Case No: CO/10213/2013

Neutral Citation Number: [2013] EWHC 3921 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 December 2013

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

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Between :

THE QUEEN on the application of ABDI ABDILAHI ISMAIL	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

G Ó Ceallaigh (instructed by **Leigh Day**) for the **Claimant**
J Thelen (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 5th November & 2nd December 2013

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Judgment

Mrs Justice Lang:

1. The Claimant, a national of Somalia, applies for judicial review of the Defendant's decision to detain him in immigration detention with a view to deportation under section 32, UK Borders Act 2007, following his conviction for assault. He seeks a declaration that his ongoing detention is unlawful and that his rights under Art. 5 ECHR have been breached. He has applied for a mandatory order for his release, and damages for false imprisonment.

2. The grounds of his application are:

   i) his detention is in breach of the *Hardial Singh* principles;

   ii) the Secretary of State has failed to consider the best interests of the Claimant's children, under her own policy and under section 55;

   iii) his detention is in breach of Art. 5 ECHR.

3. On 3rd September 2013, permission was granted on grounds 1 and 3, but refused on ground 2. A renewed application for permission on ground 2 was listed with the substantive hearing, but not pursued.

Statutory framework

4. Under UK Borders Act 2007, section 32(5), the Secretary of State must deport a person who is not a British citizen and who is not exempt, following conviction for a criminal offence for which he has been sentenced to 12 months imprisonment or more. Section 33 sets out exceptions to the requirement to deport, which include cases in which removal under a deportation order would breach a person's rights under the European Convention on Human Rights (ECHR) or the Refugee Convention or under EU law.

5. By section 36(1), a person who has served a period of imprisonment may be detained while the Secretary of State considers whether section 32(5) applies, and where the Secretary of State thinks that section 32(5) does apply, pending the making of the deportation order.

6. By virtue of the Human Rights Act 1998, s.6(1), it is unlawful for the Defendant to act in a way which is incompatible with a Convention right.

7. Article 5 ECHR provides that 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) 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.

Case law

8. In order to be lawful, immigration detention must be for one of the statutory purposes for which the power to detain is given, and it must accord with the limitations implied by domestic and European Court of Human Rights ("ECtHR") case law.

9. The ECtHR has held that, in order for detention to be lawful under Art. 5, deportation proceedings must be pursued with "due diligence", including pursuing the required documentation to effect deportation: *Mikolenko v Estonia* App. No. 10664/05; *Massoud v Malta* App. No. 24340/08.

10. The burden is on the Defendant to justify the legality of the detention (*R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, per Lord Dyson at [44]).

11. The power to detain is subject to the limitations set out in *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB), [1984] 1 WLR 704. In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196, Dyson LJ described the *Hardial Singh* principles in the following terms:

> "46. There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in re Hardial Singh [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in Tan Le Tam v Tai A Chau Detention Centre [1997] AC 97, 111A-D … . In my judgment, Mr Robb correctly submitted that the following four principles emerge:
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> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
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> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
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> iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
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> iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.
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> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person 'pending removal' for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.

> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation, the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences".

12. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, Lord Dyson said, at [22] and [24]:

> "22. It is common ground that my statement in R (I) v Secretary of State for the Home Department [2003] INLR 196, para 46 correctly encapsulates the principles …
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> 24. As to the second principle, in my view this too is properly derived from Hardial Singh. Woolf J. said that (i) the power of detention is limited to a period reasonably necessary for the purpose (as I would say) of facilitating deportation; (ii) what is reasonable depends on the circumstances of the particular case; and (iii) the power to detain ceases when it is apparent that deportation will not be possible "within a reasonable period". It is clear at least from (iii) that Woolf J. was not saying that a person can be detained indefinitely provided that the Secretary of State is doing all she reasonably can to effect the deportation."

13. In *Lumba*, at paragraphs [122] to [128], Lord Dyson rejected the submission that a refusal to return voluntarily both rendered the detention reasonable, and indicated an intention to abscond if released. The Secretary of State had to satisfy the court that, in the circumstances of the particular case, it was right to infer from a detainee's refusal to return voluntarily that he was likely to abscond. If he wished to challenge his deportation on ECHR or Refugee Convention grounds, it was reasonable for him to refuse the offer of repatriation pending the determination of those proceedings.

14. In *R (Khadir) v Secretary of State for the Home Department* [2006] 1 A.C. 207, Lord Brown helpfully reviewed the detention cases at [21] – [23]:

> "21. It is time to come to a line of cases which have considered the exercise of the power of detention, not in fact in the context of removing those refused leave to enter under Schedule 2 but rather in relation to those whom it is intended to deport under Schedule 3. The first of these cases was *R v Governor of Durham Prison, Ex p. Hardial Singh* [1984] 1 WLE 704 where, following a two-year prison sentence for burglary, the applicant was

served with a deportation order and detained for five months under paragraph 2(3) of Schedule 3 to the 1971 Act whilst the Home Office attempted to obtain for him a travel document from the Indian High Commission.....[Lord Brown then sets out the passage from *Hardial Singh* which is cited above]

22. That approach was followed by Laws J in *In re Mahmod (Wasfi Suleman)* [1995] Imm AR 311 and by the Court of Appeal in *R (I) v Secretary of State for the Home Department* [2003] INLR 196, both similarly concerned with applicants who had been detained for long periods under paragraph 2(3) of Schedule 2. Laws J in *Mahmod* said this, at p 314:

> "While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards. In this case I regard it as entirely unacceptable that this man should have been detained for the length of time he has [ten months] while nothing but fruitless negotiations have been carried on."

Laws J expressed himself "entirely satisfied" that whatever would have been "a reasonable period for this man's continued detention ... has certainly now been exceeded" and ordered his immediate release.

23. In *I*, giving my reasons (as part of the majority of the Court of Appeal) for having released the applicant from detention at the hearing of the appeal the previous month, I said this, at p 206, paras 37-38:

> "Given ... that the appellant had by then been in administrative detention for nearly 16 months and that the Secretary of State could establish no more than a hope of being able to remove him forcibly by the summer, substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period ... In short, I came to the clear conclusion that ... it was simply not justifiable to detain the appellant a day longer; the legal limits of the power had by then been exhausted."

15. It is instructive to note that the periods of detention which were considered to be unreasonable in the earlier cases reviewed by Lord Brown were 5 months (*Hardial Singh*), 10 months (*Mahmod*) and nearly 16 months (*I*). Periods of detention have been much longer in many subsequent cases.

