Case No: CO/9651/2008

Neutral Citation Number: [2010] EWHC 684 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2010

Before:

THE HON MR. JUSTICE BURNETT

- -

Between:

The Queen on the application of Albertina Ferreira Malungu	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Miss S. Knights (instructed by **Wilson & Co**) for the **claimant**
Mr. S. Kovats (instructed by **Treasury Solicitor**) for the **defendant**

Hearing dates: 1st February 2010
Written Submissions: 8th and 17th February; 8th and 19th March 2010

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Judgment

Mr. Justice Burnett:

Introduction

1. The claimant contends that her detention pursuant to Paragraph 16(2) of Schedule 2 of the Immigration Act 1971 between 10 October and 13 November 2008 was unlawful on the basis that, from information provided to the Secretary of State on 9 October, it should have been apparent that she had provided independent evidence that she had been tortured and was mentally ill. In those circumstances it is contended that the Secretary of State failed to apply her published policy found in Chapter 55 of the *Enforcement Instructions and Guidance* ["the Instructions and Guidance"] concerning detention and temporary release. It is submitted that the consequence of any failure to apply the policy which, if applied, would have resulted in release renders the detention unlawful. The claimant submits additionally, that because she commenced judicial review proceedings on 10 October she should automatically have been released in accordance with the policy of the Secretary of State.

2. The claim came on for hearing on 1 February 2010 after a chequered procedural history. Further submissions were made in writing on behalf of the claimant on 8 February and 8 March 2010 to which the Secretary of State responded by short submissions received on 17 February and 19 March respectively. The supplementary submissions on behalf of the claimant referred to three decisions (two in the High Court and one in the Court of Appeal) which concerned the principles in play in claims such as this, or their application to the facts of those cases. I am satisfied that the claimant has not established that the Secretary of State detained her in contravention of the material policies and in consequence this application must be dismissed. In those circumstances it is unnecessary to explore the legal principles that would be engaged if my conclusion had been different.

The Claimant's Immigration and Litigation History

3. The claimant is Angolan. She arrived in the United Kingdom in May 2007 on a visitor's visa which has been issued on 2 January. On 1 June 2007 she applied for asylum which was refused on 30 June 2007. On the same day a decision was made to remove the claimant to Angola as an illegal entrant. She exercised her right of appeal to the Asylum and Immigration Tribunal ["AIT"]. Although the claimant had the benefit of legal representation before the appeal hearing she appeared in person before the Immigration Judge on 27 September 2007. Her appeal was rejected in a determination dated 2 October 2007. She claimed asylum on the basis that she would be persecuted as a result of her membership of the youth wing of the Front for the Liberation of the Cabinda Enclave. She claimed to have been arrested in December 2006, to have been beaten and sexually assaulted. The Immigration Judge did not believe the claimant and concluded:

> "31. Taking into account all the evidence before me and applying the lower standard of proof to it, I am satisfied that the appellant has lied as to the reason why she left Angola and what she fears if she is returned there.

32. The Appellant has not been able to credibly explain why if she was a member of the Malimbo tribe from Kabinda that she was not able to speak the language that that tribe uses, namely Fiote. Her explanation that she spoke Portuguese because she was educated in this language is not credible bearing in mind her claim to have been from Kabinda. The fact that she does not speak the native languages of Kabinda is a clear indication that she has fabricated her evidence as to coming from that area.

33. The evidence before me clearly indicates that she was born and raised in Luanda. Her explanation as to why she had indicated this when she applied for a visa and on her passport is simply not credible.

34. The Appellant has accepted that she lied in relation to the date when she entered the United Kingdom. She has given no rational explanation for why she lied and her credibility is damaged by the admission she has made.

35. The Appellant claims to have been an active member of FLEC and had distributed political propaganda and had been expecting promotion to a more senior position within the party. That claim is incredible taking into account that she lacked fundamental knowledge regarding Kabinda and the position of FLEC. She was not able to name the governor of Kabiinda. That is a clear indication that she has fabricated her evidence to have been a member of FLEC. She was not able to give any information about the peace agreement which FLEC had entered into which is yet another clear indication that she has fabricated her evidence as to being a member of FLEC.

36. The Appellant accepts that in relation to both the visit visa application she made in South Africa and Angola that she lied on the application. She lied as to where her permanent residence was and she lied as to her reasons for wishing to go to the United Kingdom. She claims that she did so at the instigation of two separate agents who were advising her in relation to these separate applications. That claim is incredible taking into account she gave the same reason in relation to both applications for coming to the United Kingdom.

