Neutral Citation Number: [2011] EWHC 2 (Admin)

Case No: CO/2844/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2011

Before:

MR JUSTICE WYN WILLIAMS

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Between:

R (on the application of) **(1) Reetha Suppiah** **(2) Danahar Govindasamy (a child, by Reetha Suppiah, his litigation friend)** **(3) Emmanuel Govindasamy (a child, by Reetha Suppiah, his litigation friend)** **(4) Sakinat Bello** **(5) Mornike Sulaiman (a child, by Sakinat Bello, her litigation friend)**	**Claimants**
and	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
and	
SERCO GROUP PLC	**Interested Party**
and	
LIBERTY	**First Intervener**
and	
BEDFORD LOCAL SAFEGUARDING CHILDREN'S BOARD	**Second Intervener**

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Rabinder Singh QC Nick Armstrong & Adam Sandell (instructed by **Public Interest Lawyers**) for the **Claimants**
Jonathan Swift QC Charles Bourne & Lisa Busch (instructed by **Treasury Solicitors)** for the **Defendant**
David Mitchell (instructed by **DLA Piper UK LLP)** for the **Interested Party**
Laura Dubinsky (instructed by **Liberty**) for the **First Intervener**
Jane Oldham (instructed by **Legal Services Unit, Bedford Borough Council**) for the **Second Intervener**

Hearing dates: 26, 27 & 28 October 2010

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Judgment

Mr Justice Wyn Williams:

Introduction

1. The First Claimant is a national of Malaysia. On 3 January 2008 she arrived in the United Kingdom and was granted leave to remain as a visitor for a period of 6 months. At the date of her arrival the First Claimant was unaccompanied although she was pregnant with the Third Claimant. He was born on 27 March 2008.

2. The Second Claimant is also the son of the First Claimant. He was born on 20 August 1998. When the First Claimant left Malaysia the Second Claimant remained with his father, the First Claimant's husband. However, in May 2008 the Second Claimant travelled to the United Kingdom and joined his mother.

3. On 17 November 2008 the First Claimant claimed asylum at the Asylum Screening Unit in Croydon. On 20 November 2008 she was served with papers treating her as an overstayer as her leave to enter the United Kingdom had expired. The Defendant considered the First Claimant's application for asylum but refused it on 29 March 2009.

4. The First Claimant appealed against the Defendant's refusal to grant her asylum but her appeal was dismissed after a hearing before the Asylum and Immigration Tribunal. Her appeal rights became exhausted on 2 June 2009. The Immigration Judge who heard the First Claimant's appeal did not believe the account she gave as to why she had left Malaysia.

5. On 7 February 2010 the UK Border Agency (hereinafter referred to as "UKBA") served removal directions upon the First Claimant and her children specifying that they would be removed to Malaysia on 10 February 2010. On the same date the three Claimants were detained. On that date the Second Claimant was about 11 ½ years old and the Third Claimant was nearly 2. The Claimants were taken from their temporary home in Bury, Greater Manchester to Yarl's Wood Immigration Removal Centre in Bedfordshire. After reaching Yarl's Wood the First Claimant submitted further representations to the Defendant as to why she should not be removed from the United Kingdom. She also commenced proceedings for judicial review. In the face of the proceedings for judicial review UKBA decided against removing the First Claimant and her children on 10 February 2010.

6. Despite the cancellation of removal directions the First, Second and Third Claimant remained in detention at Yarl's Wood until 24 February 2010. Following release from Yarl's Wood the First Claimant and her sons returned to Bury.

7. The Fourth Claimant is a Nigerian national. She arrived in the United Kingdom on 23 August 2007. She had travelled from France to the United Kingdom and she used false documentation in order to gain entry. On the day following her arrival in the United Kingdom her child, the Fifth Claimant, was born.

8. The Fourth Claimant claimed asylum at the Asylum Screening Unit in Croydon on 17 August 2009 i.e. virtually two years after her illegal entry into the United Kingdom. Her application for asylum was refused on 22 September 2009. She too appealed to the Asylum and Immigration Tribunal but her appeal was dismissed and her appeal rights became exhausted on 15 December 2009. The Fourth Claimant's credibility was the subject of adverse comment by the Immigration Judge.

9. On 10 February 2010 UKBA served removal directions in respect of the Fourth and Fifth Claimants for removal to Nigeria on 13 February 2010. On the same date the Fifth Claimant and her child (then aged about 2 ½) were detained. They were taken to Yarl's Wood that same day.

10. UKBA did not remove the Fourth and Fifth Claimant on 13 February 2010. The probability is that it did not do so because an injunction restraining removal had been granted on 12 February 2010 although it is also the case that the Fourth Claimant was unfit to travel. In any event the Fourth and Fifth Claimants were not released from detention immediately. They remained at Yarl's Wood until 22 February 2010.

11. All five Claimants (together with two other claimants who subsequently served notices of discontinuance) issued these proceedings on 1 March 2010. They raise wide ranging and difficult issues. In summary, the amended grounds for judicial review assert that the detention of each of the Claimants was unlawful from its inception or alternatively became unlawful prior to their release; the grounds further allege that the rights of the Claimants under Articles 3, 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "ECHR") were infringed. The grounds contain withering criticisms of the Defendant's policy in relation to detaining families with children and it is asserted that the policy is unlawful.

The Defendant's policy in relation to detaining families with children

12. The practice of detaining families with children pending removal or deportation is the subject of considerable controversy. There are many reputable and authoritative persons and organisations who consider that it is never justified. However, that has not been the stance adopted by successive Home Secretaries. Over many years policies have evolved and been published which dictate the circumstances in which detaining families with children pending removal or deportation can be justified. In R(S) v SSHD [2007] EWHC 1654 (Admin) I considered the Defendant's policy as it related to detaining families with children in 2005. I was asked by the Claimants in that case to hold that the policy was unlawful. I found that the policy then existing consisted of a number of key elements as described in paragraphs 26 and 27 of my judgment and that the policy was lawful (see paragraphs 44 and 45). The Claimants in S had no opportunity to test my view of the lawfulness of the policy on appeal; I found that on the facts presented the detention of the Claimants was unlawful save in relation to a comparatively short period when the Claimants were detained pursuant to "fast-track procedures" then in force. (On the authorities as they stood in 2007 the challenge to the short period of detention pursuant to the fast-track procedures was almost bound to fail). As far as I am aware, the approach

to the lawfulness of the Defendant's policy which I adopted in S has not been the subject of criticism in judgments of the High Court since 2007 (or for that matter in the Court of Appeal) and neither Mr. Rabinder Singh QC for the Claimants in these proceedings nor Ms Dubinsky for the First Intervener, Liberty, submits that my approach in S was wrong on the basis of the submissions then made to me.

13. The Defendant's current policy is somewhat different in its content to that which I considered in S; it seeks to take account of important changes which have happened since 2005 and in particular the coming into force of section 55 of the Borders, Citizenship and Immigration Act 2009. The policy is published in a document which is made available to all relevant personnel within UKBA but which is also available to members of the public. The document is entitled "Enforcement Instructions and Guidance". In S an earlier version of that document had been in existence at the time the decision to detain had been made. I found that although the document then existing contained the relevant published policies it was necessary to read the document in the light of ministerial statements which had been made in order to explain the policy content. So far as I am aware no ministerial statements have been made in recent years with a view to explaining the policies contained within the "Enforcement Instructions". Nonetheless it seems to me that it is still appropriate to read the policies contained within the current "Enforcement Instructions" against the background of the ministerial statements to which I referred in S.

14. Chapter 45 of the "Enforcement Instructions" is entitled "Family Cases". Chapter 55 contains more general policy statements relating to the detention and temporary release of persons who are to be removed from the UK. It is to the relevant parts of Chapter 55 that I turn first. Chapter 55.1.1 reads:-

> "As well as the presumption in favour of temporary admission or release special consideration must be given to family cases where it is proposed to detain one or more family member and the family includes children under the age of 18….. Section 55 of the Borders, Citizenship and Immigration Act 2009 (s.55) requires UKBA border functions to be carried out having regard to the need to safeguard and promote the welfare of children. Staff must therefore ensure that they have regard to this need when taking decisions on detention involving or impacting on children under the age of 18 and must be able to demonstrate that this has happened, for example by recording the factors they have taken into account. Key arrangements for safeguarding and promoting the welfare of children are set out in the statutory guidance issued under s.55."

Chapter 55.1.3 makes it clear that detention must be used sparingly and for the shortest period necessary. This precept is amplified in 55.3 which provides:-

> "1. There is a presumption in favour of temporary admission or temporary release – there must be strong evidence for believing that a person will not comply with the 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."

Chapter 55.3.1 makes the obvious point that all relevant factors must be taken into account when considering the need for initial or continuing detention. It then identifies many of the factors which will, most commonly, arise for consideration. They are:-

- "What is the likelihood of a 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? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)
- Is there a previous history of complying with 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? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of a 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 a risk of offending or harm to the public (this requires consideration of the likelihood of harm **and** the seriousness of the harm if the person does offend)?

- 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?"

15. Chapter 55.9 deals with special cases. The special cases are identified as including families (55.9.4). The relevant extracts from the policy relating to families are as follows:-

> "The decision to detain an entire family should always be taken with due regard to Article 8 of the ECHR….and, where there are children under the age of 18 present, duty to have regard to the need to safeguard and promote the welfare of children. Families, including those with children, can be detained on the same footing as all other persons liable to detention. This means that families may be detained in line with the general detention criteria….
>
> In family cases, it is particularly important to ensure that detention involving children is a matter of the last resort, e.g. alternatives have been refused by the family and an exhaustive check has detected no barriers to removal. It should be for the shortest possible time, i.e. removal directions are in place.
>
> Detention of an entire family must be justified in all circumstances and there will continue to be a presumption in favour of granting temporary release.
>
> ….
>
> Detained children are subject to enhanced detention reviews, and the Family Detention Unit reviews the detention of children at day 7, 10, 14 and every 7 days thereafter. The Family Detention Unit will also seek the authorisation to continue detention from the Minister for those families with children who remain in detention beyond 28 days.
>
> Since December 2009 as part of the UKBA's implementation of the s.55 duty to safeguard and promote the welfare of children, the Family Detention Unit (FDU) holds the authority to require release of any family with

> children on the basis of welfare grounds raised in the FDU enhanced reviews.
>
> Such authority will override wider enforcement grounds for detention when necessary and any requirement to release should be complied with expeditiously."

16. Chapter 45 begins by recording that family removals, especially those involving children, are a particularly sensitive area of work. It reminds decision makers that as from 2 November 2009 section 55 of the Borders, Citizenship and Immigration Act 2009 introduced a new duty for safeguarding and promoting the welfare of children for those exercising UKBA functions.

17. Chapter 45.1 is concerned with a document known as the Family Welfare Form. It stresses the need for such a form to be included on each family case file from the start of each family claim. It does so because it is intended that this form shall be the basis upon which "key operational decisions" will be made for each family case.

18. Chapter 45.2 is concerned with family welfare issues and operational risks. This section stresses that any information suggesting that a child who is to be detained is vulnerable should be clearly noted on section 2 of the Family Welfare form in order that a properly informed consideration can be made upon how best to approach removal in his case. 45.2.10 explains that the duty of safeguarding and promoting the welfare of children introduced by s.55 of the 2009 Act requires UKBA officers to make timely and appropriate referrals to agencies that provide ongoing care and support to children and for UKBA to foster effective working with partner agencies to ensure the best interests of the child.

19. Chapter 45.4 deals with family detention. It is in the following terms:-

> "s.55 of the Borders, Citizenship & Immigration Act requires the SSHD to make arrangements ensuring that UKBA functions will be discharged having regard to the need to safeguard and promote the welfare of children.
>
> The detention of families with children will only be used as a last resort and for the shortest possible period of time. This reflects UKBA obligation under the UN Convention of the Rights of the Child. However, families including those with children can be detained on the same footing as all other persons liable to detention, and in line with the general detention criteria (55.1).
>
> The decision to detain an entire family should always be taken with due regard to Article 8 of the ECHR and the UKBA's duty to safeguard and promote the welfare of children.

> The following alternatives must always be considered primarily:
>
> - Voluntary return
> - Self check in removal directions
> - Detention of head of household but see 45.6.3 for Splitting Families
>
> **Detention of families with children should be used only as a last resort and full consideration as to why it is considered the only option to effect removal must be recorded on section 2 of the FWF.**"

20. I should also refer to parts of Chapters 45 and 55 which are the subject of criticism by Mr Singh QC. 45.2.6 provides for the involvement of social workers; however, there is no provision within that part of the policy for the involvement of social workers or other persons with specific child welfare qualifications in the detention decision-making process, certainly at the stage when detention is first being considered. Chapter 45 refers to the statutory duty to have regard for the need to safeguard and promote the welfare of children but nowhere does this Chapter suggest that the welfare of children should be a primary consideration. No guidance is provided within Chapter 45 upon how the decision-maker assesses what constitutes the safeguarding and promoting the welfare of a child. Mr Singh QC also points out that Chapter 55 appears to suggest that families with children can be detained on the same footing as all other persons liable to detention. As I have observed already I do not see how that suggestion is compatible with the duty under section 55 of the 2009 Act.

21. Notwithstanding these criticisms of the written policy it is quite clear that it contains a number of crucial elements which in my judgment are easily discernable. Those elements which are critical to this case are these. First, a decision maker who is contemplating authorising detention of a family with children so as to ensure their removal must consider first whether all other reasonable alternatives have been examined and rejected for good reason. I refer in particular to the possibility of voluntary return and "self check in removal directions." Second, he should consider the individual merits of each case; all relevant circumstances particular to each case must be taken into account. Third, he must have regard to the duty under section 55 of the 2009 Act to safeguard and promote the welfare of the child/children involved. Fourth, he should proceed on the basis that the detention of a family with children is a measure of last resort. If detention is authorised it must be reviewed in accordance with the terms specified in the policy; in any event there is an overarching duty to ensure that detention must be for the shortest possible time. When deciding whether to maintain detention at a detention review the decision maker must consider the duty under section 55 of the 2009 Act afresh.

22. The Defendant's policy also stresses the importance of the document known as the Family Welfare Form. This form is intended to be the basis upon which "key

operational decisions" will be made in each case. Consequently, the form should contain the reasons why detention is considered to be justified in any given case.

23. During the course of oral submissions some debate took place about whether the policy demanded that detention of families with children should be authorised only in exceptional circumstances. This issue is unimportant on the facts of the individual cases before me. It is of some significance, however, to the Claimant's challenge to the legality of the Defendant's policy.

24. The Defendant's policy does not say expressly that detention of families with children should be authorised only in exceptional circumstances; further the policy appears to record that families with children can be detained "on the same footing as all other persons liable to detention" (although in my judgment that cannot be right given the duty which exists in relation to children under section 55).

25. As a matter of language the policy does not demand that detention of families with children should occur only in exceptional circumstances; rather the policy demands that such detention should occur only as a measure of last resort. In practice and if the policy is properly applied there is unlikely to be any significant difference between the two concepts in any given case. However, as I pointed out in S there is at least one ministerial statement post-dating the first formulation of this policy which suggests that detention of families with children should be an exceptional course. In the written skeleton argument presented on behalf the Defendant it appears to be accepted that the policy requires that exceptional circumstances should exist to justify the detention of families with children (see paragraph 61). In the circumstances I propose to proceed on the basis that the proper interpretation of the Defendant's policy is that detention of families with children should be authorised only in exceptional circumstances. That accords with the evolving understanding of the policy over time; it also means that the suggestion contained in the written policy that families with children can be detained on the same basis as any other person liable to removal can be regarded, quite properly, as being redundant.