16. In *R (A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804, Toulson LJ said:

> "45. ….a pertinent question in this case is whether, and to what extent, a risk of the individual absconding and a risk of him re-offending may be taken into account in considering what may be a reasonable time for

> attempting to bring about his removal or departure. The way I would put it is that there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty. Counsel for both parties agreed with that approach as a matter of principle".
>
> "55. A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

17. In *R (JS (Sudan)) v Secretary of State for the Home Department* [2013] EWCA Civ 1378, the Court of Appeal approved the modifications to the *Hardial Singh* principles made by Nicol J. in *Hussein v Secretary of State for the Home Department* [2009] EWHC 2492 (Admin) at [44]. The essence of the modification was that the Secretary of State must act with reasonable diligence and expedition to determine whether any of the exceptions to deportation in section 33 apply, and detention should not be continued if resolution of the section 33 issues, or any subsequent deportation, or both together, will take more than a reasonable time.

18. In *JS (Sudan)*, Macfarlane LJ, giving the judgment of the court, rejected the submission that a 6 month yardstick should be "the norm" (at [51]) and gave guidance on the assessment of a reasonable period:

> "52. The focus of this case is upon the period of detention and the administrative activity, or inactivity, that took place during this time. It is, however, necessary to stress that the assessment of what is a "reasonable" time needs to reflect the overall context. That context is of a foreign national, who has no right to remain in this jurisdiction, who has been convicted of serious criminal offences, in relation to whom the criminal court has made a recommendation for deportation and in respect of whom, as a matter of law, the Secretary of State is required to implement deportation unless the individual is seen to fall within one of the narrow statutory exceptions. Moreover the determination by the Secretary of State of whether, despite the strong policy and statutory impetus favouring deportation, such an individual should, exceptionally, be given leave to remain is a serious and important matter requiring proper and careful

> evaluation which, of necessity, will occupy a period of time. Any evaluation of that period of time, must, therefore, reflect the gravity of the decision that is to be taken.
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> 53. Again, looking at aspects of reasonableness in this context, it will be the case that the individual has committed a serious criminal offence. The individual will however, only be in criminal detention because he has already served the full term of the sentence imposed by the criminal court. His past criminal offending, of itself, cannot be any justification for implementing or extending his time in immigration detention.
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> 54. A further factor in the context of reasonableness is that the individual will have no statutory right to challenge the Secretary of State's decision, if it is to proceed with deportation, until that decision has been made…."

19. In *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112, Richards LJ observed (at [68]) that the Judge had been right to give proper weight to the very long period of detention of 38 months and "rightly treated it as a factor of considerable and increasing importance as the situation dragged on. As the period of detention gets longer, the greater the degree of certainty and proximity of removal I would expect to be required in order to justify continued detention."

20. Richards LJ also accepted (at [68]) that a detainee's failure to co-operate may cause delay for which he, not the Secretary of State, is responsible. Lack of co-operation may also be relevant to the overall assessment of the risk of absconding.

21. In *R (Wang) v Secretary of State for the Home Department* [2009] EWHC 1578 (Admin), Mitting J took into account the fact that, although the Secretary of State alleged non co-operation, he had not exercised his powers under section 35 Asylum and Immigration (Treatment of Claimants etc) Act 2004 to require the claimant's co-operation to enable a travel document to be obtained, and to prosecute for non-compliance. Mitting J concluded that, on the facts of that case, there was an insufficient basis upon which either to prosecute or convict the claimant.

<u>The Defendant's detention policy</u>

22. The statutory powers to detain have to be exercised in accordance with the Defendant's published policies on detention, in Chapter 55 of the Enforcement Instructions and Guidance ("EIG"), unless there is good reason to depart from them.

23. Chapter 55 of the '*Enforcement Instructions and Guidance* ("EIG") sets out the Defendant's policy with regard to 'Detention and Temporary Release'. Paragraph 55.1.1 sets out a general presumption in favour of temporary admission or release rather than detention. 55.1.2 provides that cases concerning foreign national prisoners are subject to the general policy in 55.1.1 and that the starting point in such cases "remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention".

24. However, 55.1.2 goes on to say that the nature of foreign national prisoner cases means that special attention must be paid to their individual circumstances and provides that in any case in which the criteria for considering deportation action are met:

> "the risk of re-offending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of temporary admission or release is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding."

25. At 55.1.3 it states:

> "Substantial weight must be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending and the seriousness of the harm if the person does re-offend must be considered. Where the offence which has triggered deportation is included in the list at page 63, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of release. In cases involving these serious offences, therefore, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences."

26. The list entitled "Crimes where release from immigration detention or at the end of custody would be unlikely" includes "assault occasioning actual bodily harm" (the offence for which the Claimant was convicted) and also "other knife offences".

Factual history

27. The Claimant was born on 15th October 1980, and is now aged 33. He is a citizen of Somalia, with indefinite leave to remain in the UK.

28. His account was that he was born in Mogadishu, Somalia. When he was a young child, his father, Abdullahi Ismail, died. His mother re-married and moved away to live with another family, leaving him and his younger sister in the care of her sister (his aunt), Khadra Abdirahman Omar-Hashi. His aunt was originally from Hargesia, Somaliland, but moved to Mogadishu upon marriage. While he was still living in Mogadishu with his aunt, his mother moved to Europe. He has had no contact with her and does not know her whereabouts.

29. The Claimant's aunt fled to Ethiopia to escape the civil war in Somalia with her own child, the Claimant and his sister. They entered the UK on 3rd October 1993, on a GV3 visa in the name of Amina Mohammed that had been issued under the family reunion policy. The Claimant's aunt said she was the wife of Abdi Ahmed Hussain, a Somali national, who was settled in the UK. She said that the Claimant was one of her children listed on the GV3.

30. On 1st June 1994, the Claimant's aunt claimed asylum with her dependant children, and the Claimant and his sister as her dependant nephew and niece. She said that her real name was Khadra Abdirahman Omar Hashi, and that in Ethiopia she had stolen the identity card of her friend Amina Mohammed, replacing Amina's photograph with her own. The Defendant now doubts this account as the photograph and mother's details in Amina Mohammed's application for entry clearance (sent through from the British Embassy in Addis Ababa) were the same in the documents subsequently relied upon by the aunt.

31. On 15th March 1996 the Claimant was given exceptional leave to remain, as a dependant of his aunt. On 16th November 2001, the Claimant was given indefinite leave to remain, as a dependent of his aunt, under the overstayers scheme.

32. The Claimant has been in the UK since the age of 12, and he has attended UK schools. He has been employed as an apprentice mechanic; as a security guard; in a packaging plant, a call centre and in his uncle's restaurant in Southall.

