Case No: CO/316/2010

Neutral Citation Number: [2011] EWHC 516 (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

Date judgment handed down: 9 March 2011

Before :

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

- -

Between :

The Queen, on the application of

TENDAI RANGWANI **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: 2 February 2011

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JUDGMENT

His Honour Judge Stephen Davies

Introduction

1. In this case the Claimant, Tendai Rangwani, seeks judicial review in relation to what he contends was his unlawful detention by the Defendant, the Secretary of State for the Home Office (SSHD), over the period of his administrative detention beginning on 19/06/09 and ending with to his voluntary return from the UK to Zimbabwe on 3/04/10. His primary complaint is that he should not have been detained and should have been released; his fallback position is that if he was lawfully detained then he should have been detained in an Immigration Removal Centre (IRC) rather than in prison. Because he is no longer in detention, the case is really about whether he has a claim for damages against the Defendant and, if so, on what basis.

2. In short, the position is as follows:

 (1) On 13/05/05 the Claimant, then aged 19 years, entered the UK from Zimbabwe on a Zimbabwean passport, and was given 6 months leave to remain as a visitor. He went to live with his mother and half brother in Nottingham;

 (2) On 17/09/05 he committed an extremely serious offence, an offence of rape committed against a 13 year girl;

 (3) On 16/01/06 he was convicted and on 17/2/06 he was sentenced to a term of 10 years' imprisonment, reduced to 7 ½ years on appeal, so that he was due to be released from the custodial element of his sentence on 19/06/09. He was required to sign the Sex Offenders Register (SOR);

 (4) The Claimant did not make any application to extend his period of leave, but on 29/04/08 he made an asylum claim, which was rejected and his appeal to the AIT was dismissed on 6/07/09, his appeal rights becoming exhausted on 17/07/09;

 (5) A deportation order was made against him on 119/03/09;

 (6) On 15/06/09 Ms D'Addio, the caseworker within the Criminal Casework Directorate (CCD) of the UK Border Agency (UKBA) responsible for the Claimant's case, wrote to the Governor of HMP Wakefield, where he was detained, asking him to notify the Claimant that he would continue to be detained from 19/06/09 under paragraph 2(3) of Schedule 3 to the Immigration Act 1971. The enclosed 'reasons for detention' letter and the subsequent monthly progress reports issued to the Claimant show that the reasons why the Defendant had decided that the Claimant should remain in detention were in summary: (a) the risk of absconding; (b) the risk of re-offending.

 (7) From 19/06/09 the Claimant continued to be detained in HMP Wakefield, rather than being transferred to an IRC, despite written requests to that effect made by his solicitors on his behalf which went unanswered by the Defendant until 16/12/09. The Defendant's case is that the Claimant was risk assessed on 27/09/09 by Ms Bernice Ouseley, an Immigration Officer in the Detainee Escorting and Population Management Unit (DEPMU – the UKBA department responsible for managing those in administrative

detention), who decided that he should remain in prison. The Defendant says that it advised HMP Wakefield that this was the position in October 2009;

(8) The first monthly progress report issued to the Claimant in July 2009 asked the Claimant to advise the Defendant if he wished to return to Zimbabwe and if he wished to apply for the Facilitated Return Scheme (FRS), under which he would receive financial and other assistance to return to and relocate in Zimbabwe. It would appear that since there were no enforced removals to Zimbabwe at this time, the only prospect of securing the Defendant's removal to Zimbabwe was with his agreement;

(9) On 12/08/09 the Defendant was advised that the Claimant's half brother, who had been holding his passport for him, was claiming that he was unable to find it. It would appear that by this time the Defendant had been made aware that the Claimant was willing to return to Zimbabwe voluntarily and was interested in the FRS;

(10) On 10/11/09, after some delay, the Claimant was interviewed in order to obtain details to arrange for a request to be made to the Zimbabwean High Commission (ZHC) for the issue of an Emergency Travel Document (ETD) to facilitate his removal to Zimbabwe. The note records that he claimed he had been told by the Foreign National Prisoner (FNP) liaison clerk at HMP Wakefield that he was not eligible for the FRS;

(11) On 11/11/09 an application for bail made by the Claimant could not proceed because he had not been produced from prison. Effective bail applications were however made on 7/12/09 and 15/2/10, and bail was refused on each occasion on the grounds that there were substantial risks of absconding and re-offending.