The circumstances leading to the detention of the Claimants at Yarl's Wood

The Claimants' accounts

The Suppiah family

26. The First Claimant and her children lived in Bury from December 2008 until 7 February 2010. During that time the First Claimant did nothing to evade UKBA; upon being granted temporary release the Claimant had been made subject to a condition that she report periodically to a specified office of UKBA and she complied with that condition to the letter. In early January 2010 the National Asylum Support Service (NASS) sent the First Claimant a questionnaire. The questions related to the medical history of the family, bank account details and the Second Claimant's schooling. The First Claimant completed the questionnaire and returned it to NASS by the time specified.

27. The First Claimant accepts that on 15 January 2010 two female employees of UKBA visited her at her home in Bury. She says that the visit was a short one; the only detail of the visit which is contained within the First Claimant's witness statements is that one of the employees appeared to make a sketch map of the house. This visit made the First Claimant suspicious about what was about to happen. The First Claimant's suspicions were heightened, so she says, when a NASS inspector visited her on the Monday prior to 7 February 2010 (the Monday would have been 1 February). Normally that official was jovial and friendly; on this occasion his demeanour was markedly different.

28. The First Claimant says that at approximately 7.00am on 7 February 2010 employees of UKBA and police officers arrived at her home. The Second Claimant was still sleeping in bed. The officers banged on the front door and, having gained entry, told her to pack up all her belongings. The First Claimant was not permitted to call a lawyer. After packing was complete, the family was placed in a white van with caged windows and driven to a car park; in the car park they changed vans and then travelled to Yarl's Wood.

The Bello family

29. For some months, at least, prior to her detention, the Fourth Claimant lived with the Fifth Claimant in North Woolwich, London. Following the refusal of her asylum claim in September 2009 she was made the subject of a condition that she should report weekly to UKBA. The Fourth Claimant acknowledges that there were three occasions between the end of September and her detention when she did not report but she says that on each occasion there was an acceptable reason for her failure. She has no recollection of being visited by officers of UKBA shortly before her arrest and detention.

30. On 10 February 2010 approximately 10 employees of UKBA attended at the Fourth Claimant's home at approximately 6.00am. They told her that she had to leave with them and they gave her a sack to pack her belongings. She was told that she was to be removed to Nigeria. The Fourth Claimant and her daughter were taken to UKBA premises known as Becket House. At Becket House both the Fourth Claimant and her daughter were searched; the Fourth Claimant was upset that her very young child was subjected to a search. Each had to stand up with their arms outstretched. Sometime later that day they were taken to Yarl's Wood.

The Defendant's account

31. There is no material difference in the Defendant's account of what happened between the refusal of the Claimants' asylum claims and the date when they were detained save in one important respect. The Defendant maintains that both families were offered assisted voluntary return to their country of origin. In simple terms assisted voluntary return is the name given to a scheme under which persons with no right to remain in the United Kingdom are given financial and other assistance to re-locate in their country of origin provided they leave the UK voluntarily. Mr Richard McDonald, Assistant Director for the UKBA Family Detention Unit, says in a statement dated 30 April 2010 that the First Claimant and her family were offered assisted voluntary return on 15

January 2010. He says in a separate statement but also dated 30 April 2010 that the Fourth Claimant and her child were offered assisted voluntary return on 22 September 2009. He claims that both the First and the Fourth Claimant refused the offers made to them.

32. The evidence of Mr. McDonald is not the only source for the suggestion that the First Claimant and her family were offered assisted voluntary return. In her witness statement dated 2 May 2010, Ms Dawn Mclean, an immigration officer who was the officer in charge when the First Claimant and her children were arrested on 7 February 2010, also asserts that the First Claimant was offered assisted voluntary return on 15 January 2010 (see paragraph 9 of her statement) although as I read it she does not say that she was one of the persons who visited the First Claimant on that day.

33. The probability is that both Mr. McDonald and Ms Mclean rely upon documents to support their assertion that assisted voluntary return was offered on 15 January. The first important document is the document which was completed following the visit to the First Claimant on 15 January – a document entitled "NW Asylum Team 5 (Support) – Visit pro-Forma". The document records that the visit began at 10.10am and concluded at 10.31am. The document contains this question:-

> "1c. Has the Applicant been made aware of how to go about making a voluntary return, in the event of an unsuccessful asylum claim?"

The question is followed by the words "Yes/No"; in the document the word "Yes" is circled. Clearly this tends to suggest that some kind of discussion took place about voluntary return between the First Claimant and the officers. What is not clear, however, is whether the scheme was being explained to the First Claimant on 15 January, for the first time, and she refused to participate in it or whether the document simply shows that at some earlier point information had been provided to the First Claimant about the scheme.

34. There is certainly an indication that information about assisted voluntary return had been provided to the Fourth Claimant earlier than 15 January. The Defendant has disclosed a document entitled "Decision Service Record" which, at least according to its face, is a document which is read to an unsuccessful asylum seeker when the decision is communicated to him that his asylum claimed has failed. Part of what is read is in the following terms:-

> "Should you wish to appeal you must do so by the date given in the notice of decision. If you do not appeal by this date you are expected to leave the United Kingdom without delay or you will be removed.
>
> The assisted voluntary return leaflet details how to contact the International Organisation for Migration. This independent organisation can offer help and advice on returning home. They can also offer reintegration

> assistance, this may include assistance in setting up a small business, educational or vocational training.
>
> Should you choose to appeal this decision support will continue until your appeal rights are exhausted.
>
> Your next scheduled reporting event has been set for Friday 3 April 2009 at Dallas Court. You should continue to report weekly until you leave the United Kingdom.
>
> If you choose not to appeal, or if you appeal and your appeal is dismissed, arrangements will be made for you to be removed to Malaysia if you fail to organise your own departure from the United Kingdom. Failure to assist with the re-documentation process may lead to prosecution."

35. I am prepared to accept that the First Claimant was alerted to the possibility of assisted voluntary return in March or April 2009. There is no clear record, however, to indicate that the scheme was fully explained to her or that she refused, unequivocally, to participate in it. All that seems to have happened is that she was provided with a leaflet explaining the scheme but at a time before she had exhausted her appeal rights. It may be that, strictly, a person who is provided with a leaflet explaining the assisted voluntary return scheme and who, thereafter, does nothing to participate in the scheme can be categorised as refusing an offer to take up the scheme. That, however, seems an overly restrictive approach especially when the leaflet is provided to him before his appeal rights are exhausted and, therefore, at a time when his focus will probably still be upon remaining in the UK.

36. As well as the documents referred to above there are other documents disclosed by the Defendant which refer to assisted voluntary return. A Family Welfare Form was partially completed by an officer or officers of UKBA. That form suggests that voluntary return was discussed at the time of the service of the decision refusing asylum on 2 April 2009. However, the response of the First Claimant is recorded as being "unknown." A "Personal Family Booking Form: Check List" was completed which suggests that voluntary return was discussed on 15 January but provides no details relating to the circumstances in which this was done. Further, the Check List is wrong when it suggests, as it does that the Family Welfare Form had been completed.

37. On the basis of this unsatisfactory evidence I am not prepared to find, on balance of probabilities, that assisted voluntary return was explained to the First Claimant on 15 January and that she refused to participate in the scheme. The officers were present with her for no more than about 20 minutes. During that time, as the Visit pro-forma itself clearly indicates, a number of different issues were discussed and at least one officer spent time investigating the layout of the house. It hardly seems credible that the voluntary scheme was explained in detail and the First Claimant made an informed choice not to participate.

38. It is not suggested that any officers of UKBA offered assisted voluntary return to the Fourth Claimant at any time shortly before she was detained. To repeat, the suggestion is that the offer was made 22 September 2009 i.e. on the day that her asylum application was refused.

39. There is no evidence from any person who dealt with the Fourth Claimant on or about 22 September 2009 or who claims to have been a party to a discussion about assisted voluntary return on that date. On or about 22 September the Fourth Claimant was served with a letter entitled "Determination of Asylum Claim." The reverse of that letter contains a check list of documents enclosed with the letter. The "Assisted Voluntary Return Leaflet" is not marked as having been provided to the Fourth Claimant.

40. It is true that the Family Booking Form: Check List compiled some months later suggests that assisted voluntary return was offered on 22 September 2009. However, it contains no details about the circumstances in which the offer was made (or who made it) and the Check List is demonstrably wrong about another important matter i.e whether the Family Welfare Form had been completed. I am not prepared to find that assisted voluntary return was offered and refused on the basis of this document.

41. I turn to the events surrounding the arrest of the First Claimant and her family. Ms Maclean asserts that six employees of UKBA went to the First Claimant's home. No police officers accompanied the immigration officers although they had been notified of what was to occur. Ms Maclean says that the team arrived at 7.19am. An officer knocked on the door and the First Claimant admitted the officers. The Second Claimant was asleep in bed and the Third Claimant was in a pram downstairs. Once the officers were admitted to the premises the First Claimant was informed that the three claimants were being detained and that they would be taken to Yarl's Wood prior to departure for Malaysia on 10 February 2010. The First Claimant and her elder son were advised to pack sufficient property for their time at Yarl's Wood and their return to Malaysia. The Claimants took 48 minutes to complete their packing. During this time the premises were searched as were all three Claimants. The team left the premises with the three Claimants at 8.10am. They were taken to Bury Central police station in a Volkswagen transporter people carrier, adapted with a grill between the driver and passenger area. On arrival at the police station officers from G4S Care and Justice Services Ltd were waiting to transfer the First Claimant and her sons to Yarl's Wood. The transfer to Yarl's Wood was effected in a people carrier vehicle which was identical, for all practical purposes, to the vehicle which had been used to take the Claimants from their home to the police station.

42. Ms Maclean took contemporaneous notes of what was occurring from the moment that the team arrived at the Claimants' home. The contemporaneous notes have been disclosed and, no doubt, they form the basis of Ms Maclean's witness statement. Further, photographs of the vehicle used by the UKBA officers to transport the Claimants from their home to the police station have been produced.

43. I accept the evidence of Ms Maclean as to what occurred between arrest and arrival at Yarl's Wood. I appreciate it is untested by cross-examination.

However, no submissions were advanced to me to suggest that her account was unreliable. It is an account which is supported by authentic contemporaneous documentation.

44. Ms Ceri Williams was one of the officers involved in the detention of the Fourth Claimant and her daughter. She has made a statement relating to the events prior to and on the day of the detention of these Claimants. Nine officers were deployed to detain the Fourth Claimant and her daughter. That number was considered necessary because it was believed that persons other than the Fourth Claimant and her daughter lived at her home. According to Ms Williams the team arrived at the Fourth Claimant's home at 6.32am. The Fourth Claimant was searched and the premises were searched. By 6.56 packing was complete. The Claimants left the premises at 7.03 and were taken to Becket House in a Volkswagen people carrier.

45. The Fourth and Fifth Claimants remained at Becket House until 10.00am. During this period they were provided with the opportunity to make telephone calls and they were offered food and hot drinks. There is in existence a document which suggests "a mitigating circumstances" interview occurred but the document contains no detail of what was discussed. The Claimants were taken to Yarl's Wood in a vehicle which was identical to that which had been used to transport them to Becket House.

46. Again, I have no hesitation in accepting the evidence of Ms. Williams. It is supported by contemporaneous documents; nothing was said during the oral submissions which cast doubt upon its authenticity or reliability.

47. My conclusions about the circumstances of the arrest of the Claimants do not mean, of course, that the adult Claimants and the Second Claimant, in particular, did not find the experience upsetting. I would be very surprised if anyone confronted with significant numbers of immigration officers arriving at their home early in the morning in order to detain them pending removal could be anything other than very upset.

<u>The decision to detain the Claimants</u>

48. In his statement dated 30 April 2010 Mr McDonald seeks to justify the detention of the Suppiah family in the following paragraphs:-

> "6. On 15 January 2010 Ms Suppiah was offered an assisted voluntary return but declined that offer.
>
> 7. On 7 February 2010 the Secretary of State issued removal directions for Ms Suppiah for her removal on 10 February 2010. She was also served with an IS91R (Reasons for Detention) and a full factual summary with full details of her Immigration History. The original Asylum refusal letter was determined on 30 March 2009 and served in person on 2 April 2009. The removal directions were authorised by A/HMI Gus McDonald.

> 8. Ms Suppiah had no legal basis to remain in the United Kingdom, she had previously failed to comply with her conditions of stay by overstaying her 6 month entry visa and not leaving the United Kingdom when required to do so and also refused an offer of assisted voluntary return.
>
> 9. Ms Suppiah and her sons were then detained on 7 February 2010 for removal to Malaysia on 10 February 2010."

49. Form IS91R is a notice to a detainee containing the reasons for his detention. The notice to the First Claimant is in the following terms:-

> "1. TO: Reetha Suppiah
>
> I am ordering your detention under powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002.
>
> 2. Detention is only used when there is no reasonable alternative. It has been decided that you should remain in detention because…."

There follows a series of reasons which, potentially, justify detention. The person completing the form is required to indicate which of the reasons apply in the particular case. In the case of the First Claimant the reasons said to justify detention were twofold; that her removal from the United Kingdom was imminent and that she had previously failed or refused to leave the United Kingdom when required to do so. Precisely the same reasons were provided to the Second and Third Claimant in support of the decision to detain them. The IS91R in each case was signed and dated on 7 February 2010. It is to be observed that the IS91R did not assert that the First Claimant was likely to abscond.

50. Mr McDonald's statement does not disclose the identity of the person who made the decision to detain these Claimants. However, that information is provided in the witness statement of Ms Maclean. Her witness statement contains the following paragraph:-

> "It was the UK Border Agency's expectation that the Claimants would make immediate plans to leave the United Kingdom voluntarily once their appeal rights had become exhausted on 2 June 2009. However, they failed to do so and so assistant director Colin Berrington of Reliance House 20 Water Street, Liverpool, L2 8XU authorised on 28 January 2010 that they should be detained in accordance with paragraph 16(1) of Schedule 2 to the Immigration Act 1971 in order to enforce their removal from the United Kingdom in accordance with section 10 of the Immigration and Asylum Act 1999."

51. There is no witness statement from Mr Berrington in these proceedings. I have scrutinised the case notes with care and I cannot find any minute or note which contains any record of the reasons which led him to the view that the First Claimant and her children should be detained other than that which is contained in the IS91R.

52. It is common ground that it was necessary for Mr Berrington to consider whether the detention of the child Claimants was justified given the terms of section 55 of the 2009 Act. The Family Booking Form: Check List appears to confirm that the decision to detain the children had regard to the duty to safeguard and promote their welfare and was documented on file but no documents have been adduced in evidence which demonstrate that Mr. Berrington considered the duty under section 55 or if he did what his reasoning process was in relation to it.

53. In the statement of Mr. MacDonald which deals with the Fourth Claimant and her daughter the relevant parts read:-

> "5. Ms Bello arrived in the United Kingdom on 23 August 2007 by car from France using false documentation. She claimed asylum at the Asylum Screening Unit in Croydon on 17 August 2009 some 2 years later. She was treated as an illegal entrant on 17 August 2009.
>
> 6. The family were offered an assisted voluntary return on 22 September 2009 and this was refused. Ms Bello was placed on reporting restrictions and was required to report weekly, but she failed to report on 3 occasions.
>
> 7. The application for asylum was refused on 22 September 2009 and she became "appeal rights exhausted" on 15 December 2009.
>
> 8. Ms Bello had no legal basis to remain in the United Kingdom, she had previously entered the UK illegally, had failed to regularise her stay for almost 2 years, had not left the United Kingdom when required to do so and had refused an offer of assisted voluntary return.
>
> 9. The family was detained on 10 February 2010 for removal on 13 February 2010."