33. On 21st May 2007 he married a Dutch citizen, Ayna Fahi, in an Islamic religious ceremony. They lived in Leicestershire and had two children, Selma, born on 28th November 2007 and Raht, born on 9th January 2009. They were divorced on 19th February 2011. According to the Claimant, he visited his children, until he was sent to prison on 28th November 2011. Thereafter his only contact with them was by telephone. Leicestershire City Social Services contacted his ex-wife Ayna on 28th March 2013, in response to requests from UKBA. She said they had had no contact from the Claimant for over two years.

34. Prior to his imprisonment, he maintained links with his aunt and his cousins, and his sister, who have been naturalised as British citizens. He has a large extended family of aunts, uncles and cousins, who are part of the Somalian community in the UK. He speaks Somali with a northern dialect. Although he spent his early childhood there, he has no ties to Somalia, and does not have any family or friends there, as far as is known. He has never had a Somalian passport.

35. The Claimant has been convicted and sentenced for a number of offences and breaches of court orders:

    i) 18.5.00: convicted of a Theft Act 1968 offence, and fined.

    ii) 29.9.00: convicted of theft, possession of cannabis and failing to surrender to bail and given a probation order and concurrent community sentence.

    iii) 3.4.02: convicted on 3 charges of failing to surrender to custody, and sentenced to 1 day's imprisonment.

iv) 08.3.06: convicted of handling stolen goods and sentenced to 28 days imprisonment.

v) 29.6.06: convicted of assault on a constable and fined £50 plus compensation and costs.

vi) 27.2.07: convicted of three charges of racially aggravated threatening behaviour, and failure to surrender to bail. He received a community work requirement and was fined (which order was subsequently varied due to poor compliance).

vii) 17.3.08: breach of a community order.

viii) 9.5.08: breach of a community order.

ix) 6.10.11: at Harrow Crown Court, after a trial by jury, he was convicted of assault occasioning actual bodily harm. On 28.11.11, he was sentenced to 15 months imprisonment.

36. In his sentencing remarks at Harrow Crown Court, H.H. Judge White described how the Claimant attacked a friend with a knife, in his leg and face, for no apparent reason, after he had been consuming alcohol. Fortunately there were no long-term effects on the victim, but the consequences could have been much more serious.

37. The custodial part of his sentence ended on 21st May 2012 and his licence terminated on 5th January 2013.

Deportation procedures

38. On 9 January 2012, the Claimant was notified of his liability to automatic deportation under the UK Borders Act 2007, section 32(5). Following release from prison on 21st May 2012, he was immediately detained pursuant to UK Borders Act 2007, section 36(1). He has been detained ever since in various locations.

39. A notice of decision to deport and a deportation order, dated 5th November 2013, were served just before the substantive hearing on 6th November 2013. The accompanying reasons stated that deportation was required under section 32(5) Borders Act 2007; none of the exceptions applied. The Defendant accepted that removal from the UK would interfere with his family and private life under Art. 8 ECHR, as he had been settled in the UK since he was aged 12, and he had close family in the UK, including two children. However, the Defendant concluded that the interference was in the public interest and was in accordance with the permissible aims of the prevention of disorder and crime and the protection of the rights and freedoms of others.

40. The Defendant decided that his place of origin was Hargeisa, Somaliland, and so he could be removed there. Alternatively, if he preferred, he would be removed to Mogadishu, Somalia. The Defendant concluded that removal to Somalia would not place him at risk contrary to Art. 3 ECHR or Article 15(c) of the Qualification Directive.

41. The hearing on 6th November was adjourned to enable the Claimant to see the documents and evidence upon which the Defendant had made her decision, and to

consider his response. Thereafter the Defendant served a supplementary deportation notice, on 26th November 2013, which corrected errors in the previous notice (in particular, acknowledging that his children were British not Dutch) and added further details about his lineage.

42. The Claimant has since appealed to the First-tier Tribunal against the decision to deport.

Length of detention

43. The Claimant was detained for immigration purposes with effect from 21st May 2012. At the date of the second hearing before me, he had been in detention for 1 year, 6 months and 11 days. Unless granted bail, he is likely to be in detention for at least another year while his deportation appeal is decided. In my view, these are lengthy periods.

44. The Claimant cannot be deported until his appeal rights are exhausted. His appeal to the First-tier Tribunal (FTT) is listed to be heard on 20th January 2014. However, that hearing date may not be effective because he has only just been able to instruct immigration solicitors, who may not be able to prepare his appeal in time. His present solicitors are not able to act for him in his immigration appeal.

45. In my judgment, the FTT is unlikely to be in a position to determine the appeal, in a way which is fair to both parties, until the authorities in Somaliland have notified UKBA whether or not they will allow the Claimant entry. According to Mr Alex Munson, Executive Officer in Criminal Casework, and Ms Anne Scruton, Country Manager Africa 1 of the Country Returns Operation and Strategy Team, the Claimant's Somaliland Referral Form (together with his bio-data forms and other supporting documents) was sent to the Migration Delivery Officer in Ethiopia on 14th November 2013. The Migration Delivery Officer will contact the Somaliland authorities who will undertake pre-verification checks. Somaliland does not have a conventional national registration system so clan chiefs are asked to verify the identity of individuals and families within their clan group. No one was able to tell me how long it would take before a reply was received from the Somaliland authorities. Although earlier cases indicate that there was a Memorandum of Understanding with Somaliland, the Defendant has not sought to rely upon any such Memorandum in this case.

46. The determination of his appeal by the FTT may be delayed by the forthcoming country guidance case on Somalia, intended to update existing country guidance, which is expected to be heard by the Upper Chamber (Immigration and Asylum) (UTIAC) in January 2014. The issues are:

> "Whether the current situation in Mogadishu is such as to entitle a national of Somalia whose home area is Mogadishu to succeed in their claims for refugee status, humanitarian protection or protection against refoulment under Articles 2 and 3 of the ECHR solely on the basis that they are civilians and do not have powerful actors in a position to afford them adequate protection."

Typically, country guidance decisions from UTIAC are reserved for several months because of the complexity of the issues and the volume of expert evidence. Of course, if the Somaliland authorities agree that the Claimant is a citizen of Somaliland and consent to entry, the alternative option of removal to Mogadishu is unlikely to be in play any longer.

47. It was common ground before me that, in accordance with usual practice, the FTT would be likely to reserve its decision, and promulgation would be about 6 to 8 weeks after the hearing. If, as is likely, the unsuccessful party appealed, the appeal process would take about 3 months if permission to appeal was ultimately refused by both the FTT and UTIAC. If, on the other hand, permission to appeal was granted, the process would take about 9 months. An appeal to the Court of Appeal would extend the time still further, but as that is an exceptional course, I have not included it in my calculation.

