Case No: CO/3185/2013

Neutral Citation Number: [2014] EWHC 3858 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 20th November 2014

Before:

MR JUSTICE WYN WILLIAMS

- - - - - - - - - - - - - - - - - -

Between:

The Queen
(on the application of)
DOOST ALEMI **Claimant**

- and -

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

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(Transcript of the Handed Down Judgment of
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Christopher Jacobs (instructed by **Duncan Lewis & Co Solicitors**) for the **Claimant**
Andrew Deakin (instructed by **The Treasury Solicitors**) for the **Defendant**

Hearing dates: 5 November 2014

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Judgment

Mr Justice Wyn Williams:

Introduction

1. In these proceedings the Claimant alleges that he was unlawfully detained between 1 March 2013 and 16 August 2013. I received documentary evidence and heard oral argument in relation to that issue on 5 November 2014.

2. The pleadings also disclose a second potential issue for determination by the court namely whether or not it would be lawful for the Defendant to remove the Claimant from the United Kingdom to Belgium. I did not consider that issue on 5 November; at the handing down of this judgment I will make such further directions as may be necessary if that issue remains a live one.

3. In this judgment the word Defendant is used to mean the party sued and all persons making decisions on her behalf.

Relevant History

4. The Claimant is a national of Afghanistan. In or about February 2007 he entered the United Kingdom illegally and claimed asylum at ASU Croydon. Following an assessment it was accepted that the Claimant was a minor and he was placed in the care of the Social Services Department of Croydon Borough Council. In March 2007 the Claimant's application for asylum was refused but he was granted discretionary leave to remain within the United Kingdom until his eighteenth birthday. Subsequently, the Claimant was assessed as being older than he claimed with the consequence that his discretionary leave to remain came to an end on 1 July 2008.

5. In that month the Claimant applied for further leave to remain in the UK. By the date of his application he was an over-stayer. In 2008, 2009 and 2010 the Claimant remained in this country and his application remained undetermined. In the same time period he committed a number of criminal offences although he was never sentenced to a custodial term.

6. In July 2010 the Claimant was detained by the Defendant with a view to removing him to Afghanistan. Removal directions were set but deferred in the face of an order of this court preventing removal. Between July 2010 and November 2010 the Claimant remained in detention.

7. In November 2010 the Claimant was granted bail subject to a direction that he report at specified periodic intervals. The Claimant failed to abide by this direction and in due course he was listed as an absconder. Meanwhile he had been seeking to avail himself of his appeal rights within this country. It suffices to say that his appeal rights became exhausted on 16 February 2011.

8. On 16 February 2013 the Claimant was arrested on suspicion of illegal entry into the United Kingdom. He was discovered at Sheerness docks. In an interview the next day he volunteered the information that he was a failed asylum seeker who had absconded whilst on bail. His account was that he left the United Kingdom in January or February 2011 and travelled to France and Belgium. In Belgium he applied for asylum. Upon arrest the Claimant was in possession of an Afghanistan passport and

Belgium resident's card and he maintained that he had obtained those lawfully while in Belgium. On the strength of the information provided by the Claimant and in the light of his immigration and criminal history a decision was taken to detain him.

9. The Claimant was first detained at Dover Immigration Removal Centre; I proceed on the basis that he was kept there until 29 June 2013 when he was moved to a centre known as Brook House. I have been provided with the medical notes which were generated during the whole period that the Claimant was detained. The parties accept that an accurate picture of the events which unfolded during the Claimant's detention can be gleaned from those records together with other sources of evidence to which I will refer as and when appropriate.

10. One of the medical notes for 18 February 2013 made, apparently, by a health care assistant reads as follows:-

> "New reception from police station,
>
> Arrived in UK yesterday, states stayed in UK five years from 2007 to 2011. Been in detention in heathrow 2010 that's four months.
>
> Declared H/0 chest pain, headache, eye problem, depression, stated that he took medication for depression in Belgium but doesn't know the English name.
>
> Referred to MO and mental health triage.
>
> H/0 self about 1½ year ago in Belgium, states he had counselling after.
>
> Appeared settled in mood, denies any thoughts of self-harm at present."

11. The next day (19 February 2013) the Claimant was seen at the Health Centre by a Dr Naveed Tippu who is described in the notes as a Clinical Medical Officer. The doctor found "no evidence of serious mental illness" but diagnosed chronic headaches and anxiety. Medication was prescribed which was suitable for those conditions.