54. Mr McDonald makes no mention of form IS91R in the case of the Bello family. In Orange File Tab 3 page 110 there is a form addressed to the Fourth Claimant and her dependant. The form is dated 10 February 2010 but not signed. (Curiously, a file copy has been signed). There is no evidence that the form was served upon the Fourth Claimant. Indeed, a close reading of the statement of Ms Ceri Williams strongly suggests that it was not (see paragraphs 21 to 26).

55. The unsigned form suggests that the following were the reasons why the decision was taken to detain the Fourth and Fifth Claimants; they were likely to

abscond; their removal from the United Kingdom was imminent; they did not have enough close ties to make it likely that they would stay in one place; they had previously failed to comply with conditions of their temporary admission; they had not produced satisfactory evidence of their identity, nationality or lawful basis to be in the United Kingdom and they had previously failed or refused to leave the United Kingdom when required to do so.

56. Ms Williams says that the decision to detain the Fourth and Fifth Claimant was made by Deputy Director Thomas Greig of Becket House, 60-68 St Thomas Street, London SE1 3QU. There is no witness statement from that person and my search of the case notes has failed to reveal any minute or record made by him of the reasons which persuaded him that detention was appropriate. The Family Booking Form: Check List suggests that Mr. Greig complied with his duty under section 55; that is the only document adduced which bears upon that issue.

The Claimants' Detention at Yarl's Wood and its effects

57. Before dealing with specific complaints made by the Claimants about their detention as Yarl's Wood it is necessary to describe its facilities in some detail. Since 2003 Yarl's Wood has been used to detain single women and families with children. It currently provides 405 bed spaces: 284 spaces for single women and 121 spaces for families. The 121 bed spaces for families comprise 60 twin-bedded rooms with inter-connecting doors between rooms so as to permit of use by families of varying sizes. The centre is operated by the Interested Party pursuant to a contract with the Defendant; this arrangement has subsisted since 2007.

58. A detailed description of the facilities at Yarl's Wood is contained in a witness statement dated 10 May 2010 made by Ms Sarah Edwards. She is a senior executive officer of UKBA and the manager of the team of UKBA officers who work at Yarl's Wood. The following account is taken from Ms Edwards' statement.

59. Upon arrival at Yarl's Wood detainees are placed into waiting rooms to await the commencement of the formalities of booking in and allocation of accommodation. Except in wholly unusual circumstances children are not searched. Once the formalities of booking in are complete detainees are seen by a nurse. That occurs, normally, within 2 hours of arrival and prior to the detainees being taken to their accommodation. The assessment covers medical history, allergies, medication, psychological distress, height, weight, vaccination history, TB scars and temperature. The detainees are offered an appointment with a GP which, if taken up, takes place within 24 hours of arrival.

60. Families are seen by members of the UKBA team within 24 hours of arrival. The families are interviewed and part of the purpose of the interview is to ensure that they understand why they are being detained.

61. There is exhibited to Ms Edwards' statement a photograph showing a typical family room. As I have said, family rooms have an inter-connecting/interlocking door for which the occupants have a key with an

adjacent room to allow for larger family groups to be accommodated together with en suite facilities.

62. Meals are provided three times a day. The dining room for families is separate from that used by single women.

63. Yarl's Wood has a nursery and a dedicated school consisting of four classrooms. There are two classes catering for children aged 5-11 years and 12-16 years. The other two classrooms are set aside for arts and craft and as an IT suite. The nursery is open between 9.00am and 5.00pm; the school is open between the same hours. Although school hours are longer than normally encountered in a state school the last period (between 3.30pm and 5.00pm) is dedicated to play activities. The school facilities are subject to inspection by OFSTED.

64. According to Ms Edwards, all persons detained at Yarl's Wood, including children, have access to free on-site primary health care services with the same level of service and care as are provided by National Health Service general practitioners in the community. The health care centre is staffed 24 hours a day, 7 days a week by qualified medical staff. Persons detained have access to health care services on demand. GP services are provided between 9.00am and 5.00pm Monday to Friday and at weekends between 9.00am and 12 noon. The health care provided is subject to the standards of and inspection by the Care Quality Commission. Health care provision is also inspected by HM Chief Inspector of Prisons.

65. It is against this background that I turn to consider complaints made by the Claimants about aspects of what occurred during their time in detention.

66. The First Claimant says that upon arrival at Yarl's Wood both she and her children were searched. The First Claimant was upset that officers at Yarl's Wood thought it appropriate to search the Third Claimant.

67. On the day that the Claimants were due to be removed from the UK, but before they had left Yarl's Wood, the First Claimant was told by her solicitor that removal directions had been cancelled. Nonetheless, all three Claimants were taken to Heathrow Airport and the First Claimant asserts that the family was kept at Heathrow for many hours. During that time she suffered from chest pains and both the children were suffering from diarrhoea and vomiting.

68. The First Claimant complains that both Second and Third Claimant were sick during the course of their detention at Yarl's Wood. She asserts that the medical attention at Yarl's Wood was of a very low standard. By inference, at least, she suggests that the children were not treated appropriately.

69. The First Claimant says that complained of chest pains for a number of days during her detention. She says that she was provided with an ECG on 18 February 2010 but this was after many days of complaints.

70. The First Claimant is also critical of the educational facilities which were provided to her children.

71. The Second Claimant has also made a witness statement in these proceedings. He says that during the course of detention he found it difficult to eat and sleep and when he did sleep he suffered from nightmares. He found the food "horrible" and he found it distressing to be in the dining room since children were vomiting and crying. During the whole period of his detention the Second Claimant felt frightened. One of his teachers at the school was nice but on one day a different teacher told the pupils that they were being held in a prison and that they were being held in prison so that they could be sent back to their own country. It was shortly after this, says the Second Claimant, that he developed giddiness and diarrhoea.

72. One of the issues which was debated at some length before me was whether or not the Second Claimant had special educational needs prior to his detention at Yarl's Wood. It is asserted on behalf of the Second Claimant that he did and that these needs were not met at any time during the course of his detention.

73. The Interested Party has made available medical and other records compiled upon the First, Second and Third Claimants while they were detained. I deal first with medical records. These records demonstrate that each of the Claimants underwent a medical review within a short time of their arrival at Yarl's Wood. The records also show that each Claimant was examined or reviewed by a general practitioner within 24 hours of arrival. Prior to being taken to Heathrow each of the first three Claimants was assessed to ensure that they were fit to fly. On 17 February 2010 the First Claimant's medical record has an entry which is consistent with her complaining of chest pain. That is the first entry in the medical record which records that symptom. At 9.35am the following morning an ECG was undertaken which showed no abnormality.

74. The medical records compiled for the Second Claimant describe him as being cheerful and co-operative upon his arrival at Yarl's Wood. On 13 February 2010 the Second Claimant was complaining of "a headache and cold-like symptoms". He was given calpol and advised to have plenty of rest. No record exists which confirms that the Second Claimant suffered any lasting sickness or diarrhoea. He did not complain of an inability to sleep or that he was suffering from nightmares.

75. The records compiled for the Third Claimant show that at his initial assessment he appeared to be fit, active and happy. From 13 February onwards, however, there are a number of entries in his medical records which confirm that he had become ill. The Third Claimant was prescribed paracetamol on 13 February 2010. On 16 February 2010 there is an entry to the effect that the Third Claimant did not attend at an appointment with the GP. On 17 February there are three entries. In the second of the entries there is a complaint that the Third Claimant is suffering from diarrhoea. There is no entry between 17 February 2010 and 24 February when the family left Yarl's Wood.

76. It does not seem to me that the medical records support the suggestion that the Second Claimant was suffering from any significant physical illness while he was detained at Yarl's Wood. There is a note for 17 February 2010 in the educational records which suggests that he was "unwell at the end of last week" but that, of course, is consistent with the medical records. The educational

records also record that the Second Claimant was badly behaved on 11 February. That note cannot support the view that he had a significant illness.

77. In my judgment, it would not be right to conclude that the Second Claimant suffered a significant physical illness simply on the basis of his witness statement and that of his mother. Further, there has been no attempt to suggest that the medical records or other records disclosed are inaccurate or incomplete. It is also significant in my judgment that when a welfare assessment was undertaken by a social worker, Jan Gallagher, on 23 February 2010, the First Claimant told Ms Gallagher that the Second Claimant had not suffered illness "although his stools [had been] looser than normal."

78. The medical records do support the suggestion that the First Claimant sought treatment for herself and the Third Claimant. They appear to demonstrate, too, that appropriate treatment was afforded to these Claimants within a reasonable time of their complaints, certainly their recorded complaints.

79. I turn to the issue of the Second Claimant's educational needs. On 8 February 2010 Mrs Jeannie McChlery (who is either a teacher or a member of support staff at Yarl's Wood) faxed the Second Claimant's school in Bury asking for information relating to the Second Claimant's educational attainments. She did so after first obtaining permission from the First Claimant. On 9 February 2010 the school replied. Information was provided about various tests which had been undertaken and the reply continued:

> "Danahar was working with the Curriculum Language Axis Service (CLAS) in school. He was also due to be assessed for Special Educational Needs due to concerns regarding learning difficulties in addition to the language problems in school….
>
> Further to this, Danahar has been a pleasure to teach and has displayed nothing but excellent qualities during his time at the Derby High School."

80. Following receipt of this letter (whenever that was) Mrs. McChlery came to realise that the social worker, Jan Gallagher, had no information about the nature of the Second Claimant's special educational needs (see email dated 16 February 2010 contained in the Orange File page 902). Accordingly, on 17 February 2010 Mrs. McChlery faxed the school again seeking more detailed information about the Second Claimant's special needs. There was no reply to that request by the time that Jan Gallagher undertook her welfare assessment on 23 February and the release of the Claimants on 24 February.

81. It is clear that during the period of the Second Claimant's detention his special educational needs were not addressed. That said there is no evidence that those needs had been assessed or addressed by his school in Bury.

82. I should also refer to the detention reviews which were undertaken in respect of these Claimants. Reviews occurred regularly. On each occasion the person undertaking the review asserted that there were no known welfare issues. The

records of the reviews show that on 11 February 2010 the reason why detention was maintained was that the Claimants were likely to abscond if given temporary admission or released. Thereafter the decision about whether or not to maintain detention seems to have turned upon the likely timescale of the resolution of the judicial review proceedings which had been commenced by the First Claimant.

83. On 16 February the person undertaking the review noted:-

> "We are day 10 of detention and based on other cases may be looking at a further 3-4 weeks prior to removal.
>
> There are two children in this family unit. My concerns over the possible length of detention relate to the 11-year old an age group which may find detention particularly problematic.
>
> Please can you speak to LPL about release?"

On 23 February the same person wrote:-

> "I am still of the view that we should release …. I have spoken with Dawn Maclean (LPL) and she has agreed to release."

84. There are factual issues relating to the treatment of the First, Second and Third Claimants which are impossible to resolve on the basis of the papers alone. The following are examples of such disputes. It is said that the Second and Third were searched upon their arrival at Yarl's Wood. The evidence of Ms Edwards strongly suggests that is very unlikely. Were the Claimants taken to Heathrow on 10 February 2010 even though it was then known that removal directions had been cancelled? Again it is impossible to reach a conclusion. Fortunately the failure to resolve issues such as these has no real bearing upon the core issues in this case.

85. The Fourth Claimant makes no particular complaint about the facilities at Yarl's Wood in her witness statements. She does, however, assert that her daughter developed an illness during her detention.

86. The medical records disclosed for the Fourth and Fifth Claimants show that an initial medical assessment took place shortly after arrival at Yarl's Wood and that a general practitioner assessed these Claimants within 24 hours of their arrival. On 12 February 2010 the Fifth Claimant was assessed as being fit to fly. Shortly thereafter, however, and certainly by the following day the assessment changed; the records demonstrate, clearly, that the Fifth Claimant became unfit to fly by 13 February. On that date the Fifth Claimant was suffering from a fever and a cough. On 16 February 2010 the Fifth Claimant was not taken to clinic to be examined by a nurse. However, on the same day she was seen by a doctor. The doctor was told that she had been suffering from diarrhoea for 24 hours and that she had a persistent cough. He/she was also told that the Fifth Claimant had not eaten for 3 days although she had been drinking water. The doctor

prescribed appropriate medication considering it at least a possibility that the Fifth Claimant was suffering not just from diarrhoea but also from a chest infection.

87. The Fifth Claimant was seen again by the doctor on 17 February. By 3.00pm that day the Fifth Claimant was described as being happy in nursery and eating prawn crackers.

88. On 22 February 2010 the Fifth Claimant was seen in clinic by the nurse. Symptoms of illness are recorded. She did not attend a general practitioner's appointment that day even though one was arranged but, in any event, the Fourth and Fifth Claimant were released from detention that day.

89. There seems little doubt that the Fifth Claimant did fall ill during the period of her detention. In the light of the medical records, however, it is impossible to conclude that she was not afforded access to appropriate medical personnel or that she was treated inappropriately.

90. The record of detention reviews also throws light on the state of health of the Fifth Claimant during her period of detention. The records relating to the detention reviews carried out on 15 and 16 February are considered later in this judgment. On 19 February the detention review record contains the following under the heading "welfare issues":

> "Removal was deferred as Mornike was unwell and unfit to fly. Notification has been received today [19 February] from Yarl's Wood, concerns have been raised as Mornike is still unwell, it appears she has had an allergic reaction to the anti-malarial medication. The alternative medication has been given to her but there are concerns around how her immune system could cope with potential illness in Nigeria. Mornike is clinging to her mother and is no longer the lively child she was when detained, her appetite has diminished she is distressed if her mother will not carry her everywhere."

Under the heading "Reasons for continued detention" there appears:-

> "Mornike who was assessed as a lively child upon detention has been unwell for almost a week as a result of an allergic reaction to the anti-malarial medication, she has been give the alternative medicine but continues to be unwell and concerns have been raised by Yarl's Wood with regard to her health and well-being as she has become clingy and distressed if her mother will not carry her everywhere.
>
> The case owners were considering releasing the family on 19 February before the case for concern was received,
>
> Release recommended?"

91. For some reason which the Defendant does not explain release did not take place until 22 February 2010.

92. The First Claimant has been examined by Dr. Andrew Dossett, a locum consultant psychiatrist. He was instructed by her solicitors to undertake a psychiatric assessment of the effects of her detention and to report. His report makes clear that his opinion is based upon the First Claimant's account of her experiences both at Yarl's Wood and previously and upon his findings at examination.

93. In Dr Dossett's opinion, the Claimant was suffering a major depressive episode at the time of his examination; she was also suffering from post traumatic stress disorder. The doctor expresses his view as to the cause of these conditions in a guarded way. He says:-

> "It is impossible to be certain, but it seems much more likely than not from Mrs Suppiah's account that these problems were associated with if not caused by the manner of her transfer and the conditions she experienced in detention, set against a background of abuse and trauma in Malaysia. The fact that her son has now been referred to the Child and Adolescent Health Services may add weight to this view."
>
> (This last sentence is a reference to the Second Claimant)

94. The account of detention which the First Claimant gave to the doctor is recorded in his report as follows:-

> "5.1 In February 2010 the immigration officials and the police arrived at her home at 7.00 in the morning. Her older son was sleeping at the time. She described a "hammering" on the door. She was immediately 'reminded' of the fear that she used to feel when her family of origin had discovered her and her husband's latest hiding place. She described a sense of terror.
>
> 5.2 They were taken in a van, "like prisoners", to Yarl's Wood Immigration Removal Centre and remained there for approximately 18 days.
>
> 5.3 Her older son….told by the teacher in the detention centre that he was in prison. She said that her son became quiet and withdrawn and would not eat nor talk to her and would hardly drink. When he did speak he asked her if they were in prison and what had they done wrong.
>
> 5.4 She described how both her children suffered from diarrhoea and vomiting. She said that many children in the centre also suffered from diarrhoea and vomiting. She told me that having to frequently ask for antibiotics and

> simple pain killers, such as paracetamol. She was denied access to the usual medications prescribed by her GP prior to her admission to Yarl's Wood. She was eventually allowed to see a doctor due to chest pain. She said that she and her children were "treated like criminals".