48. These are the reasons for my conclusion that the Claimant is unlikely to be deported, if at all, for at least another year from now.

Deportation to Mogadishu, Somalia

49. The Defendant faces significant obstacles in effecting enforced removals to Mogadishu, Somalia, both for logistical and human rights reasons. Voluntary removals do not present the same difficulties.

50. The evidence indicated that there has been only one enforced removal since February 2012. It took place in November 2012. Currently there are some 23 Somali nationals in detention awaiting removal, though it is unclear how many are awaiting removal to Mogadishu, as opposed to other Somalian destinations.

51. A letter from the Treasury Solicitor dated 12th November 2013, stated that enforcing removals to Mogadishu has "logistically been extremely difficult". However, it was anticipated that more effective enforced removals would take place in future. Ms Thelen was instructed not to disclose to me what these logistical difficulties were, or what the expected improvement was, other than to indicate that they related to problems in obtaining airplane flights for those being forcibly removed. The Defendant expects enforced removals to Mogadishu to re-commence in 2014.

52. The obstacles to deportation to Mogadishu on human rights grounds have been well documented in UK and international reports, and in case law. Civil war broke out in Somalia after the collapse of its government in January 1991. Since 2007, Al Shabaab, an Islamist force with links to Al Qaida, has been battling for power, and thousands of civilians have been displaced and/or killed.

53. UTIAC gave authoritative country guidance in *AMM & Ors v Secretary of State for the Home Department* [2011] UKUT 00445 (IAC) with the United Nations High Commissioner for Refugees as intervener. In relation to Mogadishu, its conclusion (taken from the headnote) was as follows:

> "1) Despite the withdrawal in early August 2011 of Al-Shabab conventional forces from at least most of Mogadishu, there remains in general a real risk of Article 15(c) harm for the

> majority of those returning to that city after a significant period of time abroad. Such a risk does not arise in the case of a person connected with powerful actors or belonging to a category of middle class or professional persons, who can live to a reasonable standard in circumstances where the Article 15(c) risk, which exists for the majority of the population, does not apply. The significance of this category should not, however, be overstated …"
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> "2 The armed conflict in Mogadishu does not, however, pose a real risk of Article 3 harm in respect of any person in that city, regardless of circumstances. The humanitarian crisis in southern and central Somalia has led to a declaration of famine in IDP [internally displaced persons] camps in Mogadishu; but a returnee from the United Kingdom who is fit for work or has family connections may be able to avoid having to live in such a camp. A returnee may, nevertheless, face a real risk of Article 3 harm, by reason of his or her vulnerability."

54. According to the Defendant's *Operational Guidance Note* ("OGN") (September 2013) and *Country of Origin Information* report (August 2013), the position in Somalia has improved since the UT's decision in *AMM*. Al-Shabab has been ejected from Mogadishu and other major cities, making them more stable. In 2012, a new President, Parliament and Constitution were established. However, the political situation remains volatile. The Report of the Independent Expert to the UN Human Rights Council, dated 16th August 2013, stated that the "the recent Al-Shabaab takeover of Hudur and the devastating attacks against the regional court of Mogadishu, on 14 April, and on the United Nations common compound, on 19 June 2013, are reminders that the improvements will have to be consolidated and that insurgent groups are still capable of grave harm."

55. Evidence from reliable international sources indicates that Somali exiles are returning and there is investment in the city's reconstruction. The OGN (2013) advises that the situation in Mogadishu should no longer be regarded as presenting a general risk of Art 15(c) harm; it will depend upon the personal circumstances of the returnee. The Defendant's evaluation of the evidence has led her to the conclusion that the Claimant's personal circumstances are such that his removal to Mogadishu would not breach Art. 3 ECHR or Art. 15(c) Qualifications Directive. He is a fit adult male, and a member of the Isaaq clan, who can speak Somali, and would be able to undertake unskilled work. The Somali authorities have not yet been approached to see if they would accept him as a Somali citizen, but the Defendant does not anticipate that this will present difficulties.

56. The Claimant disputes the Defendant's assessment, arguing that the guidance in *AMM* remains authoritative, and that he would be at risk if deported. The report from the expert Dr Hoehne, submitted by the Claimant, identifies the risks which he would face as a westernised outsider, without clan protection, family or friends, and without funds. The Isaaq clan are mainly based in the north of the country, not in Mogadishu. Dr Hoehne also points to a deterioration in conditions in Mogadishu since June 2013, which is not reflected in the OGN report of September 2013. The OGN report did

advise that the human rights situation remains poor. Law enforcement is conducted at clan level, with ineffective oversight by the police and courts.

57. The parties agreed that I should not seek to pre-judge the merits of future deportation to Mogadishu, as that is a matter for the FTT to decide, having heard full evidence and probably with the benefit of up-to-date country guidance on Mogadishu.

58. However, I have concluded, on the evidence before me, that there has been no realistic prospect of removing the Claimant to Mogadishu during his detention so far (from May 2012 to December 2013), because of the Defendant's "logistical" problems in implementing enforced removals, together with the legal obstacles to deportation arising out of the country guidance case of *AMM*. The full picture regarding the "logistical" problems has been withheld from me but since the Defendant bears the burden of proof, I have given the benefit of any doubt about the extent of these problems to the Claimant. Looking ahead, there is now no realistic prospect of removal of the Claimant to Mogadishu until the appeals process has run its course, including the forthcoming country guidance case. Of course, the Defendant is entitled to rely upon potential deportation to Somaliland as an alternative justification for detention, and I turn to consider that next.

Deportation to Somaliland

59. Somaliland is an autonomous region of Somalia. It is a self-declared sovereign state but not recognised as such. It is relatively more stable and secure than Mogadishu, and it is not suggested that the Claimant would be at risk there.

60. The difficulty with removal to Somaliland is establishing citizenship. According to the OGN 2013, at paragraph 2.3.13:

> "In 2010, the FCO reported that the authorities in Somaliland and Puntland will only admit failed asylum seekers returning from European countries who originate from their territory or those who have close affiliations to the territory through clan membership. In the case of majority clan affiliates, this means those associated with the Isaaq in Somaliland … The Tribunal in AMM and Others concluded that there is no evidential basis for departing from the conclusion in NM and Others, that Somaliland and Puntland in general only accept back persons who were former residents of those regions and were members of locally based clans or sub clans…"

61. The Claimant's expert, Dr Hoehne, advised in his report dated 29th November 2013, that under Article 2 of the Somaliland Citizenship Law, citizenship is acquired through the male line only. He also states that the authorities are reluctant to accept forced returns. According to the Defendant, there has been one enforced return to Somaliland since February 2012, and two voluntary returns.

