Case No: CO/11729/2010

Neutral Citation Number: [2014] EWHC 3478 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 October 2014

Before :

HIS HONOUR JUDGE KEYSER QC
(Sitting as a Judge of the High Court)

- -

Between :

THE QUEEN (on the application of AS)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Azeem Suterwalla (instructed by **Messrs GT Stewart, Solicitors & Advocates**) for the **Claimant**
Gwion Lewis (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 9 October 2014

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Judgment

HHJ Keyser QC:

1. The claimant challenges the lawfulness of his detention by the defendant between 24 November 2010 and 13 December 2010; he claims a declaration that the detention was unlawful and damages for false imprisonment and breach of his rights under article 5 of the European Convention on Human Rights. The claim is brought pursuant to permission granted by Alexandra Marks sitting as a deputy High Court Judge on 19 March 2014.

The facts

2. The claimant is a national of Afghanistan. He entered the UK in November 2009 and sought asylum, claiming that his date of birth was 14 April 1995 and that accordingly he was a child aged 14 years. The defendant did not accept that that was his true age. On 7 December 2009 the London Borough of Ealing ("Ealing") produced an age assessment, compliant with the guidelines established in *B v London Borough of Merton* [2003] EWHC 1689 (Admin), which concluded that the claimant's date of birth was 25 April 1992. On 26 January 2010 the defendant refused the asylum claim. The claimant appealed that decision to the First-tier Tribunal, which dismissed the appeal on 12 May 2010.

3. On 23 June 2010 UK Border Agency ("UKBA") notified the claimant that he was required to start reporting to the Home Office. On 28 June 2010 the solicitors who were acting for the claimant in respect of his community care issues and the ongoing dispute regarding his age wrote to UKBA in respect of the reporting requirement:

> "[F]urther to an independent social worker concluding that our client is the age he says he is, Ealing Local Authority have agreed to reassess our client and this assessment should take place imminently. …
>
> Given that our client's age is still in dispute, we would ask that he continue to be treated as a minor for the purpose of immigration control and that he not be required to report pending the conclusion of the Local Authority age reassessment."

UKBA did not reply to that letter. The claimant failed to report on the first two dates fixed for him to do so. On 20 July 2010 UKBA sent to the claimant a formal notice, notifying him that his failure to report as required might jeopardise his temporary admission/release as an alternative to detention and his entitlement to asylum support and rendered him liable to prosecution. The notice concluded: "You must report as required to your next scheduled reporting event on 2 August 2010. Should you have difficulty in being able to meet this or any future appointment, you should contact this office immediately." On 27 July 2010 the claimant's solicitors wrote to UKBA, repeating the request in their letter of 28 June 2010. Again UKBA did not reply to the letter.

4. On 4 November 2010 the claimant was detained by UKBA and placed into immigration detention. According to the age assessment carried out by Ealing, he was then aged 18½ years. On that basis, he was liable to removal from the UK; it was

the defendant's policy not to remove failed asylum seekers under the age of 17½ years. On 11 November 2010 removal directions were set for 23 November 2010.

5. The claimant commenced this claim on 10 November 2010, challenging his ongoing detention. On 22 November 2010 the claimant commenced a second claim, this one against Ealing, seeking judicial review of a re-assessment of the claimant's age carried out by Ealing, which had again assessed the claimant as being over 18 years of age. On 22 November 2010 Silber J made an order preventing the defendant from removing the claimant from the UK until the determination of the application for permission or further order. He also consolidated the two cases.

6. On 24 November 2010 there was a hearing before Mr James Dingemans QC, sitting as a deputy High Court judge, to determine the claimant's applications for permission to apply for judicial review and for interim relief in the form of a mandatory order that he be immediately released from detention. The deputy judge refused to grant a mandatory order for the claimant's immediate release from detention. However, he gave permission to the claimant to apply for judicial review of Ealing's decision as to his age, and he ordered that a fact-finding hearing take place on 9 February 2011 to determine the claimant's age and date of birth. He granted an interim injunction restraining the defendant from removing the claimant from the UK pending the outcome of the fact-finding hearing.

7. On 6 December 2010 the claimant filed an appeal against the deputy judge's refusal to grant interim relief in the form of a mandatory order for his release from detention. That appeal was overtaken by events. On 13 December 2010, the claimant was released from detention. The reason given for the release was pressure on the resources of the detention estate.

8. The fact-finding hearing did not take place on 9 February 2011 as ordered by Mr Dingemans. Instead it was held by Lang J in January 2012. In her judgment dated 9 March 2012 she found on the balance of probabilities that the claimant was aged between 18 and 19 and said at [97]:

> "The fairest way to reach a precise age is to take the midway point between those two ages. I therefore find that the claimant is aged 18 years and 6 months, as at 24 February 2012, the date on which this judgment was due to be handed down. Thus his date of birth is deemed to be 24 August 1993."

The effect of that decision is that the claimant is to be taken as having been 17 years and 2 months old at the date when he was detained and 17 years and 3 months old at the date of Mr Dingeman's order.

