Neutral Citation Number: [2014] EWCA Civ 990

Case No: C4/2012/1629

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT
Queen's Bench Division
Mrs Justice Lang
[2012] EWHC 2899 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 17th July 2014

Before:

Lady Justice Arden
Lord Justice Underhill
and
Lord Justice Floyd

- -

Between:

R o/a O (by her litigation friend the Official Solicitor)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Hugh Southey QC and Mr Ranjiv Khubber (instructed by **Lawrence Lupin Solicitors**) for the **Appellant**
Ms Julie Anderson (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 26 February 2014

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Judgment

Lady Justice Arden :

Issue for this appeal

1. This issue on this appeal is whether the Secretary of State for the Home Department ("the Secretary of State") could continue lawfully to hold the appellant, O, in immigration detention from 24 July 2010 to 6 July 2011 notwithstanding a change in the diagnosis of her mental illness and medical opinion that she should be cared for in the community. This issue arises because O has sought permission to apply for judicial review of the Secretary of State's decision to detain her, in order to seek damages for unlawful detention for the period following that diagnosis. By her order dated 3 April 2012, Lang J refused her permission to apply for judicial review. I shall take the events in chronological order below but, as explained, this court has already considered the lawfulness of O's detention prior to 24 July 2010 and so that period of detention will not be further considered in this judgment.

2. The judge, in a short judgment, held that what she had to decide was:

> "…whether the circumstances had changed such that the detention had become arguably unlawful under either *Hardial Singh* principles, as submitted, or because of an arguable failure on the part of the Secretary State properly to apply her policy on the mentally ill." (judgment, [26])

3. O had entered the UK illegally with her son, S, and unsuccessfully claimed asylum. O contends that she arrived in the UK in November 2003. She suffered from mental illness. O committed offences of child cruelty against S, who subsequently returned to Nigeria. She was given bail but absconded. She then had a daughter, M, and committed a further offence. She pleaded guilty to offences of child cruelty on 12 July 2008 and was sentenced to twelve months imprisonment with a recommendation that she should be deported at the end of the term. While she was in prison and during her detention she demonstrated the effects of her psychotic illness by self-harm.

4. On her release from prison on 8 August 2008, the Secretary of State decided that she should be deported. At the same time she decided to detain O and she was sent to a detention centre known as Yarl's Wood. That means that she was detained for a period of nearly three years, which is worryingly long. A deportation order was not made at this time because of concerns about O's mental health and because there were ongoing care proceedings about M.

5. In proceedings brought by O against the Secretary of State, prior to these proceedings, this court had held that O's detention up to 23 July 2010 was unlawful ([2011] EWCA Civ 909, per Ward, Richards and Hughes LJJ). In those proceedings, the Secretary of State had conceded that she had not applied her then current policy on detention correctly in O's case during the period from 8 August 2008 to 28 February 2010, but this court had held that O did not suffer any loss because she could have been lawfully detained anyway during that period. There was evidence of a high risk of re-offending in relation to child cruelty. O acted on impulse and suffered from anger. There was also a high risk of absconding.

6. This court came to the conclusion that the policy was lawfully applied in the second period of detention from 28 February 2010 to 23 July 2010 (for which the Secretary of State did not make the same concession).

7. The present proceedings concern the period ("the third period") commencing on 24 July 2010 and ending on 6 July 2011, when O was released on bail from immigration detention.

O's mental condition

8. When O was sentenced following her conviction in July 2008 for child cruelty, she was diagnosed by a Dr Shah as having a recurrent depressive disorder and an emotionally unstable personality disorder. Opinions differed as to whether she would be better off in detention or in hospital but medical opinion was in favour of her continued detention either in a detention centre or in hospital. In 2009, Professor Katona became involved on her behalf. He noted by September 2009 that her condition had deteriorated considerably since 2008. On at least one subsequent occasion he recommended a transfer to hospital under section 48 of the Mental Health Act 1983. In addition, on 10 October 2009 he concluded that O's mental condition had deteriorated to the extent that she was no longer able to conduct her proceedings. The court has since appointed a litigation friend, who acts for her in these proceedings. Other doctors treating O in March 2010 recommended psychological intervention in a secure in-patient setting. On 15 March 2010 Dr Ratnayake, a consultant psychiatrist at the Bedfordshire and Luton Mental Health and Social Care Partnership NHS Trust advised the detention centre that O's needs were met at the detention centre and that she would not obtain any benefit from transfer to a hospital.