(12) On 22/12/09 the Claimant was accepted into the FRS, and on 5/01/10 the Defendant made an application to the ZHC for an ETD. An interview was arranged at the ZHC on 27/01/10, but this had to be re-scheduled to 24/2/10 as a result of HMP Wakefield being unwilling to allow the Defendant out of prison other than in a caged van. The ETD was granted on 26/2/10, removal directions were set on 20/03/10 and the Claimant was deported on 3/04/10.

3. So far as these proceedings are concerned:

(1) Letters before action were sent to the Defendant and to the Governor of HMP Wakefield on 10/12/2009.

(2) The proceedings were commenced against both the Defendant and the Governor of HMP Wakefield on 11/01/2010. The relief sought was: (a) the Claimant's release from detention or alternatively a transfer to an IRC, together with a declaration that his detention alternatively his non-transfer to an IRC was unlawful; (b) a declaration that the D's policy regarding the place of detention was unlawful; (c) damages.

(3) On 1/06/10 HHJ Gilbart QC granted permission against the Defendant but not against the Governor of HMP Wakefield. There has been no renewal application in respect of the refusal of permission as against the Governor.

(4) On 1/11/10 the claim was due to be heard, but it was adjourned by HHJ Stewart QC on the basis that the Claimant was entitled to seek disclosure from the Defendant of

documents relevant to what the Claimant was contending was an unpublished secret policy in relation to detaining those such as the Claimant, convicted of serious sexual offences, in prison instead of in an IRC.

(5) Disclosure was provided, and the Defendant also produced witness statements from Bernice Ouseley made 3/12/10 and from Mike Richardson, a Higher Executive Officer in the CCD, made 15/12/10. The case was listed before me on 16/12/10, but could not be dealt with on that occasion because there was insufficient time to deal with this case and another case, which had been ordered to be tried at the same time because it raised similar issues, in the time available, it being agreed that the other should be dealt with first as more urgent since the claimant in that case was still in detention. Accordingly this case was adjourned to 2/02/10, when it proceeded before me and, having heard a full day's argument, I adjourned to provide a written judgment.

4. By the time of the hearing on 2/02/10, the issues had been clarified and refined, so that they may now be stated to be follows:

(1) The Claimant's primary case is that his administrative detention was unlawful by application of what are commonly referred to as the Hardial Singh principles. The Defendant disputes this.

(2) A particular factor relied upon by the Claimant as part of his case in this regard is what he contends was his unlawful detention in prison rather than in an IRC. This is on the basis: (i) firstly, that the place and conditions of detention are themselves relevant to the reasonableness of continuing detention; (ii) secondly, that being detained in prison led to significant delays in his removal and a breach of the Defendant's obligation to act with reasonable diligence to secure removal. The Defendant does not accept that the Claimant's detention in prison was unlawful. She accepts that in principle the place and conditions of detention are of relevance, but only of limited relevance. She does not accept that being detained in prison led to delays or, if it did, since this is the result of a lawful decision to detain in prison it can have any bearing on matters.

(3) As to the claim for damages for unlawful detention, the Claimant submits that he is entitled to damages in tort for false imprisonment and/or under Article 5 European Convention on Human Rights (ECHR). The Defendant disputes that damages are available where, as here, the detention was pursuant to s.36 UK Borders Act 2007 (UKBA 2007).

(4) The Claimant's alternative case is that even if his detention as such was not unlawful, his continued detention in prison rather than in an IRC was unlawful. Although the Claimant does not following disclosure contend that a secret policy was unlawfully applied to him, he does I think still maintain his challenge to the relevant policy as set out in the Enforcements Instructions Guidance (EIG) section 55.10. He also submits that: (a) there appears to have been no or no proper exercise of the decision-making process applying all of the relevant factors as mandated by the EIG; (b) on a proper application of the relevant factors a decision not to transfer the Claimant to an IRC would have been irrational; (c) the Defendant failed in its obligation under the EIG to conduct an assessment on an individual basis or to provide reasons for a decision to reject a request for a transfer to an IRC. Save for some concession that there was some

delay in making the initial decision and in communicating that decision, this is all disputed by the Defendant.

