Case No: CO/7411/2010

Neutral Citation Number: [2011] EWHC 154 (Admin)

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

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester, M60 9DJ

Before :

His Honour Judge Stephen Davies
sitting as a Judge of the High Court

- -

Between :

The Queen, on the application of

A.E. (Libya) — **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

- -

Mikhil Karnik (instructed by **Paragon Law, Nottingham**) for the **Claimant**
Julie Anderson (instructed by **Treasury Solicitors Department, London**) for the **Defendant**

Hearing date: 16 December 2010

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JUDGMENT

Introduction

1. In this case the Claimant, to whom I shall refer as A.E., seeks judicial review in relation to what he contends is his unlawful detention by the Defendant Secretary of State for the Home Office (SSHD). In short, the position is as follows: (1) in October 2008 the Claimant, having been convicted of various offences, including two breaches of a Sexual Offences Prevention Order (SOPO) imposed on an earlier occasion, was sentenced to a term of 30 months' imprisonment in total; (2) He was due to be released from the custodial element of his sentence on 9 October 2009; (3) From that time onwards he has continued to be held in prison by the Defendant under administrative detention, pending his removal to Libya pursuant to a deportation order made against him by the Defendant; (4) Although the Claimant appealed the decision to deport him to the AIT, that appeal was dismissed in September 2010 and his appeal rights have since become exhausted; (5) The Defendant is currently engaged in the process of seeking to obtain an Emergency Travel Document (ETD) for the Claimant's removal to Libya; (7) If and when the ETD is obtained, there will be no remaining obstacle to his removal.

2. The Claimant complains that his continued detention is unlawful and also contends that his continuing detention in prison instead of in an Immigration Removal Centre ('IRC') is in itself unlawful. He seeks an order for his release, alternatively an order quashing the decision not to release him and a reconsideration of that decision, alternatively an order for his transfer to an IRC, alternatively an order quashing the decision not to transfer him to an IRC and a reconsideration of that decision, further or alternatively damages for his wrongful detention alternatively wrongful detention in prison rather than an IRC.

3. The Claimant made his application for judicial review on 7 July 2010. He also made an application for interim relief seeking his release from detention, alternatively his transfer from prison to an IRC. The application for interim relief was refused by HHJ Waksman QC both on paper and at a renewed oral hearing. On 31 August 2010 HHJ Waksman QC refused permission to bring judicial review proceedings on the basis that:

   (1) The challenge to continued detention was bound to fail since at worst the Defendant was responsible for a modest delay in the AIT appeal process, and even if there was some delay in arranging for an ETD that would be outweighed by the very clear risk of further offending and absconding.

   (2) The challenge to detention in prison was also bound to fail because the decision not to transfer was in accordance with the Defendant's policy in the Enforcements Instructions Guidance (EIG) section 55.10 which had not been challenged as irrational.

   He also directed that if an application to renew was made it should be heard on a rolled up basis with a time estimate of 1 day.

4. On 8 September 2010 the Claimant renewed the application on what were described as amended and reformulated grounds. It appears from paragraphs 90 onwards of the renewed application that the Claimant is challenging the refusal to transfer him to an IRC on a number of alternative bases, including arguments that (1) the Defendant failed to provide any or any good reasons, contrary to the EIG; (2) the Defendant failed to consider the Claimant's individual circumstances or to conduct any risk assessments; (3) the decision not to transfer

was irrational; (4) if the policy is that the Claimant's sexual offences convictions alone preclude transfer, then the policy is irrational

5. On 5 November 2010 there was an order by consent adjourning the hearing of the application to 16 December 2010 and making provision for the Defendant to (1) provide disclosure of documents 'concerning the application of any policy in respect of detention of serious sex offenders in relation to the Claimant (including any risk assessments)', (2) file evidence. The Defendant did so, and I heard the application on 16 December 2010. Submissions lasted the full day allowed, so that I reserved judgment. Since the question as to whether or not permission should be granted was not dealt with as a preliminary issue at the outset, and since I have heard full argument on the substance of the claim, I consider that the appropriate course is to grant permission and to proceed to deal in this judgment with the substantive claim on its merits.

6. I should mention that this case was - at the request of the parties - listed to be heard at the same time as another case with a different claimant but the same defendant, because the issues were similar in both, and because the same solicitors and counsel were involved. However, because the time estimate for each was 1 day, but only 1 day in total had been allocated for both cases, and because the facts of each case were different, it was clear that both could not be dealt with in the single day allowed. Accordingly, since this case was one of urgency involving continuing detention whereas the other was not, it was agreed at the outset that I should adjourn the hearing of that case and deal solely with the present case, which is what I did.

7. The Claimant's case, as summarised in opening, is as follows:

   (1) His continued detention is unlawful, by application of what are commonly referred to as the Hardial Singh principles. One particular factor relied upon as part of his case in this regard is what he contends is his wrongful detention in prison rather than in an IRC pursuant to what he contends is an unlawful secret policy. Alternatively:

   (2) Even if his continued detention as such is not unlawful, he contends that his continued detention in prison rather than in an IRC, pursuant to the alleged unlawful secret policy, is wrongful.

8. It is convenient to begin by referring to the legislative background, the relevant case law and the applicable policies in force in the period with which this case is concerned, before turning to the facts, considering the arguments and expressing my conclusions.

The legislative background

9. There is no controversy in this case as to the relevant legislative background which can, therefore, be stated relatively shortly.

10. The power to make a deportation order on conviction arises under ss.3 and 5 Immigration Act 1971. The power to detain pending removal or departure on a person against whom a deportation order is in force is conferred by paragraph 2(3) of Schedule 3 to the 1971 Act.

11. Since the Claimant had been sentenced to a term of imprisonment in excess of 12 months, it is common ground that the Defendant was obliged under s.32(5) UK Borders Act 2007 to make

a deportation order against him unless one of the exceptions in s.33 applied, including the case where removal would breach his Convention rights: s.33(2). Accordingly, under s.36, the Defendant was required to exercise his power of detention under paragraph 2(3) of Schedule 3 against the Claimant unless, in the circumstances, he thought it inappropriate to do so.

The limit on the length of lawful detention – the Hardial Singh principles

12. It is also not controversial that there are limits on the lawfulness of continued deportation, under principles stated in the case of R (Hardial Singh) v Governor of Durham Prison [1984] 1 WLR 704, and followed ever since. The principles were summarised by Dyson LJ in R (I (Afghanistan)) v SSHD [2002] EWCA Civ 888 as follows:

    46. [T]he following four principles emerge:
    (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
    (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
    (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
    (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

13. On a number of subsequent occasions the Court of Appeal has revisited the Hardial Singh guidelines and subjected them to further consideration, most recently in the case of R (MH) v SSHD [2010] EWCA Civ 1112.

14. It is common ground that there are a number of relevant circumstances to be considered when deciding whether the length of detention is reasonable.

15. It is clear from the authorities that the burden is on the Defendant to satisfy the court on the balance of probabilities that the Claimant is being properly detained pending removal, so that the court must make up its own mind on this issue rather than limit itself to conducting a public law review of the Defendant's decision to continue to detain.

16. The prospects of securing the detainee's removal within a reasonable time is of course an issue of fundamental importance. It is however clear from the authorities that there is no requirement that the removal be 'imminent', nor that a specified date for removal can be identified. Further, there is no set time limit beyond which detention will automatically become unreasonable; everything depends on the facts of the individual case. Equally, however, the longer the period of detention the more anxiously the court will scrutinise the reasons put forward as justifying the continued detention.

17. The authorities show that the risk of absconding if not detained is a relevant consideration. Mr Karnik referred me to the judgment of Dyson LJ in I (Afghanistan) where he said that the risk of absconding is not a 'trump card' which always justifies continued detention, no matter the circumstances. Ms Anderson accepted this but observed that nonetheless it may be a factor which carries considerable weight. For example in R(A) v Secretary of State for the

Home Department [2007] EWCA Civ 804, Toulson LJ and Keene LJ attached considerable significance to the risk of absconding.