9. On 10 February 2011, Dr Roxane Agnew-Davies signed a report on O. Her view was that O was suffering severe Post-Traumatic Stress Disorder ("PTSD") and a depressive disorder. Her opinion was that O required a package of care and treatment in the community. This would involve specialist counselling over many years. She stated that in her opinion O presented a psychological profile and clinical history which was highly consistent with other victims of severe childhood abuse and neglect and victims who have been trafficked whom she had interviewed. She stated that the reviews of the research conducted by other named researchers suggested that PTSD and depressive disorder were long term mental health problems and required specialist treatment. While some women recovered spontaneously, O's mental health had been further damaged by her experiences of psychotic symptoms and a history of self harming behaviour which required specialist long term management. She considered that O's mental health depended on a sure and stable support network and ongoing contact with M while she remained awaiting adoption. She considered that O's PTSD, depressive and self harming symptoms would flare up if she was returned to Nigeria and have extremely negative consequences on her capacity to cope.

10. Professor Katona later wrote a report saying that he agreed with the opinion of Dr Agnew-Davies.

11. On 16 February 2011 the solicitors for O's litigation friend sent Dr Agnew-Davies' report to the Treasury Solicitor, then instructed by the Secretary of State to defend judicial review proceedings brought on O's behalf. Their letter explained her diagnosis and recommendations at length.

12. On 8 April 2011, the UK Border Agency ("UKBA") wrote a closely-reasoned 8-page letter in response. This stated that the report of Dr Agnew-Davies contained no new information or diagnosis that had not been previously addressed in the medical reports provided by various doctors between May 2008 and October 2010. The UKBA said that the impact of detention on O's mental health had been considered extensively in the judgment of HHJ McMullen dated 16 August 2010, which was later the subject of the decision of this court to which I have already referred.

13. The letter concluded that O's deportation would not have an impact of the severity required for a violation of Article 3 of the European Convention on Human Rights ("the Convention"). Since March 2010 there had been infrequent episodes of agitated behaviour. Over the last seven months O's mood and behaviour had been settled and stable in marked contrast to how she was in the early part of 2010. None of the nurses, GPs or counselling team or operational staff within the detention centre had raised concerns about deterioration in her mood or behaviour and it was clear that the coping strategies that O had learnt at Yarl's Wood were being used effectively. The letter also stated that no necessity had been identified for her to be reviewed by the mental health team. The psychiatry nurses at Yarl's Wood engaged with O on a regular basis and had not identified any concerns.

O applies for release on bail

14. In March and June 2011, O made applications for bail which were refused by the immigration judge. O applied for judicial review of the March decision but Mitting J refused that application on 10 May 2011. On 1 July 2011, O made a further application for bail, which was granted with conditions as to residence and sureties with effect from 6 July 2011.

O succeeds in setting aside the Secretary of State "certification" decision

15. When the deportation order was eventually made in November 2010, the Secretary of State exercised her power to certify that O was not entitled to an "in-country" appeal against that order and thus made a "certification decision". That meant that she would have to return to Nigeria before she could appeal. The Secretary of State maintained that decision following the report of Dr Agnew-Davies. On 10 May 2011, Mitting J granted O permission to apply for judicial review of the Secretary of State's decision to maintain the certification decision in UKBA's letter of 18 April 2011. He refused permission on one ground, and this court subsequently granted permission on that further ground.

16. On 2 November 2012 HHJ McKenna sitting as a judge of the High Court granted judicial review of the certification decision on the grounds of both Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life) of the Convention. HHJ McKenna quashed the Secretary of State's certification decisions and held that O had an in-country right of appeal. His primary ground was that it was arguable that removal to Nigeria would be contrary to Article 3 given her medical condition. He also held that it was arguable that it would also involve a breach of Article 8 as steps for M's adoption had been discontinued and O wished to apply for contact with her.