(5) As to the claim for damages for detention in prison as opposed to an IRC, the Claimant again submits that he is entitled to damages in tort for false imprisonment and/or under Article 5 ECHR. The Defendant disputes that there is any entitlement to damages in tort or under Article 5 ECHR, in circumstances where the detention in prison was - she submits - specifically authorised under the Immigration (Places of Detention) Direction 2009.

5. It is convenient to begin by referring to the legislative background, the relevant case law and the applicable policy 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

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

7. 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.

8. 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) UKBA 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.

9. Under the Immigration (Places of Detention) Direction 2009 the Defendant directed, as he was entitled to do under paragraph 18(1) of Schedule 2 to the 1971 Act, that persons detained under paragraphs 2(2) or (2) of Schedule 3 to the 1971 Act or s.36 UKBA 2007 may be detained in, amongst other places, prisons: see paragraphs 3(1)(f) and 3(2). Under paragraph 18(4) of Schedule 2 to the 1971 Act, when read with paragraph 2(4) of Schedule 3 to the 1971 Act, a person so detained is 'deemed to be in legal custody'.

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

10. 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.

11. 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.

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

13. 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.

14. 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.

15. 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.

16. 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'.

17. 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 two 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.

18. 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.

19. 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

1 Foreign National Prisoner

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.

20. 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 effect of non-compliance with policy

21. This point was 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 by the Detention Centre Rules 2001 and the Operations Enforcement Manual 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).

22. 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.

23. 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.

24. 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 - Chapter 55 of the Enforcement Instructions and Guidance (EIG)

25. 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 19/06/08 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.'

26. The EIG 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 26/10/10. I have been provided with the versions in existence as at 2/03/10 and as at 26/10/10. It has not been said that there were any material alterations between 19/06/09 and 2/03/10, so that the case has proceeded on the premise that it is the pre-26/10/10 version in front of me which was in force when the Claimant was first detained under administrative powers.

27. Before turning to section 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 sections 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."

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."

28. Provision is made in section 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

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'

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.

29. Returning to 55.10.1, in the version of 2/03/10 it provides as follows:

'Immigration detainees should only be held in prison establishments when they present specific risk factors that indicate they pose a serious risk to the stability of immigration removal centres. Risks which would indicate that detainees should be held in prison accommodation include, but are not restricted to, the following circumstances:

♦ 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 (However in all such cases consideration should be given to the specifics of the offence and behaviour whilst in custody);
♦ 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.

Where a detainee meets the above criteria DEPMU 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 CIO 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).

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.'

30. It is clear, therefore, that 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. Where someone who has committed a serious sexual offence requiring registration on the SOR, the risk assessment must focus on the specifics of the offence and behaviour whilst in custody, but is likely to result in a conclusion that they should not be transferred to an IRC.

The Claimant's case in relation to unlawful detention

1) Delay

31. For the Claimant Mr Karnik's primary focus was his submission that the Defendant had been guilty of unreasonable delay. He made this submission both on a general level, namely that it had taken from 14/07/09 (when he submitted the Claimant had exhausted his appeal rights and was willing to co-operate in his removal) to 3/04/10 to remove the Claimant, and that this was an unreasonably long time, and also at a specific level, primarily by reference to the computerised case note records (referred to as GCID) disclosed by the Defendant. Ms Anderson disputed that the Defendant had been guilty of unreasonable delays, whether one looked at the time taken overall or at the specific history. She submitted that it is not appropriate to subject the case to a minute examination and also 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.

32. Although Mr Karnik began by referring me to entries from 2008 identifying that the Claimant would have been open for inclusion in the Early Removals Scheme (ERS), he realistically accepted that once the Claimant had made his asylum application that was no longer appropriate. He therefore concentrated his fire on the position from July 2009 onwards, and submitted that:

    (1) By the end of July 2009 the Defendant knew that the Claimant was not pursuing any further asylum appeal, could not be returned on an enforced basis to Zimbabwe given existing Home Office policy, and could only therefore be returned voluntarily.

    (2) By mid-August 2009 the Defendant must have known that the Claimant was willing to co-operate in his voluntary return, and also knew that the Claimant's brother was unable to locate his passport.