18. The authorities also show that the risk of re-offending if not detained is a relevant consideration. Mr Karnik submitted that since the primary purpose of administrative detention is to effect deportation, although the risk of re-offending is a relevant consideration it is nonetheless a secondary consideration. In my judgment this is a matter of semantics; the risk of re-offending is clearly a relevant consideration, but the weight to be attached to it in an individual case depends on the circumstances. As Ms Anderson submitted, it is not merely the risk of re-offending which is relevant but the likely type of offending. As Simon Brown LJ said in I (Afghanistan), 'if one could predict with a high degree of certainty that upon release the detainee would commit murder or mayhem that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee's removal abroad'.

19. In considering the risk of absconding and the risk of re-offending, the court is entitled to have regard to, but should not defer to, the reasons given by an Immigration Judge ('IJ') in dealing with any application by the detainee for bail. As has been observed in the cases, IJs are naturally extremely experienced in this area and, also, often have the advantage of hearing the detainee give evidence before them. Mr Karnik however referred me to paragraph 50 of the decision of Burnett J in R (Ibrahim & another) v SSHD [2010] EWHC 764 (Admin) in support of his submission that the court should not be over-influenced by the fact that – as in this case – the detainee had, and had exercised, a right to make repeated bail applications whilst in administrative detention, all unsuccessful. He submitted that the IJ hearing the individual bail application is making an interim decision pending the determination of the appeal to the AIT, whereas the court at this stage is being asked to conduct a fundamentally different enquiry, and cannot abdicate its responsibility to decide on the overall lawfulness of continued detention to the IJ. I agree with this submission, and have regard to the records of the bail applications and the reasons given for refusal, but do not regard them as in any way determinative of the issues I have to decide.

20. The authorities demonstrate that the detainee's conduct in relation to his removal is also relevant. A court can, in an appropriate case, take into account that the detainee could have returned to his home country voluntarily but has chosen not to do so, both as a relevant factor in its own right and also as a consideration relevant to the risk of absconding. However the Court of Appeal has cautioned that this cannot be used as a justification for, in effect, an indefinite period of detention of someone who, for good reason or bad, it is not willing to repatriate voluntarily. A court can also in an appropriate case take into account that the detainee has failed to co-operate with his removal, whether by physically refusing to submit to forced removal or by mounting unsuccessful legal challenges against removal. Again however this cannot justify an indefinite period of detention. Nonetheless in the case of R (WL (Congo) & Others) v SSHD [2010] EWCA Civ 111 the Court of Appeal held (paragraph 102) that it was relevant to the assessment of the legality of continued detention that the period of detention had been increased by the pursuit of applications for asylum or leave to remain, appeals and judicial review proceedings, 'particularly if his applications and appeals are obviously unmeritorious'. They continued:

'In our judgment, as a matter of principle, a FNP[1] cannot complain of the prolongation of his detention if it is caused by his own conduct'.

It is clear from WL (Congo), therefore, that this is a relevant factor, even if the applicant has acted perfectly reasonably in pursuing these claims, although the weight to be given will depend on all of the relevant circumstances of the particular case, including whether the claims were pursued reasonably or unreasonably.

21. Ms Anderson submitted that the prospects of removal within a reasonable time, the risk of absconding, the risk of re-offending and the detainee's conduct in relation to his removal are the only decisive factors. Mr Karnik disagrees, saying that other relevant factors would include for example the effect of the continued detention upon the detainee and the conditions of detention. In that respect he relied upon paragraph 48 of the judgment of Dyson LJ in I (Afghanistan), and he also referred me to the decision of the ECHR in Massoud v Malta, a decision delivered on 27 July 2010. He submitted that the latter case made clear that the exception to the right under Article 5.1 ECHR not to be deprived of liberty applicable to foreign nationals (5.1(f - detention in the immigration context) only applied so long as the deportation proceedings being taken were being prosecuted with 'due diligence': paragraph 60. He submitted that Article 5 operated to prevent an individual from being detained arbitrarily, that in this context detention justified under national law could still be arbitrary, and that to avoid being arbitrary it must be carried out in good faith, be closely connected to the ground of detention relied upon, the place and conditions of detention should be appropriate, and the length of detention should not exceed that reasonably required for the purpose pursued: paragraph 62. He relied on the reference to the 'place and conditions' of detention as justifying his submission that when considering the legality of continued detention, the fact that it was in prison as opposed to an IRC was a relevant consideration.

22. I accept his submission that that the Court must have regard to all relevant circumstances when considering the Hardial Singh principle as well as the Article 5 obligation and, in that context, may in an appropriate case have regard to the place and conditions of detention.

The law relating to undisclosed policies

23. This point was recently considered by the Court of Appeal in WL (Congo). In the section of the judgment of the Court given by Stanley Burnton LJ entitled 'Unpublished policies' (paragraphs 70-79) it was held that:
    (a) It was not unlawful simply to have an unpublished internal policy to guide officials.
    (b) Whilst there was a requirement that the relevant law be both accessible and precise, that requirement was satisfied (in the context of detention) by Para 2 of Schedule 3 to the Immigration Act 1971 and the Hardial Singh guidelines.
    (c) It was unlawful to operate an unpublished policy in a manner inconsistent with a published policy, contrary to a legitimate expectation that the published policy would be applied.

The effect of non-compliance with policy

24. This point has recently been considered by the Court of Appeal in R (SK (Zimbabwe)) v SSHD [2008] EWCA Civ 1204, where it was concluded that breach of the obligation imposed

1 Foreign National Prisoner

by the Detention Centre Rules 2001 and the Operations Enforcement Manual (as to which see below) to undertake regular reviews of detention and provide written reasons for the continued detention would not in itself render continued detention unlawful, because it is an application of the Hardial Singh principles which determines the legality of detention. The point was also considered in WL (Congo), where it was concluded that the application of an unlawful unpublished policy did not in itself render detention unlawful, but only where the unlawful policy was applied to the detained person and was a material cause of the detention (paragraph 89).

25. Finally, and most recently, the point was considered in R (Anam) v SSHD [2010] EWCA Civ 1140. In that case Black LJ considered the earlier decisions in some detail and held (at paragraph 52) that it had been determined authoritatively by the earlier Court of Appeal authorities that when deciding whether or not a person's detention is unlawful a causation analysis is required, and further (at paragraph 57) that the legality of detention is to be determined according to Hardial Singh principles.

26. Whilst the decisions in both SK (Zimbabwe) and WL (Congo) are the subject of appeals to the Supreme Court, whose judgment is awaited, those decisions are of course binding on me as matters currently stand.

27. Black LJ went on to consider whether the causation analysis required the court (a) to consider whether or not the detainee would inevitably have been detained notwithstanding the error, or (b) to conduct its own analysis of whether the detainee should have been detained had the policy been correctly complied with, having regard to all relevant circumstances. She considered (paragraph 77) that the latter approach was the correct one. Longmore LJ agreed with this, although he also considered that on a proper analysis of SK there was no need to apply a causation analysis in any event, because a proper application of Hardial Singh principles decides the issue by itself. Maurice Kay LJ was of the view, given the pending appeal to the Supreme Court, that it was unnecessary to decide the point since, on the facts of that case, on either analysis the outcome would have been the same.

Home Office policy

28. The history of the published policy of the Home Office in relation to the continued administrative detention of time served FNPs is detailed in the introductory section of the judgment of the Court of Appeal in WL (Congo). In addition to the policy contained in various White Papers, the Home Office also issued detailed operational guidance to its employees engaged in this process, originally known as the Operations Enforcement Manual (OEM) and then from 19 June 2008 in the Enforcement Instructions and Guidance (EIG). As described on the current UKBA website:
'This manual contains guidance and information for officers dealing with enforcement immigration matters within the United Kingdom.
We have sought to present this manual in a form suitable for public disclosure but there is a small amount of material that cannot be disclosed because it may damage the effectiveness of the immigration control.'

29. As also described in the WL (Congo) case, in April 2006 the SSHD introduced and applied an unpublished policy which the Administrative Court subsequently held was unlawful, so that the practice ceased in September 2008.

30. In this case the Claimant contends that subsequent to September 2008 the Defendant introduced and applied to him an unpublished policy relating to categories of FNP who would never be considered for transfer to IRCs, and that this was unlawful. I consider at this point the published policies and the evidence as to the unpublished policy.