Legal framework for O's detention

17. The relevant framework is in primary legislation, immigration guidance and case law.

18. Where a deportation order is made, the Secretary of State's power to detain the person who is to be deported in detention is contained in the Immigration Act 1971, schedule 3, paragraph 2(3), which provides:

> "(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

19. Equivalent powers exist where removal directions may be made in respect of any person.

20. The courts have developed principles for implying time limits for detention under these powers. They are known as the *Hardial Singh* principles, so called after the decision of Woolf J (as he then was) in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 in which the principles were first formulated. In *R (I) v SSHD* [2002] EWCA Civ 888, [2003] INLR 196 at [46] Dyson LJ (as he then was) summarised the *Hardial Singh* principles as follows:

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

21. In *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, the Supreme Court approved this formulation of the *Hardial Singh* principles.

22. The Supreme Court also amplified the principles in several respects. In summary, the Supreme Court held that:

    i) the risk of reoffending was a relevant factor; and

    ii) the refusal of voluntary repatriation and the pursuit of appeals against deportation would be relevant only in certain circumstances.

23. In *R(Kambadzi) v Secretary of State* [2011] 1 WLR 1299, a case decided shortly after *Lumba*, the Supreme Court considered the consequences of a failure by the Secretary of State to carry out regular reviews of a person's detention. It held that this failure was sufficiently close to the decision to detain to render the detention unlawful. However, no substantial damages would be awarded if the person would and could have been lawfully detained in any event.

24. The Secretary of State's policy about holding persons with mental illness creates a presumption that a person with mental illness will not be placed in detention. This policy is to be found in paragraph 55.10 the Enforcement Instructions Guidance ("EIG") (as amended):

> "Persons considered unsuitable for detention:
>
> The following are normally considered suitable for detention in only very exceptional circumstances…
>
> - those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
>
> …
>
> 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…"

25. In *Lumba*, the Supreme Court considered the consequences of a breach of a policy. It held that the decision which was in breach of the policy was invalid but that the detainee would have no claim for substantial damages if he would and could have been lawfully detained anyway.

26. Accordingly the question for this court is whether there was a breach of the policy and if so, whether O would and could have been lawfully detained anyway.

27. The presumption that a person with mental illness will not be placed in immigration detention can be displaced only in two cases: (1) where the illness can be satisfactorily managed and (2) where there are very exceptional circumstances. The Secretary of State relies on case (1). There was an attempt in argument to rely on case (2) but there was no evidence that the Secretary of State considered this to be the basis for detention at the time, nor any explanation of what the very exceptional circumstances were in this case. So I do not further consider case (2) in this judgment.

Judgment of Lang J

28. The judge held that there had not been a material change in circumstances in the period from 24 July 2010 to 6 July 2011 ("the third period") from those in previous periods (when she had been lawfully detained) for the following reasons:

i) The *Hardial Singh* principles were not infringed because the delay was caused by O's legal challenges.

ii) This court had found that there was a high risk of absconding and a significant risk of re-offending in the first and second periods and it was unrealistic to argue that these findings did not apply in the third period.

iii) The fact that O was successful in her bail application in July 2011 did not indicate that the previous detention was unlawful:

> "…by that stage, circumstances had changed, in particular improved mental health and a care package from a local authority."

iv) For the same reasons she had no claim under Article 5 of the Convention.

v) Paragraph 55.10 of the EIG had lowered the test for detention from what it had been in the first period (a point not pursed on this appeal), and it was unlikely that O could show that her illness could not be satisfactorily managed in detention.

vi) The fact that she had been granted permission to appeal against the deportation order in April 2011 might have reduced the risk of absconding but her mental illness would prevent that step having that effect in her case.

vii) There had been an improvement in her medical condition which supported the view that her medical condition could be satisfactorily managed in detention.

viii) There were unsuccessful applications for bail and for judicial review of the refusal of bail between 7 March 2011 and 17 June 2011.

ix) The judge held that the grant of bail had been influenced by the fact that by June 2011 two of the medical experts, Dr Agnew-Davies and Professor Katona, took the view that O was more appropriately treated by a care package in the community.