    (3) It ought, therefore, to have been a quick and easy process to follow through the Claimant's desire to pursue the FRS (although he submitted there was no evidence that the Claimant's willingness to return was conditional on this), obtain an ETD and remove the Claimant. Instead the ETD interview was not conducted until November 2009, the Claimant was not accepted onto the FRS until December 2009, the interview with the ZHC was delayed until February 2010, and removal did not occur until early April 2010.

33. He submits that delays were caused by the Claimant being in prison as opposed to an IRC. He focuses on the evidence of the Claimant's solicitor, Mr Speight, who refers to the difficulties in communications in prison when compared with an IRC. He refers to the Claimant's suggestion in the GCID that he had been misinformed about the FRS by a prison liaison officer. He refers to the history of difficulties in producing the Claimant first for the ETD interview, second for the initial abortive bail application, and third for the ZHC interview.

34. In response, Ms Anderson submits that overall the removal took place within a reasonable time and there is no basis for criticism of the Defendant, in the context that one cannot expect everything to be done immediately. So she submitted that it would not have been reasonable

to move to arranging an ETD as soon as it was reported that the brother had alleged he could not find the passport, that inevitably it takes time to arrange an ETD interview and process an application to be accepted onto the FRS, that inevitably it takes time to arrange an interview with the appropriate foreign country representative, and to proceed to removal. She also refers me to the witness statement of Mr Richardson who confirms in terms that there is no delay introduced by a detainee being held in prison as opposed to an IRC, because there is the same point of contact system, and no difference in the progress of the FRS application. She disputes the suggestion of Mr Karnik, made orally, that there is evidence of a systemic failure in relation to progressing removals from FNPs held in prison. She refers to the audit inspection of HMP Wakefield itself to show that there is no such criticism made in that document.

35. In my judgment the Claimant's criticisms are largely unfounded. Thus apart from what appears to have been some delay within the period from mid August 2009 (when the Defendant was first informed that the passport was lost) to mid November 2009, when the ETD interview took place, it does not seem to me that the evidence discloses that the Defendant failed to act with reasonable or due diligence. Even if one assumes that the ETD interview could have been arranged within a month, the delay is no more than two months at most. Although there is some evidence of 'interface' problems as between UKBA and the Prison Service, particularly in relation to the communication of the latter's security requirements which undoubtedly did cause some difficulties and delays, I do not consider that they can fairly be said to be systemic or to have led to serious problems or significant delays. There is no satisfactory evidence that the Claimant was misinformed about his eligibility for the FRS, and even if he was: (a) the monthly review letters sent to him explained that he was eligible; (b) on his own case that was not a bar to his voluntary removal, so that he could always simply have said at any time that he was willing to leave voluntarily without the benefit of the FRS.

36. Accordingly, I reject the submission that the Defendant was guilty of failing to progress this case overall with reasonable or due diligence.

2) Risk of absconding

37. Ms Anderson submitted that the Claimant was an overstayer, since he failed to apply to extend his 6 months' leave within the period of its currency. That appears to be strictly correct, although of course there is the mitigating factor that he was already in custody by the time his period of leave expired.

38. Ms Anderson also submitted that in circumstances where the Claimant had committed a very serious offence, had unsuccessfully claimed asylum, and would have had no settled address on his release other than what was offered by the probation service, there was inevitably a risk of absconding if the Claimant had been released pending removal.

39. Although Mr Karnik pointed to the absence of any specific evidence to suggest there was a risk of absconding, in my judgment there clearly was such a risk given the circumstances which are identified by Ms Anderson. Although Mr Karnik also submitted that the existence of licence conditions would minimise that risk, I do not accept that this meant that there was no or no more than a minimal risk in this case.

3) Risk of re-offending

40. Unsurprisingly, this featured heavily in the Defendant's submissions.

41. In seeking to deal with this point Mr Karnik referred me to the evidence that in June 2009 the probation service had put in place a risk management plan for the Claimant and in December 209 had found acceptable accommodation for the Claimant. He suggested that this showed that they believed he could safely be released. He also referred me to the Offender Assessment System (OASys) process that was undertaken in March 2009, which assessed his risk of reconviction as 'low'.

42. Ms Anderson submitted that since the probation service were obliged to take steps to plan for the Claimant's release regardless of their view (whatever it was) as to his risk level on release, the fact that they had done so, and in particular that they had located accommodation which they considered suitable, was irrelevant. I agree with that submission.