37. I believe none of the Appellant's evidence; I find that she is an Angolan national who can be returned to Angola where nobody would have any adverse interest in her. She has no credibility whatsoever. I have taken into account section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. She has given evidence to both the Home Office and to myself which was designed or likely to conceal information or mislead. She has not answered questions honestly that had been

> put to her both in relation to her interview with the Home Office and when giving her testimony before me."

4. The claimant sought a reconsideration of her appeal. The Senior Immigration Judge refused the application, as did Lloyd Jones J.

5. On 11 April 2008 the Secretary of State detained the claimant pending removal. She remained in detention until released on bail 13 November 2008. On 7 May 2008 solicitors acting for the claimant made representations which they suggested amounted to a fresh claim for asylum. Nothing new was advanced in support of the claim, in particular it was not suggested that the claimant had been tortured or was mentally ill. The Secretary of State rejected those submissions on 10 July 2008. A fortnight later the claimant lodged a claim for judicial review of that decision. Permission to apply was refused on paper by Goldring J on 7 August 2008. He considered the claim to be totally without merit and described it as 'hopeless'. The application was renewed orally but refused on 22 September 2008. In the meantime the claimant had made two unsuccessful applications for bail. On 11 August Immigration Judge Khan refused bail in these terms:

> "The applicant has failed to report as required on numerous dates between November 2007 and May 2008 without a satisfactory reason other than claiming she had no transport and was unwell. Although she has made an application for judicial review, I am satisfied that there is a materially greater risk than normal risk of her absconding because of her previous failure to report. Furthermore, no sureties have been offered and despite the applicant having NASS accommodation, there would appear to be little incentive for her to comply with bail conditions. The risk of absconding is too high for bail to be granted."

6. Nothing had changed when the next application was heard on 1 September 2009, save that a surety had been found who was not thought satisfactory by the Judge. Additionally, the Immigration Judge considered the recent refusal of permission to apply for judicial review a significant factor is evaluating the risk of absconding. On 28 September 2008 the Secretary of State set removal directions for 13 October.

7. On 9 October 2008 the claimant's current solicitors, who had been instructed on 25 September, submitted fresh representations to the Secretary of State. Enclosed was a report prepared by Lucy Kralj of the Helen Bamber Foundation dated 7 October concerning the claimant's mental health and her scarring. There was also a letter from Jose Matuno of the Cabinda Community and a note from Fred Bridgland, a journalist with expertise in Angolan affairs (including Cabinda) indicating that he would be prepared to provide a report. Those representations were rejected as not amounting to a fresh claim on 4 November. That rejection was followed by further representations contained in a letter dated 7 November which enclosed a statement from the claimant herself and Mr Bridgland's report. By letter dated 13 February 2009 those representations were not accepted as amounting to a fresh asylum claim. Further material was sent to the Secretary of State on 6 March 2009 comprising a report from

the Medical Foundation for the Care of Victims of Torture, a report from Dr Arnold, a wound and scar specialist and further material from Mr Matuno. As a result of considering that new material the Secretary of State concluded that there was a fresh claim for asylum, but rejected it. In the result, a fresh right of appeal to the AIT was generated, which for reasons which are not material to this claim, has not yet been heard.

8. On 10 October 2008 these proceedings were issued, at that time challenging the Secretary of State's lack of recognition that a fresh claim for asylum had been made the day before. On 13 October a stay on removal was granted. Very shortly after receiving the Secretary of State's response to the first set of representations made by her current solicitors and on the same day as sending the second set (7 November), the claimant lodged an application for bail with the AIT. The grounds were, first that the claimant was a victim of torture, secondly that she was unlikely to abscond and thirdly that her removal was no longer imminent. Bail was opposed on the following grounds:

> "REASONS FOR OPPOSING BAIL
>
> - Removal action will be immediately initiated should the applicant's Judicial Review application and further representations dated 07/11/08 be refused.
>
> - The applicant has demonstrated scant regard for Immigration Laws in the past, having presented a false passport on arrival to secure entry to the United Kingdom. The fact that the applicant failed to disclose these facts at the time of entry would suggest that little reliance might be placed on the applicant complying with Immigration control in the future.
>
> - The applicant has breached the conditions of his (sic) Temporary Admission in the past, having failed to report to the Immigration Service on various occasions as required. This would suggest that little reliance might be placed on the applicant complying with any conditions of release now.
>
> - Only £500 of recognizance per surety has been offered. It is considered that this is disproportionate to the risk of absconding in this case, particularly given the late stage of his (sic) case and his (sic) previous Immigration history.
>
> - On 26/08/08 the subject made a bail application to the High Court. This was subsequently refused on 01/09/08. The grounds for the bail application remain the same grounds that have been presented for the adjudicator's bail hearing.