9. On 26 January 2012 the claimant made a fresh claim for asylum. After receiving further written representations in 2012 and 2013, the defendant refused asylum for reasons set out in a letter dated 29 November 2013. The claimant appealed against that refusal. On 2 April 2014 a judge of the First-tier Tribunal allowed the appeal on asylum grounds and on human rights grounds. Meanwhile, as I have said, on 19 March 2014 Alexandra Marks, sitting as a deputy High Court Judge, gave permission to the claimant to apply for judicial review of the decision to detain him. In her order she observed that the lawfulness of detention, in accordance with the principles

established in the case-law, was a matter for the court to determine. She did not state any reasons for concluding that the detention was arguably unlawful.

The legal framework

10. The power to detain a person liable to administrative removal from the UK is set out in paragraph 16(2) of Schedule 2 to the Immigration Act 1971:

> "If there are reasonable grounds for suspecting that a person is someone in respect of whom [removal] directions may be given … that person may be detained under the authority of an immigration officer pending—(a) a decision whether or not to give such directions; (b) his removal in pursuance of such directions."

11. However, the lawfulness of the *exercise* of the power to detain is distinct from the mere *existence* of the power and falls to be judged in accordance with the principles established in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704 and a line of subsequent cases (generally known as the *Hardial Singh* principles) and the general law relating to administrative conduct.

12. In *R (Walumba Lumba and Kadian Mighty) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, Lord Dyson stated the relevant principles as follows at [22]:

> "(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 a reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

13. In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, where he had first offered that formulation of the principles, Dyson LJ (as he then was) explained the interrelationship of the principles and gave guidance as to their application:

> "47. Principles (ii) and (iii) are conceptually different. Principle (ii) is that the Secretary of State may not lawfully detain a person 'pending removal' for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person

> within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.
>
> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation …. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

14. The following observations may be made in respect of the *Hardial Singh* principles.

   i) There is no general limit on what is a reasonable period of detention. It cannot be said that such-and-such a period is, *per se* and viewed in isolation, reasonable or unreasonable. Each case is fact-sensitive. Any relevant factor may affect the length of time of detention that might be regarded as reasonable. As HHJ McKenna observed in *R (Dinh Tho Luu) v Secretary of State for the Home Department* [2014] EWHC 2803 (Admin), one or more factors might have special weight in a particular case but no one factor is necessarily determinative.

   ii) The relevance of the risk of absconding provides a specific illustration of the first point. As Lord Dyson observed in *Lumba* at [121], in considering what is a reasonable period of detention, the risk of absconding is a particularly important factor, "since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place". However, as he observed in *R(I)* at [53]: "the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out, regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake."

   iii) Although there are no hard and fast rules as to what is a reasonable period, "there must come a time when, whatever the magnitude of the risks, the period of detention can no longer be said to be reasonable" (*R (M) v Secretary of State for the Home Department* [2008] EWCA Civ 307, *per* Dyson LJ at [14]).

   iv) When considering the third of Lord Dyson's principles, the test, which has been expressed in various ways, is whether there is a realistic prospect that

deportation will be effected within a reasonable period. (Cf. *Lumba*, *per* Lord Dyson at [103].)

15. In addition to the *Hardial Singh* principles, the lawfulness of the exercise of the power of detention also falls to be considered in accordance with the law governing the review of administrative action. In particular, an administrative act or decision may be unlawful by reason of the failure to follow a relevant policy. I shall say more on this point later.

16. When considering a claim for relief in respect of unlawful detention, the court is concerned with the question whether the detention was lawful. The burden is on the claimant to show that he was directly and intentionally detained by the defendant. If the claimant discharges that burden, the burden shifts to the defendant to show that there was lawful justification for the detention. (Cf. *Lumba*, *per* Lord Dyson at [65].)

Summary of the claim

17. The claimant no longer contends that his detention from 4 November to 24 November 2010 was unlawful; his case now relates to detention after 24 November 2010. At the hearing of the claim, the case was advanced on alternative bases.

18. The first basis, which is a modification of the case appearing in the Re-amended Grounds dated 8 August 2013, is that detention after the order of Mr Dingemans QC on 24 November 2010 ("the Order") was contrary to the *Hardial Singh* principles and unlawful. It is said that the Order itself was a critical factor that rendered further detention unlawful, though it was relevant in two different ways. In the first place, the Order established that it was arguable that the claimant was a child; therefore no further period of detention was reasonable within the second *Hardial Singh* principle. Alternatively, for the purposes of the third *Hardial Singh* principle, the Order established that the defendant could not remove the claimant until at least some time after the fact-finding hearing. In those circumstances, the defendant could not effect deportation within a reasonable period and, therefore, she could not lawfully continue to detain the claimant.