43. So far as the OASys is concerned, Ms Anderson submitted that its conclusion could not be binding either on the Defendant or on this court. She also observed that it assessed the risk of reconviction for 'other offences' (ie non-sexual and non-violent) as low, whereas it assessed the risk of reconviction for sexual offences within 2 years of release as 'raised'. It also assessed the level of risk to children if the Claimant was in the community as 'high',. It also recorded the extremely disturbing elements of the index offence, being that: (a) the offence was committed against a 13 year girl who lived with her family next door to the address at which the Claimant was staying with his brother at the time; (b) he had on his own account been attracted to her, but not asked about her age, and had previously invited her for a date; (c) the incident occurred when he had been invited to attend a barbecue at the neighbour's house; (d) the offence involved forcible anal rape and, unsurprisingly, caused the victim real physical and psychological trauma; (e) initially the Claimant had falsely denied that there had been intercourse, subsequently he falsely alleged that the intercourse was consensual, thirdly he falsely denied that there had been anal penetration, and had only pleaded guilty at the Pre-Trial Review; (f) notwithstanding his guilty plea the Claimant had persisted in maintaining post-conviction that he had only had consensual vaginal sex; (g) whilst in prison he had made no progress in addressing the risk factors which had led him to commit the index offence and which would – therefore – involve a risk of re-offending on release. As Ms Anderson submitted, even if the OASys was correct to assess the risk of reconviction as low, the consequences of further offending of the same kind as the index offence were extremely serious.

44. I accept Ms Anderson's submissions. The evidence clearly discloses in my judgment that there was at all times a significant risk of the Claimant committing further serious sexual offences if released, and the consequences of his so doing would undoubtedly be extremely serious for any victim. Accordingly I have no doubt that this is a highly material factor when considering the appropriateness of the decision to detain and the reasonableness of the overall length of detention.

4) Other relevant circumstances

45. Ms Anderson submitted, in my judgment correctly, that there clearly was a good prospect of removal within a reasonable period.

46. I do have regard to the fact that the Claimant has been detained in prison, in conditions which are clearly much more constrained than the conditions he would have been subjected to had he been transferred to an IRC. However, 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. Furthermore, the conditions of detention were no worse than those suffered by any other prisoner in the position of the Claimant.

5) Conclusions in relation to challenge to detention

47. Applying the Hardial Singh principles to the facts of this case, I am satisfied that both the initial detention of the Claimant and his continued detention over the period until he was removed were lawful. I am satisfied therefore that there is no basis for the complaint 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.

Availability of damages had I concluded that the Claimant had been wrongfully detained under Hardial Singh principles

48. The Defendant's argument is that where there is a statutory authority for detention, then that provides the legal justification for the detention so that there can 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. Ms Anderson relied upon the decision of the Court of Appeal in WL (Congo) at paragraphs 88-90, which referred to the position under sub-paragraph 2(1) of Schedule 3 to the 1971 Act, and on the subsequent first instance decision of Blake J in R (MXL) v SSHD [2010] EWHC 2397 (Admin), where at paragraph 29 he applied that principle to an automatic deportation case, where s.36 UK Borders Act 2007 provides for detention unless the Secretary of State considers it inappropriate. Ms Anderson submitted that this applied not just to cases where the decision could be impugned under public law principles, but also to cases where the detention is rendered unlawful under Hardial Singh principles.

49. In contrast, Mr Karnik submitted that:
    (1) Whatever the position might be in paragraph 2(1) Schedule 3 cases, the same reasoning did not apply in s.36 UKBA cases, because the wording is not the same. The control mechanism generally is one of causation.
    (2) In any event, the principle only applies to decisions impugnable on public law grounds, not those where detention is rendered unlawful under Hardial Singh principles.
    (3) The same argument does not prevent the Claimant from obtaining damages for breach of Article 5 ECHR.

50. Ms Anderson appeared to accept that in principle damages could be awarded under Article 5, although she emphasised that in accordance with the applicable principles established for the award of damages in such cases they would only be awarded where necessary to do so to give just satisfaction to the injured party, and that they should be modest.