- In light of the above it is considered that there are substantial grounds for believing that the applicant, if released on bail (whether subject to conditions or not) would fail to surrender to custody."

9. The reference to a false passport in that list was an error. It was put slightly differently in the 'Monthly Progress Report to Detainees' provided to the claimant on the same day. There it was said 'you admitted entering the UK using a passport to which you were not entitled. As a result you were served with an IS151A Notice to an illegal entrant.' Whilst it is correct that such a notice was issued, it was based upon the claimant having falsely obtained a visitor's visa when she had no intention of leaving the United Kingdom if she obtained entry. The report contained a garbled summary of the judicial review proceedings as they then stood, but noted that it was decided to maintain the removal directions after the application for judicial review was lodged. That was consistent with a letter written to the claimant's solicitors on 11 October 2008 stating just that. Summary grounds were lodged on 7 November explaining why the Secretary of State did not consider the representations amounted to a fresh claim. No intimation of the claim for false imprisonment had yet been given. The report concluded in the following terms:

> "Your case has been reviewed. It has been decided that you will remain in detention because:
>
> - There is reason to believe that you will fail to comply with any conditions attached to the grant of temporary admission or release.
>
> - To effect your removal from the United Kingdom.
>
> This decision has been reached on the basis of the following factors:
>
> - You have exhausted all of your rights of appeal and your removal from the United Kingdom is pending.
>
> - You have previously failed or refused to leave the United Kingdom when required to do so.
>
> - You have used documentary deception to gain leave to enter/remain or evade removal and it is considered likely that you will do so again.
>
> - You do not have enough close ties to make it likely that you will stay in one place.
>
> Your case will continue to be review on a regular basis. A further letter will be sent to you in one month if your case has not been resolved by then."

The administrative process was overtaken by events when on 13 November the claimant was granted bail by the AIT.

The Secretary of State's Policy

10. The following sections of the Instructions and Guidance are material to the factual arguments advanced by the claimant:

> "**55.5 Factors influencing a decision to detain (excluding pre-decision fast track cases)**
>
> 1. There is a presumption in favour of temporary admission or temporary release.
>
> 2. 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.
>
> 3. All reasonable alternatives to detention must be considered before detention is authorised
>
> 4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.
>
> 5. Each case must be considered on its individual merits.
>
> The following factors must be taken into account when considering the need for initial or continued detention:
>
> **For detention:**
>
> - 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 law? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)
>
> - Is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave, etc)
>
> - What are the person's ties with the United Kingdom? 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 of Judicial Review or representations which afford incentive to keep in touch?

Against detention:

- Is the subject under 18?
- Has the subject a history of torture?
- Has the subject a history of physical or mental ill health?

55.16 Persons considered unsuitable for detention

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

The following are normally considered suitable for detention in only very exceptional circumstances whether in dedicated IS detention accommodation or elsewhere:

- unaccompanied children and persons under the age of 18 (but see 55.15.3);
- the elderly, especially where supervision is required;
- pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.6 for the detention of women in the early stages of pregnancy at Oakham or Yarl's Wood);
- those suffering from serious medical conditions or the mentally ill;
- those where there is independent evidence that they have been tortured;
- people with serious disabilities;

Paragraph 60.8 deals with procedures that should be followed when judicial review claims were threatened or issued. The text extant in 2008 included this:

"Where detailed grounds have been lodged but Border and Immigration Agency considers that the claim has no merit TSols should be instructed by the Border and Immigration Agency to notify the Court of this, with a request that the

> application is expedited. Where possible, detention should be maintained pending the outcome of the judicial review."

11. In the light of the material placed before the Secretary of State on 9 October, to which I shall next turn, the claimant submits that she provided independent evidence that she had been tortured and that she was mentally ill and so should have been released. By contrast, the Secretary of State took the view that the new material amounted to a last ditch attempt without merit to prevent removal after exhausting the legal process very shortly before, and followed the course set out in Paragraph 60.8.

