Case No: CO/2683/2014

Neutral Citation Number: [2015] EWHC 825 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2015

Before :

HONOURABLE MRS JUDGE ELISABETH LAING DBE

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Between :

XIAO YUN XUE	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Mr Tim Buley (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimant**
Miss Julie Anderson (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 3-4 March 2015

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Judgment

Mrs Justice Elisabeth Laing DBE :

1. This is a claim for unlawful detention. The Claimant, a Chinese Citizen, was detained by the Defendant ("the Secretary of State") from 2 March 2012 to 17 June 2014, when she was released, having been granted bail by Mitting J on 13 June 2014. This claim was issued on 9 June 2014. Permission to apply for judicial review was granted on the papers by HHJ Platts on 10 October 2014. At the hearing of the substantive application, the Claimant was represented by Mr Buley, and the Secretary of State by Miss Anderson.

2. I have not found this an easy case to decide. It is a case in which the competing claims of firm immigration control and of the welfare of an individual starkly conflict. The Claimant was detained administratively for over two years. The longer her detention went on, the more vulnerable she became. Her physical health has been significantly compromised, probably permanently. Her mental health also declined in detention. She eventually fell down a stairwell and broke her back. But she is a foreign national. She has no right to be here. Her account of the reasons why she left China has been disbelieved by the First-tier Tribunal ("the FTT"). The Secretary of State has decided that she should be deported on public interest grounds, because of her persistent record for offences of dishonesty. She has a very poor history of absconding while on temporary admission. She has no passport. During her detention she did not initially co-operate with the Secretary of State's attempts to get her an emergency travel document ("ETD"). The lack of an ETD was, for over a year, the only barrier to her removal.

The facts

The Claimant's entry to the United Kingdom

3. The Claimant was born on 1 October 1966. She entered the United Kingdom on 25 April 2006: she did not enter through immigration control, but was found hiding in an airport lavatory. She then claimed asylum. She was given temporary admission.

The Claimant's criminal and reporting history

4. The Claimant did not go to her asylum interview on 16 April 2006 and her claim was refused on non-compliance grounds. A recorded delivery letter sent on 5 July 2006 to the address she had given was returned. On 12 July 2006 she failed to report as required.

5. She came to the attention of the authorities when she was arrested for selling counterfeit goods on 12 July 2007. She was again given temporary admission, but failed to report on 14 July 2007. She was again arrested for the same offence on 17 July 2007. She was again given temporary admission and again failed, on 21 July 2007, to report in accordance with its terms. She was convicted of selling counterfeit goods and failing to surrender to bail on 19 July 2007. She was fined. She again failed to report in accordance with the terms of her temporary admission on 21 November 2007.

6. Absconder action was taken on 4 January 2008. She reported on 10 March 2008 and was given fresh conditions. She failed to report on 18 April 2008. She was again

given fresh conditions but failed to report, and absconder action was again taken. She came to the attention of the authorities again on 8 May 2008, when she was further arrested for selling counterfeit goods. She was released. She did not report and absconder action was taken on 13 June 2008. Further reporting conditions were served at an address given to police on 8 September 2008. She did not report. On 20 December 2008, she again came to the attention of the authorities when she was again arrested for selling counterfeit goods. She gave a new address to the police.

7. On 3 March 2009, the Claimant was convicted of assaulting a constable. She was given a community order and a curfew for 8 weeks monitored by an electronic tag. That order was varied. A suspended sentence of 12 weeks' imprisonment was substituted. She was given a conditional discharge in respect of other offences. She was convicted of breach of a community order on 25 March 2009. No action was taken. On 27 May 2009, she was again convicted of selling counterfeit goods. She was given a 12 weeks' sentence suspended for one year. She was required not to sell counterfeit goods. No action was taken in respect of other offences. On 29 May 2009 she was convicted of breach of a community order and sentenced to 14 days' imprisonment. The 12-week suspended sentence was activated.

8. She was again arrested for selling counterfeit goods. She was convicted on 27 August 2010. She was sentenced to 3 concurrent suspended sentences of imprisonment.

9. She came to the attention of the authorities in 2011 when she was arrested again for selling counterfeit goods and for immigration offences. She refused to give an address. She said she lived in Hackney. She was released and required to report on 6 October 2011. On 16 November 2011, she was once more convicted of selling counterfeit goods.

10. She received sentences of immediate imprisonment totalling 10 months' including the activation of a suspended sentence. On 28 February 2012, the Claimant was given notice of her liability to deportation on the grounds that her deportation was conducive to the public good. The Claimant now has seven convictions for 17 offences.

The Claimant's immigration detention

11. The minute of the decision to detain the Claimant is dated 28 February 2012. The terms of the proposal to detain are repeated in the subsequent recommendations to detain made in later detention reviews. The suspicion that the words have been cut and pasted is increased by a recurrent typo in the phrase "The decision to detain is balance [sic] and proportionate...". The authority to detain is based on the Claimant's previous offences and the high risk of offending and absconding. The Claimant was transferred from HMP Holloway to Yarl's Wood Immigration Removal Centre ("the IRC") on 2 March 2012.

12. On 15 March 2012, she made a second claim for asylum, and on 20 March 2012, appealed against the decision to make a deportation order. She was interviewed and the Secretary of State refused her asylum claim. On 27 March 2012, the first detention review noted high risks of absconding and of committing further offences. It said that

the Claimant had no known medical conditions. The presumption against release was outweighed by the criteria for maintaining detention. An ETD request had been emailed. The barriers to removal were an outstanding asylum claim, a lodged appeal and the ETD. The decision maker considered that the Claimant should be detained until she could be removed. No timescale for overcoming the barriers to removal was given.

13. As I said, the Claimant had no travel documents. That meant that the Secretary of State had to get an ETD from the Chinese authorities. The Secretary of State had tried to get the Claimant to provide details for a biodata form on 14 April 2012 but she could not write her details.

14. The next detention review noted that completed ETD forms had been received on 23 April 2012. The barriers to removal were the same. Detention was maintained. The appeal hearing had been deferred in order to enable the Secretary of State to make a decision on the Claimant's asylum claim.

15. On 1 May 2012, the Claimant tried to hurt herself by banging her head. She was put in the Kingfisher Unit, a Separation Unit.

16. The next detention review (on 23 May 2012) noted that an ETD and an appeal were barriers to removal. The asylum decision had been served. The plan was to pursue the ETD and check the progress of the appeal. The appeal was due to be heard the next day. The officer who authorised detention commented that the ETD was in process and removal would be within a reasonable timescale once the ETD had been obtained and the Claimant's appeal rights were exhausted ("ARE"). On 7 June 2012 the FTT refused an application for bail and on 14 June 2012 it dismissed the Claimant's appeals against the refusal of her asylum claim and against the decision to make a deportation order. At paragraph 14 of its determination, it said that the Claimant was "a person of no credibility whatsoever". Her claims were "entirely false" (determination, paragraph 20).

17. The next review was on 19 June 2012. The completed ETD forms had been received. The barriers to removal were said to be an outstanding appeal and an ETD (paragraph 3) but paragraph 2 noted that the appeal was dismissed on 14 June. I think what the author meant (see paragraph 5 and the later comments) was that although the appeal to the FTT had been dismissed, the Claimant's appeal rights were not yet exhausted. The barriers to removal were waiting for ARE, serving the deportation order and getting an ETD. The Claimant was referred to as "he" in the comments. Once "he" was ARE, the deportation order was served and the ETD agreed, removal directions should be set immediately. There was a realistic prospect of removal within a reasonable period.