62. The Defendant has investigated the Claimant's family history from the information provided in his aunt's application for asylum and naturalisation and his sister's application for naturalisation. The Defendant has gathered evidence that the Claimant's mother was called Safia Omer-Hashi (DOB 1960); that she was born and

brought up in Hargeisa, Somaliland; and that she was a member of the Habr Awal sub-clan of the Issaq majority clan.

63. The Defendant did not accept the Claimant's assertion that he and his sister were born in Mogadishu. In his sister's application for naturalisation, she said she was born in Hargeisa. A travel document application in 1998 stated that the Claimant was born in Hargeisa (the Claimant said that the application was filled in incorrectly by a family member).

64. There is less information about the Claimant's father, Abdullahi Ismail, which is unfortunate as citizenship passes through the male line. His sister stated in her naturalisation application that he was born in Hargeisa. There is no evidence as to his clan, but it seems at least likely that he too was from the Isaaq clan.

65. The Defendant has identified a link between the Claimant's father and other family members living in the UK who are from Hargeisa. When interviewed, the Claimant listed the names of his cousins in the UK, saying that they were his "father's brother's children". These names matched the names of Abdi Ahmed Hussain's brothers, as set out in the 1992 family reunion application. Therefore the Defendant has formed the view that the Claimant's father (Abdullahi Ismail) was Abdi Ahmed Hussain's maternal uncle i.e. his mother's brother. His mother was called Fadumo Abdillah Hussein, she was born in Hargeisa on 26th June 1939 and came to the UK permanently in 1973, to join her husband, Ahmed Hussein Roblch, also from Hargeisa. A report by Cleveland Constabulary on Mr Roblch's naturalisation application, dated 4th September 1979, lists one of her brothers as "Abdi Abdullahi" whom the Defendant believes to be Abdullahi Ismail, the Claimant's father. I had some doubt about this since his family name was Ismail not Hussein. Also, according to his daughter's naturalisation form, his date of birth was 1957, and his wife's date of birth was 1960. He was therefore from a different generation to his (alleged) sister Fadumo who was born in 1939.

66. However, Mr Munson has stated in his second witness statement that, in light of his past experience in similar cases, he is confident that the Somaliland authorities will verify the Claimant's citizenship, on the basis of the evidence which he has submitted.

67. Whilst being careful not to pre-judge the outcome of the application to the Somaliland authorities, I have concluded on the evidence before me that there was a realistic prospect of deportation to Somaliland, during the period of the Claimant's detention, once his family background had been properly investigated. Deportation to Somaliland remains realistic, though the timing is uncertain. I have excluded consideration of the Claimant's Art. 8 claims in making this assessment.

The diligence, speed and effectiveness with which the Secretary of State has progressed the Claimant's proposed deportation to Somalia or Somaliland

68. In the light of its past experience and knowledge, the UKBA must have been aware from the start of the Claimant's detention in May 2012 that an enforced return to Mogadishu or Somaliland was a challenging objective, which would require them to undertake a detailed investigation of the Claimant's family, and his past and present links with Somalia and/or Somaliland. In respect of Mogadishu, it would then be necessary for UKBA carefully to assess the risks to the Claimant's safety against the

background of the country evidence and country guidance. In respect of Somaliland, UKBA would then have to present evidence of citizenship which would be verifiable by the Somaliland authorities.

69. However, on perusing the records, it is apparent that UKBA failed to get to grips with these issues until August 2013, 15 months after he was first detained, and 18 months after they first obtained nationality and family details from him.

70. On 9th January 2012, the UKBA wrote to the prison Governor asking him to pass to the Claimant the letter warning him of his liability to deportation, and to advise him of its contents. UKBA also sent a questionnaire which stated at the top:

> "In order to give further consideration to the above, I would be grateful if you would ask [the Claimant] the following questions. The replies may be faxed, with the confirmation of conveyance slip to [number]"

71. The questionnaire was duly faxed by the prison to UKBA on 9th February 2012. The contemporaneous correspondence shows that the fax was received by UKBA. However, UKBA either lost, or did not receive, pages 21 to 25 of the questionnaire, which asked whether there were grounds for claiming exceptions to deportation under section 33, UK Borders Act 2007. Mr Turner, Executive Officer with responsibility for the Claimant's case at the time, was unable to explain what happened, but conceded in his witness statement:

> "|I cannot confirm that we did not have the full completed questionnaire."

72. It was only in June 2013, when Ms Gloria Howell, an Executive Officer in Criminal Casework, was investigating prison records for evidence of family visits, that she saw the complete version of the questionnaire held in his records, and realised that the version she had been working from was incomplete. As it was a standard pro forma issued by UKBA, it should have been obvious at a much earlier stage that these pages were missing, and a search should have been conducted in the UKBA office for the missing pages, and enquiries made of the prison and the Claimant. I consider that UKBA officers were negligent in their processing of the Claimant's case.

73. On missing page 21, the Claimant (or more likely, a prison officer completing the form on his behalf) put a cross in the boxes confirming that he wished to rely upon the exceptions to deportation in section 33 Borders Act 2007. He relied upon his status as the spouse of an EEA national, and that his removal would breach his human rights and his rights under the Refugee Convention. On missing page 22, where the questionnaire asks for the reasons to support the claim to exemption, someone has written "See attached covering letter". The attached covering letter has still not been located.

74. UKBA's detention reviews in 2012 repeatedly stated that the Claimant had not claimed asylum nor claimed he could not return to Somalia. This was an error, as he had made those claims in the missing pages of the questionnaire and the covering letter. It was only after the missing pages were found that the UKBA wrote to the

Claimant, on 4th June 2013, asking him to provide the reasons why he claimed he could not safely return to Somalia.

75. Leaving to one side the issue of the missing pages, the UKBA should have been considering from the outset whether it would be a breach of the Convention or the Qualification Directive for the Claimant to be returned to Somalia, in view of the acute risks identified in the country guidance case of *AMM*, decided in 2011, and the Defendant's own operational guidance notes and country of origin information. The evidence does not support Ms Thelen's submission that the UKBA had been considering throughout whether or not the exceptions to deportation in section 33 UK Borders Act applied in relation to Somalia.