51. Given the conclusion which I have reached it is not strictly necessary for me to express an opinion on this point. Furthermore, since this particular area of the law is in the process of consideration by the Supreme Court, with the decision expected next month, there seems little to be gained in my venturing an opinion. Accordingly, I limit myself to saying that if I had concluded that the Claimant's detention had been rendered unlawful under Hardial Singh

principles then I would have been satisfied that he would have been entitled to an award of modest damages under Art 5, on the basis that it was necessary to do so to render just satisfaction, but I would not have been satisfied that he was entitled to damages for the tort of false imprisonment.

Challenge to refusal to transfer from prison to an IRC

52. 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 officer was 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.

53. I have already observed that before me the challenge on the basis of the application of an unlawful secret policy was not pursued. That is not surprising, given that the evidence discloses that it was not until April 2010, after the Claimant had left the UK, that any internal adjustment to the policy as set out in the EIG was implemented. It is therefore unnecessary for me to say any more about this, since it was fully addressed in the judgment I have already given in the associated case, AE (Libya) v. SSHD [2011] EWHC 154 (Admin).

1) The challenge to the EIG policy regarding transfers

54. If and insofar as there is maintained a challenge on the basis that the policy as contained in the EIG was irrational or unlawful, I reject it, for the following reasons.

55. 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'.

56. 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 argues 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. She 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.

57. 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 serious sex offenders such as 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 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.

58. 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 SOR 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, so that the question as to whether there are exceptional circumstances is considered at the outset, and where a request by a detainee for a transfer must be considered and, if rejected, reasons provided.

2) The procedural and substantive challenges

59. Mr Karnik identified the following non-compliances with section 55.10: (1) the failure to conduct an initial risk assessment so as to decide whether or not the Claimant should be transferred to an IRC, or to notify the Claimant as to the result of that assessment / decision; (2) the failure to deal with the Claimant's repeated request, through his solicitors, for a transfer to an IRC; (3) the failure to provide reasons for rejecting the request.

60. Ms Anderson had to accept that on Ms Ouseley's own evidence there was a delay from 19/06/09 to 27/09/09 in there being any assessment as to whether the Claimant should be kept in prison or transferred to an IRC. Ms Ouseley says that she assessed the Claimant 'in accordance with the accepted criteria'. She says that she considered the risk which the Claimant posed to female visitors, especially young female visitors, to an IRC, and also to women and children outside the IRC on the basis of internet availability. She says that she also considered the Claimant's licence conditions, one of which was that he should not enter or reside in the same household as any child. She says that she had regard to his good behaviour in prison. She says that nonetheless she considered it inappropriate to assess him as suitable for transfer to an IRC. She says that she reviewed his case on a monthly basis, and again on 20/03/10 when as a short term expedient to facilitate removal she authorised his transfer to Colnbrook short term IRC.

61. I am troubled by the fact that there is no documentary record of the assessments apparently undertaken by Ms Ouseley. I am also troubled by the fact that there is no record of any letter to the Claimant, whether via the Governor or in response to his solicitors, which communicates the decision reached by Ms Ouseley. I am also troubled by the fact that there was no reply at all to repeated correspondence until 16/12/09, when in a lengthy letter replying compendiously to a number of previously unanswered communications it was said in response to this issue, only that:

'This [conviction] falls into the category of serious sexual offences and as such he is not considered suitable for transfer to an IRC.

62. Indeed the letter also erroneously mis-quoted the Claimant's solicitors' correspondence, in which they had said that he did not want to be transferred to an IRC outside the Midlands, which they quite inexplicably misread as a request not to be transferred at all.

63. Ms Anderson submitted that: (a) section 55.10 did not require any particular form to be used to conduct the internal risk assessment or to notify the result of that, so that it was not necessarily surprising that Ms Ouseley was unable to produce one; (b) there is no reason to disbelieve what she has said in her signed witness statement; (c) indeed there is confirmation in the GCID since the entry for 13/10/09 records the CCD caseworker being advised by DEPMU (ie the department for whom Ms Ouseley works) that the Claimant is a 'protocol case' (which, it is known, is a reference to the protocol in place between UKBA and NOMS which carries into force the EIG guidance) and 'his location is reviewed regularly', and then relaying this to the relevant probation officer at HMP Wakefield; (d) although the delays in replying was indeed regrettable, the letter of 16/12/09 does expressly refer to section 55.10 of the EIG, and can be properly and reasonably read as saying that given the Claimant's conviction the circumstances are such that he should remain in prison. She submits that the fact that the Claimant had been of good behaviour whilst in prison is really of limited relevance in a case such as this, where the offending behaviour is serious sexual offending against a young female, especially where there is no evidence that during his custodial sentence his offending behaviour has been addressed. She submits that no other factors were at the time, or have been in the course of this case, been identified to rebut the presumption.