18. On 19 June 2012 the Claimant complained of stomach problems. She said she had missed 21 meals in 7 days. On 23 June 2012 she told healthcare staff she was hearing voices. She was not eating or drinking. Her appeal rights were exhausted on 26 June 2012. On 29 June 2012 she was taken to hospital, having collapsed, and with severe stomach pain.

19. The next review was on 11 July 2012. The barriers to removal were service of the deportation order and the ETD. The fact that the Claimant was ARE had not been noticed until 4 July 2012. Its author had intended to prepare the deportation order in the week beginning 9 July 2012 but had been given other urgent work. It was necessary to pursue the ETD and to serve the deportation order. Paragraph 8 (headed "Does the individual suffer from any known or claimed medical conditions (including mental health issues, or threats of self harm)") noted that the IRC had rung on 9 July 2012 to say that the Claimant was not eating. The IRC had asked that the ETD and deportation order be obtained "asap". The review's author recorded that he/she had other urgent work. The comments on the review said that there was a realistic prospect of removal within a reasonable period.

20. The application for bail had said that the Claimant was ill and unable to eat. On 16 July 2012, the official in Criminal Casework Directorate ("CCD") who was dealing with her case asked for information from the clinician responsible for her in the IRC. The Claimant withdrew a second application for bail on 18 July 2012. The CCD caseworker was told on 19 July 2012 that the Claimant had been seen by the responsible clinicians on 17 July 2012. She refused Complan but said she was drinking milk in her room. A medical appointment was made for 18 July 2012. She did not go and a second appointment was made for 19 July 2012.

21. A deportation order was served on 6 (or possibly 8 August) 2012. On 15 August 2012, the Claimant went to Bedford Hospital for an endoscopy.

22. The next review was on 15 August 2012 (the previous review recorded that the next review was not due until 17 August 2012). Its author noted that the ETD forms had only been partly filled in as the Claimant could only write her name. A new ETD request was sent on 17 July 2012. Another form had been sent to the IRC. However, the author of the report thought that the Claimant might be "non-compliant" as she was being monitored by healthcare at the IRC because she was not eating at times. The only barrier to removal was said to be the ETD. It was necessary to re-interview the Claimant for the ETD. Paragraph 8 of the review repeated that the Claimant claimed not to be eating and that she was being monitored by healthcare at the IRC. The service of the deportation order was said to decrease the Claimant's likelihood of complying with reporting conditions. The comments on the review were that if the Claimant did not co-operate with the next ETD interview, the case should immediately be referred to "CSIT" (the Country Specialist Investigation Team) to ensure that she was documented. Once an ETD was agreed, there would be no further barriers to removal and removal directions could be set immediately.

23. The next review was on 12 September 2012. Paragraph 2 noted that the Claimant had been non-compliant with the ETD process. A new request for an ETD interview had been sent. The only barrier to removal was the ETD. The plan was to pursue the ETD and to arrange an interview with CSIT in case the Claimant continued not to co-operate. Paragraph 8 repeated that the Claimant claimed not to be eating and was being monitored.

24. There was a further review on 9 October 2012. It recorded that the Claimant had now completed ETD forms which had been sent for initial verification. The plan was to pursue the ETD with a CSIT interview if this did not work. Paragraph 8 was in the same terms as paragraph 8 of the previous review. The comments noted that the Claimant had prolonged her stay in the IRC by not co-operating with the ETD process. She had recently provided further information which was being checked. Once the ETD was agreed, there would be no further barriers to removal and removal directions could be set immediately.

25. On 11 October 2012, the Claimant told an officer in the IRC that she was ill. She was told to see a doctor and an appointment was made. On 12 October 2012 the Claimant made further submissions to the Secretary of State. On 19 October 2012 she made an application for bail.

26. An ETD interview with an interpreter had been done on 21 September 2012, although the Claimant had said that she was not well. But on 16 October 2012, a returns liaison officer ("RLO") said that the Claimant had given false information about herself.

27. A third application for bail was refused on 29 October 2012. On 5 November 2012 the Claimant again said that she was ill and was told to see a doctor. An appointment was made for the next day. There was a further detention review on 9 November 2012. The only barrier to removal was the ETD. Paragraph 2 did not record the fact that the RLO had said that the information given by the Claimant was false. The plan was to continue to pursue the ETD. The review said that the forms had been completed and sent to the RLO for initial verification.

28. On 10 November 2012 the Claimant was taken to hospital on the advice of a GP for urinary retention and put on bedwatch. She returned from hospital on 17 November 2012. A request for temporary admission was received on 5 December 2012.

29. On 6 December 2012 and 16 January 2013 the Claimant was seen in the IRC and told that her failure to give accurate information was causing delays. On 16 January 2013 she was told that this could lead to prosecution. On 16 January 2013 the Chinese biodata form was filled in.

30. On 21 January 2013 she was found using a ligature. She was returned from healthcare on 30 January 2013 and was said to be fit for detention in the ordinary area of the IRC and released from healthcare isolation. She then became upset, and was put under hourly observation. On 5 February 2013 she was moved into temporary confinement. By 15 February 2013 she had not slept for 10 days, was reporting hallucinations and had flooded her room. She was referred for a mental health review. She was described as "tearful, frustrated about detention and it was thought that this was leading to explosive behaviour". The conclusion was that she needed cognitive behavioural therapy or antidepressants. When she tore up her flip flops she was removed from free association. She was moved back to the ordinary area of the IRC on 17 February 2013. On 18 February observations were reduced to hourly observations.

31. On 20 February 2013, the Claimant said she would co-operate in attempts to get an

ETD. An interview was arranged for 6 March 2013.

32. On 23 February 2013 she was seen by a volunteer GP from Medical Justice, Dr Beeks. On 1 March 2013, the Claimant tried to hurt herself by throwing herself on the floor.

33. The next detention review I need to refer to is the twelfth, dated 1 March 2013. Paragraph 2 referred to the Claimant's consistent non-compliance, and even deceitfulness, in connection with the ETD. She had missed an opportunity to be interviewed in November 2012 because she was in hospital, but an interview had been arranged for 6 March 2013. There were no barriers to removal apart from documents. Paragraph 8 said that the Claimant had been placed under constant supervision by ACDT (assessment care in detention teamwork) because she had been found with a potential ligature and had been "constantly displaying bizarre behaviour". There had been a meeting to discuss a care plan to manage her at the IRC. A weekly review had been set up. The official authorising detention agreed that the presumption of liberty was outweighed by the risks of re-offending, harm and absconding. At this point, the Claimant had been detained for a year. While this is clear from the material in the heading of the review template, Mr Buley submitted that it was not referred to in the reasoning in the review.

34. On 3 March 2013, the Claimant said she wanted to go back to China. On 6 March 2013 the ETD application was filled in. On 11 March 2013 CCD asked the IRC how the Claimant was. She was said to be better, but still sometimes distressed at night. The healthcare team was thinking of changing her medicine. On 15 March 2013, however, the Claimant climbed over a stairwell barrier and threatened to jump. She had to be stopped from hurting herself.

35. On 23 March 2013, the ETD application was cleared and sent to the Chinese authorities. A further request for temporary admission was received on 5 June 2013. An interview was planned for 18 April 2013. This went ahead. On 10 May 2013 the Secretary of State was told that a report would be sent to the Chinese Embassy, which would have 20 days in which to respond. An ETD was agreed with the Chinese Embassy on 24 May 2013. It was due to expire on 21 May 2014.

36. On 21 May 2013, the Claimant was admitted to hospital with urinary retention. She was discharged with a catheter the following day. 1 litre had been discharged from her bladder, which showed that it had become very distended (normal capacity is about 400 ml: see Dr Clark's first report). This was thought to be caused by constipation, which was in turn caused by anti-depressants. She was returned to the IRC with a long-term catheter. As Dr Clark explains, over the next few months, the catheter was removed to see if the Claimant could urinate independently, but she could not, so she was taught how to use a catheter intermittently herself, 3 or 4 times a day. On 10 January 2014, a test showed that the Claimant's bladder was no longer able to contract even when it was full, and so she needed to continue to use a catheter.