The Representations Supplied on 9 October 2008

12. The core contention in the letter dated 9 October was that the Immigration Judge was wrong on the question of credibility and that the claimant's failure to describe the treatment she had sustained at the hands of Angolan soldiers or her scarring was explicable because of the sexual nature of the events. Additionally, it was said that the failure previously to mention scarring was explicable on the basis that nobody had asked her, including by implication both sets of previous solicitors who had acted for her.

13. The letter from Fred Brigland added nothing to the claim since it amounted to no more than an indication that he would provide a report by 7 November. The letter from Jose Matuno dated 9 October stated that the claimant had contacted his organisation 'last year' and attended one meeting, although such meetings are held every two months. She did not register with the organisation. He went on:

> "She did not register officially with the Organisation as per our requirement, but she has been assessed by me by responding to questions regarding the general knowledge of Cabinda … Moreover we are hereby confirming that Albertina Malungu is from Cabinda as one of the proof she has taken part in our demonstration in Manchester…Thus, we believe that Albertina Malungu would obviously be in danger if she returns to Angola."

In my judgment this letter provided no real support for a 'fresh claim' for asylum. On the most exiguous basis, it suggested that the Immigration Judge had been wrong to conclude that the claimant was from Luanda but failed to engage with any of the detailed reasons given by the Judge for his conclusions.

14. The report from Lucy Kralj comprised the substance on which the claimant relied. Ms Kralj is a registered nurse who was working as clinical co-ordinator at the Helen Bamber Foundation. She had worked as a specialist nurse for asylum seekers across four health trusts prior to that. She was a trainee psychotherapist. Ms Kralj had the benefit of a draft statement of the claimant dated 3 October (which was not provided to the Secretary of State) but did not have any other documentation, such as the claimant's original asylum interview, the Secretary of State's rejection letter, the Immigration

Judge's determination or the history of unsuccessful applications in legal proceedings. The claimant gave Ms Kralj an account of events in Angola. She described her physical health. Ms Kralj recorded the claimant as describing a number of symptoms indicative of 'mental disorder which require further psychiatric assessment.' In particular there were symptoms of post-traumatic stress disorder. Her conclusion was as follows:

> "Ms. Malunga is a grossly traumatized young woman who has never received support or therapeutic intervention to assist her in the aftermath of her immense trauma and multiple bereavements. She is a very private person who does not like to express her emotions in the company of others and lives with feelings of deep and intense shame and self disgust. She is prone towards understatement and tends to require great encouragement to speak in a freely associative manner. However, once she begins to speak the content of her thoughts and feelings are intrinsically linked to her trauma.
>
> Ms Malunga has experienced profound alterations in her sense of personal identity and her ability to make sense of the world within her system of faith. This has led to a deeply shaken sense of herself within the world. Ms Malunga is in a very fragile mental state and a deterioration would, without a doubt, require formal psychiatric intervention. However, due to her feelings of shame and stigmatization, coupled with a fear of authority figures, I find it highly unlikely (a near certainty) that Ms. Malunga would not avail herself to the services of professionals independently. This suspicion is supported by her inability to access therapeutic services in the UK, even during times when Ms. Malunga felt that she was actually losing her mind. She tends to isolate herself socially – which is known to be a poor prognostic marker for a number of mental health complaints but has specifically been found to be a poor prognostic marker following rape (Little & Breltkopf (2006).
>
> Ms. Malungu certainly meets the criteria for treatment at the Helen Bamber Foundation and should such an opportunity arise, I will certainly offer Ms. Malungu long term therapeutic support and psychiatric assessment."

Ms Kralj also produced a scarring report detailing scars on the right arm and both legs, most of which the claimant stated were the result of torture. Nine areas of scarring were identified. Two were attributed by the claimant to childhood trauma. Of the others Ms Kralj's conclusions were, in summary:

> (i) Scarring A: Old burn injuries on the arm which were 'highly consistent' with the account given by the claimant but could have been caused by a superficial burn with any solid instrument.
> (ii) Scarring B: The claimant had no recollection of how this faint 0.5 cm scar on her right wrist was caused. It could have been caused by a shard of glass or small blade, and could have been self-inflicted or inflicted by another.