31. In addition to the documents which have been produced, I have been assisted also by 2 witness statements produced on behalf of the Defendant, comprising:
    (i) A witness statement made on 29 November 2010 by Bob Evans, being the Deputy Director, Head of Operations, Detention Services, Criminality & Detention Group, which is a part of the UK Border Agency ('UKBA'). Although not explained in the statement, I assume that the Criminality & Detention Group is connected or related to the department of UKBA known as the Criminal Casework Directorate ('CCD'), which is referred to in the EIG as having responsibility for dealing with FNP cases.
    (ii) A witness statement made on 3 December 2010 by Bernice Ouseley, being an Immigration Officer in the Detainee Escorting and Population Management Unit (DEPMU). DEPMU is the UKBA department responsible for managing those in administrative detention.

Chapter 55 of the Enforcement Instructions and Guidance (EIG)

32. As I have said, this came into effect in June 2008, replacing the OEM. It has been the subject of a number of revisions since then, and is now it appears in version 10.1. As appears from the judgment in WL (Congo), it was altered in September 2008 in relation to FNPs, and altered again following the judgment at first instance in WL (Congo). The most recent alteration took effect on 26 October 2010. I have been provided with the versions in existence as at 2 March 2010 and as at 26 October 2010. It has not been said that there were any material alterations between October 2009 (when the Claimant was first subjected to administrative detention) and 2 March 2010, so that the case has proceeded on the premise that it is the pre-26 October 2010 version in front of me which was in force when the Claimant was first detained under administrative powers.

33. Before turning to #55.10.1, headed 'Criteria for detention in prison', which is in many ways at the heart of this case, I should also refer to various other parts relevant to FNPs, and in so doing I repeat with gratitude the summary of certain relevant sections by Black LJ in the Anam case:

    '24. Chapter 55.1.1 sets out the general presumption in favour of temporary admission or release rather than detention.

    25. Chapter 55.1.2 says 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". However, 55.1.2 goes on to say that the nature of these 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 (as they are here)
    "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."

26. The Guidance returns elsewhere in Chapter 55 to the issue of CCD cases, for example in 55.1.3 it is said that:

"[s]ubstantial 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 55.3.2.1, 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. Where a serious offender has dependent children in the UK, careful consideration must be given not only to the needs such children may have for contact with the deportee but also to the risk that release might represent to the family and the public."

No list to speak of can be found at 55.3.2.1 but there is a list elsewhere in the Guidance entitled "Crimes where release from immigration detention or at the end of custody would be unlikely" and there can be little doubt that it is to this list that 55.1.3 refers. The list includes robbery[2].

27. Chapter 55.3A concerns the decision to detain in CCD cases. It includes the following passage related to "more serious offences" which appears to concern those offences on the list to which I have just referred:

"More serious offences

A conviction for one of the more serious offences is strongly indicative of the greatest risk of harm to the public and a high risk of absconding. As a result, the high risk of public harm carries particularly substantial weight when assessing if continuing detention is reasonably necessary and proportionate. So, in practice, it is likely that a conclusion that such a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean detention is not appropriate. Caseworkers must balance against the increased risk, including the particular risk to the public from re-offending and the risk of absconding in the individual case, the types of factors normally considered in non-FNP detention cases, for example, if the detainee is mentally ill or if there is a possibly disproportionate impact on any dependent child under the age of 18 from continued detention. Caseworkers are reminded that what constitutes a "reasonable period" for these purposes may last longer than in non-criminal cases, or in less serious criminal cases, particularly given the need to protect the public from serious criminals due for deportation."

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2 And, relevantly to this case, certain sexual offences together with 'all those who are currently on the Sex Offenders Register, either for the present crime or any previous crime'

28. Similar themes are re-worked elsewhere in Chapter 55, with 55.3.1 setting out a list of the factors influencing a decision to detain, and 55.3.2 providing further guidance on deciding whether to detain someone in a CCD case, including the following passage:
"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 because of the significant risk of harm to the public posed by those convicted of violent, sexual, drug-related and other serious offences. In practice, release is likely to be appropriate only in exceptional cases."

34. Provision is made in #55.6 for approved forms to be used when following the procedures provided for by the EIG. In relation to CCD cases such as the present: (1) IS91RA Part A CCD is the form used by CCD for recording the assessment of the risk posed whilst a person is in detention; (2) IS91RA Part B is the form used by DEPMU for assessing risk and deciding on the appropriate detention location; (3) ICD 1913 is the form recording the reasons for detention, which must be served on the detained person.

35. Returning to 55.10.1, in its current version it provides as follows:

'Immigration detainees should only be held in prison establishments when they present risk factors that indicate they pose a serious risk to the stability of immigration removal centres or to the safety of others being held there.

Detainees moving from the prison estate into the IRC estate will undergo an individual risk assessment. The existence of any of the following risk factors indicates that a detainee should be held in prison accommodation rather than an IRC but the list is not exhaustive and DEPMU staff should also satisfy themselves that no other risks exist which would make it inappropriate for the detainee to be moved to an IRC:

♦ National Security – where there is specific verifiable intelligence that a person is a member of a terrorist group or has been engaged in/planning terrorist activities;
♦ Criminality – those detainees who have been involved in serious offences involving the importation and/or supply of Class A drugs, committed serious offences involving violence, or committed serious sexual offences requiring registration on the sex offenders' register, those who are subject to MAPPA levels 2 and 3 and/or there is a threat to members of the public if the detainee remains within the UKBA estate ;
♦ Behaviour during custody - where an immigration detainee's behaviour whilst in either an IRC or prison custody makes them unsuitable for the IRC estate e.g. numerous proven adjudications for violence or incitement to commit serious disorder which could undermine the stability of the IRC estates;
♦ Security – where the detainee has escaped from prison, police, immigration custody, escort or planned or assisted others to do so;
♦ Control – engagement in, planning or assisting others to engage in/plan serious disorder, arson, violence or damage;
♦ Health Grounds - where a time-served FNP is undergoing specialist in-patient medical care that is not available in the IRC estate. This may include mothers who have given birth recently and who need to continue to benefit from the care of the prison's mother and baby unit. The detainee will be transferred to the IRC estate when medically fit to do so.

If DEPMU decide that the detainee is not appropriate for accommodation in an IRC they will refer them to the Population Management Unit (PMU) of the National Offender Management Service (NOMS) who will consider their allocation to a prison.

Where it is agreed with the DEPMU SEO that a person normally considered unsuitable may, exceptionally, be detained in a dedicated immigration removal centre, full details must initially be detailed on the IS91RA part A and entered on the 'risk factors' section of form IS91 served on the detaining agent (see 55.6). For example, individuals subject to MAPPA 2 or 3 may be temporarily moved into the IRC estate for positioning prior to removal or to facilitate a documentation visit from overseas officials.

All cases who have completed a prison sentence will be assessed by DEPMU on an individual basis as to whether they should remain in prison or be transferred to an Immigration Removal Centre. Any individual may request a transfer from prison to an Immigration Removal Centre and, if rejected by DEPMU, will be given reasons for this decision.

More generally, in the interests of maintaining security and control in the UKBA detention estate as a whole, a cap is placed on the total number of time served FNPs who may be held in the estate at any one time. Where this cap is reached, time served FNPs will continue to be held in prison accommodation, even though there may be free spaces within the estate and even though the individuals concerned may not themselves meet the criteria to be held in prison accommodation. Subject to the numerical cap, transfer to an IRC should be considered and effected at the earliest practicable opportunity, unless the individual concerned meets the criteria to be held in prison accommodation.

In all cases, prompt and evidenced consideration must be given to the transfer of time served FNPs to the UKBA detention estate, and transfers should be effected as soon as reasonably practicable. Reasons for deciding not to transfer an individual must be recorded, as must the reasons for any delay in effecting transfers.'

36. The version in existence before 26 October 2010 is in identical terms, save that:
    (1) The first paragraph does not include the reference to 'the safety of others';
    (2) The 'criminality' risk factor contained the following additional sentence in brackets: 'However in all such cases consideration should be given to the specifics of the offence and behaviour whilst in custody'.

37. In both cases, therefore, there is a requirement for a specific risk assessment, and reasons must be given for refusing a transfer to an IRC if one is requested. In both cases, where someone who has committed a serious sexual offence requiring registration on the Sex Offenders Register (SOR) the risk assessment is likely to result in a conclusion that they should not be transferred to an IRC save in exceptional circumstances.