12. On 28 February 2013 the Defendant set removal directions to Afghanistan for 18 March 2013. On the same date the Claimant sent a fax to the Defendant in which (a) he conveyed the impression that he thought that he was to be removed to Belgium as opposed to Afghanistan and (b) asserted that he had mental health problems and that he had attempted suicide when in Belgium.

13. On 1 March 2013 the Claimant made a suicide attempt. On any view it was a serious attempt; the Claimant hanged himself and his life was saved by the intervention of staff at the detention centre. The details of this event are contained in the medical notes. The suicide attempt took place in the early hours of the morning. At approximately 10.30 that same day the Claimant was assessed by Dr Tippu. The note relating to that assessment is as follows:-

> "History: seen in Hythe House. Tried to strangulate himself. Is non responsive. Has been worried about Immigration issues and about likely transfer to Belgium. See earlier entries. Awaiting counselling.
>
> Examination: non communicative, no eye contact, low mood, no overt psychosis.
>
> Diagnosis: depression reactive due to Immigration issues.
>
> Plan: staff in Hythe to find out if he has RDs, keep ACDT open. Commence anti-depressants……."

Some two hours later a further assessment took place. The note in relation to this assessment reads:-

> "Attended assessment, Care in Custody and Team Review …….review conducted by SO Barry Richards. Mr Alemi feeling very low and says he is "hopeless". Initially very reluctant to engage in the review and just sat with his head in his hands and kept pulling at his fingers. He wants to join his brother who has a business in Nottingham but his brother has returned to Afghanistan on a short visit as their mother is seriously ill. He will not be home until 7 March. Mr Alemi has been given the contact details of several solicitors and advised to contact one of them to take his case. He cannot say he will not attempt further self-harm and will therefore remain on constant watch in Hythe Unit. For review again tomorrow."

14. It appears to be common ground that following the Claimant's suicide attempt he was placed in a segregated unit with the aim that he would be under constant supervision by staff. Nonetheless a medical note for 3 March 2013 refers to the Claimant handing in a noose and a note for 5 March 2013 (made by Dr Tippu) reveals that the Claimant had made another noose having been allowed to go to a non-segregated location. Despite this event Dr Tippu considered, upon examination, that the Claimant was showing no signs of mental distress as of 5 March 2013.

15. On 7 March 2013 the Claimant was assessed by Mr Eugene Connell. Mr Connell is described in the notes for that date as "a practitioner". I will return to his actual status shortly. The note of the assessment reads:-

> "Prisoner has received medication for mental health problems (YX019) – states that he wishes to be released or transferred to a mental hospital.
>
> He describes that he will attempt to end his life if he remains in detention. He reports that he reacts to situations in which he feels wronged or slighted by trying to end his life.
>
> ……..

Overview notes – client was found suspended in a hanging suicide attempt 6 days ago. …….

Overview notes – currently on constant obs after a hanging attempt.

……

Detained in hospital under section 46 of the MHA 1983 – he states that he attended a psychiatric hospital in Belgium on a voluntary basis. This cannot be confirmed.

H/O: psychiatric disorder – no.

Prisoner has received medication for mental health problems – no.

Computer records – I have explored his record and spoken with staff.

Summary of needs – Mr Alemi presented with good personal hygiene and maintained good eye contact. He sat appropriately through the interview but began to wring his hands during our conversation. He stated that he had pain in his heart and that hurtful things happen in his life. When he feels upset by people or not in control he stated that he has thought of ending his life. He has lived in the UK since 2007 but reports that he did not make attempts while in the community and has never received treatment. He reports attending a mental health unit voluntarily in Belgium. He stated he wants to be released or transferred to a mental health hospital.

I can find no evidence of disordered thinking or perceptual abnormality. His low mood and anxiety appears to be in the context of his detention and imminent RD's (18.04.13).

He declined any treatment and does not meet the criteria for transfer to hospital.

His suicidal ideation seems functional and a response to receiving his R.D.'s.

He should remain on constant watch at present……..”

16. On 8 March 2013 the Claimant lodged a claim for asylum. Essentially his grounds were the same as those which had been rejected in 2007. The next day, 9 March, the Claimant was seen by Dr Tippu who diagnosed “situational depression and anxiety”.

17. On 12 March 2013 the Claimant's solicitors sent a letter before action relating to the Defendant's decision to remove the Claimant to Afghanistan. In that letter before action specific reference was made to the Claimant's mental health and the assertion

was made that the Claimant was unfit to be removed on account of his mental condition.