37. CCD asked for an up-date on the Claimant's health. She was asked where in China she would like to be sent to. On 5 June 2013, she said that she did not want to go to

China and refused to give a destination. The same day a further application for temporary admission was received. On 7 June 2013, a letter before claim was received.

38. On 17 June 2013, the lead nurse at the IRC said that the Claimant was not fit to fly because of chronic constipation, and that a catheter was due to be removed. The catheter was removed and a check-up was arranged for the following day. The same day, Dr Beeks gave a report to Duncan Lewis, who were then the Claimant's solicitors. On 19 June 2013, Duncan Lewis sent that report to the Secretary of State. They asked for the deportation order to be revoked and for the Claimant to be released.

39. The report from Dr Beeks was based on a 70-minute examination done on 23 February 2013. There is no explanation for the delay between that and the date it was prepared (17 June 2013). Dr Beeks had consulted the Claimant's medical notes in the IRC. An entry dated 15 March 2013 showed that she had had to be restrained from jumping into a stairwell and had been taken to an isolation unit. A mental health assessment in February 2013 described her as very tearful. She was having difficulty coping with detention and seemed to be exhibiting "intermittent explosive behaviour". She had been placed on ACDT in January 2013 after being found with a ligature which officers had to separate her from.

40. Dr Beeks diagnosed a major depressive episode with psychotic features and was very concerned about the Claimant's suicidal tendencies. The Claimant was one of the most seriously depressed patients Dr Beeks had ever seen. She would expect a further mental health assessment to be done after such a serious suicide attempt with an urgent referral to a psychiatrist. As far as Dr Beeks could tell, the Claimant had not been referred to a psychiatrist at any stage. Her IRC medical notes showed that healthcare were concerned about the risks that she would harm herself. Her mental health had deteriorated in detention. It was likely that her detention was directly contributing to her depression. Dr Beeks felt that the Claimant should urgently be released so that she could be treated in the community. Her mental health was likely to improve there. Her medication needed review since her present treatment was "clearly ineffective in controlling her symptoms and her distress". The staff at the IRC had noted that the Claimant needed formal psychological therapy and this did not seem to be available in the IRC. Dr Beeks did not consider that the Claimant was feigning her symptoms.

41. The Claimant was not in fact seen by a psychiatrist instructed by the Secretary of State until January 2014, when she was seen by Dr Leahy.

42. The next review I was referred to was on 21 June 2013. An ETD had been obtained, but the Claimant had "health issues which makes [sic] her unfit to fly". The caseworker was liaising with healthcare about this. "Medical reasons" were a barrier to removal. But it was considered that the Claimant could be removed within a reasonable time. Paragraph 8 referred to the Claimant's recent hospitalisation with chronic constipation. A short-term catheter had been removed and she was due to have a check-up the next day. The action plan was to await the outcome of the

"medical issues". Detention was authorised. The Claimant was said to be "highly deceptive and a clear flight risk, notwithstanding her medical issues. Please persist in obtaining fitness to fly. I would not want it [the ETD] to become invalid while we ponder her medical position".

43. On 26 June 2013 the IRC said that she was fit to fly, but a final decision would be made later that day. A written assessment that the Claimant was fit to fly on 26 July 2013 said that she would need medical escorts.

44. The Claimant's representatives contacted the Secretary of State on 1 July 2013, referring to the representations dated 19 June 2013. The Secretary of State had not received these, so asked for them to be sent again. They were sent again under cover of a letter dated 2 July 2013. On 8 July 2013 the caseworker asked the IRC for "a full copy" of the Claimant's medical records. The IRC replied on 9 July 2013 with an "overview", as the notes were extensive. The Claimant suffered from chronic constipation which made her unable to pass urine. She had a catheter in situ which healthcare had tried to remove, but she could not pass urine without it. She was to have a test in the hospital the next day; it could be that the catheter could then be removed, but maybe not. She had been discharged by the gastroenterologist. She was on medication for depression and constipation which she did not always take. Being catheterised did not affect fitness to fly. The IRC could meet her medical needs and she was suitable for detention, but the longer she was detained, the more likely her health was to deteriorate further. On 11 July 2013, the IRC told the caseworker that the trial without the catheter had failed. It would stay in place until 25 September 2013 when she had a further appointment at the hospital. She might need a further referral to hospital for her constipation. It could take a long time to resolve this if she did not take her medicine.

45. On 15 July 2013 the Claimant tried to strangle herself with a 'phone cord. On 17 July 2013, the Claimant was said to be in a normal area of the IRC after complying with its rules.

46. A detention review dated 17 July 2013 said that further representations were a barrier to removal. "These include extensive medical issues. Although I have... a very brief 'fit to fly' report, to reply to the further representations I need a FULL medical history...". The template for detention reviews had changed by this stage, and the paragraph dealing with medical issues had become paragraph 12. This recorded that the Claimant had recently been hospitalised with chronic constipation leading to urinary retention. It had been reported that a short-term catheter had been removed. Healthcare at the IRC had said that the Claimant had had a check-up and was fit to fly. Against paragraph 13 (which refers to Chapter 55.10 of the EIG), the caseworker wrote, "N/A".

47. The action plan was that once a full medical history had been obtained from the IRC, "hopefully a swift dismissal of the ...representations can be made and removal directions set immediately". Paragraph 18 of the recommendation said that "removal directions likely to be set within the week", and, in that context, that "continued detention was necessary and proportionate". That was only realistic if the full history

could be obtained, and the representations swiftly dealt with. Detention was authorised. The decision maker said that the Claimant did not appear to have a serious medical condition and that her condition was clearly being managed in the IRC. He/she said that he/she had asked for "the full medical assessment" to be obtained as a priority as "it seems incongruous that she can be deemed fit to fly by our own medical staff but we are postponing removal" in order to answer medical representations. There is no reference in this review to the report from Dr Beeks, or to its possible implications.

48. On 22 July 2013 Duncan Lewis asked for the Claimant's release. The Secretary of State refused on 24 July 2013.

49. There was an undated review at some time in August 2013. This noted that the Claimant had been hospitalised most recently on 13 August 2013, with urology problems, and that she suffered from depression. Paragraph 55.10 was not engaged as the Claimant's health could be appropriately managed in the IRC. The IRC would continue to monitor her health and would up-date the caseworker. Paragraph 7 referred to an appeal against the decision to revoke the deportation order. This implies that at that stage the Secretary of State did not consider that the application for revocation would be certified under section 94 of the Nationality Immigration and Asylum Act 2002, and it also implies a delay while an appeal was lodged and determined. Yet paragraph 18 recorded that removal directions were likely to be set that week. In the light of that timescale, detention was said to be necessary and appropriate. The official authorising detention, by contrast, referred to "eventual removal" once the Claimant was ARE. He/she was satisfied that the case had been considered in accordance with Chapter 55 of the EIG.

50. On 13 August 2013, the Secretary of State decided to treat the representations of 19 June 2013 as an application to revoke the deportation order. The Claimant was taken to hospital that day with a distended abdomen. She was discharged three days later.

51. She saw an immigration officer on 11 September 2013 and said that she was not well. She was referred to healthcare. A further report on her health was sought. The Claimant had an appointment at the hospital on 13 September 2013. Her catheter was removed that day and she started to catheterise herself. The Claimant was said to be fit for detention. Dr Omara who was instructed by Duncan Lewis prepared a psychiatric report on 15 September 2013. This was not sent to the Secretary of State for some time. The Secretary of State inferred that Dr Omara's assessment must have been done in the legal corridor or on a social visit, as it had not been done in the healthcare unit. This meant that Dr Omara had not engaged with the healthcare staff who were looking after the Claimant.