19. The second basis on which the claimant seeks to put his case is a new one, not contained in the Re-amended Grounds but introduced for the first time in Mr Suterwalla's skeleton argument on 25 September 2014. What is said is that the period of detention between 2 December and 7 December 2010 was unlawful, because the defendant failed to comply with her own policy of carrying out detention reviews during this period. That policy required detention reviews after certain specified periods of detention: twenty-four hours, seven days, fourteen days, twenty-one days and twenty-eight days. In the present case, the twenty-one-day review was carried out on 25 November 2010. The twenty-eight-day review ought therefore to have been carried out on 2 December 2010, but in fact it was not carried out until 7 December 2010. Detention was therefore unlawful between 2 December and 7 December 2010.

20. For the defendant, Mr Lewis objected to the introduction of the second basis of claim and submitted that permission should not be given to rely on it. I shall consider that objection after discussing the challenge on *Hardial Singh* grounds.

The challenge on Hardial Singh grounds

The second Hardial Singh principle

21. The claimant's case is that the primary importance of the Order was that it gave him permission to challenge the age assessment that had concluded he was an adult. The grant of permission established that, in the words of the test for permission then applicable, "there was a realistic prospect or arguable case that at a substantive fact-finding hearing the court would conclude that the claimant was of a younger age than that assessed by the local authority and was or had been on the relevant date a child": *per* Holman J in *R(F) v Lewisham London Borough Council* [2009] EWHC 3542 (Admin), [2010] PTSR (CS) 13 at 14.

22. Mr Suterwalla submitted that Mr Dingemans' finding of a realistic prospect that the claimant would be found to be a child was significant because of the importance attached by the defendant to not detaining children. In this regard, he referred to the defendant's policy document *Enforcement Instructions and Guidance* ("EIG"), in which chapter 55 deals with "Detention and Temporary Release". It is convenient here to set out the main passages referred to.

> "55.1 *Policy*
>
> 55.1.1 *General*
>
> The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used."
>
> "55.1.3 *Use of detention*
>
> *General*
>
> Detention must be used sparingly and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable."
>
> "55.3 *Decision to detain*
>
> 1. There is a presumption in favour of temporary admission or temporary release—there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 2. All reasonable alternatives to detention must be considered before detention is authorised.

3. Each case must be considered on its individual merits, including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved."

"55.3.1 *Factors influencing a decision to detain*

All relevant factors must be taken into account when considering the need for initial or continued detention, including:

- What is the likelihood of the person being removed and, if so, after what timescale?

- Is there any evidence of previous absconding?

- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?

- Has the subject taken part in a determined attempt to breach the immigration laws? …

- Is there a previous history of complying with the requirements of immigration control? …

- What are the person's ties with the UK? Are there close relatives (including dependants) here? Does anyone rely on the person for support? … Does the person have a settled address/employment?

- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?

- Is there is a risk of offending or harm to the public …?

- Is the subject under 18?

- Does the subject have a history of torture?

Does the subject have a history of physical or mental ill health?"

"55.9.3 *Unaccompanied young persons*

As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children (that is, persons under the age of 18) must not be detained other than in very exceptional circumstances. If unaccompanied children are detained, it should be for the shortest possible time with appropriate care. This may include

> detention overnight but a person detained as an unaccompanied child must not be held in an immigration removal centre in any circumstances. This includes age dispute cases where the person concerned is being treated as a child."
>
> "55.9.3.1 *Individuals claiming to be under 18*
>
> The guidance in this section must be read in conjunction with the *Assessing Age* Asylum Instruction …
>
> The Home Office will accept an individual as under 18 … unless one or more of the following categories apply …:
>
> …
>
> B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over."

The *Assessing Age* instruction, mentioned in section 55.9.3.1 of EIG, "sets out the policy and procedures to follow when an asylum applicant claims to be a child with little or no evidence, and their claim to be a child is doubted by [UKBA]": section 1.1. Part 8, headed "Weighing up conflicting evidence of age", contains the following relevant provisions:

> "It is Agency policy to give prominence to a Merton compliant age assessment by a local authority, and it is likely that in most cases that authority's decision will be decisive. However, all sources of information should be considered and an overall decision made in the round. …
>
> 8.2 *New relevant evidence received post age decision*
>
> Case owners will normally need to review a decision on age if they later receive relevant new evidence (including the grounds of an appeal)."

23. Mr Suterwalla did not contend that the claimant's continued detention after 24 November 2010 was in breach of the policy regarding the detention of children; he said that the policy "did not deal" with the circumstances of the present case, though one might think that another way of putting the point would be to say that the policy does not contain the provisions that would lead to the outcome sought by the claimant. Rather he submitted that Mr Dingemans' acceptance that there was a real prospect of the claimant being found to be a child was an important change of circumstances. From that time on, it was clear that there was a real risk that the continued detention of the claimant would be the continued detention of a child. (The way Mr Suterwalla put it was that the claimant was thenceforth "a putative child".) In the light of the policy against detaining children other than in exceptional circumstances, the defendant thereafter required strong justification for the claimant's continued detention. As Mr Suterwalla put it in his skeleton argument: "[G]iven the defendant's policy of not detaining children, the reasonable approach would be not to detain those category of individuals who had established, through a Court process,

that they might be a child, unless there were countervailing factors for why detention should be maintained. The claimant's case is that the *starting presumption* must be that putative children will not be detained, subject to countervailing factors."