PSO 4630

38. On 4 February 2008 Prison Service Order (PSO) 4630 issue 287 was brought into effect. This contained a section numbered 5 headed 'Allocation and categorisation of those detained under the Immigration Acts'. It does not appear to have been revised since February 2008, at least as relevant to this case, and provides as follows:

'5.1 Population Management Section liaises with the Immigration Service population managers (DEPMU) to determine the most appropriate location for the detainee to be held after expiry of a custodial sentence, should immediate removal not be possible. A protocol is in place between NOMS and BIA which sets out the criteria for allocation.

In general terms, Immigration Detainees will only normally be held in prison accommodation in the following circumstances:

- National Security – where there is specific (verified) information that a person is a member of a terrorist group or has been engaged in terrorist activities.
- Criminality – those detainees who have been involved in the importation of Class A drugs, committed serious offences involving violence, or committed a serious sexual offence requiring registration on the sex offenders' register.
- Security – where the detainee has escaped prison or immigration custody, or planned or assisted others to do so.
- Control – engagement in serious disorder, arson, violence or damage, or planning or assisting others to so engage.

The above criteria are an initial guide to indicate the suitability of detainees for the IRC estate. *It must be recognised that the behaviour of ex-FNP detainees will be the key factor as some who would be excluded by the above criteria may be sufficiently well behaved to merit transfer.*

It must be assumed that regardless of the guidelines any ex-prisoner who had been deemed suitable as a Cat. D will be acceptable for the IRC estate.

When a detainee meets the above criteria they should be referred to PMS who will consider their allocation to a prison.

Immigration detainees who fall into one or more of the following groups will remain in prison custody:

- Importation of class A drugs
- An offender subject to Notification Requirements (Sex Offender Registration)
- Life and Public Protection sentenced (under the CJA 2003) prisoners
- Those identified as presenting a risk or potential risk to children as set out in "Safeguarding Children" policy
- Offenders who need to be managed at MAPPA levels 2 and 3
- Offenders identified on OASYS as high or very high risk of harm
- Those subject to protection from harassment procedures under PSO 4400 chapter 2.

5.2 DEPMU handles both management of the population held in the Immigration Removal Centres, and the detainee escorting contracts.

5.3 DEPMU will require a risk assessment to enable them to consider an immigration detainee for transfer from a prison to a Removals Centre. The prison may therefore on occasions be asked to complete form IS91RA (supplied by the Border and Immigration Agency) in order to allow DEPMU to risk assess the subject's suitability for a transfer. The form requests information concerning the subject's behaviour in prison, and all relevant information, including adjudications, should be disclosed.'

39. It is relevant to observe, therefore, that under PSO 4630 there are stated to be certain categories of detainee who will remain in prison regardless of their individual circumstances, and with no possibility of transfer even in exceptional circumstances, contrary to the position as established in the EIG. Among those categories of prisoner are offenders subject to SOR notification requirements, into which category the Claimant falls.

DSO 12/2007

40. In September 2008 Detention Service Order 12/2007 came into effect. It dealt with transfers of FNPs subject to Multi Agency Public Protection Arrangements ('MAPPA') from prisons to IRCs. It required UK Border Agency ('UKBA') staff to risk assess FNPs on a monthly basis

to establish their suitability for transfer into an IRC, with the risk assessment to be based on the behaviour of the individual detainee.

May 2009 SLA

41. From 1 May 2009 a Service Level Agreement (SLA) between National Offender Management Service (NOMS) and UKBA set out in Appendix D the criteria for this risk assessment. Although so far as I am aware not a published document, it was in substantially the same terms as #55.10 EIG, although it also contained a further specific direction in paragraph 10 that these criteria were only an 'initial guide', that the 'key factor' would be 'the behaviour of immigration detainees', and that on 'closer inspection' detainees initially appearing unacceptable might present an acceptable risk for transfer. Mr Karnik emphasises this as recognising the need for individual consideration.

The DEPMU Notice dated 28 April 2010 and subsequent events

42. The documents disclosed by the Defendant and Mr Evans' witness statement reveal that on 28 April 2010 Mr Evans issued a Notice, instructing that with immediate effect no MAPPA cases should be moved into any IRC. It appears that the impetus for this was a letter from NOMS to DEPMU dated 1 April 2010 expressing concern that unsuitable detainees were being held in IRCs and released without proper notice to and liaison with the relevant authorities.

43. I should note at this stage that there are different categories of MAPPA cases; level 1, which applies to low or medium risk individuals, includes cases, such as the Claimant in this case, who are automatically included as a result of being placed on the SOR. Levels 2 and 3 applies to higher risk cases.

44. Mr Evans states that this Notice was intended to have only temporary effect until a meeting, arranged for 6 May 2010 could take place. He says that at the meeting inconsistencies between PSO 4630 and the SLA were discussed, it being recognised that the former was more restrictive in that it provided for certain categories of FNP who would not be transferred to an IRC regardless of their personal circumstances. It is clear from the minutes of that meeting that there was considerable discussion about which categories of detainee should not be transferred to IRCs regardless of their personal circumstances. In particular, the category of MAPPA 1 sex offender cases was raised as an issue for further discussion. In that context Mr Karnik has observed that one argument raised at the meeting, according to the minutes, was that it could be said to be inconsistent to say that the risk from MAPPA 1 sex offenders was so great that they could not be transferred to IRCs when, but for their being in administrative detention, they would already have been lawfully released into the community. The meeting concluded with the parties agreeing that further discussions and action were required.

45. Subsequent to the meeting, the policy was revised by Mr Evans issuing a further Notice 64/2010 dated 16 August 2010, under which the injunction on transfer of MAPPA cases into IRCs was lifted in part, but continued to apply to MAPPA level 1 registered sex offender cases (of which, as I have said, the Claimant was one) as well as MAPPA 2 and 3 cases. Again, Mr Evans states that this Notice was only intended to have temporary effect, pending agreement on the new arrangements.

46. The Defendant has also disclosed a chain of email correspondence between DEPMU and NOMS following a further meeting held on 8 September 2010, from which it appears that it

was agreed that whilst certain categories of offender, including child sex offenders, would be barred from transfers to IRCs, other sex offenders, including MAPPA 1 cases, would be risk assessed by the prison probation offender manager, which DEPMU would use as part of their risk assessment process in deciding whether transfer was suitable. It appears to be suggested that pending the drafting and implementation of a new PSO and SLA the existing PSO would be used as guidance. In one of the emails Ms Wiggins, a NOMS representative, used the phrase 'blanket ban' in relation to the remaining excluded categories.

47. In his witness statement, however, Mr Evans says that there is no blanket ban, because 'there will always be the potential for an exceptional case to be transferred to an IRC notwithstanding convictions for such serious offences but they are expected to be self-evident (eg where the circumstances of the conviction or its date mean the general risk assessment process will yield a low risk of harm to the public)'. If this is intended to be a reference to the EIG, then it is consistent with the versions in force both before and after 26 October 2010. If however it is intended to be a reference to the PSO, then it is clearly incorrect, because the PSO does indeed in my judgment contain a 'blanket ban' on certain categories of detainee, as indeed Mr Evans recognises in his witness statement.

<u>The relevant facts</u>

1) The Claimant's background and offending history

48. The Claimant was born in Tunisia on 26 December 1960 but moved with his family to Libya as a child so that he has Libyan nationality. He arrived in the UK from Libya on 8 March 1978, with a view to studying. He was given leave to enter. He has remained in the UK, save for some short absences, thereafter. He married in 1985 and had 2 children, now aged 23 and 17 respectively. He was divorced in 2000, but has remained in close contact with his ex-wife and children since. Although his immigration history is long and somewhat convoluted, in summary:
    (1) From 1978 to 1991 the Claimant appears to have been in the UK legitimately. In May 1990 exceptional leave to remain was given following an appeal launched by the Claimant against a refusal of leave to remain..
    (2) From 1991 to 2006 the Claimant was in the UK with permission as the spouse of a UK citizen.
    (3) In 2006 following his further criminal conviction of June 2005 (as to which see below) a decision to deport was made but subsequently not pursued in the face of an appeal.

49. Mr Karnik accepted, as indeed he had to, that the Claimant has a long history of offending whilst in the UK. He has very large number of convictions. Beginning in 1982 he has amassed convictions on 26 separate occasions for a total of 64 offences. Most of the convictions are for offences of dishonesty, with the other offences mostly driving-related. There is also one conviction dating from November 1996 for failing to surrender to custody, for which he was fined £30.