95. The difficulty is that much of the First Claimant's account to the doctor is at odds with the contents of the medical records as summarised above. There is simply no means of knowing how Dr Dossett would have expressed himself had he known that parts of the Claimant's account were contradicted by the medical records. Further, it cannot be overlooked that the account which the First Claimant gave to the doctor about her history in Malaysia and her flight to this country was not accepted when that evidence was heard and tested before an Immigration Judge. In these circumstances I am doubtful about whether a sound basis exists for concluding that the First Claimant developed a psychiatric illness of significance as a consequence of her detention. However, I need not reach a definitive conclusion upon this issue. There is no suggestion that she disclosed the possibility of such an illness during her detention at Yarl's Wood. If it becomes relevant at a later stage of these proceedings to know whether the First Claimant suffered a psychiatric illness as a consequence of her detention that can be investigated further.

96. The Second Claimant has been the subject of an assessment undertaken by Professor William Yule, Emeritus Professor of Applied Child Psychology at the Institute of Psychiatry. Professor Yule interviewed both the Second Claimant and his mother separately in Bury on 29 July 2010. The Professor asked the Second Claimant about specific experiences in detention using a check list which had been devised to study the effects of detention on child asylum seekers. The answers elicited by the doctor were as follows:-

> "He acknowledged that they had all been subject to searches, but had not had to strip off. Their rooms and belongings had been searched. He had seen fights between other detainees, the food was of poor quality and they had to wait a long time for it. He did not have access to recreational activities. He was able to attend school of a sort but was critical of its value. He was woken early by all the noises in the place."

The Professor also conducted what he describes as a systematic inquiry of the Second Claimant's stress reactions following "the Anxiety Disorder Interview Schedule for children." The Second Claimant described traumatic events in his life – all of which occurred before detention at Yarl's Wood – but also asserted that he had been very frightened by his experience of being taken to Yarl's Wood. The Second Claimant told the Professor that he avoids reminders of being at Yarl's Wood, that he has trouble sleeping, that he loses his temper more and that he has difficulty paying attention.

97. I should also record that Professor Yule interviewed the First Claimant at length about the Second Claimant's condition.

98. Professor Yule considers that the Second Claimant meets the criteria for a diagnosis of post traumatic stress disorder of a moderate level. He bases that diagnosis upon the account given to him by the Second Claimant and his mother. The Professor is also of the view that the Second Claimant suffers from low mood. In the Professor's opinion the experience of sudden removal, the attempted placing on the plane and detention in Yarl's Wood directly caused the ongoing distress. The conclusions reached by Professor Yule are broadly similar to those which were expressed by Ms Gaynor Hodson in a letter dated 14 June 2010. Ms Hodson is a therapist and her involvement occurred as a consequence of a referral by the Second Claimant's general practitioner.

99. On or about 21 October 2010 Dr S M Ahmad, a consultant child and adolescent psychiatrist, provided a report upon the Second Claimant to the Defendant's solicitors. Dr Ahmad did not examine the Second Claimant. In his report he lists the documentation which was made available to him as being the Second Claimant's medical history and an account of his experiences prior to arrival in the UK, prior to detention at Yarl's Wood and an account of experiences at Yarl's Wood and thereafter. I am not entirely convinced that I am aware, precisely, of the documentation which was viewed by Dr Ahmad. It probably matters not.

100. Dr Ahmad was asked for his views on a number of issues. In particular Dr Ahmad was asked for his views on Professor Yule's diagnosis and, further, for any comments he had in relation to Professor Yule's opinion as to its cause. In relation to the diagnosis of post traumatic stress disorder Dr Ahmad wrote:-

> "After carefully considering all the available evidence, I agree with Professor Yule's opinion that Danahar was emotionally traumatised by the chain of events taking place between 7 and 24 February 2010, and as a result developed symptoms of post traumatic stress disorder with co-morbid symptoms of depression as described by Professor Yule.
>
> However, in my view, the trauma happened to a young man who had already been chronically traumatised by the interpersonal violence and other adverse events in his country of birth. I would expect Danahar to have been suffering from the chronic traumatic symptoms on his arrival in the UK.
>
> In my opinion, trauma in relation to Yarl's Wood was super-imposed on his pre-existing post traumatic symptoms.
>
> In my view, the removal to Yarl's Wood on the morning of 7 February 2010, and then subsequent removal to the airport on 10 February 2010, was much more traumatising for Danahar than his actual stay at Yarl's Wood which was a period of two weeks.

> I also agree with Dr Yule's view that Danahar has developed episodes of low mood. However, in my opinion these low moods shifts are not associated with any functional disability."

Later in his report Dr Ahmad said that the only area of Professor Yule's report with which he had any area of disagreement was that he was "not as confident as he is that the residual PTSD symptoms, which Danahar clearly has, can be solely or primarily be attributed to his period of detention."

101. It is difficult to evaluate the views expressed by Professor Yule on the one hand and Dr Ahmad on the other simply on the basis of their written reports. It does seem to me to be clear, however, that there is a degree of agreement between the two. I do not read Dr Ahmad as saying that the period of detention, in itself, had no adverse impact upon the well-being of the Second Claimant. In my judgment, his view is that it did, albeit that other factors played a greater part in causing the psychiatric illness from which, he accepts, the Second Claimant has suffered since February 2010.

102. When Ms Gallagher undertook her welfare assessment on 23 February 2010 the First Claimant disclosed to her something of the trauma which, it is alleged, the Second Claimant suffered while living in Malaysia. Ms Gallagher records the information provided by the First Claimant in the following paragraph of her written assessment:-

> "Reetha stated there were no outstanding appointments for the children although she is working with a support group in the community to enable Danahar to access counselling. Reetha informed the assessment that Danahar's younger years were very traumatic due to physical abuse inflicted on him by paternal family members. Reetha described Danahar being cared for by her sister-in-law and brother-in-law. Reetha states this was as she was told he would receive a better life and Reetha could seek employment. Danahar became withdrawn during this time though according to Reetha viable reasons were provided by the alleged abusers. Reetha stated Danahar finally shared that his 'carers' were regularly placing a spoon on a hot stove and inflicting pain by holding this to his toes. Reetha states the impact of this abuse has left him emotionally scarred hence the special needs issue being raised in education."

The First Claimant did not suggest to Ms Gallagher that detention was exacerbating the psychiatric or emotional problems from which her son was suffering.

103. In my judgment it is very difficult to determine whether the detention, in itself, had any significant effect upon the Second Claimant's psychiatric condition. I am prepared to accept, of course, that the trauma associated with the initial arrest and arrival at Yarl's Wood may have had an adverse effect. It is by no means clear to me, however, that there is cogent evidence that the period of

detention which followed had a significant adverse effect – particularly after removal directions were cancelled.

104. As I have said there is clear evidence that the Fifth Claimant and to a lesser extent the Third Claimant suffered illnesses during their period of detention. However, no independent medical evidence has been obtained upon them. I infer, reasonably I hope, that the illnesses suffered by these Claimants were short lived.

The detention of children, in particular at Yarl's Wood, and its potential effects

105. At the time these proceedings were issued nearly 1000 children were being detained each year in detention centres. On average, children spent almost 16 days in detention; in some instances, however, detention subsisted for as long as 61 days. Many children who are detained are not removed shortly after the detention has commenced. There are many instances where children are detained but then released again because removal, for whatever reason, cannot take place. In the six month period prior to November 2009 420 children were detained at Yarl's Wood. Of those, nearly half were released before removal could be effected.

106. The Claimants and Liberty, the First Intervener, submit that the overwhelming consensus from multiple, authoritative and independent expert sources, both in the UK and internationally, is that detention is inherently and seriously harmful to the health and development of children. The Claimants and Liberty have assembled a large volume of evidence to justify that submission. Some of the sources of evidence relied upon are listed, conveniently, in paragraph 17 of the skeleton argument presented on behalf of Liberty. They are:-

a) The Intercollegiate Briefing Paper published in 2010 by the Royal College of General Practitioners, Royal College of Paediatrics and Child Health, Royal College of Psychiatrists and UK College of Public Health;

b) A paper entitled "The mental health of detained asylum seeking children"; written by Matthew Hodes and published in the European Journal of Child Psychiatry in 2010;

c) A report prepared for the purposes of these proceedings by Dr Dora Black entitled "Psychiatric Report on the Effects of Detention of Children";

d) A report prepared for these proceedings by Dr Kimberley Entholt entitled "Psychological Report on the Effects of Detention on Children and Families".

e) A paper written by Lorek and others (including Dr. Enholt) and published in 2009 entitled "The mental health difficulties of children held within a British immigration detention center: A pilot study";

f) A paper written by Robjant, Hassan and Katona and published in 2009 in the British Journal of Psychiatry entitled "Mental health implications of detaining asylum seekers: systemic review";

g) A paper written by Robjant, Robbins and Senior and published in 2009 in the British Journal of Child Psychology entitled "Psychological distress amongst immigrant detainees: A cross-sectional questionnaire study";

h) A paper written by Mina Fazel and Derek Silove and published in 2006 in the British Medical Journal entitled "Detention of Refugees";

i) A paper written by Steel, Silove, Brooks, Momartin, Alzuhairi and Susljik published in the British Journal of Psychiatry in 2006 entitled "Impact of immigration detention and temporary protection on the mental health of refugees".

j) A report entitled "Safeguarding Children" published in July 2005 by HM Joint Chief Inspectors.

There can be no doubt, in my judgment, that these papers do, indeed, support the submission advanced by the Claimants and Liberty set out above.

107. If further support was necessary, I also have before me the statements of Ms Penny Nicholls, the Director for Children and Young People at the Children's Society, and Mr. Pierre Mahklouf, the Assistant Director of Bail for Immigration Detainees (BID) a charity founded in 1998 to offer free representation and advice to immigration detainees in relation to bail and unlawful detention. In September 2008 the Children Society formed a partnership with BID funded by the Diana Princess of Wales Memorial Fund to carry out direct work with families and children affected by immigration detention.

108. Between February 2009 and 14 April 2010 (the date of Ms Nicholls' witness statement) the Society has worked directly with 47 families who have been detained; in total these families included 58 children. On the basis of that work (the details of which need not be recited) Ms Nicholls expresses the view unequivocally that detention is inherently harmful to children.

109. Mr Makhlouf's statement is long and detailed. Its main purpose is to seek to demonstrate that UKBA does not, in practice, adhere to the Defendant's policy when making decisions about detention of families with children. At this stage it suffices to record that the experience of BID has been that detention is inherently harmful to children and that as a matter of principle the detention of families with children should end immediately.

110. The Defendant has adduced no independent evidence which casts any doubt upon the validity or accuracy of the evidence relied upon by the Claimants and Liberty. Rather, it relies upon the evidence of Mr David Wood, the Strategic Director of Criminality and Detention of UKBA. In his first witness statement Mr Wood specifically accepts that the detention of children "can have adverse affects upon them"; however, he goes on to assert that UKBA "does not accept the proposition that it always will." He does not accept that the research which the Claimants rely upon is "necessarily based on sound methodology."

111. Quite how well qualified Mr. Wood is to offer an opinion on the specialist evidence adduced by the Claimants and Liberty is something of a mystery but, in any event, in these proceedings it is unnecessary to reach a definitive conclusion upon whether it is established to the civil standard of proof that detention is inherently harmful to children. On the basis of the evidence adduced by the Claimants and Liberty, no one can seriously dispute that detention is capable of causing significant and, in some instances, long lasting harm to children. As I have said, Mr. Wood expresses an opinion which is to very similar effect.

112. Yarl's Wood is the only immigration removal centre with dedicated facilities for holding families for longer than 72 hours. Inevitably, therefore, the effect of detention at Yarl's Wood upon child detainees has been the subject of considerable scrutiny. That scrutiny has been undertaken by a variety of persons and bodies. The bodies and persons include Independent Monitoring Boards appointed by the Defendant, HM Chief Inspector of Prisons, the Children's Commissioner and the Home Affairs Select Committee of the House of Commons.

113. There can be no doubt that many criticisms have been made of the régime at Yarl's Wood since 2003. However, no useful purpose would be served by a recital of historical criticism of Yarl's Wood. It seems to me to be sufficient for the purposes of reaching proper conclusions upon the issues in this case that I focus upon that which has been said about Yarl's Wood in the recent past. I begin in 2008 i.e. some months after the Interested Party began to manage Yarl's Wood.

114. Between 4 and 8 February 2008 HM Chief Inspector of Prisons, Anne Owers, carried out an announced inspection at Yarl's Wood. Her report upon the inspection is comprehensive. It is sufficient in this judgment to highlight extracts from her Introduction. The Chief Inspector wrote:-

> "Yarl's Wood, near Bedford, is the main immigration removal centre for women and families. This was the centre's first full announced inspection since it was taken over by Serco in April 2007. Despite the upheaval of this change of management and a significant reduction in staff, the centre was performing reasonably well in many areas. However, as with all immigration removal centres, there was insufficient activities for detainees. We were also particularly concerned by the length of detention of some children and the damaging effect it had on them.
>
> …..
>
> The plight of detained children remained a great concern. While child welfare services had improved, an immigration removal centre can never be a suitable place for children and we were dismayed to find cases of disabled children being detained and some children spending large amounts of time incarcerated. We were

> concerned about ineffective and inaccurate monitoring of the length of detention in this extremely important area. Any period of detention can be detrimental to children and their families, but the impact of lengthy detention is particularly extreme. ……
>
> Yarl's Wood is to be congratulated on sustaining reasonable performance in many areas, despite the upheaval of the change of management and reduction in staff numbers. However, significant concerns remain, particularly the lack of activity for detainees, which is a failure that we have identified across the immigration detainee estate. Even more worrying was the plight of children detained for increasing periods of time with insufficient provision to meet their needs. Yarl's Wood must seek to meet these concerns, but they are ultimately issues for the UK Border Agency, which must urgently address them."

115. Between 9 and 30 November 2009 the Chief Inspector carried out an unannounced follow up inspection. She published her report in February 2010. Again it is sufficient to quote extracts from her Introduction. Ms Owers wrote:-

> "Yarl's Wood is the only immigration removal centre that holds only women, children and families. The inherent vulnerability of the population has meant that it has been subject to particularly active scrutiny.
>
> This inspection found there had been some improvements in the centre since the last inspection, particularly in relation to conditions, services and support for children. There was a new school, professionally run, which attempted to provide a good curriculum for the wide range of transient children held. The youth club and youth worker provided much-needed support and activity and nursery provision was good. Social workers participated in weekly multi-disciplinary meetings to discuss the welfare of each individual child.
>
> …..
>
> In spite of these improvements, and the support which individual members of staff provided, we continue to have concerns about aspects of the detention at the centre. The first related to the detention of children. In spite of the centre's considerable and commendable efforts, the fact is that detention clearly and adversely affected children's welfare, as our interviews with and observations of detained children during the inspection made clear.