24. In support of the contention that continued detention after the Order was unreasonable and therefore unlawful, the claimant relies on a number of other matters as showing that the justification for detention was not strong even before the Order.

25. First, while he was in detention on 18 November 2010 the claimant was assessed by an independent educational psychologist. The report describes the claimant as "vulnerable both emotionally and as a result of his significant learning difficulties". Non-verbal assessments of ability and of working memory placed him in the bottom 1% of the population. The claimant was said to have "little understanding of the world around him"; the report expressed the view that he would have "immense difficulty living independently without structured and training (sic)". It was recorded that the claimant had the appearance of being under "extreme stress". He was having difficulty eating, and his doctor said that he was underweight. The report was provided to the defendant before the Order was made and its findings have not been disputed; indeed, the judgment of the First-tier Tribunal in April 2014 refers to the conclusions of the report and records that the Immigration Judge was given no reason to doubt them. Mr Sutterwalla submitted that the claimant's vulnerability was a further reason why continued detention was unjustified.

26. Second, although the ostensible justification of the detention, as shown on the *Notice to Detainee* dated 4 November 2010 was that the claimant was likely to abscond if given temporary admission or release, the risk of absconding was (submitted Mr Suterwalla) minimal. The evidence of a likelihood of absconding was the claimant's failure to report in the summer of 2010. That failure had, however, to be seen in the context of the correspondence from the claimant's solicitors, as well as the evidence of the claimant's vulnerability. In this regard, the witness statement that the claimant made for the purposes of the hearing before Mr Dingemans had given a credible explanation of his failure to report, namely that he was terrified that if he went to report he might be detained and removed to Afghanistan. The claimant had lived continuously at Afghan Association Paiwand accommodation in Harrow and had made clear his intention of continuing to reside at such accommodation in the future. His assurances in that statement that he would comply with the Home Office's requirements were the more credible, once he had received permission to challenge Ealing's age assessment; cf. sections 55.1.3 and 55.3.1 of EIG. Moreover, despite the defendant's supposed concerns over the risk of absconding, the detention reviews did not in fact mention that risk, and the risk was clearly not perceived to be of sufficient weight to outweigh the significance of the pressure on places, which was ultimately the factor said to justify release.

The third Hardial Singh principle

27. Mr Suterwalla submitted that, as a result of the Order, and from the time of the Order, there was no realistic prospect of the claimant being removed from the UK until some time after 9 February 2011, which was the date originally fixed for the fact-finding hearing. That date was 77 days after the date of the Order, and by the date of the Order the claimant had already been in detention for twenty days. Even if judgment were not reserved and the defendant obtained a favourable decision at the hearing

itself, there would necessarily be some delay while removal was implemented. Having regard to the period of time that the claimant had already spent in detention and to the various factors mentioned above, detention until the earliest realistic date of removal would be unreasonable. Therefore, even if the duration of detention were not already unreasonably long, the Order made it clear that the defendant could not effect deportation within a reasonable period. Therefore it was unlawful for her to continue to exercise the power of detention.

Discussion of the Hardial Singh challenge

28. In his skeleton argument, Mr Suterwalla put the first ground of challenge in this way:

> "The claimant's case is that the maintenance of his detention became unreasonable, and therefore unlawful, at the point that it was decided by Mr Dingemans QC on 29.11.10 that he was arguably a child and that the issue of his age would not be determined until at least 09.02.11."

In his response, Mr Lewis submitted:

> "A generic complaint that detention 'became unreasonable' does not correspond with any of the *Hardial Singh* principles."

29. As is explained above, the reference to Mr Dingemans' decision that the claimant was "arguably a child" was used in oral submissions to develop an argument under the second *Hardial Singh* principle. For my part, however, I consider that the second principle is not properly engaged by the argument and that Mr Lewis's original objection is well founded.

30. It seems to me that the second *Hardial Singh* principle is directed specifically to the limits of the duration of lawful detention. Its operation depends on two conditions: first, that the statutory power to detain has arisen; second, that the statutory power has been lawfully exercised. The point of the second *Hardial Singh* principle is that, although the power has been lawfully exercised, it is subject to the implied limitation that it can be exercised only for a reasonable period, that is, a period which is reasonably necessary for the purposes of effecting deportation: see *R v Governor of Durham Prison, ex p. Hardial Singh*, *per* Woolf J at 706E.