76. Mr Turner was case officer from 8th February to 18th May 2012. In the initial questionnaire, the Claimant disclosed his real name (he had been using an alias); his date of birth; that he was a national of Somalia and was born there; some limited details about his parents; and he stated he had entered the UK in 1992 (in fact, it was 1993). Mr Turner responded asking him for more details about his parents and his clan, which the Claimant was unable to provide, as he had been separated from his parents at a young age and left Somalia as a child. Months were spent trying to locate the letter granting the Claimant indefinite leave to remain. Unsurprisingly, the Claimant did not have the letter with him either in prison or immigration detention. His criminal solicitors did not have it, and he was unable to get any response from friends or relatives. In my view, in the circumstances of this case, Mr Turner should have obtained confirmation of his leave to remain from the Claimant's immigration file at a much earlier stage.

77. Ms Howell was the case officer responsible for the Claimant's case from 25th May 2012 to 6th June 2013. By the date of the detention review dated 18th June 2012, she had not taken any further steps to investigate the issues surrounding removal to Somalia. The review stated:

> "[The Claimant] is from Somalia, he states he does not know the name of the clan he belongs as he came to the United Kingdom when he was a child. He further states his father is deceased and he does not know the whereabouts of his mother in Somalia. He has not claimed asylum or indicated that he cannot return to Somalia. When [he] is served with a deportation order he will have an in-country right of appeal against our decision to deport him. Once his appeal rights become exhausted we will be able to obtain an EU letter and set removal directions to return him to Somalia within a reasonable time scale"
>
> "It is not yet known where in Somalia [the Claimant] is from and his clan. Further checks is (sic) necessary to establish whether there is a realistic prospect in his removal from the UK"

78. In a letter dated 21st June 2012, the Claimant's request for temporary admission was refused. It stated that he had still not provided evidence relating to his claimed indefinite leave to remain in the UK and concluded:

> "We are continuing to make arrangements to obtain a travel document for your clients removal from the United Kingdom. However, your client has not provided us with any evidence to prove his identity."

79. The detention review dated 11th July 2012 repeated the same text regarding deportation to Somalia as in the June 2012 review. The senior officer who reviewed the report added:

> "Note for CO: We need to establish full immigration history, clan and his place of birth to assess prospects of removal. This should be done before the next DR."

80. On 18th July 2012, Ms Howell wrote to the Claimant asking him for the date on which he entered the UK, and details of the grant of indefinite leave to remain. She also asked him for his place of birth. The Claimant replied on 26th July 2012 giving answers to her questions, as previously provided in the questionnaire, adding that he was born in Mogadishu.

81. The detention review dated 13th August 2012 recorded that Ms Howell had traced his immigration file which confirmed the immigration history he had given. It gave a considerable amount of further information, including the details of his aunt and sister, the family reunion application and the Hussain family, which over a year later were to form the basis of Mr Munson's conclusion that the Claimant's origins were in Somaliland, not Somalia. However, these issues were not investigated by Ms Howell or anyone else in 2012.

82. In the next detention review on 9th October 2012, there was no record of any further investigation on return to Somalia. The report repeated exactly the same text as in June regarding his deportation to Somalia.

83. On 16th October 2012, Ms Howell was sent an email by a more senior officer advising her on the lines of enquiry she should follow in relation to his family members. However, there was no record of any progress in the next detention review on 7th November 2012.

84. On 13th November 2012, the Claimant completed a Bio-Data form giving details of his aunt and sister; his schooling; his GP and his mosque.

85. There were further detention reviews on 4th December 2012, 2nd January 2013, 4th March 2013 and April 2013. None of these recorded any further progress on deportation, and they all repeated exactly the same text as in June 2012.

86. An application for temporary admission/bail was issued on 1st May 2013.

87. The next detention review, dated 15th May 2013, stated that "a deportation decision has yet to be made as Mr Ismail has frustrated all attempts by the Home Office to establish his true identity and nationality. These issues were only resolved in October 2012". The basis of this assertion was that it was not not until October 2012 that the Claimant had disclosed his real name of Abdi Abdilahi Ismail and thereafter bio-data was collected for an EU letter in his correct identity. This was patently untrue. In the

questionnaire in February 2012 he had provided his real name. He gave it again to Ms Howell in the letter dated 26th July 2012. She recorded in the detention review dated 13th August 2012 that "he was granted ILR under the overstayers scheme in 2001 under the name of Abdi Abdilahi Ismail". Moreover, throughout Ms Howell had been aware that the Claimant said he was a national of Somalia, and this was confirmed in his immigration file. At this stage, the possibility of establishing family lineage in Somaliland was not under consideration. I conclude that the UKBA was presenting an untruthful explanation for the delay in progressing the investigation into deportation to Somalia.

88. The 15th May detention review stated that if the family split submission was approved, as expected, a deportation decision would be completed within 2 weeks. However, there had been no adequate investigation into whether he could lawfully be deported to Somalia. Although the review acknowledged the need to establish "clan affiliation due to the changing situation in Somalia and the requirement to consider removability under the AMM caselaw", this had not been done.

89. Bail was refused by an Immigration Judge on 22nd May 2013. The reasons for the decision were:

> "… He has been convicted of a serious ofence of assault occasioning actual bodily harm..The PO told me that a deportation decision would be made and served on A in the next few days. I have seen no evidence of the level of risk he may present of causing harm to members of the community. He admits having used aliases but there is no evidence of the circumstances in which he did so. He appears to have no close relationships with a partner or other relatives in the UK. He has offered no sureties. There is no evidence to show that he would be willing to return voluntarily to Somalia. Having considered all the above factors I am satisfied that, if granted bail, he is likely to abscond." (emphasis added).

90. I accept the Claimant's submission there was no reasonable basis for the Defendant's assertion to the Judge that a deportation decision was going to be made in the next few days. The Defendant was aware of the significant difficulties in enforcing deportations to Somalia, and the lack of progress in the investigation into the Claimant's circumstances. This information was bound to have influenced the Judge considerably. Although usually a refusal of bail by an independent court is an indicator of the reasonableness of detention, I am unable to treat it as such on this occasion, because the Judge did not have the true facts available to him.

91. The Claimant's case moved to another stage in June 2013, for several reasons:

   i) On 22nd May 2013, a pre-action protocol letter from new solicitors, Leigh Day & Co., threatening to commence judicial review proceedings in respect of unlawful detention on 5th June 2013.

   ii) On 4th June 2013, Ms Howell's discovery of the missing questionnaire pages with the claim to an exception from deportation on human rights and refugee convention grounds, which prompted her to write to the Claimant and his solicitors asking for the reasons in support of his claim.

iii) In response to Ms Howell, on 5th June 2013, a detailed letter from Freemans, his immigration solicitors, setting out the Claimant's case under the Refugee Convention and Art. 3 and Art. 8 ECHR.