> What was particularly troubling was that decisions to detain, and to maintain detention of, children and families did not appear to be fully informed by considerations of the welfare of children, nor could their detention be said to be either exceptional or necessary. Over the past 6 months, 420 children had been detained, of whom half had been released back into the community, calling into question the need for their detention and the disruption and distress this caused. Some children and babies had been detained for considerable periods – 68 for over a month and one, a baby, for 100 days – in some cases even after social workers had indicated concerns about their and their family's welfare. Detailed welfare discussions did not fully feed into submissions to Ministers on continued detention.
>
> ….
>
> Yarl's Wood was an improved and largely well-run centre. However, there were two main findings from this inspection. The first is that the conditions, activities and services for children, within the centre, had improved significantly, but this, while welcome, could not compensate for the adverse effect of detention itself on the welfare of children, half of whom were later released back into the community."

116. On 16 May 2008 the Children's Commissioner for England, Sir Al Aynsely-Green visited Yarl's Wood to see first hand the provision and conditions at the centre and to hear from children, young people and their families about their experiences of the detention process. In the aftermath of that visit he produced a report entitled "The Arrest and Detention of Children Subject to Immigration Control". The report was published in 2009. The report contained 42 recommendations. However, there were six "top-line recommendations" that underpinned the report and its key messages. Those key recommendations were:-

> "1. Detaining children for administrative reasons is never likely to be in their best interests or to contribute to meeting the Government's outcomes for children under the Every Child Matters framework. The administrative detention of children for immigration purposes should therefore end.
>
> 2. Exceptional circumstances for detention must be clearly defined and should only be used as a measure of last resort and for the shortest period of time in line with the requirements of Article 37(b) of the United Nations Convention on the Rights of the Child (UNCRC).

> 3. The UK Border Agency (UKBA) should develop community-based alternatives to detention which ensure that children's needs are met, and their rights not breached, during the process of removal. We acknowledge that UKBA needs to take a risk-based approach to immigration. However, we do not believe that this needs to be incompatible with acting in the best interests of the child as required by Article 3 of the UNCRC.
>
> 4. Since the detention of children is unlikely to end immediately as we would wish, the recommendations made at the end of each chapter should be urgently implemented to ensure children are treated in compliance with Every Child Matters and the UNCRC.
>
> 5. In line with international human rights standards, the Government's removal of the reservation against Article 22 of the UNCRC, the Government should monitor compliance with these standards particularly in relation to the detention of children.
>
> 6. UKBA should set out the accountabilities of all agencies, from the Home Office through to the providers, clearly and unambiguously so that detainees, interested agency and the public are aware of the respective agencys' responsibilities and accountabilities with regard to the detention and removal of failed asylum seekers."

117. UKBA formally responded to this report in August 2009. The "battle lines" were drawn at the very beginning of its response. Under the heading "Why children are detained" UKBA responded:-

> "[The] principal recommendation is that the administrative detention of children for immigration purposes should end. UKBA agrees that the detention of children and their families is regrettable – but we differ on whether the recommendation is realistic in practice.
>
> UKBA fully recognises its responsibility towards children…..
>
> But our responsibility towards children has to be exercised alongside our duty to enforce the laws on immigration and asylum. This includes ensuring that people leave the UK when we and the independent courts have found them not to have a legal right to be here. We would much prefer it if families in this position left the country voluntarily. Unfortunately, some families refuse to do this, even when provided with numerous opportunities to do so, including incentives provided

> under the Assisted Voluntary Returns Scheme. Advice about this scheme will include information about families who have actually returned under AVR, (with an opportunity to contact those who have returned successfully), as well as the opportunity to talk to IOM case workers. But where families still refuse to leave, UKBA has to be able to enforce removal and a short period of detention is a necessary, albeit an unfortunate, part of that process. It must be remembered that it is the parents' refusal to comply with UK law that makes this action necessary. We also consider that maintaining the family unit together, including any children, is preferable to splitting the family. It is for this reason that we think that [the] first recommendation is impractical."

That said UKBA accepted the importance of exploring community-based alternatives to detention and, further, that detention should be used only in clearly defined circumstances as a last resort and for the shortest period of time.

118. In October 2009 the Children's Commissioner undertook a follow up visit. His report upon the visit was published in February 2010. Under the heading "Assisted Voluntary Return" the Children's Commissioner wrote:-

> "It is not clear what the 'numerous opportunities' given to families to leave voluntarily amount to in practice, although it is encouraging to hear from UKBA that 350 families left under AVR arrangements last year.
>
> During our visit to the Family Detention Unit (FDU) we were shown the booking-in forms which LEOs complete and on which a place in the family detention estate is predicated. The booking of a family into detention requires the LEO to certify that 'voluntary return has been offered to the family, and that the offer and response are documented on file.' We do not have information regarding how the quality, method and timing of delivery of the information about AVR by the case owner or the enforcement office is audited by anyone, and this must be addressed.
>
> We are aware that information on AVR is provided in writing in the 'reasons for refusal' letter sent to Applicants when their initial claim is refused. However, a lack of face-to-face opportunities for Applicants to discuss AVR with their case owner after receipt of the initial decision fall short of a meaningful attempt to ensure families have a full opportunity to consider their options. UKBA have offered further meetings….to discuss these issues, which we welcome.

> Of the 10 families interviewed while we were at Yarl's Wood, 8 were asylum Applicants and 2 were visa overstayers. We were able to test the proposition that families are 'fully informed' about AVR and know that they will be detained if they do not depart voluntarily."

119. In his foreword and introduction the Children's Commissioner acknowledged that there was much to report that was positive. He drew attention to significant improvements in the operation of Yarl's Wood and in the willingness to commit to promoting the welfare of children as required by section 55 of the Borders, Citizenship and Immigration Act 2009. However, he remained of the view that detention was harmful to children and never likely to be in their best interests.

120. On 29 November 2009 the House of Commons Home Affairs Committee published its report entitled "The Detention of Children in the Immigration System". The report's conclusion is important and is worth quoting in full:-

> "19. In this report we have made 3 main recommendations on improvements which can be made to the legal process, the processing of asylum claims and the treatment of detainees pending legal decisions. Any and all of these recommendations will reduce the number of children held in longer-term detention, and UKBA should make every effort to reduce the need to detain small children for sustained periods of time. We fully accept the principles behind detention – we cannot envisage UKBA fulfilling the tasks set for it in any other way – but we insist that this power be used only sparingly, as a last resort and for the shortest possible time.
>
> 20. While it may be argued that adopting these courses of action may lead to a slight increase in the risk of absconding, we believe that this risk is very low and in both moral and financial terms it is a price worth paying to prevent the long-term, indeterminate detention of small children."

Under the heading "Facility at Yarl's Wood" the Committee had this to say:-

> "Having visited the centre ourselves, it is clear to us that great strides have been made since HM Chief Inspector of Prisons' report of August 2008. We endorse Sir Al Aynsely-Green's comments in that regard. **We note that Yarl's Wood appears to be a much better facility than the one so heavily criticised in the past. We note the new, purpose-built school which suggests UKBA's good intentions for improving conditions for detainees at Yarl's Wood. However, it must be remembered that Yarl's Wood remains essentially a prison. There is a limit to how family-friendly such a facility can be; and while we accept that conditions have improved,**

> **we still regret that such a facility is needed in the first place.**
>
> **13. We are convinced that the improvements at Yarl's Wood are tackling the symptoms of the problem rather than the cause and that sustained improvements in the treatment of children in the immigration system will be as a result of reform to the overall asylum process. Focusing on the undoubted, very visible, improvements at Yarl's Wood alone does not address the wider issues.**"

The Committee noted that Yarl's Wood was not adjacent to a major port or airport. It recommended that, longer term, UKBA concentrated its efforts on sites which were next to Gatwick and Heathrow airports respectively. In the view of the Committee "this will help to underline to both parties that detention is intended to be the final stage in the process."

121. Paragraph 7 and 8 of the report are also worth quoting in full:-

> "**7. We do not understand why, if detention is the final step in the asylum process, and there is no evidence of families systematically "disappearing or absconding", families are detained pending judicial reviews and other legal appeals. The detention of children for indeterminate periods of time (possibly for 6-8 weeks), pending legal appeals must be avoided. We recommend that after a child has spent an initial fortnight in detention and every 7 days thereafter, UKBA notifies the Home Office, and the Children's Commissioner as to why detention for this amount of time is justified and why the continued detention of this child is necessary.**
>
> **8. We further recommend UKBA consider the use of electronic tags, reporting requirements and residence restrictions while reserving the right to detain as an alternative to indeterminate detention pending final legal decisions. More generally we urge UKBA to work from the principle that the detention of young children must only ever be used as a last resort and the length of time spent in detention should be reduced."**

122. There is nothing controversial in the view expressed by the Committee to the effect that there was no evidence of families systematically disappearing or absconding. That view was formed, at least in part, by evidence given to the Committee by Mr David Wood.

123. Between January and April 2010 Mr John Vine, the Independent Chief Inspector of UKBA undertook an inspection of the effectiveness and efficiency of UKBA

in removing families who did not have permission to remain in the UK; he also undertook an inspection of how UKBA was meeting its duty to have regard to the need to safeguard and promote the welfare of children. In the aftermath of his inspection Mr Vine produced a comprehensive report. The executive summary makes depressing reading. I see no option but to record it in full:-

> "1. The UK Border Agency not only has responsibility for securing the border but also for identifying and removing those who have no right to be in the United Kingdom. This inspection focused on the effectiveness and efficiency of the UK Border Agency's approach to removing families, taking account of its obligations to carry out its functions having regard to the need for safeguard and promote the welfare of children.
>
> 2. There was limited evidence that an individual action plan existed for each family which took account of the family's welfare needs and arrangements for them to return home. In particular there were no performance measures by which case owners were assessed in this regard and no evidence that reporting requirements, outreach work, information on voluntary return or plans for enforced removal were co-ordinated.
>
> 3. Staff and managers demonstrated a clear awareness of the advantages, both in financial and welfare terms, of families with no right to remain returning home voluntarily. However, there were no consistent standards of promoting the option of voluntary return, no consistency in where, when and by whom the discussions with the family should take place and no plans for national analysis of pilots being undertaken in different regions.
>
> 4. The Family Welfare Form – an audit trail of the planning decisions on how to progress each case – was the primary mechanism for managing the welfare of families. However, this was not completed effectively on a consistent basis. There was a lack of consistent understanding about the purpose of the form and the responsibility for its completion.
>
> 5. Arrests for families occurred primarily at the family home between 6.30am and 7.00am. While there were reasons for arresting at this time of day, there was no evidence that an assessment had been made of each family's individual circumstances to decide if this was the most effective or proportionate approach. Alternative arrangements had been made in Glasgow where families were arrested at a reporting centre but there was no

> evidence that the pros and cons of this approach had been considered on an individual basis in other parts of the UK.
>
> 6. Reviews of detention were conducted at different levels of authority at different times without a clear rationale. While enhanced reviews by one part of the UK Border Agency and individual regional managers provided greater assurance that the families' welfare was being actively considered, there was no indication of why such enhanced reviews should not take place routinely in all parts of the UK Border Agency dealing with children.
>
> 7. Individual regions had developed some innovative approaches to managing family cases but there was no national collation or analysis of management information to identify trends or best practice.
>
> 8. There was poor file management and retrieval with incomplete audit trails and important details of cases held in different files or data bases."

Twelve important recommendations were made to address the problems addressed in that executive summary. Those most relevant for present purposes were that UKBA should (1) develop a clear action plan for each family involving, amongst other things, options for returning voluntarily and options for arrest and detention (if appropriate); (2) clarify how voluntary return should be offered to families and, thereafter, train members of staff accordingly; (3) ensure that Family Welfare Forms were completed in full; (4) ensure that all alternatives, including self-check in were exhausted before enforced removal was considered; (8) review the level of seniority required to maintain the detention of families, ensure there is a clear rationale for the level at each detention review and ensure that each review takes full account of the family's circumstances; (10) ensure that a clear audit trail is maintained in every family case and clarify the information that should be stored on the file and the case information database; (11) review its training requirements for staff to ensure that they are aware of cultural issues when engaging with families; and (12) publish and analyse a clear set of management information in respect of families with dependent children to provide greater transparency and to fully inform policy and practice.

124. Mr. Vine's views carry very significant weight. It is difficult to believe that any reasonable person could take issue with his recommendations or the reasons why he makes them.

125. I should also record that the Claimants relies upon the fact that on 20 September 2009 two boys each aged 5 were found to be engaged in sexual activity while they were being detained at Yarl's Wood. It was later alleged that one of the children had been the subject the subject of sexual abuse at the hands two older boys while in detention. This incident and these allegations were the subject of a thorough investigation by the Second Intervener (the "Board"). The Board produced a comprehensive report; it also produced an executive summary which

has been disclosed in these proceedings. The Executive Summary makes a number of criticisms of UKBA and the Interested Party; without doubt, it calls into question the desirability of detaining children in an immigration detention centre.

126. It does not seem to me, however, that the Board's findings, as expressed in the Executive Summary, throw any particularly new light upon the Claimant's core submission which is to the effect that the detention of children is inherently harmful to them.

127. During the course of the proceedings the Claimants made an application for disclosure of the full report prepared by the Board. It was for this reason that the Board intervened in these proceedings so as to oppose the application. After hearing argument, I rejected the application. I gave short reasons why at the conclusion of the application. If the Claimants require it for the purposes of any appeal, I will provide a separate written judgment in due course explaining my reasons in more detail.

The relevant legal framework

128. In this case there is no dispute about the fact that the First Claimant overstayed her leave after entering the UK lawfully and that the Fourth Claimant entered the country illegally. Accordingly, UKBA was entitled to remove them together with their children) to their countries of origin. Further the provisions of paragraph 16(2) of Schedule 2 Immigration Act 1971 were also applicable. They are in the following terms:-

"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."

129. The power to detain contained within paragraph 16(2) of Schedule 2 to the 1971 Act has been subject to judicial scrutiny over many years. It is common ground that the power must be exercised in accordance with principles which have evolved in a number of decisions of this Court and the Court of Appeal beginning with the decision of Woolf J (as he then was) in R v Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704 and ending with the recent decision of the Court of Appeal in Anam v Secretary of State for the Home Department [2010] EWCA Civ 1140. Many of the relevant principles are conveniently summarised in the judgment of Dyson LJ (as he then was) in R(I) v Secretary of State for the Home Department [2002] EWCA Civ 888. That case concerned the exercise of the power to detain in the context of deportation as opposed to removal but nothing turns on that. At paragraphs 46 to 48 Dyson LJ said:-

"There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, 11A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:

i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

iv) the Secretary of State should act with the reasonable diligence and expedition to effect removal.

47. Principles (ii) and (iii) are conceptually distinct. 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 a 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 pursuant to paragraph 2(3) of Schedule 3 of the Immigration Act 1971. 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."

130. In R (A) v Secretary of State for the Home Department [2007] EWCA Civ 804, the Court of Appeal gave close consideration to the relevance to be attached to the fact that the person to be removed and detained had refused to return voluntarily to his country of origin prior to enforcement action being initiated against him. Toulson LJ considered this aspect in paragraphs 46 to 54 of his judgment. His conclusion is expressed at paragraph 54:-

> "I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely to often be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return at once. In the latter case the loss of liberty involved in the individual's continued contention is a product of his own making."

