen or an asylum seeker. The law of this country does not regard the liberty of one as less worthy of protection from unlawful interference at the hands of the state than the other. The fact that it has come about due to illegality, incompetence or some other cause less serious than a knowing abuse of power renders it no less damaging to the person detained. If a policeman arrests a person because he has got the law wrong, or has made a mistake about his powers, it is no defence to the grant of damages that it was not a deliberate abuse of power. If it were so, then one might be considering exemplary or aggravated damages. I see no reason why illegality, incompetence or confusion by Home Office staff should be treated any differently, subject to the limitations set out in *Lumba* at paragraph 68. None apply here.

What relief should be given ?

164. There are three issues to determine

i) what damages should be awarded for the unlawful detention of the Claimant?

ii) should the Court exercise its discretion to declare the removal unlawful?

iii) should the court order the Home Secretary to arrange his return to the United Kingdom?

165. On the first issue, both parties agreed that I should defer the assessment of damages, with directions. I agree. This issue will be referred to a Master of the Queen's Bench Division for assessment, in the absence of agreement. For the reasons given, damages should be assessed for the unlawful detention of the Claimant from 24th June 2014 until 7th August 2014. No discount is to be given for the fact that he was an asylum seeker, nor any increment added for the fact that the detention was unlawful. Damages should also be assessed for the unlawful detention from 7th to 19th August, but on a nominal basis.

166. On the second issue, I must start by emphasising a matter of considerable importance. There was no challenge before me to the legality of the setting of the Removal Directions, nor any attempt to quash the original letter refusing the claim for asylum, nor has there been any attempt to quash the decision of the Upper Tribunal to refuse permission to appeal the FTT judge's dismissal of the Claimant's appeal. I thus have no power to quash them, even if I were minded to. It follows that, although I have ruled that the Claimant was unlawfully removed because he had an extant asylum claim, all of the matters urged upon me as to the process by which the Claimant's case was dealt with are irrelevant unless they go to the question of the relief to be granted. The Defendant urges that the reasons given in both letters - that of 8th July and of 18th August (had it been served) - would hold good, and that the prospects of the Claimant overturning them are minimal. The Claimant contends that the letters are both tainted by what had gone before, and fail to address the deficiencies of the process, and that therefore the prospects of challenging a properly served second letter are not to be dismissed. That all goes to the second issue.

167. Even then, the Defendant opposes the Claimant being returned, and contends that any challenge can be conducted from Pakistan. The Claimant through Ms Kilroy says that

he should be permitted to return to the United Kingdom to pursue his challenge here. That goes to the third issue.

168. Ms Kilroy contends that the process was deficient because

i) he was a vulnerable applicant within the parameters of the *Detention Action* judgment, and should not have been placed on the Detention Fast Track;

ii) the interview should not have been conducted in the absence of the Claimant's lawyer;

iii) insufficient time had elapsed for a lawyer to be properly instructed;

iv) there were breaches of the instructions and guidance of the Defendant on the conduct of the DFT and of interviews;

v) the Claimant had medical conditions which affect the reliance which can be placed on what he said in interview;

vi) the lack of representation, and the inadequacy of the time allowed for instructions, resulted in errors being made about the documents referred to, and resulted in his case being inadequately represented;

vii) those matters affected the weight one can give to the first refusal letter;

viii) those conditions and matters also affected the fairness of the FTT appeal hearing, and the weight one can give the judgment;

ix) the subsequent consideration by Tribunal Judges of the applications to appeal was inadequate and failed to address the substantial issues raised;

x) since the letter of 18th August 2014 draws on the interviews and on the previous findings of the FTT, no weight should attach to its contents.

169. Ms Bayoumi contends that:

i) although a lawyer should have been present, there is no reason to think that the answers given in interview were unreliable;

ii) the adverse credibility findings about the Claimant's case for asylum were based upon those answers and the documents he produced. There is no reason to think that the presence of a lawyer or a certified translation of the documents, would have made any difference;

iii) The FTT judge made his own independent adverse credibility findings. The Defendant was entitled to rely on them in the letter of 18th August. There is no reason to think that any other outcome could have occurred.