50. The Claimant has however been sentenced on 3 occasions for serious sexual offences. Thus:

    (1) In December 2002 he received a sentence of 29 months' imprisonment concurrent for one offence of indecent assault on a female under 16 and one offence of indecent assault on a female aged 16 or over. He was placed on the SOR for 10 years.

(2) In June 2005 he received a sentence of 30 months' imprisonment for it appears two offences of causing or inciting a female child under 16 to engage in sexual activity. The sentencing judge clearly regarded it as a cause of grooming, and said that he had no doubt that the Claimant, who he categorised as 'utterly selfish and self centred', remained a danger to young girls. He was required to sign the SOR for life and made the subject of a SOPO of indefinite duration, which amongst other things prevented him from communicating with or being in the company of any child under 17 years or from staying anywhere at which such a person lived, save in both cases for members of his family.

(3) In October 2008 he was sentenced for a number of matters including two breaches of his SOPO, for which he received a total sentence of imprisonment of 30 months, of which 12 months related to the breaches of the SOPO. It is clear that there were two separate convictions on two separate occasions before two separate Crown Courts for two separate breaches of the SOPO. It appears that the first breach arose from the Claimant driving a motor vehicle which he had not notified to the police, and the second arose from the Claimant being in the company of a girl aged 14 years. The sentencing judge on this occasion also expressed himself satisfied that the Claimant was a significant risk to young girls between 13 and 16 and that he was 'devious, calculating and manipulative'.

2) The Claimant's administrative detention

51. As already indicated, the Claimant was due for release on licence on 9 October 2009. Accordingly it was necessary for a decision to be taken whether grounds existed to detain him administratively from that point pending his deportation.

52. It is not in dispute that the Claimant met the criteria for automatic deportation, given the circumstances of his conviction and the length of his prison sentence. On 2 November 2009 the Defendant sent to the Claimant a Deportation Order together with a letter written by a CCD officer giving reasons, extending over 7 pages, why the Defendant had decided that deportation was appropriate.

53. On 30 September 2009 an officer of CCD Mr Smithson conducted a risk assessment in form IS91RA Part A CCD and, having identified the positive indicators of risk in the case of the Claimant as being 'a history or a threat' of 'violence' and 'abuse of women / children', submitted that form to DEPMU with a request for detention space for him. In the minute dated 30 September 2009 of the decision to detain the Claimant it was accepted that his risk of absconding was not high, although it should be noted that this was in the context that at that time no previous attempts to deport him had been pursued. It was however concluded that his risk of re-offending was 'exceptionally high', that he was a risk to the public, in particular to young girls, and that his criminal history and level of risk to the public justified his detention.

54. It is clear that in completing this minute the author had regard to a probation service report provided in September 2009. Although that is not before me, it is referred to in the AIT decision as assessing the Claimant's risk of serious harm as 'high', and it is also referred to in the letter of 2 November 2009 as including the statement:
'Using the Walker Model of progressive dangerousness I assess that [AE] is a person with entrenched beliefs and attitudes and is led by them to seek out opportunities to act on them.

His history of offending behaviour indicates a pattern of grooming young females with the intention of engaging or forcing them into sexual acts'.

55. Furthermore, the probation service produced a subsequent report produced in March 2010 which is before me. It records that:
    (1) An OASys assessment completed on 4 February 2010 assessed the risk of serious harm level to females under the age of 18 as 'high'
    (2) The author made the same reference to the Claimant's history indicating a pattern of grooming young females, referred to his previously demonstrated willingness to breach conditions imposed on him, and assessed his risk of re-offending as 'imminent whilst in the community regardless of conditions imposed as he has demonstrated in the past a willingness to breach them'.

56. Although I have not been referred to the contemporaneous documentation, it is clear that on the completion of the custodial element of his sentence the Claimant was subjected to administrative detention, with the decision being made to detain him in prison as opposed to an IRC. On 16 October 2009 the Claimant refused to return to Libya voluntarily.

57. On 6 November 2009 the first 28 day review of the Claimant's detention was completed by CCD, in which continued detention was authorised on the basis that the risk of re-offending and absconding outweighed the presumption of release. Further monthly reviews conducted thereafter have authorised continued detention on the same basis.

58. On 12 November 2009 the Claimant's solicitors wrote to DEPMU requesting his transfer to an IRC. They referred to paragraph 55.10 EIG, but made no reference to any circumstances which were asserted to constitute exceptional circumstances justifying his transfer notwithstanding his status as someone who had committed serious sexual offences requiring registration on the sex offenders' register. This was not responded to until 27 January 2010, when the CCD responded saying that 'DEPMU had considered the request, but that due to the nature of your client's criminal history they believe him to be unsuitable for location at an IRC'.

59. In the meantime, on 15 December 2009 an application made by the Claimant to an IJ for bail was refused. This was the first of 10 bail applications made in the period December 2009 to July 2010. The reasons for refusing bail were not always the same, although on a number of occasions the IJ has referred to the risk of re-offending and/or the risk of absconding; see for example the cogently expressed reasons of the IJ who refused bail on 22 July 2010.

60. On 27 May 2010 the Claimant's solicitors repeated the request for a transfer. The letter referred to the delay in progressing the AIT appeal hearing and said that as a result the Claimant had become 'increasingly anxious and depressed', although no evidence was enclosed to support this assertion. It said that the prospects of the Claimant making a successful bail application are 'extremely low'. Thus no exceptional circumstances were identified as such, it is apparent from the letter that the new factors identified were (a) the delay in the AIT appeal; (2) the consequent effect on the Claimant; (3) the likelihood that he would remain in detention pending the conclusion of the AIT appeal. The letter in response from CCD dated 1 June 2010 did not specifically address those points; it simply stated that 'DEPMU have considered your client's request for relocation to a removal centre but that due to the nature of his criminal convictions (sex offences) he is not considered suitable for the removal centre'.

61. In her witness statement Ms Ouseley states that she reviewed the Claimant's case on 14 December 209, 6 January 2010, 23 January 2010, 20 July 2010 and 5 October 2010, and continued to risk assess him as unsuitable for transfer to an IRC. If that is accurate, then it would appear that the decision referred to in the letter dated 1 June 2010 was either taken by someone else (and not evidenced in any document produced to this court) or alternatively that it refers back to the risk assessment as long ago as 23 January 2010.

62. The most recent assessment on Form IS91RA Part B, dated 20 October 2010 and signed by Ms Ouseley, allocates the Claimant to prison on the grounds of his sex offending convictions, and SOPO, concluding that 'in accordance with instructions from UKBA and NOMS, sex offenders who have committed offences against minors should not be placed in any IRC'.

63. Ms Ouseley accepts in her witness statement that the Claimant has not been reviewed on a monthly basis 'due to information quality issues between NOMS and UKBA', but says that this has not had any effect on his position.

3) The AIT proceedings

64. The Defendant made a deportation order against the Claimant pursuant to s.32 UKBA 2007 as a foreign criminal by notice dated 2 November 2009.

65. By Notice of Appeal received by the Tribunal on 11 November 2009 the Claimant exercised his right of appeal and also appealed the Defendant's refusal to grant him asylum.

66. It appears that the full hearing was first listed for 14 December 2009 but was adjourned due to the Claimant's own request for an independent expert report[3]. On 12 February 2010 the IJ made a direction for full disclosure of the Claimant's files, which were not disclosed until 17 March 2010. There was then a further adjournment whilst the Claimant's solicitors considered the files, and a further adjournment because the Defendant was not ready. The final hearing was then re-listed for 22 June 2010, but regrettably could not proceed because the IJ assigned to hear the case had previously been prosecuting counsel in one of the Claimant's previous criminal prosecutions. The hearing finally proceeded on 26 August 2010 and the determination of the First Tier Tribunal was promulgated on 9 September 2010. In a careful and lengthy decision comprising 169 paragraphs the AIT dismissed the appeal. On 11 October 2010 a Judge of the First Tier Tribunal refused permission to appeal and it is common ground that thereafter the Claimant's appeal rights became exhausted on 30 November 2010 when the Upper Tribunal refused permission to appeal.