18. On 13 March 2013 Dr Tippu completed a report pursuant to Detention Centre Rule 35. The material parts read:-

> "Mr Alemi has made two serious attempts at suicide/self-harm. He is presently being managed within the ACDT process and is under constant supervision.
>
> Mr Alemi is presently taking ante-depressants and Anxiolytics due to situational depression and anxiety.
>
> He does not suffer from any mental illness and his presentation is due to anxiety and worry of imminent removal. He remains a significant risk of further attempts at self-harm/suicide."

19. On 15 March 2013 the Claimant's solicitors commenced proceedings for judicial review. At that stage the principal focus of the proceedings was a challenge to the Claimant's imminent removal. However the grounds of challenge also included the assertion that the Defendant was unlawfully detaining the Claimant. There were two substantive paragraphs in support of this ground which read:-

> "73. It is accepted that the Claimant's initial detention was lawful as an illegal entrant in the UK in accordance with the Defendant's IS.151A.
>
> 74. However, it is submitted that the Defendant has failed to adequately review this position upon the Claimant claiming asylum in the UK on 7 March 2013. Instead the Defendant has erred in law by applying paragraph 353 of the Immigration Rules to the Claimant's asylum claim following the Claimant's solicitor's telephone conversation with the Defendant's Kent casework team on 12 March 2013."

It is worth observing that the Claimant's mental condition was not mentioned, specifically, in relation to the lawfulness of detention; rather, as a discrete ground, it was alleged that the decision to remove the Claimant was unlawful because he was unfit to fly on account of his mental illness.

20. In the face of the judicial review removal to Afghanistan did not take place. Instead, on 22 March 2013, the United Kingdom requested Belgium to consider the Claimant's asylum claim pursuant to what is known, colloquially, as Dublin II.

21. On or about 25 March 2013 the Claimant was provided with a document entitled "Monthly Progress Report to Detainees". The report summarised some of the history which has been set out above. It then continued:-

> "Your case has been reviewed. It has been decided that you will remain in detention:

- Because there is reason to believe 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 previously failed to comply with the conditions of your stay, temporary admission or release.

- You have previously absconded or escaped.

- You have failed to observe United Kingdom Immigration Laws by entering via actual clandestine means.

- You have not produced satisfactory evidence of your identity, nationality or lawful basis to remain in the United Kingdom.

- You do not have enough close ties to make it likely that you will stay in one place."

22. On 2 April 2013 the Belgian authorities accepted their responsibility to determine the Claimant's asylum claim.

23. On 9 April 2013 the Claimant's solicitors wrote to the Defendant, specifically, to seek his release on temporary admission. The letter referred, specifically, to the Claimant's mental health and noted that the monthly progress report "had not addressed the issues of self-harming and suicidal attempts by [the Claimant]." On 19 April 2013 the Defendant refused the Claimant's request for temporary admission.

24. On 3 May 2013 the Claimant's solicitors wrote to the Defendant indicating that the Claimant had been assessed by Dr Rachel Thomas a Consultant Clinical Psychologist. The letter went on to summarise the view of Dr Thomas which was to the effect that the Claimant was mentally ill and was in need of proper care in a secure psychiatric facility that was suited to his complex mental health needs. On 8 May 2013 the solicitors sent the Defendant a report from Dr Thomas which had been made on 2 May 2013 and amended on 7 May 2013.

25. Let me take stock at this stage. Between the date that the Claimant was first detained and 8 May 2013 he made six serious attempts at suicide. It appears, too, that in the same period there were a number of other, discrete, incidents of self-harm. Throughout this same period the Claimant was kept in a segregated area and, ostensibly, under constant observation. He was assessed on a number of occasions by Dr Tippu and by Mr Connell.

26. On 17 April 2013 the Claimant had been provided with a second monthly progress report. For all practical purposes it was in identical terms to the report which was

provided to him in March 2013. It certainly made no mention of suicide attempts, self-harm or mental illness.

27. Between 17 February 2013 and 8 May 2013 there were a number of detention reviews. The flavour of those reviews was that detention was justified because the Claimant would be likely to abscond and/or commit criminal offences if released and that the Claimant was being monitored, appropriately, by staff within the centre in which he was held.

28. Dr Thomas conducted a detailed assessment of the Claimant and reached a number of conclusions which she expressed in definitive language. She described the Claimant as a severely traumatised man who was suffering from severe post traumatic stress disorder. She considered him to be a "severe and acute suicide risk". In her opinion Dover IRC was not a suitable environment for the Claimant and needs were such that a transfer from detention to a suitable psychiatric hospital was necessary to achieve an improvement in his state of health.