Developments since the hearing before Lang J

29. The parties have refined their positions and reduced the issues since the hearing before the judge. This appeal has been delayed while another appeal raising a point which O originally wished to raise in this appeal was heard. On this appeal O no longer relies on any change in the policy in paragraph 55.10, or indeed on Article 5 of the Convention as opposed to the *Hardial Singh* principles. The Secretary of State contends that O does not rely on the third *Hardial Singh* principle, but as I see it both the second and third principles are in issue. The Secretary of State does not now rely on any delay caused by the O's legal challenges. As mentioned above, in reality O's complaints cannot be traced further back than the delivery of Dr Agnew-Davies' report to the Treasury Solicitor on 16 February 2011.

My conclusion on this appeal

30. For the detailed reasons given in the paragraphs which follow, and summarised in the final paragraph of this judgment, I conclude that the continued detention of O was lawful. I now turn to the parties' submissions on this appeal, and the rulings that I would make on them.

O's case on breach of the Hardial Singh principles

31. O's case is that the Secretary of State should have appreciated that she would not be able to deport her within a reasonable time and that her detention became unlawful. In the course of considering this issue there are two threshold issues: (1) whether the *Wednesbury* test of unreasonableness applies; and (2) whether O's mental condition could be satisfactorily managed in detention following Dr Agnew-Davies' report.

32. Mr Hugh Southey QC, for O, submits that the fact that this court held that it was lawful to detain O for the first and second periods of detention is not conclusive of the matter in the third period. Detention in the third period was unlawful because the Secretary of State failed to appreciate the material changes that had taken place since her original detention: (1) when detention continues, at some point enough must be enough and the longer detention continues the greater the need to show justification; (2) the Secretary of State did not engage with the report of Dr Agnew-Davies; (3) permission to apply for judicial review of the deportation order had been granted in May 2011 and so it was arguable that the Secretary of State had erred in law in certifying that O had no in-country appeal from the deportation order, and (4) a package of support was brought together for O to be cared for in the community. O had provided evidence of the support that she would receive if she were released from detention from her three proposed sureties (all of whom had had long standing involvement and contact with her).

33. Mr Southey naturally relies on the fact that on 2 November 2012 HHJ McKenna granted judicial review of the Secretary of State's decision to deny O an in-country right of appeal against her deportation on the grounds of Articles 3 and 8 of the Convention. However, that occurred outside the third period. Ms Julie Anderson, for the Secretary of State, warns against the use of hindsight based on this or any other event outside the third period. I agree, but nonetheless the fact that the certification decision was set aside is some confirmation that the Secretary of State's prospects of removing her within a reasonable time were receding.

34. Much obviously turns on the medical evidence that O produced from Dr Agnew-Davies, which the Secretary of State did not accept. On Mr Southey's submission, O's detention was in breach of paragraph 55.10 of the EIG after that report because she required treatment which the detention centre could not provide. In addition, Professor Katona stated that in his opinion detention was detrimental to O's mental health and that there had been less self-harm in recent weeks partly because of sedation.

35. Mr Southey criticises UKBA's response of 18 April 2011. He submits that once the report of Dr Agnew Davies was available it should have been clear that there was a good case that her detention violated Articles 3 and 8 of the Convention. It was wrong to attach any weight to the suggestion that her various legal challenges were self-generated if her detention was unlawful.

36. The Secretary of State at the time preferred to rely on the medical advice already received. That raises the question whether in determining the lawfulness of the detention the court is a primary decision maker (and must make its own choice between the medical experts) or whether its role is to supervise the decisions made by the Secretary of State for their compliance with the law.

37. Mr Southey submits that there is conflicting authority on the threshold question whether it has to be shown that the decision-maker acted as no reasonable decision-maker would have done (the *Wednesbury* test of unreasonableness). He submits that the court is the primary decision-maker on the legality of detention, and it does not make sense to apply the *Wednesbury* approach.

38. As Ms Anderson points out, this conflict of authority was considered by Richards LJ in *R(LE Jamaica) v SSHD* [2012] EWCA Civ 597 at [29 (viii)]. Richards LJ, with whom Maurice Kay and Kitchin LJJ agreed, summarised the position as follows:

> "In summary, it seems to me that in submitting that it is for the court to determine as primary decision-maker whether detention was in accordance with the policy, Mr Southey has elided the question whether the decision maker directed himself correctly as to the meaning of the policy (a matter on which the court is the ultimate decision-maker) and the question whether, if so, the decision-maker acted within the limits of his discretion when applying the policy to the facts of the case (a matter in relation to which a *Wednesbury* test applies)."