The conduct of the process

170. I shall start by making three general observations

i) while each of the facets of the process of which complaint is made must be examined, it is of course necessary to stand back and see if the cumulative effect deprived it of fairness in the case of the Claimant;

ii) the Claimant's case was the subject of an appeal before an independent judge, and appropriate weight must be given to his findings, in the context in which they were made;

iii) part of that context is that a deliberately swift process, while not thereby rendered unfair, can only operate properly if all those engaged in it or whose decisions are affected by it (the Defendant's officers, representatives and Immigration Judges) do their bit to see its safeguards are observed.

171. I start with the medical position. I am satisfied that when the main interview started, the officer had no reason to think that the Claimant was unfit for interview. Although he had the misfortune to suffer from various ailments, there is nothing in the medical assessment or medical examination which suggested that he was not fit for interview or detention. But that cannot be a once for all judgment. Trial judges have the common experience of a person (witness or defendant) who is fit to take part in a criminal trial at the start of the day, then quite genuinely becoming overwrought or confused or feeling unwell as it continues, despite trying to downplay the effects upon them. (Some claims are of course not genuine.) At the end of the first interview the Claimant said that he felt dizzy. At least one of his conditions (described as vertigo) could have such an effect. While I have no reliable evidence that he was unfit for detention, that constitutes significant evidence which affects the weight which can be given to the answers he gave in interview.

172. However while I do not consider that he was vulnerable in the sense used in *Detention Action*, so that he was unsuitable for the Fast Track, that does not mean that therefore any failures in the process as they applied to him can be waved aside or overlooked.

173. I turn now to the absence of a representative from that interview. While some criticism is to be made of the representative for his absence, there can be no doubt that the approach of the Defendant's officers deserves considerable criticism. I have already referred above to the breach of paragraph 5.1 of the relevant guidance, and to the clear entry in the Case Record that the interview booked for 1st July would have to be rearranged. I have already remarked that I have no evidence from the officer on the reasons why she decided to go ahead with the interview.

174. I have already referred to paragraph 221 of the judgment of Ouseley J in *Detention Action* on the importance of giving sufficient time for instructions to be taken. While the "4 clear days" concept is not a rule as such, it gives a good yardstick of what is reasonable. The fact is here that a 57 year old man, whose first language was not English, who was not in perfect health and whose answers had to be interpreted, was interviewed by the officer in the knowledge that he was unrepresented, and, it must be inferred, in the knowledge that to do so was a breach of express guidance. The solicitor had only received authority on 30th June.

175. It is correct that it is recorded in a pro forma section (page 130) that he said that he was still feeling fit and well, but there is no sign that, after he said that he was feeling dizzy and was " in trouble now", the officer asked any questions about the effect of

his dizziness. It was not as if this was a new matter. The examination on 26th June 2014 by Dr Maniar had referred to his vertigo.

176. With that starting point I turn to the next issue relied on by the Claimant, which related to the letters. I am unimpressed by the points made by the Defendant in the letter of 8th July 2014 that they were not certified translations. It is simply unrealistic to have expected that to have occurred in a process where he had not had the chance of seeing his representatives or taking advice. There was an interpreter there, whom the officer could have asked for a full translation. The guidance for Detention Fast Track processes at paragraph 2.2 (supra) emphasises the importance of the specific nature of the documents being ascertained and recorded. The discrepancy between the dates on the letters and their dates of delivery only emerged at a later stage.

177. All that having been said, I am not taken by the complaints made about the FTT judge's treatment of the letters. By then, the lawyers had been instructed, so that one could have expected a certified translation. But in any event his rejection of the case based on the letters does not depend on the dates that they were written but on the account of their delivery.

178. More significant is the general complaint that the solicitors could and should have done more work to get other material which could corroborate the case about the role of the Taliban, and (especially) about the Claimant's role in HEI/HIG, or to get medical evidence about the Claimant's condition. It is true of course that counsel did not ask for an adjournment or complain that more time was required. In this court's view there may be strong grounds for criticism of the solicitors and counsel then instructed. I do not agree with Judges Chalkley and Bidder QC on the absence of complaint by the Claimant for reasons already given. But Judge Walker was not under a duty to test whether counsel and solicitors were giving good advice, unless it was apparent to him that they were not doing the job properly. But that does not vitiate the duty on this court to stand back and ask if the effect of what had occurred affected the fairness of the hearing. Was what happened at the hearing vitiated by the serious failures that had already occurred?