52. On 9 October 2013 the Claimant again said she was ill. On 29 October 2013 a decision refusing to revoke the deportation order was served. The Claimant lodged an appeal against that decision on 5 November 2013. On 25 November 2013 there was a case management review.

53. An application for bail was received on 3 December 2013. It was opposed by the

Secretary of State. The Secretary of State referred to the Claimant's poor immigration record (had she not been encountered by the police on many occasions, she would have stayed at large), her history of offences, her lack of incentives to comply with conditions of bail given the refusal of her most recent representations and the fact that an ETD had been obtained. The Secretary of State also said that there was no recognisance. The Secretary of State did not accept that the Claimant was unfit for detention or unfit to fly. She would be removed as soon as her appeal was dismissed.

54. On 4 December 2013, the caseworker received a medical report which the Claimant's representatives had sent to the Secretary of State. This was the report from Dr Omara, which for reasons which were not and have not been explained, was dated 4 October 2013, but not sent until December 2013. The caseworker asked the responsible clinician how the Claimant was. Healthcare at the IRC gave an update on 5 December 2013. The Claimant was said to be fit to fly. On 10 December 2013, the Claimant's fourth application for bail was withdrawn. Dr Omara provided an addendum to the 15 September 2013 report, saying that the Claimant was not fit to fly. Dr Omara's further report was sent to the Secretary of State on 20 December 2013.

55. Dr Omara is a consultant psychiatrist. He is approved under 12(2) of the Mental Health Act 1983 ("the 1983 Act"). His report was based on a meeting with the Claimant on 15 September 2013. It lasted 3 hours. He expressed reservations about diagnosis because of the language barrier and lack of corroborative history from someone who had known her for a time. He agreed with Dr Beeks that the Claimant was suffering from typical depressive disorder. She had been prescribed medication which is usually effective. It was difficult to reach an exact diagnosis, but there was enough evidence to suggest that she required further assessment in a hospital, preferably in a low secure setting. She had a history of non-compliance and aggressive or suicidal tendencies. He did not believe that the IRC was a suitable place to assess and manage her. Because of the significant risks of non-compliance and absconding, she should be admitted under the provisions of the 1983 Act. Her presentation was likely to remain, if not to get worse if she went untreated.

56. In the addendum to his report, dated 13 December 2013, Dr Omara noted that the Claimant had not been transferred to hospital for assessment. His view was that she was likely to be suffering from a mental disorder which was of a degree and nature that warranted admission to hospital for assessment and treatment. She was a risk to herself and to her health without these. The assessment and treatment could only be available in a hospital setting. His recommendation was admission to hospital under section 2 of the 1983 Act. He did not suggest that the Claimant met the different criteria for transfer to hospital under section 48 of the MHA.

57. On 20 December 2013, officials at the IRC decided at a meeting that the Claimant's case would be monitored every week.

58. The Claimant was seen by a psychiatrist, Dr Leahy, on 2 January 2014. His view was that the Claimant was suffering from a combination of problems which were a response to severe stress in a vulnerable person. She was suffering from sleep disturbance, hallucinations and pseudo hallucinations and paranoid thinking. She

posed a diagnostic challenge. Unresolved issues about immigration and detention were perpetuating factors. He advised treating her as if she had a depressive illness with anxiety and psychotic-like features. He recommended trials of olanzapine and risperidone, and that admission to hospital should be considered if there was no improvement.

59. On 7 January 2014, the caseworker received Dr Omara's report and addendum. The caseworker asked for an update from healthcare. The Secretary of State wrote to Duncan Lewis on 14 January 2014 to say that the view of the responsible clinicians was that the Claimant's health was being satisfactorily managed in detention. Temporary admission was refused.

60. Dr Clark, a GP, prepared a further report on the Claimant. She assessed the Claimant on 1 March 2014. Her report was dated 20 March 2014. The Claimant had to use a catheter herself 3 or 4 times a day to empty her bladder. Dr Clark set out a full review of the Claimant's medical notes. Those showed that her mental health had worsened since the end of October 2013, but there had been a significant decline since February 2013. She referred to Dr Leahy's views and said that the Claimant had missed a GP appointment on 27 January 2014, and that by 1 March 2014, she had not had a review of her anti-psychotic medication. Dr Clark considered that it was likely that the Claimant would never be able to urinate independently. Dr Clark was not in a position to say whether her treatment in the IRC had caused this. The Claimant had a cluster of symptoms indicating major depression. That diagnosis was compatible with her history. Dr Clark also diagnosed PSTD (again, on the basis of the Claimant's reported history). Her symptoms suggested that her illness had psychotic features, which was Dr Leahy's view. The stairwell episode suggested a highly disturbed state with a dangerous attempt to end her life. Dr Clark did not consider that the Claimant was feigning or exaggerating her symptoms. That these were genuine was supported by the findings of Drs Beek and Omara, and repeated entries in her IRC medical records.

61. Dr Clark considered that the Claimant needed further psychiatric assessment and monitoring to review possible treatments for her depression. She considered that the Claimant's detention was significantly contributing to the Claimant's mental and physical symptoms. The Claimant had not so far been given effective treatment in the IRC. She gave several reasons why the Claimant would benefit from being released. She needed frequent psychiatric reviews and was not receiving them. Her distrust of the medical staff at the IRC was a factor. She would get more social support in the community, for example from her partner. Her severe constipation was also likely to improve. The likelihood of disruptive behaviour meant that she was not fit to fly. With adequate medical and psychiatric treatment, her health would improve.

62. On 31 March 2014, the Claimant was ordered by the FTT to serve any psychiatric evidence she relied on within 14 days. On 4 April 2014, a further psychiatric report was prepared by Dr Sagovsky, instructed by Deighton Pierce Glynn. Dr Sagovsky is a retired consultant psychiatrist and a medical member of the Tribunal Service, Mental Health. Her report is dated 4 April 2014. She saw the Claimant for three hours on 1 April 2014 and reviewed the Claimant's medical notes. When Dr Sagovsky saw the

Claimant, she was still on mirtazapine. She had been "erratic" in taking laxatives. She did not think that they worked.

63. Dr Sagovsky agreed with the other doctors that the diagnosis was not clear. The Claimant fulfilled the criteria for severe depression and PTSD. She presented as less disturbed in interview than she in fact was, because she did not want to be seen as mad. Her constipation and bladder problems were unlikely to get better in detention, and her bladder problems could become irreversible.

64. It is not clear from Dr Clark's report whether the Claimant was started on olanzapine, but Dr Sagovsky says that she was; however it was stopped for no reason which appeared from the medical notes, and it did not seem that the review of treatment which Dr Leahy had suggested had been done. The Claimant was now so unwell that detention "was a major factor in the deterioration of her health". Her fear of return to China was a contributory factor. Dr Sagovsky thought that the Claimant would do better in the community than as an in-patient. The prognosis if she remained in detention was poor. In Dr Sagovksy's view, the Claimant was too ill to be managed in detention. Her distrust of the medical staff was a contributory factor in her erratic compliance with medication. She had only been seen once by a treating psychiatrist in well over a year of experiencing serious mental health problems. The staff in the IRC tried to help, but they were unable to deal with her complex needs, especially as her problems were fuelled by being in detention.