92. A new Executive Officer, Mr Alex Munson, took over the Claimant's case on 6th June 2013.

93. Upon receipt of the letter from Freemans asserting that deportation to Somalia would breach the Refugee Convention and Art. 3 ECHR, Mr Munson decided to treat these representations as a fresh asylum claim and he transferred it to the Criminal Casework asylum team for processing. At the hearing before me, the Defendant explained that this delayed the progress of the deportation investigation, but that this delay was the Claimant's fault for claiming asylum, and then withdrawing the claim. In my view, it was the Defendant's procedures which were the cause of the delay, not the Claimant. In an asylum interview on 19th June 2013, the Claimant explained that he had leave to remain in the UK, so he had no need or wish to claim asylum, having already done so many years previously. He was invited to sign a form withdrawing any claim to asylum which he duly did. He explained the position again in his letter dated 1st August 2013. Mr Munson entered into a period of fruitless communications with the two sets of solicitors involved (who contradicted each other) before he eventually accepted, in August 2013, that the Claimant was not making an asylum claim.

94. In my judgment, Mr Munson erred in not treating Freemans' letter of 6th June as the Claimant's grounds in opposition to deportation, under section 33 UK Borders Act 2007, which specifically provides for an exception to deportation on Refugee Convention or ECHR grounds. This was, after all, the information which his predecessor, Ms Howell, had asked the Claimant to provide, in her letter of 4th June, when she realised that UKBA had mislaid the representations he had made in February 2012, when he completed the questionnaire. By treating it as a fresh asylum claim, and by putting the deportation investigation on hold, unnecessary delay was caused.

95. At the asylum interview on 19th June, the Claimant was asked more extensive questions about his family background and relatives, all of which he answered. Mr Munson acknowledged that this information was useful in pursuing the deportation action. It is not clear to me why he was described as "non-compliant" in the interview; I suspect this relates to his reluctance to pursue the asylum claim.

96. The claim for judicial review was filed on 30th July 2013. On 31st July 2013 Cranston J ordered the Defendant to file her Acknowledgment of Service by 21st August and for the matter then to go to a Judge for urgent consideration. The Claimant's papers were transferred to the judicial review team on 20th August 2013. Permission to apply for judicial review was granted on 3rd September 2013.

97. Mr Munson explained that at the end of August he went on holiday, and the case was not considered during his absence. He had already received the Claimant's aunt's immigration file and he then obtained the file of Mr Roblch (Mr Hussein's father). He saw the family connection, in the maternal line, to Hargeisa, Somaliland and to the

Isaaq clan, one of the majority clans in Somaliland. However, he had doubts about the true identity of the Claimant's aunt. He believed that she was lying about her identity and that she was really Amina Abdil Mohammed, the person from whom she claimed to have stolen the GV3 form. He recorded in the detention review dated 27th September, "It is therefore less likely that the subject could be returned to Somaliland". He consulted his senior caseworker on 12th September. He said in his witness statement that "she agreed that a status interview with the Claimant would place me in a better position to make a decision on whether Exception 1 of Section 33 applies and the Claimant's removeability."

98. The Claimant was interviewed with a Somali interpreter on 10th October 2013. Much of the interview covered old ground, but the Claimant was asked about his extended family in the UK for the first time. He gave the names of his paternal cousins which led Mr Munson to the conclusion that the Claimant's father was Mr Hussein's uncle, and therefore also came from Hargeisa, Somaliland.

99. Based on this information gathered by Mr Munson, the deportation order was served at close of business on 5th November 2013, the day before the substantive judicial review claim was listed to commence. I do not believe that the date was a coincidence. The threat of legal proceedings was acting as a spur to the Defendant to perform its legal duty. I consider that, before the threat of legal proceedings, the Claimant's case had been allowed to languish.

100. In my judgment, if the Defendant had exercised due diligence, her officers would have examined the immigration files of the Claimant's relatives at a much earlier stage, and pieced together the family history. Mr Munson was able to do this in a few months, even with the diversion of the asylum claim and his summer holiday. If the files had been examined and the more detailed "status" interview, which took place in October 2013, had been carried out sooner, the Defendant would have been in a position to make her decision on deportation at a much earlier stage.

101. I accept that matters were made more difficult for the Defendant because the Claimant said he did not know the origin of his parents, or the name of his family clan, and he gave differing names for his mother. The Defendant says the Claimant was being evasive. That may be so (the author of the pre-sentence report also referred to him as 'evasive'), but it seems to me that his limited knowledge was also consistent with his account of separation from his parents at an early age, and flight to Ethiopia and then the UK as a child. But even without the necessary information from the Claimant himself, the Defendant did have the benefit of the Claimant's immigration file and the immigration files on his relatives, all of whom are settled in the UK, which gave her a great deal more information about his family background.

102. The Defendant obtained the essential information about the Claimant's identity in February 2012. His immigration file could reasonably have been obtained by June 2012. The files of his relatives could reasonably have been obtained by September/October 2012. He could have been interviewed in the latter part of 2012, and a decision made by the end of February 2013. Even taking into account the pressure of work in the UKBA, a year would have been ample time in which to investigate the Claimant's case. In my view, the unreasonable delay was caused principally by a combination of error and neglect.

The diligence, speed and effectiveness with which the Secretary of State has progressed the Claimant's case in respect of his family

103. In the questionnaire faxed to UKBA on 9th February 2012, the Claimant informed the Defendant that he had two young daughters by his Dutch wife, who were British citizens. He said he had a close relationship with them and did not want to be parted from them. Their details were in the section of the questionnaire which UKBA received in February 2012.

104. Although his human rights claim was mislaid, the Defendant was well aware that it was necessary to consider the effect of deportation on the family, and in particular the children, under section 55, Borders Citizenship and Immigration Act 2009.

105. The investigation into these issues was slow. It was not until 10th July 2012 that a case officer, Ms Howell, attempted to make enquiries about the Claimant's children. She sent an e-mail to Leicestershire Social Services enquiring about his family. On 11th July 2012, she faxed a children's welfare referral to them asking them to provide relevant information for the purposes of the family separation authorisation decision. On 12th July 2012, Leicestershire Social Services replied saying that the family was not known to them. Ms Howell did not think to approach Leicester City Council instead.

106. On 12th July 2012 Ms Howell emailed the Children's Champion, who replied on 8th August 2012, confirming the existence of the Claimant's children, and pointing out an error in the dates of birth of the children – they were only 6 weeks apart.