179. In my judgment the best way of looking at that is to ask whether the events after 1st July 2014, and the instruction of solicitors and counsel, were sufficient to put right any effects of what had occurred. It is here that one must look at the situation in the round. The letter of refusal had emerged just 7 days (3 clear working days) after the first interview and was much concerned with the credibility of answers given at an interview through an interpreter, which should not have been conducted in the absence of his representatives, and at which he complained he was unwell. The second interview (where it also appears that the representative appear was not present) further informed the evidence at the FTT hearing about membership and activities with HEI/HIG. Only 5 (2 clear working days) elapsed after the second.

180. A period of just 8 days (5 clear working days) elapsed before the FTT hearing. The witness statement before the FTT said that he had health problems.

181. If the process had been conducted properly, with the representatives at the interview, and where there had been no complaint of illness, than it would still have been a tight timetable, albeit fair. But once those matters are added in, in my judgment the risk of

unfairness was increased to the point where it became significant, and its effect on what happened cannot be excluded.

182. I therefore have very considerable misgivings about the overall fairness of the procedure. For the reasons already given, I place no weight on the reasons given for the subsequent refusal to permit an appeal to the Upper Tribunal.

Should I grant relief on the first ground*?*

183. I am therefore unpersuaded that in the exercise of my discretion I should refuse relief on the basis of the first refusal letter, or on the basis of the decisions of Judge Woodcraft or Judge Chalkley.

184. So far as the letter of 18th August is concerned;

i) if it was written, it was written in the context of what had happened up to that point, which as I have found was affected by unfairness;

ii) So far as its first point about the solicitors was concerned, while I accept that it is true that they were instructed on 30th June 2014, given their absence from the interview, it is unlikely to be the case that they were able to translate the letters in time for the refusal letter of 8th July;

iii) the Defendant placed weight on the decision of the First Tier Tribunal judge. In its discussion of the contention that there had been insufficient time, it does not address the argument about the lack of time between the allocation into the DFT and the conduct of the First Interview. It is also apparent now (since disclosure) of the fact that the interview was held in the absence of the representative in breach of instructions;

iv) as to the reliance on Judge Woodcraft's calculation of days since the solicitor's instruction, I have already noted they were not instructed until the day before the interview. Judge Woodcraft must have been misinformed about the dates, or had misunderstood them;

v) as to the question of his medical conditions, it failed to address the important issue of the Claimant's fitness for the purposes of the process. While I do not doubt his fitness to be detained I do question his fitness at the time of the first substantial interview, upon whose answers so much reliance was placed;

vi) but above all else, the letter of 18th August 2014 was in any event, as I have found, not served, even it had been drafted.

185. I am therefore unable to accept Ms Bayoumi's submission that whatever had happened beforehand, the letter of 18th August is an answer to the claim. I am thus quite unpersuaded that the terms of the letter of 18th August should persuade me that no relief should be granted. The Home Secretary will be bound to consider the facts as they are at the date of her determination of the claim, and in the light of all material put before her.

186. But that still leaves open the question of the relief that should be granted. The choice lies between

i) declaring that the removal was unlawful, but not ordering that the Claimant be returned to the United Kingdom; and

ii) declaring that the removal was unlawful, but ordering that the Claimant be returned to the United Kingdom

187. I have no doubt that his removal was unlawful, because his claim was undetermined. Even if it was, he had not been served. Given the deficiencies in the process, I consider that I should exercise my discretion to make the declaration accordingly. I therefore turn to the third issue.

188. Ms Kilroy says, by reference to the third and fourth witness statements of Mr Khashy of 12th November 2014 and 6th January 2015 respectively that the Claimant is in hiding in Pakistan and in fear, and that his health is suffering. If his claim is made and rejected, then the conduct of an appeal will be made much more difficult if he is unable to give evidence at the hearing. It would involve the oddity of an asylum claim being considered in one of the countries where he says that the Claimant says he lives in fear.

189. Ms Kilroy referred to the judgement of Ouseley J in *Ahmed v Home Secretary* [2009] EWHC 2676 (Admin), where the judge had to grapple with similar problems.

190. On the other hand Ms Bayoumi says that the evidence of Mr Khashy on this topic should carry no weight, and refers to the lack of medical evidence. She argues that his claim can be made from Pakistan.