4) The current position

67. It is common ground that since the Claimant has no valid passport, in order to be removed to Libya an Emergency Travel Document (ETD) would have to be obtained with the co-operation of the Libyan Embassy. That procedure is now in progress. It appears that there has been some delay because the Claimant was unwilling to visit the Libyan Embassy to be interviewed, so an appointment had to be cancelled and a prison visit arranged. However there was no suggestion at the hearing of any reason to believe that there will be a difficulty

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3 See the Claimant's solicitors' letter dated 27 May 2010

or particular delay in relation to obtaining an ETD. Mr Karnik realistically accepted that if and when an ETD is obtained there would be no remaining obstacles to removal. Equally, Ms Anderson realistically accepted that if it transpired that there was some fundamental problem with securing an ETD, then might put a different complexion on the case, and that in such event he would of course be entitled to bring a fresh challenge. At this stage, however, she submitted that there was no evidence that this was the case.

The Claimant's case in relation to unlawful detention

1) Delay

68. For the Claimant Mr Karnik complained that the Defendant had been guilty of unreasonable delays, particularly in relation to the progress of the appeal to the AIT. He submitted that this rendered the continued detention of the Claimant unreasonable on Hardial Singh principles. Ms Anderson disputed that the Defendant had been guilty of unreasonable delays. She submitted that it is not appropriate to subject the appeal process case to a minute examination and, second, that in any event the criticisms are misplaced. She further submitted that even if the Defendant had been guilty of delays that did not of itself render the Claimant's continued detention unlawful.

69. It is clear in my judgment that the Defendant is under an obligation is to act with reasonable or due diligence. In my judgment that applies as much to her conduct of the appeal to the AIT as to anything else; if it could be said that the Defendant was deliberately stringing out the appeal procedure, or even that the appeal procedure was unreasonably protracted because of the Defendant's culpable acts or omissions, that would be a material factor. Nonetheless, it must be borne in mind firstly that the Defendant does not have sole control over the progress of the appeal and secondly that the Defendant's obligation is not a strict one, but an obligation to act with reasonable or due diligence. Accordingly, whilst I consider that it is necessary to form a view as to whether or not the Defendant has acted reasonably diligently in relation to the whole period of detention, including the period during which the AIT proceedings were underway, I do accept that it is not appropriate to subject the case to minute examination with a view to identifying minor delays.

70. So far as the details are concerned, Mr Karnik identified what he categorised as an initial failure of forward planning in this case, in that no steps were being taken either to make arrangements for deportation whilst the Claimant was still serving his sentence in prison or to consider whether or not one of the exceptions to automatic deportation applied. Ms Anderson submitted that there can be no proper criticism of the Defendant in these respects. She submits that there could not sensibly be imposed an obligation to take steps in advance of the time for deportation because it might be, for example, that the Claimant would have decided to leave voluntarily. She also submitted that the Defendant was entitled to wait to see what, if any, challenge the Claimant might make. I agree with the Defendant's submissions. It cannot be right or proper in my judgment to impose some form of positive obligation on the Defendant to take steps in advance of the date when the obligation to leave arises and in advance of any asylum claim being made.

71. Mr Karnik criticised the Defendant's delay in providing disclosure for the AIT case, which he submitted was the cause of significant delay. However Ms Anderson submitted that there was no basis for substantial criticism, pointing out that the AIT itself had imposed no sanction against the Defendant in this regard. She also observed that the Defendant can scarcely be

blamed for delay caused in complying with the Claimant's own request for a significant amount of disclosure especially, as transpired, when it made no difference to the eventual result. Again I agree with Ms Anderson that the evidence in this case does not suggest that the Defendant failed to act with reasonable diligence in its conduct of the AIT proceedings, and in any event that any delay due to the delay in providing disclosure did not increase the overall length of the AIT proceedings by more than a month or so. It is true that the proceedings were also delayed by the Defendant not being ready to proceed, but again that delayed matters by no more than 2 months, and in any event the reason for that has not been explored so that it cannot be concluded, for example, that the Defendant was guilty of deliberate stalling tactics or flagrant inactivity. The final delay due to the recusal of the IJ assigned to hear the case in June cannot in my judgment possibly be laid at the Defendant's door.

72. Overall, I accept Ms Anderson's argument that the Defendant cannot be criticised for the delay from the date when the Claimant ought to have left the UK voluntarily down to the date when his asylum claim was finally determined against him. It is not a question, I accept, of making a finding that the Claimant is to be criticised for pursuing a spurious asylum claim, indeed there is no submission to that effect in this case. It is simply a recognition of the fact that where, as here, someone subject to automatic deportation avails himself of his right to challenge that by raising an asylum defence, that process then has to be followed to its conclusion before steps can be taken to effect removal and, all other things being equal, the Defendant can hardly be found guilty of unreasonable delay in the period of time in which that legal challenge is proceeding.

73. Insofar as it is asserted, I am satisfied that there is no basis for criticism of the Defendant in the period from the conclusion of the AIT proceedings to date. I also agree with Ms Anderson that at this stage it cannot be said that there is no reasonable prospect of securing the Claimant's removal to Libya within a reasonable timeframe.

2) Risk of absconding

74. Mr Karnik submitted that the evidence showed, as indeed CCD had previously accepted in September 2009, that the Claimant did not present a high risk of absconding. He observed that since the Claimant was the subject of a SOPO, any non-compliance would be the subject of criminal proceedings regardless of any other sanction. He submitted that the previous offence of failing to surrender was one previous offence in the context of the Claimant having been required to attend court on any number of occasions in connection with his previous offending, so that it carried little if any weight.

75. Ms Anderson submitted that here there was a real risk of absconding, given that the Claimant had in the past failed to comply with immigration law, committed one offence of failing to surrender, and committed a whole host of other offences demonstrating his disregard for authority and willingness to breach conditions imposed on him. She also pointed out that he appeared to have no settled home life and, having now lost his appeal to the AIT and faced with the prospect of deportation, might well disappear if released from detention pending removal.

76. In my judgment there is clearly a risk of absconding which the Defendant was and is entitled to take into account and which is if anything higher now than it was at the outset. However I

accept that the risk of absconding, whilst not negligible, is not a very high risk factor on the facts of this case.

3) Risk of re-offending

77. Mr Karnik submitted that in this case what had happened was that the risk of re-offending had, wrongfully, been elevated into the primary purpose of continued detention and, wrongfully, had been treated as a 'trump card' justifying continued detention. He suggested that the offending history did not show an increasing level of serious sexual offending and that the most recent conviction for breaches of the SOPO did not in itself involve allegations of sexual offending. He referred me to a psychiatric report prepared on the Claimant at his solicitors request in connection with the AIT proceedings by a Dr Saleem dated 27 January 2010. De Saleem concluded that he was likely to commit similar offences if not adequately supervised and supported in the community, but with adequate supervision and support the likelihood of these offences occurring was not high.

78. As to the previous sexual offending history, Ms Anderson observed that the information available to the probation service, on which the Defendant was entitled to rely, indicated that there was a history of grooming, and that the breaches of the SOPO involved not simply a failure of notification but also the Claimant inviting a 14 year old girl back to his flat with her friends and alcohol. Although she noted that the Claimant had apparently challenged the conclusions in the probation reports, nonetheless she submitted that it was information upon which the Defendant was entitled to rely.

79. I am satisfied that the previous sexual offending history of the Claimant, when read with the available information as to the continued risk posed by the Claimant to young females, fully justifies a conclusion that he continues to pose a high risk of serious harm to young females, including a risk based on his history of grooming such vulnerable persons. I am satisfied that the opinion of Dr Saleem cannot when set against the other information before me justify a conclusion that a release into the community with supervision and support would reduce that risk to an acceptable level. In my judgment the author of the March 2010 probation report was fully justified in assessing his risk of re-offending as 'imminent whilst in the community regardless of conditions imposed as he has demonstrated in the past a willingness to breach them'.

4) Other relevant circumstances

80. I have regard to the fact that the Claimant has been detained in prison although, for reasons which I state in the following section of this judgment, I am satisfied that the decision to detain in prison rather than transfer to an IRC is one which cannot be challenged. Although the Claimant has now been detained administratively for a period of over 14 months as at the date of the hearing, I do not consider that on the facts of this case that is an unreasonably long period.