29. It is clear that the report of Dr Thomas or, at least a summary of it was referred to the health care professionals at the centre at which the Claimant was being held. I say that because Mr Connell made an entry in the medical notes dated 9 May 2013 in which he wrote the draft of a letter in response to the Claimant's solicitor's letter of 3 May 2013 and made reference to Dr Thomas' views.

30. Mr Connell's draft was not sent by the Defendant. Instead the Defendant wrote in a letter dated 9 May 2013.

> "I write in response to your letter 3 May 2013 in which you have submitted a report by Dr Rachel Thomas which recommends that your client should be transferred to a secure psychiatric facility.
>
> In your letter you have also suggested that your client would benefit from being assessed by an approved mental health professional who is trained in the sectioning procedure.
>
> The contents of the report have been discussed and as a result we are currently reviewing the appropriateness of your client's continuing detention. As part of this review we are gathering the relevant information and exploring your suggestion of a secure facility. Once we have all the information to hand, we will be able to make an informed decision concerning your client's future care.
>
> You have mentioned a secure facility, it is presumed that you have somewhere in mind or a recommendation to make regarding the location of such a facility."

31. The Claimant's solicitors replied the next day. They had been informed of Mr Connell. In the letter of 10 May 2013 the solicitors described him as Dr Eugene Connell and asserted that he was "a section 12 approved practitioner who would be able to assess our client for a transfer to a secure psychiatric facility."

32. It is clear that Mr Connell carried out an assessment on 16 May 2013. There is an entry in the medical notes which runs to one and a half pages approximately. It also appears that the time spent by Mr Connell with the Claimant on that occasion was a period of 12 minutes.

33. On 20 May 2013 the Defendant wrote to the Claimant's solicitors. It is necessary to set out the whole of the letter.

> "I write in response to your letters of 10 and 20 May 2013 in which you state your client is not fit for detention and should be assessed by Dr Eugene Connell from Dover Health Care who is a section 12 approved practitioner.
>
> 1. Your client has been assessed by Dr Connell and Dover Health Care advises that a copy of this report will be sent to you on Thursday 23 May 2013. TCU have not seen a copy of this report as yet.
>
> 2. To date, Dover Health Care has not given any indication that your client's condition cannot be managed in detention. Your client's health and well being is reviewed on an almost daily basis and he is afforded all possible assistance.
>
> 3. We continue to be guided by Dover Health Care and the recommendation of Dr Connell. Unless advised to the contrary, your client will remain detained.
>
> 4. Your client judicial review against removal to Afghanistan was recently concluded at the paper hearing stage stating 'permission refused and totally without merit'.
>
> 5. With the above in mind there is currently no bar to your client being removed to Belgium where he applied for asylum and was granted temporary residence.
>
> 6. Your client will be assessed in line with removal guidelines and procedures regarding his fitness to fly. Should Dr Connell's report state that your client is not fit to be detained or that he should be transferred to a secure unit then removal will not be possible."

Despite further requests from the Claimant's solicitors the Defendant did not disclose any written report of the assessment apparently undertaken on 16 May 2013.

34. On 24 May 2013 Mr Connell produced a short report. It was in the following terms:-

> "I can confirm that I carried out a nursing assessment on Mr Alemi on 23.05.2013. I feel that he presents with personality difficulties suggestive of emotionally instability. He does not meet the criteria for transfer under section 48 of the mental health act as his condition is not of a nature and degree which

> would require detention in hospital for urgent treatment. Mr Alemi has access to treatment options which meet N.I.C.E. guidelines. He currently declines these interventions. Mr Alemi's physical safety is managed appropriately by the D.I.R.C. with the use of constant supervision in response to Mr Alemi's impulsive acts of self-harm. "

This document is signed by Mr Connell and, for the first time, it became apparent to the Claimant's solicitors that Mr Connell was a nurse since that is how he describes himself beneath his signature.

35. I can see no evidence in the medical notes that Mr Connell carried out any kind of detailed assessment on 23 May 2013. Dr Tippu may have done so but, to repeat, there is nothing in the medical records which suggests Mr Connell was involved in an assessment on 23 May 2013. It may be that Mr Connell's report mistakenly referred to 23 May as opposed to 16 May.