(iii) Scarring C: A large scar on the right thigh the cause of which, beyond being the result of torture, the claimant could not recollect. It was consistent with being caused by a blade or shard of glass. The failure to recollect how this injury occurred was not remarkable given the claimant's 'dissociation'.
(iv) Scarring E: Two faint areas of scarring on the left shin. The claimant said it was inflicted during her incarceration but could not remember when or how. It could have been caused by a blade, a nail or sharp piece of wood.
(v) Scarring G: A small scar on the left foot caused when a soldier pressed a burning fork on the skin. 'The injury would have been superficial and could have been caused by another burning object not pressed hard against the skin. However, there is no reason to disbelieve the account given by Ms Malungu.'
(vi) Scarring H: A small scar on the left foot consistent with a puncture injury with evidence of infection. The claimant accounted for this injury as being caused by a piece of glass being thrown onto her foot.
(vii) Scarring I: The worst of the scars, measuring 7cm x 1 cm on the inner left thigh. It was described by the claimant as being the result of a laceration inflicted by a razor blade which was not sutured until she escaped from custody. There was some infection. Ms Kralj explained that only a very sharp and hard object could have caused this injury.

15. These representations were sent to the Judicial Review Unit of the UK Border Agency and copied to YarlsWood Immigration Removal Centre where the claimant was detained pending removal.

16. As noted above, the Monthly Progress report dated 11 November 2008 shows that a decision was made to maintain detention following receipt of the representations and claim for judicial review. A short letter dated 11 October 2008 was sent in response to the representations of 9 October. It did not deal with the substance of representations. It noted that the claimant had already submitted a 'fresh claim' which had been rejected and that the High Court had upheld all previous decisions. Goldring J had described the claim as 'hopeless'. The letter concluded:

> "In the circumstances the Secretary of State chooses to depart from her usual policy of deferring removal directions when a judicial review application has been lodged with the Courts.
>
> In the absence of an injunction Mr Malungu's removal to Angola will go ahead as scheduled."

The Secretary of State responded in detail to the representations by letter dated 4 November 2008. On 7 November an acknowledgment of service was lodged asking that the matter be placed before a judge immediately.

17. The letter of 4 November noted that the report from Ms Kralj was based upon a single interview and was reliant upon the claimant's account and thus did not necessarily provide 'substantive proof that any of the events in the report occurred.' The substance of the response to Ms Kralj's report was as follows:

"You further add that the new medical evidence will go to the core of the credibility of Ms. Malungu's case and assert that in providing objective evidence which supports her account, the findings must be challenged and the determination must be considered unsafe and the likelihood of risk on return reconsidered.

However despite your assertion and in spite of the medical examiner's attempt to provide an explanation why Ms. Malungu may have found it difficult to raise these issues earlier – such as the difficulty disclosing personal details (particularly of a sexual nature) in the Home Office interview, it is noted that the Immigration Judge who after having the benefit of seeing and hearing your client give evidence did not consider her to be credible witness and dismissed her appeal. Furthermore it is noted that not only did he doubt the credibility of your client's account, on account of her lack of fundamental knowledge regarding Cabinda and the position of the FLEC when taken together with the fact that she did not speak the native language of Cabinda, but he also considered her behaviour had profoundly damaged her credibility following her admission to have deliberately provided false information to the Embassy in Luanda in order to obtain a visitor's visa.

Nevertheless despite those adverse findings of credibility your client's case has again been reviewed in light of the medical assessment and scar report. However, it is noted that contrary to your assertion that the new objective evidence supports your client's account, it is noted that the scars referred to in the report are slight and mainly restricted to the legs and there is no clear evidence that the scarring was obviously the result of torture or detention.

Moreover it is noted that the medical examiner has attributed some of the scars to other causes such as childhood injuries and with regard to several of the other scars featured in the report it appears your client was unable to recall how these were caused apart from vaguely stating as a result of torture. It has further been noted that there is also a serious discrepancy between the medical examiners report and the comments in your letter in relation to the scar on the thigh. In this regard it noted that in your letter you state that Ms. Malunga confirms *"that this injury was inflicted when a soldier sliced her inner leg with a razor blade"*. Whereas the medical examiner has recorded that you client was unable to recall precisely how this injury occurred.