191. It is not for this Court to say whether or not the Claimant's case was made out or should be accepted if made again. His claim of 5th August was not lawfully determined. Bringing him back to the UK may be an expensive and pointless exercise if his claim for asylum is rejected.

192. If his claim is conducted while he is in Pakistan, the Claimant will be able to refer to the letters (which are already in the UK and with the Defendant) and will be able to submit any evidence obtainable in Pakistan (such as medical evidence or other evidence relating to his case). He will also be able to submit any evidence he wishes. His representatives will be able to obtain a country report. If there has to be a further interview by those reporting to the Defendant, no doubt that can be arranged at the High Commission.

193. However the fact is that he was removed unlawfully, after a Fast Track process in which there were breaches of guidance, unlawful detention, and a lingering perception of unfairness in the application of the process. It follows that the processes devised for the fair treatment of claims for asylum have not been applied in his case. I can also see that the pursuit of an asylum claim from Pakistan presents very substantial difficulties.

194. In *Ahmed* Ouseley J had to consider what to do when a claimant had been removed from the UK after the Home Secretary had wrongfully treated his representations as not amounting to a new claim, and where two deputy High Court Judges (one at the stage of the application for permission, and the other on an application for an

injunction) had refused to prevent his removal, on the basis that there was no arguable case. His approach is instructive

"2 …….A few days later the claimant was indeed removed to Iraq.

3. The oral application for permission came before me. I granted permission and dealt with the matter as a substantive hearing. As a result of which I concluded that it was arguable that there was a realistic prospect that an immigration judge might find that there was family life but which was not a particularly difficult decision, but more marginally that removal was disproportionate.

4. The Secretary of State's decision to the contrary was accordingly irrational. The question of what other relief should then follow was adjourned for argument, which I have had the benefit of, together with written submissions. In the end the position of the parties become quite simple. Miss Chapman contends that there has not been a lawful decision on the fresh claim, the only lawful decision on the fresh claim, in the light of the judgment I have come to, would not be that the claimant should be granted leave to remain but that the Secretary of State in rejecting the fresh claim should recognise that there was a realistic prospect that an immigration judge would reach a different decision and accord a right of appeal in country against the refusal of leave to remain. She contends that that being so, the remedy in addition to the quashing of the decision has to include a requirement that the Secretary of State return Mr Ahmed to the United Kingdom in order that here the Secretary of State can then make a fresh and lawful decision rejecting the fresh claim, but recognising the right of appeal and refusing leave to remain which would grant the in-country right of appeal.

5. Mr Singh, for the Secretary of State says that at the time when the removal was carried out it had the sanction of two different High Court judges. It was not unlawful. There was no requirement, as the applicant had left the country, for there to be a fresh consideration. Indeed, as that would only lead to a refusal of leave to remain, that would be redundant as the claimant was out of the country any way. The remedy that should follow from my decision would be that the claimant should make an application for entry clearance, that following my judgment, consistently with it, it would be refused, on the grounds that there was no breach of the claimant's Article 8 rights only that it was merely arguable that there was. The claimant could then appeal against that decision and the appeal, out of country, could be adequately managed by the sponsor giving evidence in the United Kingdom and some DVD, possibly video link from somewhere in Iraq to the United Kingdom sufficing for his evidence.

6. In my judgment, in essence Miss Chapman's submissions are right. I entirely accept that when removal took place, the removal took place with the permission of the court and whatever may have been the possibilities of a challenge to Mr Ockelton's decision, none was made. I also accept, in the light of my decision, that the removal did not breach any of Mr Ahmed's Article 8 rights. It is merely arguable that that they did.

7. However, it is also the position that the consequence of my decision is that the Secretary of State's decision to remove has been held to be unlawful, because it is arguably a breach of Article 8.

8. In those circumstances, had the Deputy High Court Judges known what decision would be reached, they would not have made the orders they did. The claimant would still be in the United Kingdom, by now pursuing an in-country appeal in the AIT.

9. If the Secretary of State's submissions are right, these proceedings, even though ultimately successful in the claimant's hands, and even though they had not reached fruition at the time that the Secretary of State lawfully acted in the way he did, have effectively become a complete waste of time and the claimant is in no better a position as a result of the order I make, the decision that I have arrived at, than he would have been had he had no such decision from the court at all. The consequence therefore is that although I have concluded that the decision upon which the Secretary of State acted was unlawful, the person who suffers such disadvantage as flows from it, on Mr Singh's submission, is the person against whom the unlawful decision was made and who has been disadvantaged by it.