63. I consider that there was a failure by the Defendant to follow the EIG then in force in failing to conduct an initial risk assessment / decision prior to 19/06/10 and – it follows – to inform the Claimant that he had been assessed as unsuitable for transfer to an IRC. I am also satisfied that there was a further failure in failing to give timely reasons for the rejection of the request for a transfer. I am however satisfied on the evidence that Ms Ouseley did indeed conduct a proper section 55.10 assessment on 27/09/09; this is because although I am unimpressed by the apparent failure either to document or to retain a copy of the result of the assessment on the appropriate form IS 91 RA Part B, I consider that Ms Ouseley’s evidence is consistent with the contemporaneous GCID records and that there is no proper basis for me to disbelieve what she says in her evidence submitted to this court. I am satisfied on Ms Ouseley’s evidence that in substance the requirements of the EIG were followed, so that consideration was given to the Claimant's individual circumstances (i.e. a blanket policy was not adopted). I am also satisfied that the letter of 16/12/09 was an adequate – albeit a belated – response – to the request; although the reasons are extremely shortly expressed, in a case such as this involving the commission of a serious sexual offence against a female child, where behaviour in custody is not a sure guide to behaviour in an IRC and where there are no exceptional circumstances either asserted or identified before me, there is no need in my

judgment to set out a fully reasoned articulation of the decision. I do not consider that the decision can be attacked on the basis of the misreading of the Claimant's solicitors' letter; that was plainly only an additional point rather than a central point. I am also satisfied that the decision itself cannot be attacked as contrary to the policy or as irrational or unreasonable. In my judgment it is a decision that anyone in Ms Ouseley's position would have been entitled to arrive at, for the reasons I give in the next paragraph. Although it does appear that the point she makes about the licence conditions is irrelevant, in that it is difficult to see how being in a male only IRC could involve a breach of the requirement not to enter or reside in the same household as any child, again I am satisfied that this was only an additional rather than a central point. I am also satisfied that any procedural non-compliances have had no causative impact, because whether the test is inevitability or materiality or something else, the position is that no conscientious decision maker, applying the EIG properly to the facts of this case, could have concluded it was appropriate to transfer this Claimant to an IRC.

64. Thus 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 the purpose of controlling the risks posed by a serious sexual offender. 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 either commit some serious sexual offence against them or, alternatively, to 'groom' them. I consider that what is revealed about the Claimant from the circumstances of the index offence and his response to it both at the time and subsequently whilst in prison thoroughly justified a decision that he should not be permitted to transfer to an IRC pending his removal.

3) Conclusion in relation to challenge to place of detention

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

The claim for damages for unlawful detention in prison

66. Although not strictly necessary in the light of my previous conclusions to deal with this, since it has been fully argued I should express my conclusions on the point.

67. The issue 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.

68. Mr Karnik's submission is that such a claim can succeed, either under the tort of false imprisonment, on the basis that even if one accepts – as one must at this stage in the argument – that the Claimant was lawfully detained per se, nonetheless he still has a residual liberty protected by the common law, and that such right is infringed if the Defendant wrongfully detains him in a prison as opposed to an IRC, since the conditions in prison are much more confined that those in an IRC, and since those more confined conditions amount to an unlawful interference with his residual liberty. He refers me to Clerk & Lindsell on Torts 19th edition paragraphs 15-36 and 15-37, and submits that although it is not possible, as a result of s.12(1) Prison Act 1952, for a serving prisoner to succeed in an action against the prison governor for false imprisonment where he is confined in unauthorised places or conditions, nonetheless it was accepted by the House of Lords in R v Deputy Governor of Parkhurst v Hague [1992] 1 AC 58 that he still retains a residual liberty. The example that was given was

that a prisoner could sue a fellow prisoner who locked him in some confined space, even if he could not sue the Governor if one of his staff did the same thing. It followed, he submitted, that since there is no similar statutory protection afforded in the case of administrative detention of those subject to removal, the Defendant here would be liable in damages for wrongfully detaining the Claimant in prison as opposed to in an IRC.