5) Conclusions in relation to challenge to detention

81. Accordingly, applying the Hardial Singh principles to the facts of this case, I am satisfied that the continued detention of the Claimant is lawful. I am satisfied therefore that there is no basis for the complaints made in this regard and that the Claimant is not entitled to the relief which he seeks. Accordingly this limb of the claim must be dismissed.

Challenge to refusal to transfer from prison to an IRC

82. As I indicated at the beginning of this judgment, Mr Karnik advances a number of challenges under this head, so that in substance he: (a) challenges the Defendant's refusal to transfer the Claimant to an IRC on the basis of the application of an unlawful unpublished policy; (b) complains that if that policy is, as he submits, that the sexual offences convictions alone preclude transfer, then the policy is contrary to the published policy and irrational; (c) complains that the Defendant failed to consider the Claimant's individual circumstances, to conduct any risk assessments or regular monthly reviews as required, and failed to provide any or any good reasons; (d) challenges the refusal to transfer even if pursuant to the published policy on the basis that the decision itself is irrational or Wednesbury unreasonable.

83. Ms Anderson accepts, in my judgment correctly, that a decision about whether or not to transfer to an IRC is one which is in principle susceptible to judicial review on public law grounds. She does however submit that it is an operational decision made by persons with expertise in this area, and that the court should not be too ready to overturn the judgment of such persons. I am not convinced by this argument. I accept of course that where a qualified professional conducts a risk assessment based on specified criteria and applying their own professional expertise a court should be slow to second guess that conclusion. However it does not seem to me that this is what the relevant DEPMU officers are doing in this case. They are considering the evidence of risk which is available to them, and making an assessment based on that evidence. It does not seem to me an exercise of professional skill and judgment or, for that matter, an operational decision. I do however accept that, unlike the position where one is applying the Hardial Singh principles, the only basis on which the court could interfere would be on established judicial review grounds, so that the court is not permitted to substitute its own decision for that of the Defendant.

84. As to the substantive challenge Ms Anderson submits that: (a) there was no unlawful unpublished policy; (b) if there was it was not applied to the Claimant; (c) even if it was he would not have been transferred under the published policy anyway, which was perfectly rational and properly applied in the Claimant's case; (d) the Defendant's failure to conduct monthly reviews does not render the decision unlawful given that there have been regular lawful reviews over the period in question; (e) the decision not to transfer is unimpeachable.

1) What policy has been applied by the Defendant in relation to the Claimant's detention?

85. It is apparent that there is a real difference between the policy as it appears in the various documents to which I have referred. Thus if one considers the policy as contained within the EIG, and also the SLA, then it is clear in my judgment that there is no blanket ban on the transfer to IRCs of FNPs, such as the Claimant, who were convicted of child sex offences, and who were placed on the SOR. Thus in the version of the EIG in force as at the date when the Claimant became detained under immigration control, the guidance directed the officer to focus on the specifics of the offence and the FNP's behaviour whilst in custody. Whilst it is true that this was removed from the revised version, the exceptional circumstances category still remains.

86. By contrast, it is clear that PSO 4630 makes it clear that a FNP such as the Claimant who is subject to sex offender registration notification requirements will not be transferred from prison to an IRC, regardless of any exceptional circumstances, and this is also the effect of the

two DEPMU Notices issued on 28 April 2010 and 16 August 2010. It is also clear from the evidence in my judgment that in relation to the DEPMU Notices this was a policy change which (a) was not publicly disclosed; (b) was inconsistent with and potentially less favourable to MAPPA sex offender cases than was the published policy, in that it permitted no consideration of the individual circumstances, even in exceptional circumstances.

87. In my judgment there is no evidence or basis for a submission that in general and over the full period of the Claimant's detention the Defendant has followed the policy contained in the PSO as opposed to the EIG and SLA. Although it could be argued that the policy being applied following the September 2010 meeting is the PSO, that does not on the evidence before me appear to be the case. I reach these conclusions because:
   (1) In relation to the difference between the EIG and SLA on the one hand and the PSO on the other, the PSO itself refers to the criteria for allocation as being set out in the protocol in place between NOMS and UKBA. Furthermore, UKBA officers would be expected to work to the guidance applicable to them, the EIG guidance, rather than guidance applicable to prison officers. The promulgation of the OEC, and then the EIG in its place, and the amendment to the EIG in October 2010 would all have been pointless if in fact all UKBA officers had been and still are instructed to work to the PSO.
   (2) Mr Evans says in terms in his witness statement that the exceptional circumstances category still applies and it is clear from his witness statement that he is fully aware of the fact that this appears in the EIG but not in the PSO.
   (3) The e-mail sent by Mr Evans following the September meeting refers to the PSO as being used in the short term 'as guidance'. That does not, in my judgment, dictate a conclusion that the exceptional circumstances category is not being applied.
   (4) It appears from a fair reading of the witness statement of Ms Ouseley, although perhaps not as clearly as it might do, that she has been working to the EIG guidance, which she sets out in her witness statement.

88. It is clear that the initial decision to detain the Claimant in prison was taken before the 28 April 2010 policy came into effect. There is no basis in my judgment for suggesting that the Defendant did not approach the question of whether the Claimant should be transferred to an IRC or remain in prison on anything other than the test set out in the EIG, thus including a consideration of whether there were exceptional circumstances. Although there is no evidence in the documents with which I have been provided or in the witness evidence that the question of exceptional circumstances was specifically addressed in the initial decision, Ms Anderson submits, correctly in my judgment, that equally there is no basis for believing that the appropriate policy was not followed. In particular she observed, correctly in my judgment, that one would expect exceptional circumstances either to be self-evident from the information provided to the DEPMU officer or to be asserted by the detainee. In this case there is no suggestion by Mr Karnik that at any time before 28 April 2010 the Claimant or his solicitors had asserted that there were exceptional circumstances. Nor in his submissions has he identified anything which could be regarded as such. For the reasons which I give later, I am satisfied that there were no such exceptional circumstances, nor indeed any factors which would mean that the refusal to transfer to an IRC was in any way irrational.

89. Mr Karnik submitted that the first decision letter after the introduction of the 28 April 2010 Notice, namely that dated 1 June 2010, was obviously dictated by the undisclosed policy. It will be recalled that this was a response to the Claimant's solicitors' letter of 27 May 2010, where although no exceptional circumstances were identified as such, there was specific

reference to (a) the delay in the AIT appeal; (2) the consequent effect on the Claimant; (3) the likelihood that he would remain in detention pending the conclusion of the AIT appeal. It will also be recalled that the response simply stated that 'DEPMU have considered your client's request for relocation to a removal centre but that due to the nature of his criminal convictions (sex offences) he is not considered suitable for the removal centre'. Mr Karnik also relied on the the subsequent and most recent assessment, dated 20 October 2010 and signed by Ms Ouseley, which allocates the Claimant to prison on the grounds of his sex offending convictions and the SOPO in force against him, concluding that 'in accordance with instructions from UKBA and NOMS, sex offenders who have committed offences against minors should not be placed in any IRC'.

90. I am troubled by the fact that the letter of 1 June 2010 does not respond to the specific points put forward by the Claimant's solicitors and that the assessment of 20 October 2010 makes no reference to those points either or more generally to the question of the Claimant's individual circumstances and whether or not there are exceptional circumstances. However, on balance I am nonetheless satisfied that there is still no proper basis for concluding that the Defendant approached the continuing detention of the Claimant in prison on the basis that there was no discretion even in exceptional cases to consider a transfer to an IRC. In particular I accept Ms Anderson's submissions that:
    (i) The courts should not criticise the Defendant for not drafting letters or promulgating forms which require the relevant officer to go through a lengthy tick list, including a box confirming that the officer has considered whether exceptional circumstances apply.
    (ii) In the absence of any self-evident exceptional circumstances or assertion of such by the Claimant, there is no basis for requiring the letter or form specifically to consider whether they exist.

91. Again, however, even if that is wrong, for the reasons which I give later, I am satisfied that there were and still are no exceptional circumstances nor other factors which would mean that the refusal to transfer to an IRC was or is in any way irrational.

2) The challenge to the published policy

92. In WL (Congo) the Court of Appeal held, at paragraph 48(2), that:

'Although a policy involving a presumption of detention is not in itself necessarily unlawful, a policy which effectively operates as a blanket policy is unlawful'.