Furthermore it is also noted that, in respect of the scars which your client has attributed to torture, the medical examiner has recorded in the report that *"these could have been caused by another object but there is no reason to disbelieve Ms.*

> *Malungu's … account".* On the contrary, the Immigration Judge has noted several reasons to disbelieve her account, in the circumstances the medical assessment takes your client's cases no further.
>
> In this regard careful consideration has been given to the medical examiner's assessment of your client's mental health. However it is noted that throughout the asylum process your client has always maintained that she is fit and well and in good health. In addition to this it is noted that your client does not appear to be receiving any further medical treatment or medication in relation to her purported health condition. Moreover it is noted that this sudden purported deterioration in your client's medical condition only came to light after your client has been served with the removal directions in a third attempt to remove her from the United Kingdom. In the circumstances it is considered that the timing and circumstances of these late submissions, when taken together with the serious doubts about your client's credibility are just another attempt in a long series of attempts to frustrate your client's removal to Angola."

18. The reference to a contradiction in the recent accounts for the scarring on the claimant's thigh is an error. The letter of 9 October had accurately quoted the scarring report and offered no additional explanation. It was also inapposite to describe all the scarring as 'slight' because the scar on the thigh could not fall within that description. The Secretary of State's response also dealt with the prospect of an expert report from Mr Bridgland and the letter from Mr Matuno considering neither of any moment. It returned to the very strong findings made by the Immigration Judge and then continued:

> "Moreover, it should be pointed out the Home Office Country Information Policy Unit has the benefit of a wide range of sources which includes information provide by the United States Department (sic), the UNHCR, Amnesty International, the Refugee Council and the Foreign Commonwealth Office. Therefore the situation in Angola is constantly monitored, and in view of the lack of independent corroborative evidence in your client's case there is no reason to believe that your client would suffer persecution from the Angolan authorities.
>
> Therefore in the absence of any independent countervailing evidence from a reliable source it is not accepted that your client has experienced any difficulties in Angola on account of her ethnicity, political opinion or components in her lifestyle. Nor is it accepted that there is a serious possibility that she was, or will be the object of adverse attention on the part of any agent of persecution, so as to render her at risk within the terms of the 1951 UN or ECHR Conventions.

> Finally careful regard has been given to your assertion that your client has represented herself at the AIT hearing on 27 September 2007, however it is noted that your client was represented by the Immigration Advisory Service until 3 September 2007 when they ceased to act for your client. Your client was, from 17 April 2008 represented by Abiloye & Co throughout the judicial review process, up until her application for permission was refused on 5 August 2008. Furthermore whilst in detention your client has had access to a list of legal representatives which is posted in the library at Yarlswood as well as having access to the Legal Services Commission who attend Yarlswood on a weekly basis every Tuesday and Thursday. Therefore your client has had ample opportunity to discuss the merits of her case and obtain legal representation."

The representations were not accepted as a fresh claim.

19. On 7 November the claimant's solicitors wrote again enclosing a statement dated 12 October from the claimant herself together with a report from Fred Bridgland. As already noted, these additional representations were similarly not accepted as amounting to a fresh claim. The letter rejecting those submissions, dated 13 February 2009, came long after the claimant had been released from custody but it provides continuing insight into the attitude of the Secretary of State to the claim. Mr Bridgland's report was noted as being based on no personal contact with the claimant and was written in ignorance of the fact that the claimant's father had been a minister in the Angolan Government. That was something that claimant herself seemed ignorant of at one stage, there being a confusion about whether he was a civil servant or minister. Additionally, for example, the report failed to deal adequately with the issue about the language or languages the claimant spoke. The conclusion was that at its highest the report concluded that the claimant's account was plausible. Against that was set the Immigration Judge's conclusions, having heard the claimant give evidence. The letter expressed scepticism about the claimant's statement given the many opportunities she failed to take to give such an account. It also touched again on the report from Lucy Kralj noting that it made no reference to a requirement for treatment or medication, nor was there any further evidence of mental health difficulties. The letter also pointed out that Ms Kralj had no relevant qualifications to enable her to diagnose mental illness, nor to assess and treat it.