31. However, the argument for the claimant does not relate to the duration but to the very fact of detention. This is obscured somewhat by the circumstance that the claimant was already in detention when the Order was made. That circumstance is, however, irrelevant to the logic of the claimant's argument on the facts of the case. The argument is not that this claimant as a putative child could reasonably have been detained for so long but no longer. It is that this claimant, as a putative child (that is, once he became a putative child) could not reasonably have been detained at all (detention in the period before the Order was made having preceded the date when he became a putative child). The claimant accepts that the statutory power of detention had arisen. He also accepts (a) that the power was exercised for a proper purpose, within the first *Hardial Singh* principle and (b) that the detention until the making of the Order was lawful. But he says that any detention of this claimant as a putative child, which he was upon the making of the Order, was unlawful. To say that any

exercise of the power is unlawful is quite different from saying that detention has become unlawful on account of its unreasonable prolongation. In my judgment, this is clear in itself and also appears from Dyson LJ's explanation in *R(I)* of the distinction between the second and third principles; see paragraph 13 above. If the claimant were right, the third principle would be a particular instance of the second, whereas Dyson LJ specifically recognised that detention might be unlawful under the third principle although it was not unlawful under the second principle. In short: to say that detention is unlawful is analytically distinct from saying that its duration is unreasonable, and to say that the power to detain ought not to be exercised at all is not the same as saying that a particular exercise of it falls within the second principle in *Hardial Singh*.

32. If the second principle does not apply, the matter falls to be considered under the third *Hardial Singh* principle, discussed below, or general public law grounds of review. (The fact that the lawfulness of detention under the *Hardial Singh* principles is a matter for the court to determine substantively, not a mere matter of review on *Wednesbury* principles, does not mean that normal public law grounds of review are necessarily unavailable; this is shown by the fact that failure to comply with a detention policy is itself a ground of review.) However, the claimant does not seek to rely on such general grounds.

33. In this connection it is relevant to observe that the present proceedings were stayed for more than one year pending the final determination in *R(AA (Afghanistan)) v Secretary of State for the Home Department*. The decision of the Supreme Court in that case, [2013] UKSC 49, [2013] 1 WLR 224, was mentioned only in passing before me. However, it is of some relevance. AA claimed asylum and said that he was a minor. The Home Secretary believed that he was an adult and detained him. That belief was reasonably held but was incorrect; it was later established that the claimant had indeed been a minor. The Home Secretary justified the detention by reference to the statutory power created by paragraph 16 of Schedule 2 to the 1971 Act. AA contended that the exercise of the power was unlawful because it was made in breach of section 55 of the Borders, Citizenship and Immigration Act 2009, which imposed on the Home Secretary and on immigration officers duties regarding the welfare of children in connection with immigration matters. The Supreme Court rejected the contention that the detention was unlawful because AA was in fact a minor. The following parts of the judgment of Lord Toulson JSC, with whom all of the other members of the Court agreed on all matters of relevance to this case, sufficiently show the reasoning of the Court:

> "[46] … Under section 55 the Secretary of State has a direct and a vicarious liability. She has a direct responsibility under section 55(1) for making arrangements for a specified purpose. The purpose is to see that immigration functions are discharged in a way which has regard to the need to safeguard and promote the welfare of children ('the welfare principle'). She has a vicarious responsibility, by reason of section 55(3), for any failure by an immigration officer … to have regard to the guidance given by the Secretary of State or to the welfare principle.

[47] In order to safeguard and promote the welfare of children the Secretary of State has to establish proper systems for arriving at a reliable assessment of a person's age. That is not an easy matter, as experience shows. The arrangements made by the Secretary of State under section 55 include the published policies referred to above: 'Every Child Matters', EIG para 59.9.3.1 [*recte* 55.9.3.1] and 'Assessing Age.'

[48] The instructions in 'Assessing Age' are detailed and careful. In my judgment the guidance complies with the Secretary of State's obligation under section 55(1), applying its natural and ordinary meaning. … Further, on the facts of this case there is no basis for finding that there was a failure by any official to follow that guidance. It follows that there was no breach of section 55 and therefore that the exercise of the detention power under paragraph 16 of Schedule 2 to the 1971 Act was not unlawful.

[49] … I am not persuaded that section 55 should be interpreted in the way for which Mr Knafler contends [i.e. as requiring that the welfare of AA as a child be taken into account if in fact he was a child, even though he was reasonably believed not to be a child] … The risk of an erroneous assessment can never be entirely eliminated but it can be minimised by a careful process and there are appropriate safeguards. In addition to the process for making the initial assessment, which includes requiring the benefit of any doubt to be given to the claimant, the Secretary of State is under a continuing obligation to consider any fresh evidence. An age assessment by a local authority can be challenged on judicial review, and the Secretary of State would be bound to give proper respect to the outcome of such proceedings.

[50] The judgment in the *AAM* case [2012] EWHC 2567 was right on the facts as Lang J found them, but if and insofar as her judgment amounted to holding that any detention under paragraph 16 of Schedule 2 to the 1971 Act of a child in the mistaken but reasonable belief that he was over 18 would ipso facto involve a breach of section 55, I would disapprove that part of the judgment.

[51] … [If the court held a fact-finding hearing upon a legal challenge to a local authority's age assessment, its] conclusion—if in the claimant's favour—would obviously affect the Secretary of State's future action under the Immigration Acts. It would give rise to a new situation and the Secretary of State could no longer properly rely on the accuracy of an age assessment which had been discredited by a judgment of a court."