65. On 8 April 2014 the Claimant's current solicitors served a letter before claim on the Secretary of State, enclosing the reports of Drs Omara and Clark. The Secretary of State replied on 22 April 2014. On 22 April, the Claimant's solicitors served Dr Sagovsky's report. They re-served it on 24 April 2014. In that letter they asked the Secretary of State whether she was relying on any expert psychiatric opinion, or on what the healthcare staff at the IRC were saying; there were no consultant psychiatrists based there.

66. In the meantime, the FTT notified the parties on 13 April 2014 that the Claimant's appeal would be heard on 30 May 2014.

67. On 24 April 2014, the Claimant fell from a stairwell, fractured her spine, and was admitted to hospital. The Secretary of State had made inquiries about the support she would need in the IRC. The Claimant was mobile with a back brace but would need help with washing and eating. This sort of support could not be provided in the long term in the IRC, so the Secretary of State asked how long she would need it for. The occupational therapist told the Secretary of State on 7 May 2014 that the Claimant did not need a special bed. She could care for herself, and if in the community, would be discharged with a special lavatory seat, a stool, and some support from the community healthcare team. The healthcare team told the Secretary of State that it would tell the Secretary of State when the Claimant came out of hospital whether her needs could be satisfactorily managed in detention. She was discharged to the IRC that day, and closely monitored.

68. Her detention was reviewed on 2 May 2014. The caseworker recorded that the

Claimant's appeal against the refusal to revoke the deportation order had been going on since 15 November 2013. The hearing was due on 30 May 2014. The fall was recorded, and the hospital's report of 1 May 2014. The Deputy Healthcare Manager at the IRC said that the Claimant was "currently very fragile, both physically and psychologically". He did not believe that when she was discharged the IRC could look after her appropriately. The only current barriers to removal were her appeal and "current health issues". The ETD was valid until 21 May 2014 and would take up to 20 days to re-validate once she was ARE. She could be removed once she was ARE, her ETD had been revalidated and she had recovered from her latest injuries. She would certainly abscond if released again. There was a high risk of re-offending (she would "almost certainly" re-offend) but a low risk of harm to the public. Paragraph 12 was completed with an account of the fall and its consequences. Paragraph 13 recorded that the Claimant was in Bedford Hospital with bed guards. The authorising officer said that "In the light of the risk of further offending and the harm that might be caused, as well as the likelihood of absconding, I consider that these additional factors outweigh the presumption to release".

69. Her solicitors wrote to the Secretary of State again on 8 May 2014.

70. On 12 May 2014, the Secretary of State was told that the Claimant was being closely monitored. She would get out of bed to go to the lavatory but was not trying to walk around. On 17 May 2014 an immigration officer visited the Claimant in the healthcare unit. He reported that her mood was very low and that she had not eaten that day. On 29 May 2014, the caseworker was told that the Claimant's appeal had been adjourned. The immigration officer agreed to go to a hospital appointment with the Claimant on 30 May 2014 as she was refusing to go.

71. The last detention review is dated 30 May 2014. Paragraph 12 said that on 24 April 2014 the Claimant fell down the stairs "Cause unknown". She had a spinal fracture which was "under control with simple medications including paracetamol". She needed no input from physiotherapists, according to the hospital, and no significant medical input. The conclusion of the 11 May meeting was that her condition could be managed by healthcare staff. She was fit for detention, but not fit to fly. Her appeal would be heard on 30 May 2014 and her ETD expired on that month, although it could be revalidated "when we are in a position to remove". The caseworker was receiving updates on the Claimant's medical condition. If it could not be managed in the IRC, a referral for release would be considered. Paragraph 13 of the template (which deals with Chapter 55.10) says, "See above". The authorising officer noted the medical issues but said that "this [sic] is not considered to impact on detention". The appeal was due to be heard later that month. There was an ETD which would need to be revalidated when the Claimant was ARE. She posed a clear risk of re-offending and absconding.

72. Her case was reviewed in the IRC on 5 June 2014. The Claimant was shown different places where she could go to recover, but she refused to leave the healthcare unit. The healthcare team said that she was fit to be detained but not fit to fly. She had responded well to physiotherapy but had not continued with exercises. The healthcare team were waiting for a further psychiatric report.

73. Dr Clark prepared a second report on 27 May 2014. This was served on the Secretary of State on 9 June 2014. Dr Clark had seen the Claimant on 11 May 2014. She was on constant watch in the IRC. According to the Claimant, who had been told this by a manager from the IRC, she was apparently sleepwalking when she fell from the stairwell. This is supported by the medical notes. The Claimant denied wanting to harm herself. The Claimant was having difficulty using catheters. She had a stable spinal fracture. This would take 6-12 weeks to heal and rehabilitation was necessary. Her mistrust of healthcare staff meant that she was not asking for the pain relief that was needed to help her recovery. Physiotherapy was needed. There was a risk that the fracture would cause future problems if she did not have good pain relief and physiotherapy. The lack of interpreters in the IRC was also a factor.

74. Dr Clark's view was that the Claimant was not fit for detention. Her physical and mental health had got significantly worse since she was detained. Her constipation was not being actively managed. She had not had her diagnosis explained in her own language and did not know what she needed to do to help her recover. Improvement in her mental health was doubtful in detention. She risked further significant injury while sleepwalking (or in a dissociative state). Her significant distressing and disabling symptoms were not being managed in detention. They were likely to be dealt with better in the community.

The legal framework

75. There is no dispute in this case but that at all material times, the Secretary of State had a power to detain the Claimant (conferred by paragraph 2(2) and (3) of Schedule 3 to the Immigration Act 1971). There is no express time limit which governs the exercise of that power. It is, however, subject to the *Hardial Singh* principles. These were summarised by Dyson LJ (as he then was) in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 206 and approved by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* (see paragraph 22 of Lord Dyson SCJ's judgment). These principles require the court to balance a range of different incommensurable factors.

76. Dyson LJ summarised the Hardial Singh principles in four propositions.

(1) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.

(2) The deportee can only be detained for a period that is reasonable in all the circumstances.

(3) If before a reasonable period has expired, it becomes clear that the Secretary of State will not be able to effect deportation within that reasonable period, s/he should not detain.

(4) The Secretary of State must act with reasonable diligence and expedition to effect removal.

77. He said that it is not possible to produce a list of all the circumstances which may be relevant. They include, at least, the length of the period of detention, the nature of the barriers to removal, the diligence and speed with which the Secretary of State has acted to surmount those barriers, the conditions in which the detained person is being

kept, the effect of detention on him, and the risks of his absconding and of committing offences if he is released.

78. It is common ground that the court decides whether or not the *Hardial Singh* principles have been complied with (*A (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 804.

79. In *Lumba*, Lord Dyson considered the relevance of challenges, such as appeals (paragraphs 111 and 112); and failure to co-operate with voluntary return (paragraphs 127-8). The impact on detention of a failure to co-operate with attempts to document a detainee is also considered in *WL (Congo)* (as the decision of the Court of Appeal in *Lumba* is known) . Miss Anderson for the Secretary of State points out that there is a legal obligation to co-operate in deportation cases (see section 35 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004).

80. In paragraph 218 of *Lumba* Baroness Hale mentioned the detainee's psychiatric condition (which is relevant to the impact of detention on the detainee). This point was picked up by Beatson LJ in *R(Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45; [2014] 1 WLR 3548 at paragraphs 16 and 69. He said that the state of a person's mental health is a relevant factor which will affect what is a reasonable period of detention in his case. Referring to *R(O) v Secretary of State for the Home Department* [2008] EWCA Civ 307 at paragraph 39, Beatson LJ said that where detention has caused or contributed to a person's illness, that should in principle be taken into account in assessing what is a reasonable period of detention, but he said, "...the critical question....is whether facilities for treating the person whilst in detention are available so as to keep the illness under control and prevent suffering". In paragraph 69, he added that particular care should be taken by the Secretary of State, even if her policy (in Chapter 55.10; see below) is not engaged, in assessing whether a person with mental illness should be detained and whether particular arrangements for welfare and to monitor him for deterioration should be made.