36. I can take the history between late May and 16 August 2013 quite shortly. On or about 12 June 2013 the Claimant's solicitors obtained and disclosed a report from Dr D L Bell, a consultant psychiatrist. He was engaged to comment upon the report written by Mr Connell. In his report Dr Bell was fiercely critical of the Defendant's reliance upon Mr Connell's assessment and suggested that, as a matter of urgency, a consultant psychiatrist should be engaged to assess the Claimant. It seems that two psychiatrists undertook an assessment of the Claimant in July 2013. On 6 July 2013 Dr Nadir Omara carried out a comprehensive assessment of the Claimant on behalf of the Claimant's solicitors. On 9 July Dr Francis Labinjo assessed the Claimant at the request of the Defendant. Over the course of the following weeks there were further reports from Dr. Omara and ultimately the Claimant was transferred to a secure psychiatric unit on 16 August 2013.

The Defendant's Policy on Detaining Persons who are Mentally Ill

Guidance

37. The Defendant has published the guidance which is provided to her caseworkers when they are considering whether or not to exercise a power to detain. Chapter 55.10 of the Enforcement Instructions and Guidance provides:-

> "55.10. **Persons Considered Unsuitable for Detention**
>
> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
>
> In criminal casework cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it

> outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> ……..
>
> Those suffering from serious mental illness which can be satisfactorily managed in detention (in criminal casework cases cases, please contact a specialist mentally disordered offender team).
>
> In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are waiting to be assessed, or are awaiting transfer under the Mental Health Act."

Discussion

38. Mr Jacobs advanced the following submissions in support of his contention that the Defendant unlawfully detained the Claimant during the period 1 March 2013 to 16 August 2013. First, the Claimant was suffering from a serious mental illness during the whole of that period; the Defendant knew or should have known that this was the case. Second, the Claimant's condition could not be satisfactorily managed within detention; again, the Defendant knew or should have known this was the case. Accordingly, third, the detention of the Claimant during the specified period was a breach of the guidance issued by the Defendant. There were no exceptional circumstances in this case which justified detaining the Claimant at a detention centre. Fourth, the burden was upon the Defendant to prove that detention was unlawful and she had failed to discharge the burden upon her.

39. Mr Deakin accepts that the Defendant's guidance makes it clear that a person should not be detained (except in exceptional circumstances) if that person is suffering from serious mental illness and the illness cannot be satisfactorily managed within detention. Further, he accepts that a failure on the part of the Defendant to properly consider or apply detention guidance in respect of those suffering from a serious mental illness will constitute a public law error which would render detention unlawful (see his skeleton argument paragraph 60(d) at page 13). Mr Deakin submits, however, that the detention in this case was not unlawful because, throughout, the Defendant was acting upon medical advice and it was not until a few weeks, literally, before the Claimant's transfer to a secure psychiatric unit that the evidence persuaded the Defendant of the need for such a transfer.

40. I deal, first, with the period 1 March 2013 to 8 May 2013. During this period, as I have said, the Claimant made a number of serious suicide attempts, he engaged in other, separate, acts of self-harm and he was kept in a segregated unit under constant observation. On the face of it that suggested that he was suffering from a mental illness. However during the whole of this period the Claimant was subject to a number of medical reviews. He was seen by Dr Tippu and he was assessed by Mr

Connell. Their combined view was that the Claimant was not suffering from a mental illness. Essentially their view was that he was attempting suicide and engaging in acts of self-harm because he was anxious and worried about his removal either to Afghanistan or Belgium. With the benefit of hindsight those opinions may appear quite surprising; however as events were unfolding in March and April 2013 this was the advice which the Defendant was receiving.

41. Until the Claimant's solicitors served the report of Dr Thomas the Defendant had received no medical or other expert evidence which supported a conclusion that the Claimant suffered a serious mental illness. To repeat, with the benefit of hindsight, it may be thought that the Claimant's actions in detention were consistent only with him suffering such an illness but, as I have said, the Defendant was being advised that the Claimant was not mentally ill.

42. I have not been provided with a witness statement or witness statements from those who were authorising the Claimant's detention during this period. However, on the whole of the documentation provided to me, it seems reasonable to infer that the stance adopted by the Defendant was very much informed by advice which she received to the effect that the Claimant was not mentally ill.