34. The facts of *R(AA (Afghanistan))* are materially different from those of the present case; in particular, AA was detained at a time when no cogent reasons had been put to the Secretary of State to suppose that the assessment that he was an adult might be wrong, and detention did not continue after any order that there be a fact-finding hearing. Further, the Supreme Court rejected the contention on which the present claimant may originally have hoped to rely, namely that the detention as an adult, without regard to the section 55 duty, of a person who is later proved to have been a child is unlawful. However, neither the distinction on the facts nor the Court's rejection of a particular argument makes the decision irrelevant. The following specific points are material. First, the detention of a minor is not necessarily and ipso facto unlawful. Second, breach of section 55 of the 2009 Act renders detention unlawful. Third, the detention of a minor who is reasonably believed to be an adult is not ipso facto unlawful (it may be unlawful for other reasons). Fourth, the Supreme Court accepted that the defendant's policy complied with her obligation under section 55(1). Fifth, the Court confirmed that the Secretary of State is bound to consider any fresh evidence and will not be entitled to rely on an age assessment once its conclusions have been rejected by the court. There is no suggestion that the mere decision to hold a fact-finding hearing "give[s] rise to a new situation". Sixth, although the challenge in *R(AA (Afghanistan))* failed on the merits on a point of construction of section 55, the underlying logic of the challenge was, as it seems to me, correct: it was a challenge to the legality of the exercise of the power to detain, not a *Hardial Singh* challenge on the basis of the unreasonable duration of the detention.

35. Despite a re-amendment of the Grounds of Claim after the decision of the Supreme Court in *R(AA (Afghanistan))*, the claimant has eschewed reliance on section 55 or other public law grounds and has pinned his colours firmly to the mast of the *Hardial Singh* principles. I do not consider that, in the circumstances, the wider grounds of challenge are open to him. Further, such wider grounds would not be arguable. The claimant specifically accepts that it was not contrary to the defendant's policy to continue detention after the Order was made. The Supreme Court accepted that the detention policy was compliant with section 55. The contention that the Order itself amounted to "an important change of circumstances" that required different treatment under section 55 gains support neither from the policy nor from Lord Toulson's speech in *R(AA (Afghanistan))*.

36. If, contrary to my view, the claimant's argument does engage the second *Hardial Singh* principle, on the basis that any detention of the claimant as a putative child might be considered to be *ipso facto* of unreasonable duration, I would hold that the period of the claimant's detention was not unreasonable in all the circumstances. The reasons may be shortly stated.

    i) Obvious as they are, three background matters must be borne in mind when considering the reasonable period of detention. First, the statutory power of detention had arisen, and it subsisted both before and after the Order; the second *Hardial Singh* principle is by way of an implied limitation on the duration of detention. Second, the claimant had, as is correctly accepted, been lawfully detained for twenty days before the Order was made. Third, there is no allegation of a breach of the first principle; the defendant had a firm intention to remove the claimant.

ii) What is said to have made any further prolongation of detention unlawful is the Order, establishing that the claimant was a putative child (in Mr Suterwalla's pithy formulation), in the light of the defendant's detention policy.

iii) I agree with Mr Lewis's submission that the claimant places more weight on the Order than it can bear. The Order did not change the claimant's status; the expression "putative child", though convenient as a form of shorthand, is misleading insofar as it implies the contrary. The Order did not change the evidence; it remained precisely the same as it had been before the hearing before Mr Dingemans. The Order did not change the applicable policy. The Order simply indicated the Court's view that there was an arguable case with a realistic prospect of success; see paragraph 21 above. The defendant's policy still entitled her to treat the claimant as an adult. Although Mr Suterwalla put the matter as though there were a lacuna in the policy, the simple position seems to me to be that the policy, understandably, did not treat "putative children" as a distinct category. If it was reasonable for her to treat the claimant as an adult before the Order, I do not consider that the fact of the Order made it unreasonable for her to continue to do so.

iv) The question under the second principle is whether the claimant was detained for an unreasonably long period. The total period of detention was thirty-nine days. In circumstances where the claimant had been assessed to be an adult in a *Merton*-compliant age assessment, was reasonably believed to be an adult and to have given a false age, had failed to report as required, was manifestly concerned to avoid detention and had already been detained, it seems to me to be unarguable that his detention was unreasonably long. Of course, the claimant's argument is not really that it was unreasonably long; it is that, in the situation created by the Order, it was wrong in principle.

37. As to the alternative way in which the pleaded case is advanced, I accept that the argument does properly raise the third *Hardial Singh* principle. Accordingly the question is whether the Order established that the defendant could not remove the claimant from the UK within a reasonable time.

38. Two features of the Order may be noted. First, Mr Dingemans QC fixed a date, 9 February 2011, for the fact-finding hearing and gave detailed and rigorous directions with a view to enabling the matter to be determined on that date. It was only after the detention had come to an end that the timetable was revised and the hearing postponed. Second, Mr Dingemans refused to grant an order for the release of the claimant from detention pending the fact-finding hearing. That refusal is by no means determinative of the present question. However, it shows that the deputy judge did not consider that continued detention would breach the third principle in *Hardial Singh*, at least within the tight timetable that he had laid down in the Order.