81. Rule 33 of the Detention Centre Rules 2001 SI No 328 provides that all detention centres must have a healthcare team including a "medical practitioner" who is trained as a general practitioner. Rule 34 provides that every detained person is to be given a physical and mental examination by a medical practitioner within 24 hours of admission. Rule 35(1) obliges the medical practitioner to report to the detention centre manager "on the case of any detained person whose health is likely to be injuriously affected by continuing detention or any conditions of detention." Rule 35(2) imposes a duty on the medical practitioner to report to the manager on the case of any detained person whom he suspects of having suicidal intentions, and the detained person must remain on special observation for so long as such suspicions remain, and a record of his treatment and condition during that period must be kept.

82. The Secretary of State has a policy governing detention. It is in Chapter 55 of the Enforcement and Instructions Guidance ("EIG"). This policy states that there is a presumption in favour of release, even in the case of foreign national prisoners who are detained pending deportation. In their case, however, the risks of absconding and

re-offending may be such that they are normally detained. So far as is material Chapter 55 provides as follows:

"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.**

.....

A properly evidenced and fully justified explanation of the reasoning behind the decision to detain must be retained on file in all cases.

55.1.2. Criminal casework cases

Cases concerning foreign national offenders - dealt with by criminal casework - are subject to the general policy set out above in 55.1.1, including the presumption in favour of temporary admission or release and the special consideration in cases involving children. Thus, the starting point in these cases remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attention must be paid to their individual circumstances.

In any case in which the criteria for considering deportation action (the 'deportation criteria') 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.

55.1.3. Use of detention

Criminal casework cases

As has been set out above, due to the clear imperative to protect the public from harm, the risk of re-offending or absconding should be weighed against the presumption in favour of temporary admission or temporary release in cases where the deportation criteria are met. In criminal casework cases concerning foreign national offenders (FNOs), if detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale.

If detention is appropriate, an FNO will be detained until either deportation occurs, the FNO wins their appeal against deportation (see 55.12.2. for decisions which we are challenging), bail is granted by the Immigration and Asylum Chamber, or it is considered that release on restrictions is appropriate because there are relevant factors which mean further detention would be unlawful (see 55.3.2 and 55.20.5 below).

In looking at the types of factors which might make further detention unlawful, case owners should have regard to 55.1.4, 55.3.1, 55.9 and 55.10. Substantial weight should 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 here, 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.

55.3.A. Decision to detain - criminal casework cases

As has been set out above, public protection is a key consideration underpinning our detention policy. Where a foreign national offender meets the criteria for consideration of deportation, the presumption in favour of temporary admission or temporary release may well be outweighed by the risk to the public of harm from re-offending or the risk of absconding, evidenced by a past history of lack of respect for the law. However, detention will not be lawful where it would exceed the period reasonably necessary for the purpose of removal or where the interference with family life could be shown to be disproportionate.

In assessing what is reasonably necessary and proportionate in any individual case, the caseworker must look at all relevant factors to that case and weigh them against the particular risks of re-offending and of absconding which the individual poses. In balancing the factors to make that assessment of what is reasonably necessary, the Home Office distinguishes between more and less serious offences. A list of those offences which the Home Office considers to be more serious is set out in the list accessible here.

.....

Less serious offences

To help caseworkers to determine the point where it is no longer lawful to detain, a set of criteria are applied which seek to identify, in broad terms, the types of cases where continued detention is likely to become unlawful sooner rather than later by identifying those who pose the lowest risk to the public and the lowest risk of absconding. These provide guidance, but all the specific facts of each individual case still need to be assessed carefully by the caseworker.

As explained above, where the person has been convicted of a serious offence, the risk of harm to the public through re-offending and risk of absconding are given substantial emphasis and weight. While these factors remain important in assessing whether detention is reasonably necessary where a person has been convicted of a less serious offence, they are given less emphasis than where the offence is more serious, when balanced against other relevant factors.

Again, the types of other relevant factors include those normally considered in non-FNO detention cases, for example, whether the detainee is mentally ill....

55.3.2. Further guidance on deciding to detain in criminal casework cases

55.3.2.1 This section provides further guidance on assessing whether detention is or continues to be within a reasonable period in criminal casework cases where the individual has completed their custodial sentence and is detained following a court recommendation or decision to deport, pending deportation, or under the automatic deportation provisions of the UK Borders Act 2007. It should be read in conjunction with the guidance in 55.3.1 above, with substantial weight being given to the risk of further offending and the risk of harm to the public.

Whilst as a matter of practice, the need to protect the public has the consequence that criminal casework cases may well be detained pending removal, caseworkers must still carefully consider all relevant factors in each individual case to ensure that there is a realistic prospect of removal within a reasonable period of time.

Application of the factors in 55.3.1 to criminal casework cases

Imminence

55.3.2.4 In all cases, caseworkers should consider on an individual basis whether removal is imminent. If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely

to take place in the next four weeks.

Cases where removal is not imminent due to delays in the travel documentation process in the country concerned may also be considered for release on restrictions. However, where the FNO is frustrating removal by not co-operating with the documentation process, and where that is a significant barrier to removal, these are factors weighing strongly against release.

.....

Risk of absconding

55.3.2.5 If removal is not imminent, the caseworker should consider the risk of absconding. Where the person has been convicted of a more serious offence appearing on this list, then this may indicate a high risk of absconding. An assessment of the risk of absconding will also include consideration of previous failures to comply with temporary release or bail. Individuals with a long history of failing to comply with immigration control or who have made a determined attempt of breach the UK's immigration laws would normally be assessed as being unlikely to comply with the terms of release on restrictions. Examples of this would include multiple attempts to abscond or the breach of previous conditions, and attempts to frustrate removal (not including the exercise of appeal rights).

Risk of harm

…..high risk offences should be given particularly substantial weight when assessing reasonableness to detain. Those with a long record of persistent offending are likely to be rated in the high or medium risk. Those with a low level, one-off conviction and, with a good record of behaviour otherwise are likely to be low risk."

83. The offences for which the Claimant was convicted are not on the list of serious offences referred to in paragraph 55.3.A. Chapter 55.8A of the EIG explains that Rule 35 reports are passed to the officer responsible for reviewing a person's detention and that their purpose is to ensure that particularly vulnerable detainees are brought to the attention of those who are directly responsible for authorising, reviewing and maintaining their detention. The information in the report "needs to be considered in deciding whether continued detention is appropriate in each case." Caseworkers must review continued detention in the light of the information in such a report and must respond to the IRC within 2 days.

84. Chapter 55.10 deals with the detention of those who are mentally and physically ill. So far as is relevant, it provides:

"**55.10. Persons considered unsuitable for detention**

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

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

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

- **Unaccompanied children and young persons under the age of 18 (see 55.9.3 above).**
- **The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention.**

- **Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood).**
- **Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.**
- **Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in criminal casework cases, please contact the specialist mentally disordered offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act.**
- **Those where there is independent evidence that they have been tortured.**
- **People with serious disabilities which cannot be satisfactorily managed within detention.**
- **Persons identified by the competent authorities as victims of trafficking (as set out in Chapter 9, which contains very specific criteria concerning detention of such persons).**

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

85. In *Das* the Court of Appeal considered various issues relating to Chapter 55.10. The detainee in that case was suffering from mental illness. At paragraph 45 of the judgment of the Court, Beatson LJ cited paragraph 14 of the decision of the Court of Appeal in *R (MD (Angola))* [2011] EWCA Civ 1238. Chapter 55.10 must be construed in the light of its language, context and purpose. The context is that the policy is concerned with the use of the power to detain to effect lawful removal. There is often a risk that the detainee will abscond, fail to co-operate or commit offences during a period, which is anticipated to be short, before removal. The purpose of the policy is to ensure that the lawful removal of a person who has no right to be in the United Kingdom is not frustrated.