20. Evidence has been filed in these proceedings on behalf of the Secretary of State by Angus MacDonald. In the course of his statement he said this:

> "10. When the Claimant's detention review was completed on 11 November 2008 UKBA was aware of the new further submissions that formed the basis of the Claimant's application for Judicial Review but decided to maintain detention, and in accordance with the Defendant's Enforcement Instructions and Guidance (Paragraph 60.8.1) requested that the Judicial Review to be expedited (sic). The Defendant maintains that the Claimant's removal was still imminent pending the outcome of

> the Judicial Review application and it was not necessary to defer removal in the circumstances.
>
> 16. It is not discernable from the Secretary of State's records whether or not the reviewer of the claimant's continued detention had taken into account the Claimant's further submissions of October 2008, including the medical evidence of the Helen Bamber Foundation. However, on 4 November 2008 the Defendant served the Claimant with a decision refusing to treat the Claimant's further submissions of 9 October 2008 as a fresh claim, and the Claimant's detention was subsequently maintained. At pages 1 and 2 of the letter the Defendant also specifically considered and rejected the Claimant's assertion that she had been the victim of torture and, for the reasons set out in the letter, I consider that the Claimant is not a person for whom detention is unsuitable under UKBA's Enforcement Instructions and Guidance at paragraph 55.10. This view was maintained in the Secretary of State's letter of 13 February 2009, including the previous findings on respect of the Claimant's report purporting to show the Claimant is a victim of torture (paragraph 27)…."

Discussion

21. Although there was a great deal of debate about the legal principles engaged in a case where it is suggested that the Secretary of State has maintained detention contrary to the publicly available policy the starting point from which any legal argument proceeds is the more straightforward factual question whether the Secretary of State has in fact done so. The approach to interpreting any policy is to give it a reasonable person's understanding informed by an examination of its presumed intent: *Raissi v Secretary of State for the Home Department* [2009] QB 564.

22. Paragraph 55.5 of the Instructions and Guidance identifies a history of torture, and physical or mental ill health as factors that weigh against detention. The section on which the claimant particularly relies in Paragraph 55.16 identifies the mentally ill, and those where there is independent evidence that they have been tortured, as normally suitable for detention only in very exceptional circumstances. The list in Paragraph 55.16 in which these appear contains descriptions of categories of person upon whom detention might be expected to bear particularly heavily. It is principally for that reason that their detention is normally considered appropriate only very exceptionally (although legal obligations with regard to children would also play a part).

23. At the heart of the Secretary of State's response of 4th November was a deep scepticism regarding the suggestion that the claimant might be mentally ill given that there had been no mention of it before, in circumstances where she had already been in custody for many months and had previous legal representation. In any event, Lucy Kralj's report did not provide a secure foundation for asserting that the claimant suffered from mental illness. Whilst of course recognising Ms Kralj's experience in dealing with asylum seekers, she had no professional qualifications which enabled her to speak as an expert in the diagnosis of psychiatric illness. Indeed she spoke of the need for the

claimant to undergo a psychiatric assessment. She suggested that there were symptoms of PTSD without being in a position to diagnose it. She spoke of a fragile mental state which would require formal psychiatric intervention if there were a deterioration. The Secretary of State's letter of 4 November referred to the claimant's previous indications of good health and the fact that she was not in receipt of any treatment. In the course of argument Miss Knights developed her arguments by reference to the content of the submissions contained in the letter of 9 October without any regard to the considerable history that had gone before. The Secretary of State's reaction to those representations was inevitably and entirely reasonably developed in the context of what had gone before. I do not consider that the material before the Secretary of State in the representations of 9 October established that the claimant was mentally ill.

24. The scarring report provided independent evidence that the claimant bore scars in nine areas, two of which she attributed to childhood injury. Of the remaining seven, the first was judged by Ms Kralj to be 'highly consistent' with the explanation provided to her by the claimant of how she came by it. But it could have been caused by 'any superficial burn with a solid instrument.' The balance of the scars were consistent with having been intentionally inflicted by other people. It is clear, not only from the scarring report but also from the narrative part of Ms Kralj's assessment report, that she believed the claimant, taking everything she said at face value. She was unaware of the history since the claimant's arrival in this country including a judicial determination that she was not truthful in her accounts. Whether the scars were or were not the result of torture could only judged by reference to the claimant's account of what had occurred. Ms Kralj's scarring report provided independent evidence that the claimant has the nine scars identified. It was independent evidence that seven of them were consistent with deliberately inflicted injury. But the report did not provide independent evidence that the claimant had been tortured because that depended upon accepting the claimant's account how they were caused.

25. In the result I do not consider that the claimant fell within the identified categories in Paragraph 55.16 on which she relies.