93. It is common ground between the parties that conditions in prison, at least in closed conditions such as those where the Claimant remains, are far more restrictive than those in IRCs. The Claimant relies on this as supporting his submission that the decision to detain him in prison is unreasonable and unlawful. The Defendant relies on this as supporting his submission that it is justified to adopt a general policy of refusing, save in exceptional cases, to transfer those who have committed serious sexual offences requiring registration on the SOR to IRCs. In particular, the Defendant relies on the evidence of Mr Evans to the effect that IRCs are designed to allow detainees as much freedom as possible whilst preventing absconding, so that detainees are able to use mobile phones and access the internet, there is complete freedom of movement and association, and visitors – including the families of other detainees - are both encouraged and when visiting not limited to specified visiting areas. Mr Evans contends that to transfer a convicted child sex offender such as the Claimant to an IRC

would pose unacceptable risks to children visiting the IRC, and would present a risk of 'grooming' via mobile phone and/or internet. The Defendant's case is that the IRC regime is intended to be very different from the prison regime, which makes it completely unsuitable for serious sex offenders such as the Claimant save in exceptional circumstances, which do not apply here, and that if IRCs were used to house serious sex offenders such as the Claimant that would subvert the regime established in the IRCs.

94. Mr Karnik submitted that it is wrong to consider IRCs as a bloc, when – as is common ground – there are male only IRCs. He submits that the risks posed by persons such as the Claimant could be controlled within male only IRCs. Ms Anderson accepted that there are indeed male only IRCs, but submitted that even in these female and child visitors are allowed, and there is no restriction on mobile phone / internet usage. Thus she submitted that there is no evidence that the Claimant could be transferred to an IRC where the conditions are such that the risk posed by the Claimant could be controlled. Although Mr Karnik submitted that there are male only IRCs where the conditions in which female and child visitors are controlled, so that the risk of inappropriate contact could be controlled, he was unable to point to any evidence to support this contention and it would, in my judgment, run counter to the ethos behind IRCs as described by Mr Evans if that were to be implemented. In any event, as Ms Anderson submitted, this would not deal with the risk of grooming via the internet.

95. In my judgment there can be no successful challenge on the grounds advanced by Mr Karnik to a published policy which holds that those convicted of serious sexual offences requiring registration on the sex offenders' register should, save in exceptional circumstances, remain in detention as opposed to an IRC, where that published policy does require an individual risk assessment of all detainees at the outset and on a regular basis thereafter so that the question as to whether there are exceptional circumstances is considered at the outset and regularly thereafter.

96. Although I was initially troubled by the fact that it appears that the policy introduced by the Notice of 28 April 2010 was a blanket policy which was operated without public notification that the policy had changed, on mature consideration I am satisfied that an administrative decision, in response to a genuine concern expressed by the Head of Public Protection at NOMS, to impose a short term halt on transfers of any MAPPA cases from prisons to IRCs, in circumstances where it was known that it was a short term solution pending a more considered decision, was not unreasonable nor unlawful.

3) The challenge to the decision to detain the Claimant in prison under the EIG

97. Mr Karnik submits that if the risk assessments had been conducted in accordance with the published policy, then there was no basis for the decision not to transfer the Claimant to an IRC. He relies in particular upon:
    (1) The failure, he submitted, to consider the Claimant's individual circumstances, other than his offending history.
    (2) The failure, he submitted, to consider that although his offending history is indeed poor, the majority of the offences would not indicate any serious risk to the stability of an IRC or to the safety of their staff, their other occupants or their visitors.

98. However in my judgment, for the reasons which I gave above in relation to the decision to detain, I am satisfied that the individual circumstances of the Claimant, and specifically the

risk he poses to young females, are such that the decision to detain the Claimant in prison rather than in an IRC was and is fully justified.

99. I do not consider that there is any evidence that the risks presented by the Claimant could be controlled by his transfer to some specified IRC. I accept the Defendant's evidence that the conditions in IRCs are not designed or intended for such a purpose. There is no indication that he could receive the supervision and support Dr Saleem considers necessary to reduce the risk of committing further offences whilst in an IRC. I consider that the Defendant was entitled to consider that these risks are present even in a male only IRC, where the Claimant would have the opportunity to come into contact with young female visitors and groom them.

100. I do not consider that the factors relied on by Mr Karnik, or for that matter the factors referred to by his solicitors in their letter of 26 May 2010 could justify a conclusion that the refusal to transfer can be attacked on grounds of irrationality having regard to the policy contained in the EIG and the reasons advanced as justifying such a policy.

4) Failure to hold regular monthly reviews

101. It is acknowledged by the Defendant in Ms Ouseley's witness statement that the requirement in DSO 12/2007 for a monthly risk assessment to be conducted on an individual basis of all time served FNPs remaining in prison was not complied with, but I accept her evidence that this has not prejudiced the Claimant in any way, because it is clear that risk assessments were done on a reasonably regular basis. It cannot be said in my judgment that this failure either in itself renders his continued detention in prison as opposed to an IRC unlawful, or otherwise has any material bearing on the issues in this case.

5) Conclusion in relation to challenge to place of detention

102. For the reasons I have given, this challenge must also fail.

<u>The claim for damages</u>

103. Although not strictly necessary in the light of my previous conclusions to deal with this, since it has been fully argued and since it may be relevant either if this case goes further or to the associated case, I should express my conclusions on the point.

104. Ms Anderson submitted that since this was an automatic deportation case where s.36 UK Borders Act 2007 provides for detention unless the Secretary of State considers it inappropriate, that provides the legislative authority for the detention so that there could be no claim for damages for false imprisonment, even though the courts would retain their jurisdiction to quash an unlawful decision not to direct release. She relied upon the decision of the Court of Appeal in <u>WL (Congo)</u> at paragraphs 88-90 in relation to detention under sub-paragraph 2(1) of Schedule 3, and the subsequent first instance decision of Blake J in <u>R (MXL) v SSHD</u> [2010] EWHC 2397 (Admin), at paragraph 29 applying that decision to a s.36 case such as the present.

105. I am satisfied that I must follow the decision in <u>WL (Congo)</u> and also that I should follow <u>MXL</u>, so that I conclude that there is no claim for damages available to the Claimant in this

case. Mr Karnik has failed to advance any grounds for submitting that the decision is MXL is wrong or otherwise should not be followed.

106. Furthermore, I agree with Ms Anderson that the same cases (and for that matter the further decision in Anam) make it clear that it would be necessary in any event for the Claimant to establish causation to make a successful claim for damages for false imprisonment, and that in this case the Claimant would be unable, even if he could have successfully challenged the decision to detain on procedural grounds or other illegality, to show that the detention could not lawfully have been justified in any event on the facts of this case. This is so in my judgment whether the test is one of materiality or of inevitability.

107. It is clear from the authorities that no different approach would be taken in relation to a claim for damages for breach of Article 5.

108. The further issue, which again does not arise given my conclusions but on which I should express an opinion, is whether if the Claimant could not establish that he had been wrongfully detained, but could establish that he had been unlawfully detained in prison as opposed to an IRC, he could make a successful claim for damages on that basis. Ms Anderson relied upon the WL (Congo) case and also upon the first instance decision of Kenneth Parker J in Rashford v SSHD [2010] EWHC 2200 (QB) where the judge, founding himself upon SK (Zimbabwe), held at paragraph 14 that even if there had been a procedural impropriety in relation to the Claimant's transfer from an IRC to prison, that could not found a claim for damages for false imprisonment, because the detention was and remained lawful throughout.

109. I agree with this submission and consider, respectfully, that the approach of Kenneth Parker J in Rashford is correct. In my judgment there is no basis for a claim for damages in this respect. I do not consider that Mr Karnik can rely on Article 5 in this context to seek to outflank this argument, and again I am satisfied that even if damages were in principle claimable the Claimant would have to satisfy the causation test and again, whether the test is materiality or inevitability, there is no possibility on the facts of this case that he could ever establish that the decision not to transfer him to an IRC would not have been the same regardless of any procedural or other impropriety or illegality which he might establish.

110. Accordingly, I am satisfied that there is no basis for a claim for damages either in relation to the claim for wrongful detention or the claim for wrongful detention in prison as opposed to an IRC, and these claims must fail.

Overall conclusions

111. The Claimant's claim for judicial review must be dismissed.

112. Finally, I express my gratitude to counsel for their full and helpful submissions.