86. Beatson LJ said, at paragraph 47, that the policy provides "broad guidance as to how the discretion is to be exercised". It should not be subjected to fine analysis or interpreted like a statute. What is required is a "purposive and pragmatic construction". The policy seeks to ensure that account is taken of the health of individuals and "save in very exceptional circumstances" to prevent the detention of those who, because of a serious mental illness, are not fit to be detained "because their illness cannot be satisfactorily managed in detention".

87. At paragraph 57, Beatson LJ held that the mere fact that a person was suffering from a diagnosable mental illness did not of itself engage Chapter 55.10. A detainee must be suffering from a serious mental illness which cannot be satisfactorily managed in detention before Chapter 55.10 applies. Many factors are relevant to the question whether an illness can be managed in detention; for example, the effect of the illness on the individual, and the length of time for which it is anticipated that he will be detained.

88. Beatson LJ indicated at paragraph 67 that in deciding whether an illness could be managed satisfactorily in detention, the Secretary of State needs to consider the medication a detainee is taking, and whether his evident needs can be met in

detention. Account should be taken of the facilities in the IRC, and the period for which it is likely that he will be detained. Some of those suffering significant adverse effects of mental illness can be satisfactorily managed in detention (see the facts of *OM (Nigeria)* [2011] EWCA Civ 909 at paragraph 33).

89. Where the Secretary of State has conscientiously made reasonable inquiries, and obtained such reports as have been made available from treating clinicians, she is entitled to rely on those, absent negligence by them. But she cannot delegate her statutory and public law duties to them (judgment, paragraph 70). The Court did not decide whether "satisfactory management" involved making available treatment which would improve a detainee's condition, but strongly doubted whether it did (judgment, paragraph 71). It may be implicit in the way this question was posed that the Court accepted that "satisfactory management" requires the prevention of deterioration in a detainee's condition.

90. This issue was further considered by the Court of Appeal in *R (O) v Secretary of State for the Home Department* [2014] EWCA Civ 990. Arden LJ, with whom the other members of the Court agreed, held that "satisfactorily" indicates an objective standard of assessment. The question is whether the outcome of the IRC's "treatment" will be "satisfactory". There is no requirement that the treatment be equal to that available in the community. "Generally speaking, what is required is that the treatment would generally be regarded as acceptable medical practice for dealing with this condition appropriately, which may mean keeping the condition stable...it would not necessarily mean treatment that provided a hope of recovery."

91. He also said the authorities show that the Secretary of State must consider whether Chapter 55.10 applies (paragraph 66). Where it does apply, there is a high hurdle to overcome to justify detention (paragraph 68). Liability to removal and refusal to co-operate by leaving voluntarily are not enough. A high risk of harm to public or imminent removal might suffice, as where there are cogent grounds for believing that removal will happen very soon, questions of satisfactory management may not arise (paragraph 68).

92. In *R (Das) v Secretary of State for the Home Department* [2013] EWHC 682 (Admin) Sales J (as he then was) considered whether and to what extent the Secretary of State had a duty to obtain information in mental health cases. At paragraph 42 of his judgment he said that having adopted a policy about the detention of people who suffer from serious mental illness, the Secretary of State was under an obligation imposed by public law to take reasonable steps to give practical effect to that policy (which is designed to promote the humane treatment of people who suffer from serious mental illness). If there is a real, rather than a fanciful possibility that the policy applies to a detainee, the Secretary of State has an obligation to take reasonable steps to "inform [herself] sufficiently about the relevant circumstances so as to be able to make an informed judgment" about whether the policy does apply.

93. He held that the Secretary of State breached that duty in that case because during the second period of the claimant's detention, her officials knew that there was a psychiatric report about the claimant which might well have a bearing on the question,

but they failed to obtain the report from the judicial review team. Sales J held that they should have done so. That failure affected the whole of the second period of detention. No-one assessed the report in order to see whether it was right to continue to detain the claimant, nor was it sent to the IRC medical staff to help them in their assessments. That failure made the whole of the second period of claimant's detention unlawful (judgment, paragraph 45). The claimant was, however, only entitled to nominal damages, as, on the Judge's interpretation of the policy she would have been detained anyway.

94. The Court of Appeal overturned the decision of Sales J on the threshold for the application of Chapter 55.10. But I do not read the judgment as casting any doubt on what Sales J said about the duty of inquiry on the facts of that case, or on his conclusion that the second period of detention was unlawful for the reasons which he gave. Miss Anderson showed me a later first instance decision in *R (DK) v Secretary of State for the Home Department* [2014] EWHC 3257 (Admin). As I understand his judgment, Haddon-Cave J did not suggest that this aspect of the judgment of Sales J was wrong (and if and to the extent that he did, I would respectfully prefer the approach of Sales J).

Discussion

95. Detention reviews are recorded on a template. Their structure is that a caseworker sets out the history of the case, and addresses various relevant factors by reference to numbered headed paragraphs in the template. The caseworker makes a recommendation, which is then authorised by a more senior official.

96. Mr Buley drew my attention to four general features of the detention reviews, which are relevant to the underlying justification for the Claimant's detention. First, the language of the recommendations tends to be formulaic, and there are many common features in all the recommendations. Second, although a checklist (which was not filled in at all in the early reviews) has a box which alerts the decision maker to cases in which detention has exceeded six months, there is no reference anywhere in the recommendations or authorisations to the length of time for which the Claimant had been already been detained. Mr Buley did not challenge the first twelve months of the Claimant's detention, but he submitted, as time went on, and her mental and physical problems worsened, the relevance of the length of time for which she had already been detained did increase. I would add, however, that it seems to me that the reasons for the length of the earlier detention are also of some relevance: here, they were mostly connected with the Claimant's refusal to comply with arrangements for obtaining an ETD. Third, while the reviews' assessment of the Claimant's risk of re-offending has been high throughout, in those reviews where the risk of harm to the public is referred to, that is acknowledged to be low. Fourth, a dominant theme in the reviews, and the principal argument in favour of detention is, throughout, the risk of absconding and re-offending. There is no acknowledgement that as the Claimant's mental and physical frailty increased, those risks reduced commensurately. As those risks reduced, he submitted, then, under Chapter 55.3.2.8, a point may be reached, and was reached in this case, where detention becomes or became unlawful.

97. Miss Anderson submitted that it was not for the Court to exercise what she described

as a "superhero" jurisdiction by seeking to put right perceived injustices arising from immigration detention. Detention was bound to be distressing, and depressing, for detainees. Parliament had set no time limit on the exercise of the powers conferred by Schedule 3 to the 1971 Act, and if limits were to be implied, they must not undermine the central purpose of detention, which was to facilitate the removal of FNOs who not only had no right to be here, but whose presence in the United Kingdom is not conducive to the public good. As many such prisoners, the Claimant presented clear risk of absconding and of committing further offences. To the extent that she had not co-operated with attempts to obtain an ETD, she had prolonged her own detention.

98. The Secretary of State was entitled to be guided by the views of the healthcare staff in the IRC. The fact that there had been no rule 35 reports was significant. Chapter 55.10 was not engaged, but, if it was, there were very exceptional circumstances which meant that the Claimant's detention was lawful. The *Hardial Singh* principles were not breached. The detention was lawful throughout.