26. That, however, is not the end of the matter. It is abundantly clear from the initial response on behalf of the Secretary of State on 11 October refusing to defer removal directions that he considered the new representations to be without any substance. That was the consistent position until the bail hearing that resulted in the claimant's release, and indeed was maintained until further representations were submitted in March 2009. The history suggested a determination in the claimant to resist removal. Her initial unsuccessful appeal to the AIT was followed by applications to the Senior Immigration Judge and the High Court for reconsideration. Failure through that route was followed by fresh representations by different solicitors which raised nothing of these issues. That, at least, was consistent with the claimant's failure to raise them with her first representatives prior to the appeal before the AIT, at her interview or at the appeal itself. These representations, when rejected, were followed by a 'hopeless' judicial review challenge renewed at an oral hearing despite the clear rejection on paper by Goldring J, very shortly before the claimant's current solicitors came on the scene. The strength of the Immigration Judge's findings of fabrication were as strong as it is possible to imagine. In all these circumstances it could have come as no surprise that the Secretary of State decided to maintain detention. The Secretary of State anticipated

that the application for judicial review could be processed as quickly as the one just completed and was expecting the same outcome.

27. The letter refusing to defer removal made it plain that the UK Border Agency considered the fresh representations, coming so shortly after the failure of a differently expressed challenge, to be a try-on. By the time the letter of 4 November was written and the decision was taken to maintain detention and oppose bail the Secretary of State's considered view of the new representations was clear. On any view it was appropriate to maintain detention whilst the representations were being considered. Even if there were any evidential basis upon which the claimant could show that she was either mentally ill or there was independent evidence of torture, paragraph 55.16 of the Instructions and Guidance is not in absolute terms but contemplates detention being maintained in very exceptional circumstances. The immediate background to the receipt of these representations provided ample material to support detention very exceptionally pending a decision on permission to apply for judicial review.

28. The claimant advanced a separate argument that there was no evidence that the procedure dictated by Rule 35 of the Detention Centre Rules 2001 was followed. Rule 35(1) requires a medical practitioner to provide a report to the manager of a detention centre if a person's health is likely to be injuriously affected by continued detention and rule 35(2) calls for a medical report if the medical practitioner is concerned that a detainee may have been the victim of torture. The medical records in respect of the claimant's detention from April 2008 to November 2008 were not before the Court, neither were any medical records dealing with the claimant's periods at liberty before and after her detention. Be that as it may, a failure to comply with the Detention Centre Rules 2001 does not render the detention unlawful: *R ((SK) Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 1204 at paragraph [35].

29. The claimant further contended that once the judicial review challenge was lodged on 10 October it could no longer be said that the claimant's removal was 'imminent'. The use of that language comes from Paragraph 55.23 which is in these terms:

> "In cases where a person a being detained because their removal is imminent the lodging of a suspensive appeal or other legal proceedings that need to be resolved before removal can proceed will need to be taken into account in deciding whether continued detention is appropriate. Release from detention will not be automatic in such circumstances: there may be other grounds justifying a person's continued detention, e.g. risk of absconding, or the person's removal may still legitimately be considered imminent if the appeal or other proceedings are likely to be resolved reasonably quickly."

30. This passage is of a piece with the extract from Chapter 60 quoted above which contemplates continued detention in the face of judicial review claims which are considered without merit. Furthermore, Paragraph 60.8.1 expressly contemplates seeking the expedition of judicial review proceedings because the claimant is in detention. The fact that the

claimant was detained until 13 November was not in breach of the Secretary of State's policy on detention in the face of legal challenge.

Conclusion

31. The claimant has not established the facts necessary to support a claim for unlawful detention based upon the suggestion that the Secretary of State failed to apply his policy on detention. The principles in such cases are now conveniently collected together in particular in *SK Zimbabwe* and *R (WL Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111. The Claimant submitted that any failure to comply with a public policy of the Secretary of State governing the circumstances in which he will exercise immigration detention powers would render the consequent detention unlawful, if the policy properly applied would have resulted in release. She further submitted that the question of whether a policy was complied with was a matter of fact for the High Court to determine. Thus, in this case it would for be the Court to determine whether Miss Kralj's report provided independent evidence of torture and whether the claimant was mentally ill. Further, having determined those questions, if necessary, going on to decide as primary decision maker whether nonetheless detention was appropriate or whether the circumstances fell within the exception recognised by Paragraph 55.16 itself. The position is far from as straightforward as that, but it is unnecessary to explore the implications of these submissions given my conclusion that this application should fail even approaching the case of that basis. The claimant's detention between 10 October and 13 November 2008 was lawful. The question of damages does not arise.