43. How does this conclusion fit with the Defendant's guidance? There is no suggestion in this case that the Defendant misunderstood the meaning of her guidance. Mr Deakin's point is that, in effect, the Defendant made her decision to detain on the basis of medical advice provided to her and, accordingly, her decision can be impugned only upon *Wednesbury* grounds. In making that submission he derives particular support from two decisions of the Court of Appeal. In *R (LE Jamaica) –v- SSHD* [2012] EWCA Civ 597 Richards LJ, with whom Maurice Kay and Kitchen LJJ agreed, observed:-

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

During the course of his judgment Richards LJ acknowledged that the view set out above was made obiter. However, in *R (O) –v- SSHD* [2014] EWCA Civ 919 the Court of Appeal considered the approach taken in *LE Jamaica* and expressly approved it.

44. I have asked myself, therefore, whether it was reasonably open to the Defendant to have on the material available up to 8 May 2013 that the Claimant was not suffering from a serious mental illness. Having reflected upon the matter I am not prepared to say that no reasonable Secretary of State properly directing herself on the material available could have acted as did the Defendant in this case. I acknowledge the powerful evidence of the history of suicide attempts and the incidents of self-harm but, to repeat, the Defendant was being advised that those events were not the

consequence of a serious medical illness. Further, in this timescale he was supplied with no contrary evidence in behalf of the Claimant.

45. In my judgment, however, the picture presented to the Defendant changes completely once she had received the report of Dr Thomas. Dr Thomas's report was detailed and compelling. The options for the Defendant following its receipt were (a) to accept Dr Thomas's view and instigate enquiries with a view to the Claimant's transfer to a secure psychiatric unit or (b) obtain her own advice about the nature and extent of the Claimant's alleged illness. What actually occurred was Dr Tippu and Mr Connell assessed the Claimant for comparatively short time periods and adhered to views which they had previously expressed.

46. Dr Thomas is not a medical doctor. As is well known, however, chartered clinical psychologists are well equipped to offer expert opinion upon issues relating to mental illness. As Dr Thomas makes clear in the first page of her report she has a wealth of experience which equips her to offer an opinion in this case. The Defendant has adduced no evidence as to the expertise of Dr Tippu and Mr Connell. I am aware from the documentation that Mr Connell is a "clinical nurse specialist" and I am prepared to infer that his specialism is psychiatry. On any view, however, there is a dearth of evidence as to the true level of his expertise and there is no evidence which suggests that the Defendant made any enquiry as to his expertise. To repeat, there is no evidence before me as to the expertise of Dr. Tippu.

47. In my judgment a telling document as to the willingness of the Defendant to engage with the report of Dr. Thomas is the monthly progress report for 14 May 2013. This document was in similar form to those which preceded it and much of it was identical to the two earlier reports. The document does not mention Dr Thomas's report; in setting out the reasons why detention is to be maintained it says nothing about the Claimant's state of health. The detention review documents which followed 9 May 2013 are equally silent as to Dr Thomas's report.

48. I have reached the conclusion that no reasonable Secretary of State could have concluded that detention within a detention centre was in accordance with her published guidance once confronted with the contents of Dr Thomas's report. I say that notwithstanding that Mr Connell offered his own view in writing on 24 May 2014. I do not consider that the response provided by Mr Connell in his report of 24 May 2014 could, conceivably, have detracted from the views expressed by Dr Thomas. It follows that there came a point in time after receipt of Dr. Thomas's report when the Claimant's detention was unlawful.

49. What is the date upon which the Claimant's detention became unlawful? Obviously it did not become unlawful on the date Dr Thomas's report was received. Some time, necessarily, had to elapse for the report to be considered and acted upon. Dr Thomas was not suggesting that the Claimant be released. Her proposal was that he be transferred to a secure psychiatric unit. It is accepted by both parties that such a transfer could only be affected following a recommendation to that effect by two suitably qualified medical practitioners. Inevitably, therefore, some period of time would have elapsed before such opinions had been obtained and acted upon. That is what occurred, in effect, in early August 2013 once the Defendant had accepted that she should put in place a transfer to a secure psychiatric unit.

50. I cannot be precise about the time which would have elapsed, necessarily, before all necessary steps had been taken transfer to the Claimant but it seems reasonable to estimate that the process would have taken at least two weeks.

51. In the result I conclude that the Claimant was unlawfully detained from midnight 23 May 2013 until his transfer to the psychiatric unit on 16 August 2013.

52. Given the time constraints in producing this judgment I do not offer any view upon whether, assuming my conclusions expressed above are wrong, the Claimant was unlawfully detained for a shorter period.

53. At the commencement of the hearing before me I made it clear that I would adjudicate upon the issue of liability alone. I make it clear that nothing in this judgment precludes the Defendant from seeking to argue that the Claimant is entitled to nominal as opposed to substantial damages. All issues relating to damages will be considered, as appropriate, after a trial in the Queen's Bench Division.