99. There is considerable force in these submissions. Nonetheless, I am troubled by the overall length of this detention, given its effects on the Claimant. I am also troubled that despite the medical evidence sent to the Secretary of State by her solicitors, she seems to have been seen by a psychiatrist only once during her detention (by Dr Leahy) and his recommendations for her treatment do not seem to have been followed. The Claimant was, for much of that period, an undoubted flight risk, and posed an undoubted risk of committing further offences. But the risk of harm to the public was always acknowledged by the Secretary of State to be low. Once her bladder problems became established, and certainly after her fall, her ability to abscond, and her ability to commit further offences are, as Mr Buley submitted, likely to have lessened. The fact that I am troubled by the length of this detention is neither here nor there, unless it is unlawful, and I am conscious that the Secretary of State is (subject to the application of the *Hardial Singh* principles, which is for the court) the primary decision maker on whom Parliament has conferred the power to detain.

100. Mr Buley was right not to challenge the first year or so of the Claimant's detention. I am satisfied that it was lawful. The next question is whether, at any stage after that, her detention became unlawful. Logically, the first issue is whether her continuing detention breached the *Hardial Singh* principles at any point. My conclusion is that by the date of her return to detention after her fall, the Claimant's continuing detention breached the second *Hardial Singh* principle. This is because, in my judgment, on the basis of Dr Clark's second report, which has not been contradicted, the length of time for which the Claimant had been detained, coupled with the effect of detention on her, and the likelihood of worsening in her mental and physical health it would not be reasonable for her to be detained any longer. I also accept Mr Buley's submission that the risk of absconding, and of committing further offences was reduced both by the Claimant's inability to empty her bladder without using a catheter, by the physical consequences of her fall, and by the mental and physical frailty noted by the Deputy Healthcare Manager of the IRC.

101. I also conclude, for two reasons, that the Claimant's detention was not in accordance with public law once the Secretary of State had received, and had time to consider,

Dr Beeks' report (and if that is wrong, once she had received and considered Dr Omara's). The March 2013 detention review had noted that the Claimant was "constantly displaying bizarre behaviour". It is true that Dr Beeks's report was served a long time after Dr Beeks had seen the Claimant. But once served, it was (1) clearly material which was relevant to any decision to maintain detention and (2) created a real, rather than a fanciful possibility that Chapter 55.10, as analysed by the Court of Appeal in *Das*, applied to the Claimant. The same reasoning applies to the reports of Drs Clark (the first), and Sagovsky. The theme of the medical evidence served by the Claimant's solicitors was that her conditions were not being satisfactorily managed in detention. This meant that the Secretary of State had an obligation to take reasonable steps to inform herself sufficiently about the relevant circumstances so as to be able to make an informed judgment about whether the Chapter 55.10 did apply to the Claimant, who was suffering from physical as well as mental illnesses.

102. I am not satisfied that any of these reports were taken into account by those who authorised the Claimant's detention at any stage after it was served, nor am I satisfied that the caseworker took reasonable steps to ask the healthcare staff about the material in the reports. Miss Anderson made four submissions about this.

103. First, the medical reports provided by the Claimant's solicitors were medical advocacy; I should not give them any weight, and the Secretary of State was not obliged to give them any weight. They were based on an acceptance of the Claimant's discredited account of her experiences in China, were inconsistent, and did not cast any doubt on the conclusion that the IRC could manage the Claimant's condition. I reject that submission. It is true that apart from Dr Omara, the authors of these reports do accept the Claimant's account of her experiences in China, and that acceptance influences their views, particularly their diagnoses of PTSD. Nonetheless, that is not the only reason for their conclusions, which are also based on their review of the IRC medical notes, and on their observations of the Claimant's symptoms. All the reports contain an expert's declaration, and Dr Omara and Dr Sagovsky are consultants; one recognised under section 12 of the MHA, and the other a tribunal member.

104. Second, in any event, the Secretary of State is entitled to rely on the views of the "treating clinicians". What this phrase actually seems to mean, in practice, in this case, is the nurses employed in the IRC by the Secretary of State's contractor, Serco. I accept, of course, that the Secretary of State is entitled to give great weight to what is said by the nurses who are looking after a detainee day to day. But I reject the submission that if the Secretary of State receives a report from a doctor or a consultant, the Secretary of State is always entitled to prefer what nurses in the IRC say. It will depend on the circumstances. This issue does not directly arise, in any event, in this case, as I am not satisfied that the Secretary of State put the views of the reporting doctors to the healthcare staff for their comments.

105. I also reject her third submission that the absence of any rule 35 report from a medical practitioner in the IRC entitled the Secretary of State to ignore, without further investigation, reports from doctors outside the IRC. Miss Anderson is recorded as having submitted in *Das* that the Court of Appeal should infer from the fact that there were no rule 35 reports that the Chapter 55.10 was not engaged. At paragraph 76,

Beatson LJ described these as "a powerful arguments", on the assumption that the clinicians at the IRC had the relevant information and were not in breach of their reporting duties. Her alternative submission, that the appellant would have been detained anyway, was remitted to the Administrative Court. That result implies that Miss Anderson's first submission was rejected. I note that Ms Das was a not a foreign national prisoner, although the Secretary of State had been trying to remove her for several years.

106. Fourth, Miss Anderson submitted that I could not conclude that the reports had not been taken into account from the fact that they were not referred to in the detention reviews. Reviews are internal documents and it should not be expected that they will contain everything a decision maker has considered. I reject that submission. I accept that a decision maker is not required to refer in a decision to every consideration which is relevant to the decision. The decision need only reflect his views on the issues which are important to the decision. But on these facts, this was a relevant consideration of great importance, as the format of the template shows. Moreover, Chapter 55.1. requires a decision maker to ensure that "a properly evidenced and fully justified explanation of the reasoning behind the decision to detain" is retained on file in all cases. There is no witness statement from the Secretary of State, and no material suggesting that these reports were taken into account when officials decided to maintain detention. I conclude that the fact that they were not referred to in the detention reviews means that they were not taken into account.

107. These breaches of public law mean that the Claimant's detention was unlawful from the 16 July 2013, 14 days after Dr Beeks' report was served. The Claimant is only entitled to nominal damages for that unlawful detention unless I am satisfied on the balance of probabilities that if the Secretary of State had taken the reports of the Claimant's experts into account, and had complied with her duty of inquiry, she could lawfully have continued to detain the Claimant, and would have done so. On balance, I conclude that she could, and would have, done so. If the Secretary of State had taken the reports into account and made inquiries, I consider that it is probable that the healthcare staff at the IRC would have indicated that the Claimant's conditions could be managed satisfactorily in detention. On the authorities, the Secretary of State did not have to be satisfied that the Claimant's conditions would improve in detention, only that they be kept stable.

108. I turn now to articles 3 and 8 of the European Convention on Human Rights. Mr Buley submitted, but did not press these submissions with any great vigour, that the Claimant's detention breached articles 3 and 8. While I do not rule out the possibility of such a breach in an individual case, my view on the facts of this case is that the threshold for a breach of article 3 is not crossed, and if that is right, then on these facts, a claim based on article 8 should not succeed, either, because of the legitimate demands of immigration control. This is not (at least apart from a relatively short period early on in the Claimant's detention) a food refusal case. But it seems to me, as a result of the decision of the Court of Appeal in *IM (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1561 that the bar for a breach of article 3 in this context is high one, especially when some treatment has been made available but a detainee's acceptance of that treatment has been erratic, as the Claimant's has, at

times, been in this case.

Conclusion

109. This claim succeeds. The Claimant's detention was unlawful from 16 July 2013. She is only entitled to nominal damages up until 2 May 2014, the date when she was returned to detention from hospital after her fall. At that point, as I have held, her continued detention was a breach of the second *Hardial Singh* principle, and she is entitled to an award of damages to reflect that.