69. Ms Anderson's submission is that where, as here, detention is authorised by statute, there is no residual liberty which the Claimant can assert against the Defendant and, thus, there can be no successful claim for false imprisonment by someone such as the Claimant who contends that he should have been confined in one place of detention as opposed to another. She submits that although the Administrative Court retains its jurisdiction to grant relief where the decision to detain in prison as opposed to an IRC is vitiated on public law grounds, that jurisdiction does not extend to awarding damages for false imprisonment. She relies 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.

70. Seeking to counter this, Mr Karnik submits that in that case Kenneth Parker J was only dealing with the position where there was some procedural irregularity, not with the position where had the procedure been properly followed the detained person should and would have been transferred to an IRC. However I note that an argument along similar lines, although in a different context, was advanced by the appellant in the Anam case but rejected: see paragraphs 53 – 55.

71. In my judgment the position here is that if there is a procedural irregularity, then the causation test means that the Claimant cannot succeed anyway in a claim for damages for false imprisonment. However I also consider that even if the Claimant could overcome the causation requirement in such a case, or even if I had concluded that the Claimant acted irrationally or perversely in failing to transfer the Defendant to an IRC, nonetheless the Claimant faces the same problem in my judgment that his detention as such was lawful, and that the Defendant was lawfully entitled to detain him in a prison under the 2009 Direction, so that although the Claimant can obtain appropriate relief on public law grounds he cannot obtain damages for false imprisonment. I therefore, respectfully, agree with and follow the approach of Kenneth Parker J in Rashford and conclude that it applies not only in cases of procedural irregularity. Although Mr Karnik submitted that this would be an unjust result in a case such as the present, where by the time the case is tried there is no continuing detention in prison, I do not consider that this compels a different conclusion. The Claimant is entitled to public law remedies to ensure that he is not wrongfully detained in prison, and if his detention is ended or he is transferred before the case reaches a final hearing he may still, in appropriate cases, be entitled to declaratory relief and/or an appropriate costs order.

72. That then leaves the claim founded on Article 5 ECHR. Ms Anderson's submission was that Article 5 was concerned with deprivation of liberty, not with deprivation of residual liberty, and that in any event was not breached in circumstances where the Claimant's detention in prison fell within Article 5.1(f) and was in accordance with a procedure prescribed by law. She submitted that detention in prison in such circumstances could not be regarded as arbitrary.

73. Although I was not referred to the case in submissions, the passage in Clerk & Lindsell to which I was referred made reference to the decision of the House of Lords in R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58. In that case the claimant was a mental patient, detained in Ashworth high security hospital, who complained that his seclusion in accordance with the policy adopted by the hospital breached his rights under Articles 3, 5 and 8. The majority of the House held that in circumstances where the claimant was lawfully detained the complaint under Article 5 could not succeed. They also held that the policy was not contrary to Articles 3 and 8. It seems to me that the same reasoning compels the same answer in this case, namely that there would be no breach of Articles 3, 5 or 8 in circumstances where the most that the Claimant could say would be that had section 55.10 EIG been properly applied he should have been detained in an IRC as opposed to being detained in prison, but in circumstances where is detention was lawful and where the conditions under which he was detained in prison were no different from other prisoners held in such conditions, and about which they would have no valid complaint under private law, public law or the ECHR.

74. Finally, I agree with Ms Anderson that even if any of these Articles were engaged and breached, then in accordance with the proper approach to the award of damages in HRA cases any damages awarded would have been modest.

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

Overall conclusions

76. The Claimant's claim for judicial review must be dismissed. Indeed one cannot help wondering about the practical utility of continuing these proceedings once the Claimant had voluntarily returned to Zimbabwe, in circumstances where in my judgment there was never any realistic prospect of a successful challenge on Hardial Singh principles, so that even if the Claimant could have succeeded on the second ground (i.e. detention in prison as opposed to an IRC) unless he could also have established a right to damages for false imprisonment (which seems to me always to have involved significant difficulties) there was never any realistic prospect of recovering any substantial damages, given the jurisprudence as to the availabity of damages under Article 5 ECHR.

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