Post-Judgment Discussion

MR JUSTICE WYN WILLIAMS: I understand that some typographical corrections have been provided and I am grateful you have acted so quickly if they have been. Obviously they will be incorporated into the final judgment. I am not sure of the technical term when handing down a judgment subject to typographical corrections, but that is what I have just done.

MR JACOBS: I ask for an order for anonymity for the claimant.

MR JUSTICE WYN WILLIAMS: Has there been anonymity to date?

MR DEAKIN: I understood there was anonymity in the Court of Appeal. It went there as DA (Afghanistan). The Secretary of State has no objection if the court is happy but we are in your hands.

MR JUSTICE WYN WILLIAMS: To be more inquisitive than normal, what happened before Mr Philip Mott QC because that is a written judgment? Was there anonymity in respect of that?

MR JACOBS: There was no anonymity in respect of that.

MR JUSTICE WYN WILLIAMS: Has the horse not bolted?

MR JACOBS: It might have done. I am not sure if Philip Mott's judgment, because effectively it was an adjournment - - - - -

MR JUSTICE WYN WILLIAMS: The fact that you were able to produce, in effect, a corrected copy of it - - has it an EWCA number?

MR JACOBS: I do not have it with me.

MR DEAKIN: It is available on Lexis.

MR JUSTICE WYN WILLIAMS: It is.

MR DEAKIN: It is on Lexis.

MR JUSTICE WYN WILLIAMS: If it is publicly available, Mr Jacobs, I think it would be wrong for me to make an anonymity order.

MR JACOBS: Very well. In that case some of the corrections I proposed fall by the

wayside.

MR JUSTICE WYN WILLIAMS: Putting in - - - - -

MR JACOBS: "Mr A".

MR JUSTICE WYN WILLIAMS: I take it you both think that is right. I think it is very difficult to justify an anonymity order when, in effect, the substance of the litigation is already in the public domain.

MR DEAKIN: That seems sensible. The Secretary of State is neutral on the point.

MR JUSTICE WYN WILLIAMS: I cannot see how it protects any interest of your client in those circumstances.

MR JACOBS: The only interest is that he has been an asylum seeker. There may not have been mention of that in the judgment. I cannot recall. He may repeat his claim in the further representations. The Court of Appeal took the cautious approach. I think it is the Court's practice to anonymise in all immigration cases.

MR JUSTICE WYN WILLIAMS: You learn something everyday. I thought we were all being told we had to be as open as reasonably possible. At the moment I am not prepared to make an anonymity order. I will check the status of Mr Mott's judgment. If I consider that the horse has not bolted - though Mr Deakin says it is on Lawtel (sic) but I will look at the content of it - and if there are things which are still capable of being properly anonymised then I will send an e.mail to you both and invite you to say anything you want in the light of that.

MR DEAKIN: It is Lexis, not Lawtel.

MR JUSTICE WYN WILLIAMS: On a public search engine.

MR DEAKIN: Yes.

MR JACOBS: As far as the order is concerned, could I ask for an order for the claimant's costs in respect of the liability aspect of the hearing.

MR JUSTICE WYN WILLIAMS: Subject to anything Mr Deakin says, that seems to be

right.

MR JACOBS: And also an order for detailed assessment of the claimant's costs.

MR JUSTICE WYN WILLIAMS: I do not need to grant any specific relief, do I, or are the terms of the judgment sufficient?

MR JACOBS: My understanding is that the terms of the judgment are sufficient.

MR JUSTICE WYN WILLIAMS: Obviously, you would like me to transfer the case to the Queen's Bench Division for disposal.

MR JACOBS: Yes. If I could draw an order it would say "upon the court having found the claimant was unlawfully detained" between those dates.

MR JUSTICE WYN WILLIAMS: Yes.

MR JACOBS: I can e.mail that to your clerk. With regard to the Dublin II part of the claim, there is a consent order that has just been agreed. I can inform you as to what the terms are. It is upon the defendant no longer seeking to transfer the claimant to Belgium at this time or in the future under the provisions of the Dublin regulation and upon the claimant agreeing to submit a human rights application to be considered on behalf of the claimant within six months of receiving further representations to be submitted within two months of the receiving of this order by the claimant's representatives - by consent it is ordered that the claimant do have leave to withdraw his claim insofar as it related to the Dublin regulation ground which was granted permission by Beatson LJ on 4 October 2013 and the defendant to pay the claimant's reasonable costs of work undertaken in the Administrative Court and the Court of Appeal in relation to the Dublin II regulation issue. It says, for the avoidance of doubt, the hearing on 5 November 2014 in relation to the work undertaken on the Dublin II issue to be assessed if not agreed. And then the details of assessment.