39. It is, again, important to remember that the third principle comes into play in circumstances where exercise of the power to detain was for the statutory purpose and was otherwise lawful and the detention has been continued for no more than a reasonable period. The claimant's case is that, by reason of the timescale established by the Order, continued detention until the time when there was a realistic prospect of removing the claimant would be for an unreasonably long period and that he ought

therefore to have been released immediately. I reject that case. Mr Dingemans laid down a strict and tight timetable. In respectful agreement with the view he must have taken, I consider that the justification for detention to the date of the Order also justified, as at that date, the continuation of detention until the fact-finding process was complete. There was in my judgment a realistic prospect of removal within a reasonable time. The position would, of course, have been very different if the anticipated date of the hearing had been February 2012; but the lawfulness of detention has to be viewed against the prospects of removal as they are when the decision to continue detention is taken.

40. Accordingly I reject the challenge on *Hardial Singh* grounds.

The alternative challenge on policy grounds

41. The alternative basis on which the claim is advanced (see paragraph 19 above) rests on the principle of public law that, in exercising a discretionary power, a public body must comply with its own published policies in that regard, unless there is a good reason for it not to do so. In the context of immigration detention, that principle was reaffirmed by the Supreme Court in *Lumba* (cf. *per* Lord Dyson JSC at [26]) and in *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299, where Lord Hope DPSC said at [41]:

> "… a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful. I use this expression to describe a breach of public law which bears directly on the discretionary power that the executive is purporting to exercise. …"

To similar effect, Lady Hale JSC said at [69]:

> "*Nadarajah* was a case principally brought under article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The question, therefore, was whether the detention was 'lawful' in the sense that it complied with the Convention standards of legality. It is not surprising that the court held that, to be 'lawful', a decision to detain had to comply, not only with the statute, but also with the Secretary of State's published policy. But it is also not surprising that the majority of this court has now held, in *R (WL (Congo)) v Secretary of State for the Home Department* [2011] 2 WLR 671 ('*Lumba*'), that a failure to comply with the Secretary of State's published policy may also render detention unlawful for the purpose of the tort of false imprisonment. While accepting that not every failure to comply with a published policy will render the detention unlawful, I remain of the view that 'the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result—which is not the same as saying that the result would have been different had there been no breach': see *Lumba*, para 207."

In *R(Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718, Moore-Bick LJ, with whom Christopher Clarke LJ agreed, observed at [20] that in *Lumba* Lord Dyson had made it clear that not every breach of public law would render detention unlawful and so give rise to a cause of action for false imprisonment: "It will have that consequence only if it bears on and is relevant to the decision to detain (see paragraph 68)."

42. In the light of that principle, the argument for the claimant in respect of this alternative ground of claim is simple. The defendant failed to comply with her own policy in respect of detention reviews; that policy required that a review of the claimant's continued detention take place on 2 December 2010, but the review did not in fact take place until 7 December 2010. The very nature of the policy, namely one requiring periodic reviews of the decision to continue the detention, means that the failure to comply with the policy necessarily bears on and is relevant to the decision to detain. Therefore the failure to carry out the requisite review of detention caused the continuing detention thereafter to be unlawful; this conclusion was affirmed by the majority in *Kambadzi*: see in particular [51] to [53] in the judgment of Lord Hope, with whom Lady Hale and Lord Kerr agreed.

43. CPR r. 54.15 provides that the court's permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed. PD54A, paragraph 11.1, provides that, where the claimant intends to apply to rely on additional grounds at the hearing of the claim for judicial review, he must give notice to the court and to any other person served with the claim form no later than seven clear days before the hearing.

44. In the present case, the claimant gave more than seven clear days' notice of his intention to rely on this alternative ground of claim. However, Mr Suterwalla rightly accepted that the giving of permission pursuant to r. 54.15 did not turn solely on satisfaction of the test for a grant of permission under r. 54.4, namely whether the claim was arguable; the court's general powers of case management were also relevant.

45. For the defendant, Mr Lewis opposed the grant of permission to rely on the new ground. He made no admission that detention for the five-day period in question was unlawful, though he accepted that the detention review records showed that the review due on 2 December 2010 did not take place until 7 December 2010. However, he submitted that the defendant ought not to be placed in the position of having to respond to the new ground and, in that regard, he relied on several matters. First, although the new ground could not have been included in the original claim form, which pre-dated the detention reviews, it could and should have been raised when the Grounds of Claim were amended on 24 May 2012 or re-amended by permission on 8 August 2013, and there was no satisfactory explanation of the delay in raising the new ground, despite the recent service of a witness statement purporting to address that point. Second, in deciding whether to defend the claim in the national interest the defendant was entitled to know the case she had to meet. It could not be assumed that the defendant's strategic decisions regarding the conduct of the litigation would have been the same if the new ground had been advanced when it could and should have been. Third, the raising of a new case at such a late stage caused prejudice to the defendant, in that it meant that time and attention had to be devoted to addressing the new ground shortly before the hearing. Claimants ought to be required to formulate

their cases with reasonable efficiency, so that this unnecessary burden on other litigants would be avoided.