Longmore LJ expressly agreed with the judgment of Toulson LJ. Keene LJ also agreed but gave a judgment of his own. At paragraph 79 he had this to say about the issue of voluntary repatriation:-

> "I am not persuaded by Mr Giffin that the refusal by this detainee to return to Somalia voluntarily when it was possible to do so was some sort of trump card. On this I see the force of what was said by Dyson LJ in *R (I)* at paragraph 52, namely that the main significance of such a refusal may often lie in the evidence it provides of a likelihood of the individual absconding if released. After all, if there is in a particular case no real risk of his absconding how could detention be justified in order to achieve deportation just because he has refused voluntary return? The Home Office in such a case, *ex hypothesi*, would be able to lay hands on him whenever it wished to put the deportation order into effect. Detention would not be necessary in order to fulfil the deportation order. Having said that, I do not regard such a refusal to return as wholly irrelevant in its own right or having a relevance s*olely* in terms of the risk of absconding. It is relevant that the individual could avoid detention by his voluntary

> act. But I do not accept that such a refusal is of the fundamental importance contended for by the Secretary of State."

131. It may be that these passages from the judgments of Toulson LJ and Keene LJ demonstrate differences of emphasis upon the significance to be attached to a failure by a person liable to be removed to take up an offer of assisted voluntary repatriation when a decision is being made about whether that person should be detained. Whether or not that is so is of no particular moment in this case for two reasons. First, as a matter of precedent, I am bound to follow the majority view encapsulated in the passage from the judgment of Toulson LJ set out above. Second, as I have already indicated I am not persuaded that any meaningful or proper offer of voluntary assisted return was ever made to the First and Fourth Claimant.

132. The decision in A is important also for its confirmation that it is for the court to determine whether or not administrative detention is lawful; it must make its own judgment on that issue and it is not confined to reviewing the reasonableness or rationality of the Secretary of State's decision to detain or maintain detention (see paragraphs 60 to 62 of the judgment of Toulson LJ and paragraphs 70 to 75 of the judgment of Keene LJ).

133. An issue which has risen to prominence recently is whether or not a failure by the Defendant to act in accordance with her published policies relating to detention renders the detention in question unlawful. At the time of my decision in S it was common ground that a failure to act in accordance with published policy did render the detention in question unlawful. Since S there have been a number of decisions of this court and the Court of Appeal which have grappled with this and related points. As it happens the Supreme Court is about to give judgment in two cases which will provide the answer to the point and others related to it; I refer to the appeals from the Court of Appeal in R(SK(Zimbabwe)) v SSHD and R(WL) and others v SSHD. Given this state of affairs (and the fact that the issue of failure to adhere to and/or apply the Defendant's policy is not determinative in this case as will become apparent) no useful purpose would be served by a lengthy citation from the cases. Further, I do not think it appropriate for me to offer a view of my own on this thorny issue. In this judgment, I content myself with identifying whether or not UKBA has acted in breach of the Defendant's policy in respect of any of the Claimants; further, I will also state my view upon whether detention would have been authorised/maintained even if no breach of policy had taken place.

134. The Claimants and the Intervener assert that the Defendant's policy in relation to detaining families with children is unlawful. They accept that the language of the policy is consistent with section 55 of the 2009 Act and the United Kingdom's obligations under the ECHR and the United Nations Convention on the Rights of the Child (hereinafter referred to as UNCRC). However, both Mr Singh QC and Ms Dubinsky submit that the policy is unlawful because, in the particular context within which it operates, it fails to provide or contain the procedural safeguards which are required by statutory, human rights and child welfare provisions. To use the succinct phraseology of Mr. Singh QC "the policy cannot lawfully be operated in practice."

135. It is also submitted that even if the Defendant's policy is capable in principle of being operated lawfully, nonetheless it is such that it gives rise to an unacceptable risk of unlawful decision-making; that has the effect, in the circumstances, of rendering the policy itself unlawful.

136. The Defendant robustly defends the lawfulness of her policy relating to detaining families with children. She submits that I was correct to hold in S that the then existing policy was lawful. It is further submitted that none of the changes to the policy which post-date the decision in S could possibly render the policy unlawful. As I read the skeleton argument presented on behalf of the Defendant, however, she does not assert that a policy which was incapable of being operated lawfully in practice would be a lawful policy; further, she does not assert that a policy which gives rise to an unacceptable risk of unlawful decision-making should be considered to be lawful. In relation to these aspects of the Claimants' case the Defendant submits that her policy can be operated lawfully in practice and does not give rise to an unacceptable risk of unlawful decision-making.

137. I am content to accept that as a matter of law a policy which cannot be operated lawfully cannot itself be lawful; further, it seems to me that there is clear and binding authority for the proposition that a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an unacceptable risk of unlawful decision-making is itself an unlawful policy.

138. In R (Refugee Legal Centre) v SSHD [2005] 1 WLR 2219 the issue before the court was whether the Fast Track Pilot Scheme for the adjudication of asylum applications made by single male applicants arriving in the United Kingdom from countries where the Defendant believed there to be no serious risk of persecution was lawful. The Claimant challenged its legality on the basis that the scheme was inherently unfair and therefore unlawful. Collins J rejected the challenge at first instance and his judgment was upheld in the Court of Appeal. The judgment of the Court of Appeal contains the following paragraphs:-

> "6. But what *is* the question? Mr Michael Fordham, appearing *pro bono* with Mr David Pievsky for the RLC, began by submitting that it was whether the system was capable of operating fairly. It is plain, however, as Mr Fordham accepted, that in a straightforward case, such as where the Applicant himself has advanced no Convention reason for his persecution, or what he fears cannot on any possible view be persecution, the system, however speedy, is perfectly capable of operating fairly. A more appropriate question, in our view, is the one posed by Mr Robin Tam for the Home Secretary: does the system provide a fair opportunity to asylum seekers to put their case? This avoids the arbitrariness inherent in Mr Fordham's alternative approach of seeking to construct a "typical" case. It embraces, correctly, the full range of cases which may find themselves on the Harmondsworth fast track. There will in our judgment be something justiciably wrong with a system which places asylum

> seekers at the point of entry – that is to say, when no more is known of each one than that he is an adult male asylum seeker from a country on a departmental "white list" – at unacceptable risk of being processed unfairly. This, therefore, is the question which we propose to address.
>
> 7. We accept that no system can be risk free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself. In other words, it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effect. This is why the intrinsic fairness of the fast track system at Oakington was dealt with by this court as a discrete issue in R (L) v The Secretary of State for the Home Department [2003] 1 WLR 1230, paras 48-51."

139. In R (Medical Justice) v SSHD [2010] EWHC 1925 (Admin) Silber J adopted the approach set out in the Refugee Legal Centre case when assessing the lawfulness of the policy of the Secretary of State contained within a document entitled "Judicial Review and Injunctions" which policy gave individuals, who fell into certain specified categories and who had made unsuccessful claims to enter or to remain in the United Kingdom, little or perhaps no notice of their removal directions. Silber J held that the policy should be declared unlawful if there was an unacceptable risk or "a serious possibility" that the right of access to justice of those subject to the policy would be or was curtailed – see paragraph 36 of the judgment.

140. Both the Refugee Legal Centre case and the Medical Justice case were challenges to policy on the basis of potential unfairness. If, however, it is correct that a policy may be unlawful if it gives rise to an unacceptable risk or serious possibility that unfairness will occur it also seems to me to follow that a policy may be unlawful if it gives rise to an unacceptable risk or serious possibility of unlawful decision-making e.g. a decision which ignores the interests of child family members when detention of an adult with children is authorised.

141. To repeat, I do not understand the legal principles formulated in Refugee Legal Centre or Medical Justice to be in dispute nor that they can be applied in the context of the instant case. What is disputed in this case is the submission that the policy of the Defendant in relation to detaining families with children gives rise to an unacceptable risk or a serious possibility of unlawful decision-making.

142. I have already referred to section 55 Borders, Citizenship and Immigration Act 2009 many times in this judgment. It came into force on 2 November 2009. The relevant parts of section 55 are in the following terms:-

> "(1) The Secretary of State must make arrangements for ensuring that –
>
> a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection 2 are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are –
>
> a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> c) …..
>
> d) …..
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)."

It is not in dispute that the persons who authorised the detention of the Second, Third and Fifth Claimants were engaged in discharging a function within paragraphs (a) and/or (b) of section 55(2). Similarly, the person or persons charged with the function of reviewing the detention of those Claimants was discharging a function within section 55(2)(a) and/or (b).

143. In R(TS) v SSHD [2010] EWHC 2614 (Admin) I considered the proper interpretation of section 55(1) and the guidance issued under section 55(3). My conclusions about the interpretation of the section and the guidance are set out in paragraphs 24 to 36 of the judgment. I need not repeat them in this judgment. It was not suggested in these proceedings that my views upon the section and the guidance issued thereunder were wrong; the Defendant has not sought permission to appeal my decision in TS. In summary, a decision maker discharging a function under section 55(2) of the 2009 Act should regard the need to safeguard and promote the welfare of a child as a primary consideration

unless there are cogent reasons to adopt a different approach (see paragraph 36 in TS).

144. As TS makes clear, however, the welfare of a child is not the paramount consideration when a decision maker is discharging a function under section 55(2). Further, the statutory guidance issued under section 55 makes it clear that primary duties placed upon UKBA are

> "t) To maintain a secure border, to detect and prevent border tax fraud, smuggling and immigration crime, and to ensure controlled, fair migration that protects the public and that contributes to economic growth and benefits the country."

The guidance goes on to remind readers that these duties are carried out by applying and enforcing the Immigration Acts and the Immigration Rules which necessarily includes removing from the UK persons who have no legal entitlement to remain in the UK and, in certain circumstances, detaining those individuals pending their removal from the UK.

145. I should also mention the Detention Centre Rules 2001 which came into force on 2 April 2001. Their importance is that a detention centre must be operated in accordance with the Rules and in that sense they provide very significant safeguards for persons contained within the centre. Yarl's Wood, of course, is a detention centre within the Rules.

146. Rule 3 is in the following terms:-

> "(1) The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed régime with as much freedom of movement and associations as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and their right to individual expression.
>
> (2) Due recognition will be given at detention centres to the need for awareness of the particular anxieties to which detained persons may be subject and the sensitivity that this will require, especially when handling issues of cultural diversity."

Rule 11 provides:-

> (1) Detained family members shall be entitled to enjoy family life at the detention centre save to the extent necessary in the interests of security and safety.

> (2) Detained persons aged under 18 and families will be provided with accommodation suitable for their needs.
>
> (3) Everything reasonably necessary for detained persons' protection, safety and well-being and the maintenance and care of infants and children shall be provided."

Rules 33 to 37 contain detailed provisions relating to health care. Rule 33 specifies that every detention centre shall have a medical practitioner (vocationally trained as a general practitioner) and a health care team. Those persons are charged with the responsibility for the care of the physical and mental health of the detained persons at the centre. Rule 33(5) specifies that every request by a detained person to see the medical practitioner shall be recorded by the officer to whom it is made and forthwith passed to the medical practitioner or nursing staff at the detention centre.

147. I next turn to International Conventions. The United Kingdom is a signatory to the UNCRC. Article 3(1) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 37 is in the following terms:-

> "States Parties shall ensure that:
>
> a)….
>
> b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> c) every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

148. The UNCRC has not been incorporated into domestic law in the strict sense. However, in my judgment, the proper application of section 55 of the 2009 Act effectively demands that a decision-maker complies with articles 3 and 37 of the Convention. Further, Article 5 ECHR should be read in the light of Articles 3 and 37(b) of UNCRC (see S paragraph 41).

149. Each of the Claimants complains that their rights under Articles 3, 5 and 8 of ECHR have been infringed.

150. Article 3 contains a prohibition against torture or inhuman or degrading treatment. In order to constitute a violation of Article 3 the treatment complained of "must attain a minimum level of severity". The threshold is relative; the assessment depends upon all the circumstances, including the duration of the treatment, its physical and mental effects, and, where relevant, the sex, age and state of health of the victim. These principles are not in dispute; in the Skeleton Argument presented on behalf of the Claimants, however, further submissions are made about Article 3 which seem to me to be borne out by the authorities cited in support. First, treatment may be degrading because it is such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them – see Ilascu v Moldova & Russia [2004] 40 EHRR 1030 [at 425]. Second, where conditions, including detention conditions, are inhuman and lead to a sufficient level of suffering, the absence of an intention to humiliate or debase does not rule out a violation of Article 3 – see Price v United Kingdom (Application No: 33394/96), judgment 10 July 2001. Third, Article 3 imposes upon the state both negative obligations (not to ill-treat) and positive obligations (to take steps to prevent ill-treatment). The state is obliged to take measures designed to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, and children and other vulnerable individuals are particularly entitled to state protection, in the form of effective deterrence, against such breaches of personal integrity – see A v United Kingdom [1998] 27 EHRR 25; such measures must include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge – see Z v United Kingdom [2002] 34 EHRR 3. Fourth, a failure to provide adequate medical care to people deprived of their liberty may constitute treatment contrary to Article 3 – see Mouisel v France [2004] 38 EHRR 34 at [40]. In Keenan v United Kingdom [2001] 33 EHRR 913 the court observed:

> "….The authorities are under an obligation to protect the health of persons deprived of liberty. The lack of appropriate medical treatment may amount to treatment contrary to Article 3. In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment."

The Claimants submit that by parity of reasoning the same must apply to young children and to other vulnerable individuals, including those with limited

command of English and/or who face real difficulties in obtaining legal advice and representation. Fifth, when assessing the conditions of detention for the purposes of Article 3, account has to be taken of the cumulative effects of the relevant considerations – see Dougoz v Greece [2002] 34 EHRR 61 at [46].

151. In her submissions, Ms Dubinsky draws attention to a number of recent decisions of the European Court which illustrate the application of these principles.

152. The Defendant does not dispute any of that which I have set out above in relation to Article 3. The Defendant's case, quite simply, is that the Claimants have failed by quite some margin to demonstrate that the treatment about which they complain has reached the minimum level of severity which is necessary for any violation of Article 3.

153. I need not consider the law in relation to Article 5 in any detail. Article 5 provides that no one shall be deprived of his liberty save in specified circumstances; one of the specified circumstances is when a person is detained pending deportation (which includes removal). The complaint under Article 5 in this case is of arbitrary detention and in the context of this case the detention will have been arbitrary if it is also unlawful under domestic law and independently of the Convention.

154. The Claimants also invoke Article 8. It provides as follows:-

> "Right to respect for private and family life.
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

155. I accept that the right to respect for private life protects the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. It also protects a right to identity and personal development and the right to develop relationships with other human beings and the outside world. All this emerges from two cases in the European Court of Human Rights, namely, Bensaid v United Kingdom [2001] 33 EHRR 10 and Connors v United Kingdom [2005] 40 EHRR 9.

156. None of these propositions is controversial. What is controversial is the submission made on behalf of the Claimants that when balancing competing considerations under the family life provisions of Article 8 the paramount

consideration is the interests of the child or children. In support of this submission Mr Singh QC relies upon paragraph 105 of the judgment of Mr David Elvin QC (sitting as a Deputy High Court Judge) in R (Nukajam) v SSHD [2010] EWHC 20 (Admin).

157. Paragraph 105 must be read in the context of the preceding paragraphs. I quote:-

> "103. Added to those general considerations here is the specific and important consideration of the children and the Secretary of State's own advice to the effect that:
>
> i) Families that are detained are held very briefly prior to their removal from the UK. There is a presumption in all cases in favour of granting temporary admission or release, and each case will always be considered on its merits.
>
> ii) Removal directions should be dependent on any pre-departure element of anti-malarial treatment being completed.
>
> 104. In considering these matters it seems to me that the detention of children is not something which should ever be lightly countenanced or allowed to continue except in such circumstances which clearly justify it and which do not reasonably permit of alternatives.
>
> 105. Those policy considerations are strongly reinforced by the UNCRC, as Wyn Williams J held in S which informs the correct approach to Article 5 and by the Strasbourg Court in Yousef v Netherlands [2003] 36 EHRR 20 at paragraph 73 stressing (albeit in the context of Article 8) the paramount nature of the interests of children when balancing competing considerations. It seems highly improbable that lesser weight should be accorded to children's interests in the context of Convention rights under Article 5."