MR JUSTICE WYN WILLIAMS: Is it anticipated that that remain a separate order or perhaps should it be the case that everything is incorporated into one order because it is

only one set of proceedings?

MR JACOBS: It could be incorporated into one.

MR JUSTICE WYN WILLIAMS: I think that would be better. It lessens the chances of any administrative mistakes if there is just one order. Mr Deakin, what do you want to say about any of this?

MR DEAKIN: Nothing, apart from one point. The Secretary of State obviously accepts that the claimant is entitled to costs to be assessed and also a transfer is appropriate. The Secretary of State is neutral as to whether it is transferred to the Queen's Bench Division or Central London County Court. I am not clear what the level of damages sought is likely to be.

MR JUSTICE WYN WILLIAMS: I am going to transfer it to the Queen's Bench Division for the moment; and if you would incorporate into your order that there should be a case management conference before a Master within, shall we say, two months.

MR JACOBS: Yes.

MR JUSTICE WYN WILLIAMS: And at that case management conference he can decide who best to try the hearing if, by then, you have not sorted it all out.

MR JACOBS: Those instructing me may have funding difficulties if it has to go to the County Court.

MR JUSTICE WYN WILLIAMS: If I make the order I suggest, then you will have a few months to sort it out and if you cannot the Master can dictate the appropriate level judge.

MR DEAKIN: The other point to mention is the Secretary of State will find it very difficult to proceed in any way in this case without her own expert evidence. One way of dealing with it would be to wait for the CMC before the Master. The other way would be for you to order now to grant permission for the Secretary of State to obtain the evidence and she can get cracking on it.

MR JUSTICE WYN WILLIAMS: I am very conscious that on the face of it the Secretary of State should have her own expert evidence. In the past there has been some suggestion that your client would not co-operate. Is that still the position, Mr Jacobs?

MR JACOBS: His instructions are that he does not want the Home Office on its own to lodge a report because of what happened with Mr Conway in the past. He would be happy for there to be a joint report, jointly instructed expert, but does not want the Home Office. My instructions are that if the Secretary of State obtains her own expert those who instruct me would wish to rebut anything in that. It might be an issue that is best left for the Master because I can imagine there will be some - - - - -

MR JUSTICE WYN WILLIAMS: It does mean that the period between now and the Master is left in limbo.

MR JACOBS: It might be that the parties can agree between them what is to be done at that point. I can ask those who instruct me to take further instructions from my lay client. But at the moment his instructions are that - - - - -

MR JUSTICE WYN WILLIAMS: I do not wish to be heavy-handed but from my experience of PI cases where occasionally the claimant is refusing to be examined by a reputable doctor the court has power to stay the proceedings which is of no use to your client either.

MR JACOBS: Of course.

MR JUSTICE WYN WILLIAMS: I think I am going to direct that the defendant be at liberty to obtain expert evidence as to the claimant's mental health. I will also order that the defendant disclose that report whether or not she intends to rely upon it. If I have not power to do that you had better tell me, Mr Deakin, but I think I have in the particular context of cases like this. In any event, if you do not disclose it it will be obvious that it does not help you.

MR DEAKIN: Yes. I have heard of orders like that in the case of defendants asking for

permission for further medical experts. I have not heard it done first time off, but I do not know.

MR JUSTICE WYN WILLIAMS: Perhaps that is unnecessary. If I simply direct that you have permission to obtain your own expert evidence. By the time it gets to the Master, if we say in the order there should be a CMC on the first open date after three months, it means there is bound to have been sufficient time if the Secretary of State acts expeditiously for the report to be obtained. If there is any argy-bargy about it then the Master can deal with it.

MR JACOBS: It had been previously agreed through parties that a representative of Duncan Lewis would attend that appointment with the claimant. If that could be incorporated into the order that might sway the claimant.

MR JUSTICE WYN WILLIAMS: Unless Mr Deakin disagrees, I do not see anything unreasonable about that. So incorporate into the order that at any examination undertaken by the expert witness the claimant is to be accompanied by a representative of the solicitors.

MR JACOBS: Yes. Those instructing me may want to obtain an order.

MR JUSTICE WYN WILLIAMS: We get to that point if and when we see what they say.