46. The final matter raised by Mr Lewis concerned the effect of permitting the new ground to be raised. On the evidence as it currently stands (he submitted), it was not established that the delay in carrying out the detention review had any practical effect. When the review was carried out on 7 December, continued detention was authorised. Therefore the claimant would be entitled to no more than nominal damages and a declaration that his detention was unlawful for the five-day period. Permission to rely on the new ground at this late stage was not justified by these slender remedies. On the other hand, if the court were to accede to the claimant's request and adjourn the question of causation, with a direction for further evidence directed to the question whether the claimant would have been released five days earlier if the detention reviews had taken place on schedule, the defendant would have to carry out further investigatory work that she had not anticipated and would be faced with the prospect of a further hearing to determine a substantive issue.

47. I shall take the middle course, eschewed by each side. I shall give permission to the claimant to raise the new ground, and I shall declare that the detention between 2 December and 7 December 2010 was unlawful. But I shall not permit any further investigation of the issue of causation; on the basis of the evidence before me, I shall award the claimant nominal damages. My reasons for this decision are as follows.

   i) Although there is force in the submissions made by Mr Lewis against the grant of permission under r. 54.15, the claimant's argument on the new ground, as summarised above, is unanswerable. There was a failure to carry out the detention review required by the defendant's policy; the consequence, on the authority of the Supreme Court, was that the detention was unlawful until the next review took place. Mr Lewis accepted, as he had to, that the documents demonstrated the breach of policy. He did not attempt to argue against the conclusion that the detention was thereafter unlawful, though he could have done so if there had been any answer.

   ii) Unless there are compelling reasons to the contrary, it is in my judgment proper to give judicial recognition of the incontrovertible fact that the claimant was unlawfully detained.

   iii) The matters raised by Mr Lewis do not compel a refusal of that recognition. The new ground can hardly have resulted in much extra work on the defendant's side; such extra work as there was has been done and would not be reduced by a refusal to recognise the obvious. So far as concerns strategic decisions taken at an earlier stage of the proceedings, the matter can be addressed in costs. The interest in encouraging efficient litigation practices does not justify purely penal case management decisions and, in my judgment, does not militate against the grant of the limited relief I have mentioned.

   iv) However, it by no means follows that permission should be granted for the new ground if that were to mean that directions would be given for further evidence and another hearing to determine the issue whether, but for the breach of policy, the claimant would have been released earlier ("the causation issue"). I would not have given permission on that basis.

v) Apart from the new ground, and subject to any appeal, the hearing before me would be expected substantially to conclude the case. In principle, it would be possible that a further hearing would be required to decide quantum of damages if the *Hardial Singh* ground had been made out; in all likelihood, however, that matter would have been capable of agreement, and any hearing would have been short and limited to submissions on existing evidence. This position would be changed if I were to accede to Mr Suterwalla's proposal that the causation issue be adjourned with directions. As Mr Suterwalla accepted and as I find, the present evidence, taken by itself, supports the conclusion that the missing of the detention review on 2 December 2010 made no difference to the timing of the claimant's release. The review on 7 December 2010 confirmed that detention remained appropriate but noted: "please review continued detention if bed spaces become limited, in view of timescale for hearing." It appears from this that pressure on bed spaces was not identified as a reason for release on 7 December, though it was recognised as such the following week. It would require further evidence to establish that this reason for release would have been identified earlier if the detention policy had been complied with.

vi) There are five reasons why it would be wrong to adjourn the causation issue with directions. First, it would result in a hearing that would not have been necessary if the claimant's case had been formulated properly at a reasonably early stage; any necessary additional evidence could have been produced and the entire matter could have been dealt with in a single hearing. Second, litigants—even the Home Office—are entitled to know where they stand. If the case has been managed with a view to a single final hearing, a defendant should expect that the case will be concluded at that hearing, and that it will not be required to go away and prepare for another hearing on a new point, unless there are good reasons to the contrary. Third, and related to the second point, the course proposed by the claimant would cause prejudice to the defendant by requiring the Home Office to carry out further evidential investigations at a very late stage in the proceedings. Fourth, the claimant's case on the causation issue is in my view highly speculative. It is of course possible that further investigation would show that, if reviews had taken place on 2 and 9 December 2010, the claimant would have been released earlier. But there is no evidence to show that that is at all likely; the case seems to me to rest on the hope that "something will turn up". Fifth, one is entitled to have regard to the practical significance of the claimant's proposed course of action. No important point of law is involved. An adjournment would be for the purpose of enabling the claimant to pursue substantial rather than nominal damages. Although that remedy relates to unlawful detention, the liberty of the subject is not at stake; the claimant has long since been released from detention, and the distinction between nominal and substantial damages will make no difference to his future liberty. I do not accept that the fact that the damages in question would relate to a wrongful deprivation of liberty somehow trumps other concerns of case management, and in this case it does not outweigh them.

Conclusion

48. For the reasons set out above, I shall declare that the detention of the claimant between 2 December and 7 December 2010 was unlawful and I shall award him nominal damages. The remainder of the claim will be dismissed.