158. In the Skeleton Argument presented on behalf of the Defendant paragraph 73 of Yousef is set out. It reads:

> "The court reiterates that in judicial decisions where the rights under Article 8 of parents and those of the child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail…."

159. The facts in Yousef were as follows. The Applicant to the court, an Egyptian national, was the biological father of a child (S) born in the Netherlands. Under the domestic law of the Netherlands he was prevented from recognising S as she

was born out of wedlock. Despite the Applicant's repeated requests, the child's mother (R) refused to give him permission to recognise S. In accordance with R's wishes one of R's brothers was granted guardianship of S when R died and S was placed with the family of another of R's brothers. The Applicant saw S once every 3 weeks. Relying on Article 8 he complained of a violation of his right to respect for his private and family life. The European Court rejected his complaint and it was in this context that it expressed the view that the child's interests were paramount.

160. In my judgment paragraph 73 of Yousef is an acknowledgment that in context it was the child's rights which were paramount compared with that of one of its parents. I accept the submission made on behalf of the Defendant that Yousef does not lay down a principle which is applicable in the context of the instant case.

Discussion

The First Claimant's family.

161. I am satisfied that at the time the decision was taken to detain the First Claimant and her family UKBA intended to remove the family and detention was authorised to facilitate that purpose. Further, the decision-maker (Mr. Berrington) reasonably believed that detention would subsist for no more than 3 days.

162. It seems equally clear that the risk that the First Claimant and her family would abscond (if not detained) when notified of removal directions was remote.

163. There is no sound basis to conclude that Mr. Berrington had regard to the duty imposed under section 55 of the 2009 Act to safeguard and promote the welfare of the Second and Third Claimant. I am not prepared to proceed on the basis that he did simply because it is asserted that he did in the Family Booking Form: Checklist. The reality is that there is no documentation and no witness statement which demonstrates that the duty under section 55 was properly considered; there is certainly no witness statement or document which reveals the reasoning process of the person who was charged with considering it. If I am wrong in these conclusions, there is certainly no witness statement or document which demonstrates that the duty to safeguard and promote the welfare of the Second and Third Claimant was treated as a primary consideration when the decision to detain was being considered. As TS establishes the duty placed upon the decision-maker is to treat the need to safeguard and promote the welfare of children as a primary consideration unless cogent reasons exist for a different approach. In this case, to repeat, there is no evidence that the decision-maker treated the duty to safeguard and promote the welfare of the Second and Third Claimant as a primary consideration; further or alternatively, there is no evidence adduced to the effect that the decision-maker had cogent reasons for adopting a different approach.

164. I am satisfied that no offer of assisted voluntary return was made on 15 January 2010. The probability is that no detailed discussion took place between officers of UKBA and the First Claimant at any time in which the benefits of assisted

voluntary return and the consequences of refusal of voluntary return were properly explained.

165. There is no suggestion in the witness statements adduced on behalf of the Defendant or in the documentation produced that the possibility of "self check in" was considered in this case.

166. In my judgment the failure to have regard to the duty under section 55 of the 2009 Act in advance of the decision to detain the First Claimant and her children makes their detention unlawful. While strictly, the duty under section 55 is a duty to the children this is not a case in which separation of the First Claimant and her children could have been contemplated by any reasonable decision-maker. It seems to me therefore that the failure to have regard to duty to safeguard and promote the welfare of the children renders the detention of all three Claimants unlawful.

167. I do not understand Mr Swift QC to submit that a failure to apply section 55 would render the detention unlawful only if it is also established that detention would not have been authorised or would probably not have been authorised if UKBA had complied with its statutory duty. If, however, I have misunderstood Mr Swift QC on this point it matters not. I am satisfied that detention was neither inevitable nor probable had UKBA complied with its statutory duty.

168. I reach that conclusion with confidence. It is for me to determine whether or not the power to detain was lawfully exercised – see A. I have reached the clear conclusion that the decision to detain the First Claimant and her family was not lawful for reasons which are wider in scope than the failure to have regard to the duty under section 55. In this case the risk that the First Claimant would abscond with her family was very low; no account was taken of the fact that the First Claimant had never attempted to evade the authorities nor that she had complied regularly with the reporting requirements placed upon her. In the Skeleton Argument presented on behalf of the Defendant she accepts that detention of children in Immigration Removal Centres must, by its very nature, be a cause for concern. Quite apart from her published policy it is not disputed that detention of children pending removal should be a measure of last resort. I say that since the Defendant accepts without qualification that Article 5 of ECHR should be read in the light of Article 37(b) UNCRC. Further, if it is to be accepted that "self check in" can be an appropriate alternative to detention and a matter to be taken into consideration when deciding upon whether to detain it is difficult to envisage a case in which that alternative would be more appropriate than in the case of the First Claimant and her family. In the particular circumstances prevailing in this case it is very hard to see what justification there could be for detaining the Claimant and her children.

169. It is difficult to avoid concluding, as Mr Singh QC submits, that in this case detention was imposed by default. In my judgment had all appropriate factors been taken into account detention would not have been authorised.

170. If, contrary to my clear view, detention was lawfully authorised I am completely satisfied that detention became unlawful by 16 February 2010 at the latest. By that date the Claimant and her family had been in detention for 9 days, the

prediction was that removal would take a further 3 to 4 weeks, at the very least, and the Third Claimant had become ill. In my judgment release from detention should have been authorised on that date – it was unreasonable to maintain detention for a further 8 days.

171. The authorisation of detention of the First Claimant and her children was in direct conflict with the Defendant's published policy. The policy demanded that the decision-maker should have regard to section 55 of the 2009 Act; consider all reasonable alternatives to detention and resort to detention only as a measure of last resort and in exceptional circumstances. The decision-maker failed to act in accordance with that policy. Had the policy been applied detention would not have authorised.

172. I turn to the Family Welfare Form which came into existence in respect of these Claimants. As I have set out above the Defendant's policy dictates that this form shall be the basis upon which "key operational decisions" will be made in a family case. The form is intended to be kept on each family case file and updated as appropriate during the course of the various stages between a decision to remove and actual removal.

173. The requirement that the form be kept in the family case file should ensure that the form is easily located at any material time. In this case Treasury Solicitors encountered great difficulty in obtaining the form. By 2 July 2010, i.e. 4 months after the commencement of these proceedings, the form had not been located and Treasury Solicitors found it necessary to write a long letter of explanation explaining the steps which they had instigated in order to find the form. Ultimately the form was located and disclosed on 12 July 2010.

174. An examination of the form shows it to be inconsistent with one aspect of the Defendant's case and incomplete in crucial respects. The form is inconsistent with the Defendant's current case because it suggests that assisted voluntary return was discussed with the Claimant on 2 April 2009 and that her response to the offer was not known. The form contains a box entitled "Case owner's Summary or Recommendation Details". Nothing is written in that box. The next box to be completed has the heading "Pre-detention planning." There then appears the following:-

> "The following points should have been considered and the reasons noted in full for the decisions taken. This is to form an audit trail of the available option,

- Is detention essential.
- Has SCI been considered.
- Has detention of head of household and SCI for the family been considered.
- Time/date of visit to detain including reasons for the choice.
- Recce completed, note factors to influence practical deployment and risk assessment.
- Number/gender of officers required/justify numbers.
- Names and dates authorising action.
- Is method of entry necessary.

- Reason if one not obtained.
- Key obtained, ascertain lay out of property and any information from accommodation provided re family or guests.
- Health/welfare aspects considered.
- All paperwork prepared."

There is then a space for the details to be written in. In the form in this case no details of any kind are provided.

175. The failure to complete the form correctly is a significant breach of policy; it also provides the clearest evidence that important parts of the policy and important material considerations were not considered either properly or at all.

176. As I have said, I am satisfied that had UKBA applied the Defendant's policy, detention of the Claimants would not have been authorised.

177. The Defendant's policy requires that detention be maintained for the shortest period of time that is reasonable. It is implicit, at the very least that the duty under section 55 should be considered at each detention review. These aspects of the policy were ignored when detention was maintained after 16 February 2010. If these aspects of the policy had been applied detention would not have continued beyond 16 February 2010.

178. I turn to the alleged breaches of ECHR.

179. In paragraphs 57 to 64 above I set out, in some detail, the layout, facilities within and services available at Yarl's Wood. In my judgment, it cannot be said that a person detained at the centre in February 2010 was confined in such a place or subject to such a régime which would permit a court to say that he or she was subject to inhuman or degrading treatment within Article 3. All detainees are provided with accommodation which is reasonably appropriate and all detainees are provided with proper medical provision; children are provided with reasonable educational facilities.

180. The Claimants rely upon the recent decision of the European Court of Human Rights in Muskhadzhiyeva v Belgium (Application No: 41442/07). A close examination of that case is instructive since it serves to demonstrate the difficulties which the Claimants need to overcome to establish a breach of Article 3 in this case.

181. Mrs Muskhadzhiyeva and her 4 children claimed that their rights under Article 3 had been breached by reason of their administrative detention for approximately one month in a particular detention centre in Belgium known as the 127 *bis* centre. On his visit to the centre on 28 July 2007, the general delegate of the French Community for Children's Rights stated the following:-

> "….The bedrooms increasingly resembled prison cells (graffiti, odours, dilapidation). There is no privacy in the bedrooms. For example, during the interview with the little girl, several people in an illegal situation frequently came in without knocking and sat on the next bed. On

> several occasions, men in the courtyard also put their heads up against the bars of the window of the bedroom. When you look through the window, you see men walking round the courtyard fenced in with wire, as well as a great deal of aeroplanes passing overhead. I also noticed, in the bedroom of the child and her mother, a mattress placed directly on the ground, on which a young girl was sleeping…. The 127 *bis* detention centre was not a suitable location for the well-being and proper development of a child, and in which, therefore, no child should be living."

182. The centre was visited again in October 2007 by four deputies from the European Parliament; they described it in a subsequent report as follows:-

> "This centre is situated…..next to the airport. It is surrounded by two very tall metal fences and several rows of barbed wire. There is a strong sensation of being in prison. There are bars on the windows.
>
> The centre comprises two buildings. The first building houses the social, administrative and medical staff, as well as the disciplinary solitary confinement cell. Passing through an internal courtyard, you find the building reserved for the migrants, behind the rows of trellis topped by 5m-high barbed wire.
>
> The centre houses both people seized on the territory in an illegal situation and asylum seekers, men, women, children accompanied by adults or otherwise."

The Claimants in Muskhadzhiyeva had been detained in December 2006 and January 2007.

183. The important extracts from the judgment of the court are contained in the following paragraphs:-

> "**a). With regard to the child plaintiffs**
>
> 55. The court points out that, combined with Article 3, the obligation that Article 1 of the Convention imposes on the High Contracting Parties to guarantee to any person falling within their jurisdiction the rights and freedoms sanctioned by the Convention command them to take measures to prevent the said persons from being subjected to torture or to inhuman or degrading sentences or treatment. These provisions must permit effective protection, namely of children and other vulnerable persons, and include reasonable measures to prevent bad treatment of which the authorities were or should have

been aware. (M*ubilanzila Mayeka and Kaniki Mitunga, mentioned above ¶ 53*).

56. In the aforementioned ruling, the Court concluded that there had been a breach of Article 3 due to the detention of a minor in the "127" centre situated near Brussels Airport and intended for the detention of foreign nationals pending their removal. It pointed out that the conditions of the detention of the plaintiff, then aged 5, were the same as those of an adult, and that the child had been detained for two months in a centre initially designed for adults, while she was separated from her parents, with nobody having been appointed to look after her and with no supervisory psychological or educational accompaniment measures having been dispensed by qualified staff especially for the purpose (*ibid* ¶ 50). It stressed that it should be kept in mind that the situation of extreme vulnerability of the child was decisive and took precedence over the status of foreign national in illegal residence (*ibid*¶ 55).

57. The Court does not lose sight of the fact that this case differs from the aforementioned case in terms of an important element: in this case the children of the plaintiff were not separated from them.

58. Nevertheless, in the opinion of the Court, this element is not sufficient to exempt the authorities from their obligation to protect children and adopt adequate measures with regard to the positive obligations arising from Article 3 of the Convention (*ibid* ¶ 55).

59. In this respect, the Court notes that the four child plaintiffs were aged 7 months, 3½, 5 and 7 at the time of the facts. The age of at least two of them was such that they were able to be aware of their environment. They were all detained for more than 1 month in the "127 *bis*" detention centre, the infrastructure of which was unsuitable to house children. The reality of the conditions of detention in the "127 *bis*" centre emerges from the remarks made by the general delegate….

60. In addition to this is the worrying state of the child plaintiffs' health which was pointed out by independent doctors. Thus, the Court notes that on 11 January, "Médecins Sans Frontières" drew up a psychological certificate concerning the plaintiffs, which was added to the file. This certificate stated that the children, particularly Khadizha, were showing serious mental psychosomatic symptoms, as a result of mental and somatic trauma. Khadizha was diagnosed as suffering

from post traumatic stress disorder and presenting excessive anxiety to a much greater extent than children of her age: she was having nightmares and waking up screaming, she shouted, cried and hid under the table as soon as she saw a man in uniform and banged her head against the walls. Liana was suffering from serious respiratory problems.

61. On 22 January 2007, a doctor from the same organisation drew up a second psychological certificate. It stated that the psychological state of the plaintiffs was deteriorating and that, in order to limit the mental damage, the family would have to be released. It also stated that the mother of the 4 children was experiencing a situation of stress so extreme that it was intensifying that of the children, with the children feeling that their mother was incapable of protecting them.

62. The Court wishes to point out in this respect the terms of the Convention on children's rights, of 20 November 1989, and particularly of Article 22 of it, which urges States to take the appropriate measures in order that a child seeking to obtain refugee status receives protection and humanitarian assistance, whether he be alone or accompanied by his parents.

63. Taking into account the young age of the plaintiffs, the duration of their detention and the state of their health, diagnosed by medical certificates during their detention, the Court considered that the living conditions of the child plaintiffs at the "127 *bis*" centre had reached the threshold of seriousness required by Article 3 of the Convention and resulted in a breach of this Article.

b). With regard to the first plaintiff

64. The Court points out that the point of knowing whether a parent is a victim of bad treatment inflicted on his child depends on the existence of specific factors that grant the suffering of the plaintiff a dimension and a character which are distinct from the emotional distress that may be considered to be inevitable for the close relatives of the person who is the victim of serious breaches of human rights. Amongst these factors feature the closeness of the blood relationship – in this context, the parents-child connection will be given priority – the particular circumstances of the relationship, the extent to which the relative had been a witness to the events in question and the manner in which the authorities had reacted to the claims made by the plaintiffs. The essence of such a breach resides in the reactions and the behaviour

> of the authorities towards the situation that has been reported to them. It is mainly in the light of this last element that a relative may claim to be a direct victim of the behaviour of the authorities (*Mubilanzila Mayeka and Kaniki Mitunga mentioned above ¶ 61*)
>
> 65. The Court considers the difference between this case and the aforementioned case, that is the separation of the mother and the child, takes on its full meaning in the case of the plaintiff. In the Mubilanzila Mayeka & Kaniki Mitunga case, the Court concluded that the mother had experienced intense suffering and concern due to the detention of her daughter, about which she was only informed and where the only measure taken by the authorities consisted of giving her a telephone number on which she could reach her.
>
> 66. On the other hand, in this case, the plaintiff was not separated from her children. If a feeling of powerlessness to protect them against the detention itself and the conditions of the detention may have caused her anguish and frustration, their constant presence with her must have slightly eased this feeling, such that it did not meet the threshold required to be classified as inhuman treatment. Consequently, there has not been a breach of this Article with regard to the first plaintiff."