107. No further action on this was taken until 9th October 2012, when Ms Howell began to draft a family separation referral. Before sending it off she asked the Claimant to confirm the children's names and dates of birth, but the dates were still obviously wrong. Ms Howell contacted various agencies in an attempt to obtain the birth certificates of the children.

108. Six months later, on 19th March 2013, following a chasing message from Ms Howell, Leicestershire Social Services confirmed that they could not complete the welfare referral form as they had no trace of the Claimant's children. They suggested she should contact Leicester City Social Services. Leicester City Social Services duly confirmed the existence of the children. The Probation Service had made a referral to them at the end of the Claimant's custodial term, in May 2012. Leicester City Social Services provided Ms Howell with the information obtained from an interview with the Claimant's ex-wife at that time, to the effect that their relationship had ended and they had had no contact from him for 2 years. Their files showed the same (apparently incorrect) dates of birth.

109. In March 2013, Ms Howell obtained confirmation of the details of the Claimant's children from the probation service which had them on file. This request could have been made months earlier.

110. On 5th April 2013, Ms Howell emailed the Children's Champion for her comments. She replied on 22nd April saying that if the Claimant had had no contact with his children for 2 years, his deportation was not likely to have any effect on them in the

short term. However, in the medium to long term, the inability to have face-to-face contact with him might have an unknown impact on their emotional development.

111. On 22nd April, Ms Howell completed the family separation referral which she had commenced the previous October. Authorisation was received on 16th May 2013.

112. On 17th May 2013, Ms Howell began to investigate whether the Claimant might have a right of residence as a result of his marriage to an EEA national. She wrote to him asking him for details of his marriage and divorce. The Claimant provided the date and place of his marriage and explained that the Mosque did not issue certificates of marriage. Nor did he have any documentary evidence of divorce as this was not required under Islamic law. The Claimant was found not to meet the requirements of the EEA Regulations 2006.

113. In the summer of 2013, checks were made of the prison records to try to ascertain whether the Claimant had family visits or correspondence in prison or telephone contact with his children, as the mother's account that there had been no contact whilst he was in prison was disputed by the Claimant.

114. The decision authorising family separation and the subsequent decision to deport were made before the children's nationality was verified. The deportation decision dated 5th November 2013 erroneously stated that the children were Dutch. Throughout the Claimant had informed the Defendant that the children were British. The detention reviews repeatedly stated that he had he had failed to provide evidence of their British nationality. It is evident from the case law, notably *ZH (Tanzania) v Home Secretary* [2011] 2 AC 166, that the children's British nationality was a relevant consideration when considering section 55 and Art. 8. Because of the failure either to accept the Claimant's account of their nationality or investigate the matter itself, the first deportation decision was made on a flawed basis. The Defendant had to issue a further "supplementary" deportation decision dated 26th November 2013 which stated:

> "It is now accepted that both of your children … do hold British nationality"

115. In my judgment, the Defendant's investigation of the Claimant's family life was dilatory and in some respects, incompetent. There were long periods when no action was taken, and outstanding queries were not followed up. The failure to check whether Leicester City Social Services had knowledge of the children was an error which caused months of delay. Obvious lines of enquiry, such as the probation service and the prison records, were not pursued until late in the investigation. There was a continued failure to verify the children's nationality, which only had a marginal effect on the duration of detention, but was illustrative of the low standard of investigation by UKBA.

116. Taking into account the pressure of work in the UKBA, I consider that these investigations could, and should, have been concluded much earlier, by the end of February 2013, which was just over a year from the date when the Claimant provided his family details to the UKBA.

<u>Lawfulness of detention</u>

117. Bearing in mind the Defendant's policy in Chapter 55, including the presumption in favour of release, I consider that the Defendant's initial decision to detain the Claimant whilst deciding whether or not to deport him, was justified, because of the risks of absconding and re-offending. The Defendant had previous convictions; one for a serious assault. His record showed poor compliance with community orders and, in 2002, three convictions for failure to surrender to custody, for which he was sentenced to one day's imprisonment. Although he had quite extensive family in the UK, he was not living with them at the time of his arrest, and there did not seem to be much family support e.g. visits or offers of accommodation.

118. The Defendant has also relied upon instances of poor behaviour by the Claimant in prison and in detention, though the extent of these is disputed.

119. In my judgment, applying *Hardial Singh* principles and the case law under Art. 5, the Claimant's detention ceased to be lawful when it was prolonged for an unreasonably long period as a result of the Defendant's incompetence, neglect and failure to show due diligence. I have concluded that the Defendant could, and should, have completed her investigations and made the deportation decision in a year from the start of the process, i.e. by the end of February 2013.

120. Even where there is a lengthy period of detention, the risks of re-offending and absconding may be so high that detention remains lawful. However, I do not consider that is the case here. The custodial part of the Claimant's sentence ended on 21st May 2012, and his licence terminated on 5th January 2013. By then he had paid the penalty for the offence he had committed. Assault occasioning actual bodily harm on a friend with a knife is a serious offence but not as grave as some of the offences which come before our courts. Prior to that offence he had not committed an offence for some 5 years. None of his previous offences merited deportation proceedings. The instances of poor behaviour in detention and prison are not sufficient in number or seriousness to justify detention. Although he failed to surrender on three occasions in 2002, more recently, he was on bail for 8 months awaiting trial for the assault charge without absconding or offending.

121. For the purpose of assessing risk, the Defendant had a pre-sentence report dated 7th November 2011 and a summary prepared by NOMS in 2012, which repeated the PSR assessments from 2011. The conclusion in the PSR was that the likelihood of causing serious harm was "medium". The Claimant's solicitors commissioned an impressive report by a consultant forensic psychologist, Alice Hucker. She updated the risk assessment and reached a similar conclusion to the PSR report, namely, that the Claimant presented with a medium risk of harming others in the context of associating with a negative peer group and engaging in excessive alcohol use. Whilst he abstains from alcohol, the likelihood of harm occurring is relatively low.

122. At the date of the second hearing before me, the Claimant had been in immigration detention for 18 months. There is likely to be a further delay of at least a year before the deportation appeal process is concluded. These are lengthy periods of time which, having proper regard to the risk of re-offending and absconding, I do not consider are justified in the circumstances of this case.

123. Therefore I intend to order the Claimant's release. Accommodation will be provided for him and he will be made subject to residence and reporting conditions, as well as

electronic tagging. The Claimant has lived in the UK for 20 years, and has friends and family here. Although he will have no job to go to on release, he will be eligible for support pursuant to section 4 Immigration and Asylum Act 1999, and so should not have to commit offences in order to survive. He will be fully aware that breach of conditions or re-offending is likely to result in his return to detention.