39. Mr Southey submits that this sub-paragraph was *obiter*, as Richards LJ himself conceded at [29(ix)] of his judgment. But that submission seems to me to overlook that it is apparent from Richards LJ's very careful study of the authorities that his conclusion represents by far the weight of authority. Accordingly in my judgment his speech should be taken as having concluded the question. It follows that this court should uphold the Secretary of State's decision to rely on the medical experts other than Dr Agnew-Davies and Professor Katona unless it is shown that no reasonable decision maker could have done so. In my judgment that is not shown. The opinion of Dr Agnew-Davies recommended the use of specialist counselling which was not generally available. In any event, Dr Agnew-Davies' recommendations could only be followed if a package of support for care in the community could be found.

40. Mr Southey submits that the conclusion of Richards LJ is inconsistent with the case of *R(o/a Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45 considered below. However, in that case the issue was as to the meaning of the policy and not as to the lawfulness of the Secretary of State's discretionary decision, a case excepted by Richards LJ in his summary cited above. Furthermore the approach of Richards LJ is consistent with the tenor of authority since the decisions in *Lumba* and *Kambadzi*: see *Krasniqi v SSHD* [2011] EWCA Civ 1549, where this court held in effect that the *Hardial Singh* principles were not violated by a mere administrative failing and that there had to be unreasonableness amounting to illegality, and *SS(Nigeria) v SSHD* [2013] EWCA Civ 550, [47] where Laws LJ, with whom the other members of the court agreed, spoke of the constitutional balance between the judicial and executive power.

41. That leads to the second threshold question here, namely whether O's mental condition could be successfully managed at all in detention if she could not in detention access the specialist care which Dr Agnew-Davies recommended. The answer to this would be a resounding "no" if the Secretary of State was bound under the policy to implement these recommendations. It is said that the condition could not be managed unless O received the treatment that would enable her in due course to overcome her illness, for which Dr Agnew-Davies offered the only practical hope, and produce the best outcome for her.

42. In this court's decision in *R(o/a MD (Angola) & ors v Secretary of State* [2011] EWCA Civ 1238 (to which I was party) at [14], Maurice Kay LJ held context and purpose were important in the interpretation of paragraph 55.10. That paragraph was after all a provision which was to facilitate lawful removal. He held (at [16]) that paragraph 55.10 should receive a "purposive and pragmatic" construction.

43. I agree with that approach, which also commended itself *obiter* to Beatson LJ in *Das* at [71]. The issue before Beatson LJ was:

> "…whether it suffices for satisfactory management of mental illness in detention that deterioration is prevented or whether, as Miss Rose submitted, it involves facilitating recovery, so far as is possible."

44. The view put forward by Miss Rose in *Das* was also that of the interveners in this case, which we have also seen. Beatson LJ noted that MIND's view was that:

> "…there would not be satisfactory management where a person's mental health could be improved by a particular treatment, such as counselling, but that treatment is not available in detention, or is not available without delay."

45. Beatson LJ then held:

> "I strongly doubt that the framers of the policy intended it to have this meaning or that it is the natural construction of the words used. It also appears inconsistent with the view taken in the previous decisions of this court and the Administrative Court where the question addressed was whether detention would result in deterioration. It raises broad policy questions of a kind which Miss Anderson informed the court is the subject of an investigation being undertaken on behalf of the Secretary of State by the Tavistock Institute. It also seems impractical as a test given the likely effect on an individual's mental health of the prospect of his or her involuntary removal from the United Kingdom in the very near future and given the variability of what treatment is available in different parts of the country to those with mental illnesses who are not detained. If Mind's position represents a general view among mental health clinicians, it may be an example of where legal policy and medical opinion diverge."

46. Mr Southey effectively contends for the meaning which Beatson LJ strongly doubted was correct. Mr Southey rightly emphasises that the passages which I have quoted from the judgment of Beatson LJ in *Das* were *obiter*. (Moreover, we have not seen any report from the Tavistock Institute to which he refers). However neither of those points deprives the passage last quoted of value so far as this case is concerned as we proceed, as in my judgment we must, to decide the very question which Beatson LJ did not decide, namely what the policy means by using the words "satisfactorily managed", in the circumstances of a case of this kind. This is a question of law.