10. I think Mr Singh fully understands that that is not a state of affairs which is obviously appealing to a court which would wish to see those who have been disadvantaged by a decision which the court has held to be unlawful, given an effective remedy in response to the unlawfulness. It seems to me that there are significant drawbacks to simply having an out-of-country appeal. The first, of course, is that the appeal is out of country rather than with the obvious advantages that accrue from having an in-country appeal, with the individual able to give his evidence personally and, important to a person on a matter of this sort, to be tested about his claim before a decision on it is reached. That is one point.

11. The second is that there are plainly in relation to Iraq some difficulties -- I do not suggest they are insuperable -- but there are difficulties in the way of communicating via video link from northern Iraq to London in terms of suites, hours, hire or travelling to Oman in order to make the application for it to be rejected in order to set up the appeal, which can then be carried out by video link.

12. The third factor which has some weight is that the position of an in-country appellant would be judged as at the date of the appeal and would be able to take account of the evolution of family life from the date of decision. Not without importance where the child who is essentially the foundation for this was only 4 months old, no doubt but older now.

13. Whereas the out-of-country appeal lacks the opportunity and indeed has certain problems in relation to the evidence date for the actual development of the family life, which is the foundation of the appeal, it may not always be the case that these disadvantages meant that the Secretary of State is obliged in these circumstances to bring an individual back. But it would appear to me, in this case, right that in order to make effective the remedy of the quashing, and in view of the Secretary of State's reluctance to bring the claimant back without an order,

> it seems to me that I must make an order requiring the claimant to be brought back to the United Kingdom by the Secretary of State and the Secretary of State should take all reasonable steps to contact him and to facilitate his return. I am quite happy to consider the precise terminology of such an order if it is not agreed.
>
> 14. I would just add two other observations. The first is that the courts are asked by the Secretary of State and indeed are perfectly ready to adopt a robust attitude towards those whose claims are clogging up the court and have no merit. It is right that they should be removed as swiftly as possible. It will be a very rare case indeed, I expect, where the circumstances such as they are here occur.
>
> 15. It would be very unfortunate if courts were to feel that they ought not to adopt a robust approach in relation to unmeritorious cases, less should it perchance turn out that they have been overrobust, there is no further remedy available to the person who may suffer as a consequence of that overrobustness. As that overrobustness is encouraged by the Secretary of State, it is the Secretary of State who should do what he can to bring the individual back and should recognise that if he does not, courts may be more reluctant in the future to adopt an approach which is robust and will simply wait until all legal proceedings have concluded before reaching a final view on the merits. …….
>
> 16. For those reasons I propose to quash the decision of the Secretary of State on 26th December and order him to take all reasonable measures to procure the return to the United Kingdom of the claimant and upon his being back into United Kingdom the Secretary of State will need to make an order he will need to make a further decision for there to be a basis for removal.

195. There are therefore several parallels with this case. Having considered the approach of a judge with huge experience of this kind of case, I have therefore decided that the fairest course is to order that the Home Secretary takes steps to return him to the United Kingdom for his original asylum claim to be processed and considered, in the light of all evidence now obtainable. I express no view whatever on its outcome, nor on whether or not the facts on his return will be such that the Claimant should be detained.

196. I therefore resolve the third issue in favour of the Claimant.

197. I therefore order that

i) there is a declaration that the Claimant's removal from the United Kingdom on 19th August 2014 was unlawful;

ii) the Defendant must take all reasonable measures to procure the return to the United Kingdom of the claimant and upon his being back in the United Kingdom the Secretary of State will need to make a further decision on any application by the Claimant for asylum

iii) the Defendant pay damages to the Claimant for his unlawful detention from 24th June 2014 to 19th August 2014, to be assessed on the following basis

a) until 7th August 2014 on the basis that he was unlawfully detained;

b) from 7th August 2014 on the basis that he was unlawfully detained, but on a nominal basis only;

iv) the issue of the quantum of damages is referred to a Master of the Queens Bench Division for assessment in accordance with the terms of this judgment, and for any directions on that issue.