47. I do not intend to give a definitive interpretation of "satisfactorily managed" in paragraph 55.10 of the EIG which would apply to a vast range of conditions in widely differing circumstances. The precise facts of any individual case are likely to require careful consideration. I therefore restrict myself to interpreting it in the context of the treatment options in this case.

48. The word "satisfactorily" in my judgment requires an objective judgment to be made. It does not refer to the opinion of the decision maker. That objective judgment must be as to whether the outcome of the detention centre's treatment will be satisfactory. Importantly, there is no requirement that it should necessarily be equal to that available outside detention. 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. As Beatson LJ was minded to conclude, it would not necessarily mean treatment that provided the hope of recovery. Ms Anderson pointed out that PTSD was a common disorder and there were many people in detention with PTSD. By implication, their condition in many cases, on the present state of medical knowledge and facilities, may appropriately only be kept stable.

49. In the preceding paragraph I have attached an objective meaning to the words of the policy and not given weight to the view of the Secretary of State. That is because I am dealing only with the *meaning* of the policy. If the question had been whether the Secretary of State, having properly directed herself as to the policy, had properly applied the policy, the question would not then be one of law for the court. The alternative (or second) test set out in *R(LE Jamaica)* (paragraph 38 above) would apply.

50. If follows from paragraph 48 above that the policy does not, in my judgment, have the meaning for which Mr Southey effectively contends, as noted in paragraph 46 above.

51. Returning to the facts of the present case, the crucial point as I see it about the option recommended by Dr Agnew-Davies was that it was not generally available. The fact that there may be specialist treatment somewhere which would be better for the patient does not make that which is otherwise acceptable medical practice unsatisfactory management of the condition within the meaning of paragraph 55.10. That specialist treatment could not reasonably be made available in the detention centre. Therefore the question whether the condition could be satisfactorily managed within detention had to be considered without this option.

52. In my judgment there is no basis here for questioning the medical reports on which the Secretary of State relied since it is not suggested that they did not provide acceptable medical treatment for O's mental condition. In any event, for the purpose

of acting on Dr Agnew-Davies' opinion there needed to be a package of support which was not in place and which the Secretary of State had no obligation to provide.

53. Accordingly, in my judgment, O cannot establish a breach unless she can show that the decision of the Secretary of State that O's condition could be satisfactorily managed is invalid on public law grounds.

54. It is unnecessary for me to deal with Ms Anderson's submissions that the opinion of Dr Agnew-Davies and Professor Katona that continued detention was harmful were based not solely on detention but also on the fact she was parted from her daughter, M. Likewise I need not address her submission that Professor Katona's reports had to be understood in the light of the approach in his published work that detention is injurious to health.

O's submission that there was a failure to take account of Dr Agnew-Davies' reports in her detention reviews

55. Mr Southey relies on procedural errors by the Secretary of State. He submits that, on the detention reviews, the reviewer should have had continuing information as to how the condition was to be managed. The Secretary of State's reviewers effectively ignored the new diagnosis: there is virtually no mention of Dr Agnew-Davies' report beyond the fact of its being sent by her solicitors. The detention reviews also failed to give adequate consideration to the other material changes relevant to the lawfulness of her detention.

56. Ms Anderson accepts that the Secretary of State had to engage with the report of Dr Agnew-Davies. She submits that UKBA's letter dated 8 April 2011 engaged in detail with Dr Agnew-Davies' report. The response to that report did not have to be in the detention reviews. There would also be other records dealing with medical matters, but they are not available. It was not the function of the detention reviews to engage with the current state of O's mental health.

57. Ms Anderson explains that the Secretary of State has a system to check on an ongoing basis that the illness can be managed in detention. Rule 35 of the Detention Centre Rules 2001 imposes an obligation on healthcare staff to inform the Secretary of State about any detained person "whose health is likely to be injuriously affected by continued detention" (see paragraph 55.8A of the EIG). This is the primary information route. The Secretary of State was entitled to rely on treating physicians. She can rely on their silence because of their obligation to report. Some information is transmitted to the Secretary of State. But the Secretary of State does not have access to medical records of detainees. A Rule 35 report needs consent of the subject or a certificate from the writer that it is in their interests. Such a report might stop people coming forward. The Secretary of State relies on the medical staff to pass on information. It is up to the healthcare services to consider whether it has a bearing, and the only legal obligation is to tell the Secretary of State if it is significant.

58. Ms Anderson further submits that detention reviews are not like a reasoned decision letter. They are an internal record. They do not have to respond with a report.

59. I am unimpressed by the Secretary of State's response on this point. The detention reviews ought to state, however briefly, why the decision to continue to detain has

been made notwithstanding other developments. They ought, therefore, to have explained the potential significance of Dr Agnew-Davies report and why no action was taken on it. UKBA's letter and the medical notifications under Rule 35 serve quite distinct functions and therefore they cannot take the place of properly conducted and recorded detention reviews.

Secretary of State's justification for detention

60. Ms Anderson contends that detention was justified for the purposes of the *Hardial Singh* principles by the risk of absconding and the risk of harm. Ms Anderson submits that the risk of absconding was high. O had absconded before. She was considered for bail on an application which was refused.

61. Ms Anderson submits that in a criminal deportation case such as this, even though the presumption against detention still applies, the decision-maker must consider the risk to others of further offences. The policy makes it clear that great weight is to be attached to mental disorder. In some cases, there have been substantial periods of detention: see for example, *M v The Secretary of State* [2008] EWCA Civ. 307.

62. On Ms Anderson's submission, the presence of sureties was not decisive. There were removal directions before the legal challenge was made. What had made the difference in the bail application was the care package. It is wrong to look at the length of sentence. The relevant points were the gravity of harm and the risk of recurrence.

63. On the risk of harm to others, this court in the earlier proceedings relied on medical evidence. The decision-maker is entitled to look at the history as well as the current situation. PTSD was a new diagnosis.

64. I have considered the question of the risk of absconding and the risk of harm to others. It was made clear in *Lumba* that these questions are integral to the legality of the decision to detain. I accept for the purposes of this appeal that, as Mr Southey submits, it is likely that the risk would subside and lose potency over time but the core reasons for the risk as identified by this court in the earlier proceedings reflected events in O's recent past and could not be ignored.

65. As regards these risks, the proof of the pudding is in the eating. The risks could only be negotiated if O could have the treatment. To do that she had to be in the community in an appropriately supportive setting. It is noteworthy that she did not manage to achieve release on bail on the first application. Her application was premature. On the application for judicial review of the refusal, Mitting J rejected the application. He referred to the abundance of evidence on risk of absconding and also to the difficulty which O would have in complying with bail conditions. There was also a risk of reoffending and of harm to children generally.

66. In a case where the issue on the bail application was also an issue that went to the legality of the detention, it would be totally illogical if O could succeed in any application against the Secretary of State for judicial review of a decision to detain when the arrangements to apply on her release were not worked out to the satisfaction of the court so that she could get release on bail. It was not until 6 July 2011 that an order was made for her release on bail. It is quite clear that she would not have been

granted bail but for the comprehensive package that was then put forward on her behalf with detailed supervision by her sureties and the provision of accommodation by the local housing authority.

67. Accordingly, subject to the question of the detention review, the challenge to the lawfulness of the Secretary of State's decision to continue the detention of O in the third period fails. I do not consider that the failure to conduct a proper detention review should lead to some other result in the circumstances of this case. In the circumstances it would be disproportionate to grant permission to apply for judicial review based on the failure to carry out a proper detention review in the light of Dr Agnew-Davies' report (or any other development that occurred in the third period). At most, nominal damages would be available. The conclusion that this matter should not separately proceed is consistent with the decision of this case in *R(o/a Francis) v SSHD* [2014] EWCA Civ 718 at [64], which Ms Anderson sent to us after we had drafted our judgments.

Conclusion

68. Accordingly, I would dismiss this appeal. The new diagnosis of Dr Agnew-Davies proposed a new treatment for curing her illness but her condition could still be satisfactorily managed in detention. She could still be held in an acceptable stable mental condition in detention under the existing treatment. In any event, there was a risk of reoffending and absconding. While these would have diminished with the passage of time, there still needed to be safeguards if O was released into the community and these were not put in place to the satisfaction of the court until 6 July 2011 when she was in fact released on bail.

Lord Justice Underhill

69. I agree.

Lord Justice Floyd

70. I also agree.