184. I accept the submission made by Mr Swift QC that the conditions prevailing at 127 *bis* were markedly different and much worse for children detained in that establishment than the conditions of detention prevailing at Yarl's Wood in February 2010. Further, it is clear that the Court in Muskhadzhiyeva was influenced by the fact that two of the children developed significant illnesses during detention which were diagnosed at that time and yet they were still not released. Further the children were detained for approximately one month. It was the combination of all those features which led to a finding of a breach of Article 3 in respect of the children.

185. In the instant case, as I have said, there is no basis to conclude that the Second Claimant developed any significant physical illness during his detention at Yarl's Wood; further, I am satisfied on balance of probability that such exacerbation of a pre-existing psychiatric illness which may have occurred during the Second Claimant's detention was not reported to UKBA or the Interested Party during the period of detention and that in the absence of such a report such an exacerbation was not a reasonably foreseeable consequence of the comparatively short period of detention to which the Claimant was subjected. It is true that the Third Claimant became ill during the course of detention and, as I have found, his release from detention was unlawfully delayed even if, initially, the detention was lawful. Nonetheless the Third Claimant was treated appropriately for his illness. There is no entry in the medical records between 17 February 2010 and 24 February 2010 in relation to the Third Claimant and it

seems reasonable to infer that no significant illness was persisting during that period.

186. In reaching my conclusions thus far I have taken account of the ages of the children and the potential difficulty which the Second Claimant, in particular, might face in communicating his difficulties. I have also weighed in the balance that the Second Claimant complains in his witness statement of feeling fear while being detained. I accept entirely that he must have been aware that he was the subject of enforced detention. These factors, however, either alone or in combination with the other circumstances set out above, do not persuade me that breaches of Article 3 have occurred so far as the Second and Third Claimant are concerned. The minimum level of severity was not reached.

187. I turn to the position of the First Claimant. Her position is indistinguishable from that of the mother in Muskhadzhiyeva save that the First Claimant asserts that she suffered chest pains during the period of her detention. The medical records show that she first complained of chest pains on 17 February 2010. At 9.35am on 18 February an ECG was undertaken which showed no abnormality. On any view, in my judgment, the Claimant was afforded appropriate medical treatment as a consequence of her complaint. There is no basis whatsoever for the assertion that her treatment at Yarl's Wood reached the minimum level of severity necessary for a breach of Article 3.

188. I need not deal in detail with the Claimants' claim under Article 5. I regard their detention as arbitrary within Article 5 for the same reasons as lead me to conclude that their detention was unlawful.

189. Mr Swift QC acknowledges that Article 8, inevitably, applies to the detention of the Claimants. He correctly submits, however, that if such detention is lawful a breach of Article 8 will be very difficult to establish. Conversely, of course, if the detention is unlawful it is difficult to envisage circumstances in which there would not be a breach of Article 8 since the detention, itself, would constitute an unacceptable infringement of a person's right to private life. In this case, therefore, I am satisfied that the Claimants have proved a breach of Article 8.

190. It does not seem to me, however, that there is a breach of that Article by virtue of the Claimants' treatment at Yarl's Wood as opposed to the fact of their detention at the centre. The Claimants were kept together in appropriate accommodation for a family. They were afforded prompt and appropriate medical treatment in response to complaints of illness.

191. A complaint is made that the special educational needs of the Second Claimant were not assessed. It is true that some days went by, apparently, between the staff at Yarl's Wood being informed of the possibility that the Second Claimant had special educational needs and an attempt by them to follow up what those needs might be. The plain fact is, however, that there is absolutely no evidence which begins to suggest that any assessment of the Second Claimant's special educational needs had taken place in the school which he regularly attended before he was detained. I do not think that the failure (if failure it was) to begin an assessment of the special educational needs of the Second Claimant within

the days at which he was detained in Yarl's Wood can possibly constitute a breach of Article 8.

192. In summary, I conclude that the First, Second and Third Claimant were unlawfully detained from 7 February 2010 to 24 February 2010. That detention was unlawful when considered in the light of domestic legislation, principles of domestic law which have evolved in the courts and by virtue of Articles 5 and 8 of the ECHR. I reject the submission that a breach of Article 3 of ECHR has been established by any of the Claimants; I further reject the submission that there was an infringement of their rights under Article 8 on account of their treatment at Yarl's Wood.

The Fourth and Fifth Claimant

193. I can deal with the issues raised in these cases more succinctly.

194. I am satisfied that at the time the decision was taken to detain the Fourth and Fifth Claimant UKBA intended to remove them and detention was authorised to facilitate that purpose. Further, the decision-maker (Mr Greig) reasonably believed that detention would subsist for no more than 3 days.

195. There is no sound basis to conclude that Mr Greig had regard to the duty imposed under section 55 of the 2009 Act to safeguard and promote the welfare of the Fifth Claimant. I say that for the same reasons as led me to the view that the duty was not properly considered in the case of the First Claimant and her children. There is not a shred of evidence that he treated the welfare of the Fifth Claimant as a primary consideration.

196. I am satisfied that no offer of assisted voluntary return was made as alleged by the Defendant. The probability is that no detailed discussion took place between officers of UKBA and the Fourth Claimant at any time in which the benefits of the assisted voluntary return and the consequences of refusal of voluntary return were properly explained.

197. There is no suggestion in the witness statements adduced on behalf of the Defendant or in any documentation produced that the possibility of "self check in" was considered at all.

198. One of the reasons advanced for the detaining of the Fourth and Fifth Claimant was the likelihood that they would abscond. I accept that in the case of the Fourth and Fifth Claimant there was some basis for such a concern. The Fourth Claimant had entered the United Kingdom illegally using false documentation; on 3 separate occasions she had failed to report as required by her terms of temporary admission, albeit, apparently, there was an acceptable reason for the failure.

199. Notwithstanding that some risk of absconding existed, I am not satisfied that this was such a potent factor so as to justify detaining the Fourth Claimant and her child.

200. The failure to have regard to the duty under section 55 of the 2009 Act in advance of the decision to detain the Fourth and Fifth Claimant makes their detention unlawful. Mr Swift QC submits, however, that section 55 was properly considered when the Fourth Claimant and her child were taken to Becket House in advance of their transfer to Yarl's Wood. On that basis, submits Mr. Swift QC, the period of unlawful detention can be measured in hours.

201. As in the case of the Suppiah family, the detention of the Fourth and Fifth Claimant was unlawful for reasons which included a failure to have regard to the duty under section 55. However, it was unlawful for more wide-ranging reasons; it was not a measure of last resort since alternatives had not been explored adequately or at all and the risk of absconding, although present, did not justify detention when measured against factors which militated against it. In any event Mr. Swift's submission is based on one document to the effect that "a further mitigating circumstances interview was conducted". I do not accept that this one reference is sufficient to persuade me that the duty under section 55 was discharged prior to the transfer to Yarl's Wood. Section 55 requires the decision-maker to treat as a primary consideration (in the absence of good reason to do otherwise) the duty to safeguard and promote the welfare of a child. There is nothing in the document relied upon which begins to suggest that a rigorous appraisal of that duty was undertaken.

202. While the case of the Fourth and Fifth Claimant is not quite as clear cut as that relating to the First, Second and Third Claimants, I am satisfied that the authorisation of detention was unlawful in their case.

203. The Fifth Claimant became ill on 12 February 2010. On the same date an injunction was granted to restrain removal and judicial review soon followed. On 15 February 2010 a detention review took place when further detention was authorised. The decision-maker wrote:

> "Given her immigration history it would seem that Ms Bello would be unlikely to report if released at this stage.
>
> Unless Mornike's health worsens, or she is not fit to be detained maintain detention at least until it is known if the JR is to be expedited."

204. On the next day this decision was reviewed by a more senior officer. She wrote

> "I agree with the decision to maintain detention at this time. If a JR can be expedited then we can expect removal to take place within a reasonable time period. There is nothing at this time to suggest that Mornika's illness makes her unfit for detention. If the JR cannot be expedited or if Mornika's illness means that continued detention is not appropriate for her then the family should be released. Ms Bello has not always reported as required. She has remained in the United Kingdom illegally for an extended time. These factors do not give

> confidence that the family would report voluntarily for removal if released."

205. What is clearly lacking from these decisions is any appreciation of section 55 of the 2009 Act. On that ground alone I consider that the decision to detain beyond 15 February 2010 was unlawful. Without question detention beyond 19 February was unlawful. To repeat, however, my primary conclusion is that detention was unlawful from its inception.

206. The authorisation of detention of the Fourth Claimant and her child was in direct conflict with the Defendant's published policy. Paragraph 163 above applies with equal force to these Claimants. So, too, UKBA signally failed to comply with policy so far as it related to the Family Welfare Form which came into existence in the case of these Claimants. If anything the Family Welfare Form as it related to the Fourth and Fifth Claimant was even less informative than the one prepared for the First, Second and Third Claimants. The failure to complete the form was a clear breach of published policy. Finally, I should record that the maintaining of detention after 15 February 2010 was also, in my judgment, a breach of the Defendant's published policy. Had UKBA complied with the Defendant's policy, detention would not have been authorised; it would not have been maintained (assuming it was originally lawful).

207. The Fourth and Fifth Claimants allege breaches of Article 3, 5 and 8. Articles 5 and 8 are proved on the same basis as articles 5 and 8 were proved by the First, Second and Third Claimants.

208. The claim under Article 3 is not made out. Although the Fifth Claimant developed an illness during the course of her detention and her detention was maintained following the onset of that illness I simply do not accept that the minimum level of severity necessary for a breach of Article 3 was achieved in her case. The course of the illness seems to have waxed and waned as is demonstrated by the medical records. The Fifth Claimant received appropriate and prompt treatment. No evidence has been adduced to the effect that her illness subsisted for any length of time after her release from detention and, as I have said, I infer that her illness was short lived after her release. Given her age in February 2010 (approximately 2½) it is unlikely that she was aware that she was being detained. It simply would not be right to say either that the conditions of detention in which the Fifth Claimant was held or the Interested Party's response to the Fifth Claimant's illness was such that a breach of Article 3 is established. Further I do not accept that Article 8 was breached by reason of the conditions of detention or the treatment of the Fifth Claimant during her detention.

The lawfulness of the Defendant's policy

209. As I have said, the Claimants do not assert that my decision in S was wrong. In her written submissions Ms Dubinsky was more equivocal, but, ultimately, she stopped short of submitting that my decision in S was wrong. However, both Mr Singh QC and Ms Dubinsky submit that the ambit of my decision in S is

somewhat confined. Essentially, they submit that I was engaged in a textual analysis so as to see whether the Defendant's published policy was consistent with UNCRC. I accept their submissions on that point. I do not read my decision in S as precluding a challenge to the legality of the Defendant's policy upon the grounds now advanced by Mr Singh QC and Ms Dubinsky. Mr. Swift QC did not suggest otherwise.

210. However, before dealing with the grounds now advanced I should make one thing clear. I am still of the view that the Defendant's policy conforms to this country's obligations under UNCRC. That means that I accept that the policy is consistent with Article 3 of that Convention which provides that the best interests of the child shall be a primary consideration and Article 37 which provides that detention of a child shall be used only as a measure of last resort. Further, and contrary to submissions advanced by Mr Singh QC, I am satisfied that the wording of the current policy is consistent with section 55 of the 2009 Act. It is correct that the policy, as drafted, does not say in terms that the duty to safeguard and promote the welfare of a child shall be a primary consideration when making a decision such as whether detention should be authorised. However, the policy makes it clear that the decision-maker must have regard to the duty under section 55. The duty under the section includes the duty to have regard to the statutory guidance issued under the section which makes it clear that the welfare of a child is to be treated as a primary consideration in the absence of a cogent reason to treat it differently. It is fanciful to suppose that decision-makers will not understand that the Defendant's policy must be read in the light of the statutory guidance issued under section 55.

211. It is against this background that I turn to deal with the first basis upon which the Claimants assert that the policy is unlawful namely that it cannot be operated lawfully in practice.

212. Mr Singh QC advances a number of propositions to support this submission. First, he submits that the policy as drafted contains insufficient safeguards to ensure that its key elements are applied appropriately. Second, he points to the criticisms made by those who have scrutinised detention decisions; Mr Singh QC submits that observations such as those made by HM Chief Inspector of Prisons, the Children's Commissioner for England, members of the House of Commons Home Affairs Committee and the Independent Chief Inspector of UKBA support the view that the Defendant's policy relating to detaining families with children cannot be applied, appropriately, in practice. Finally, Mr Singh QC relies upon a number of decisions of this court and the Court of Appeal post my decision in S which, he submits, add further support for the view that the policy cannot work in practice.

213. Mr Singh QC supports his submission that the policy, as drafted, contains insufficient safeguards by reference to the following matters. First, the policy fails to specify, expressly, that detaining families with children should be an exceptional course – the emphasis that detention of children should not just be a matter of last resort is insufficient. Exceptionality should be the cornerstone of the policy. Second, the policy does not refer to the need to treat the safeguarding and promoting of the welfare of children as a primary consideration; to the contrary the phraseology of the policy, submits Mr Singh

QC, actively discourages decision-makers from considering the welfare of children where that conflicts with the goal of immigration control. Third, the policy is silent upon the involvement of any child welfare professional in the initial decision to detain children. Mr Singh QC submits that this is an important omission since, at least in many cases, specialist advice should be taken before detention is authorised. Fourth, the policy fails to spell out that information from third parties will often be important to the decision-making process e.g. information from schools, social services or information about health. Fifth, the policy does not mention, is not concerned with and does not direct decision-makers to consider the clear risk to children of detention as demonstrated by the views of those reputable persons and organisations identified above.

214. I am not persuaded that the absence of safeguards as identified by Mr. Singh QC renders the policy inoperable in practice. As I have found the Defendant's policy contains a number of key elements. Upon its proper interpretation exceptional circumstances must exist before detention of families with children is justified. It is the key elements taken together with the overarching obligation to resort to detention only in exceptional circumstances which ensure that the policy complies with section 55 of the 2009 Act, obligations under UNCRC and the ECHR. The policy ensures that every decision-maker should know that the Defendant's policy demands that detaining children should take place in exceptional circumstances only and is a measure of last resort; inevitably, therefore, the decision-maker will know that it is incumbent upon him to undergo a rigorous analysis of all relevant factors before authorising that measure of last resort.

215. In my judgment the approach taken by the Claimants towards the Defendant's policy is overly prescriptive. It is neither necessary nor even desirable for the Defendant's policy to attempt to prescribe in advance what constitutes exceptional circumstances or when detention is justified as a measure of last resort or to lay down each and every step which a decision-maker should take along a long and difficult road leading to an anxious decision requiring sound and informed judgment. The submissions of Mr Singh QC about the potential involvement of a specialist adviser illustrate the point which I am seeking to make. I have no doubt that circumstances may arise when advice from a specialist adviser – whether in the field of social services, health or education – should be sought prior to a decision to detain. Equally, there will be circumstances where such advice is, obviously, unnecessary. How is the policy to be drafted to cater for each eventuality and those myriad of circumstances in between which call for the exercise of judgment?

216. Ultimately I accept the submission of Mr Swift QC on this aspect of the case. He says that the criticisms advanced of the written policy relate to its drafting, not to its substance. None of the drafting criticisms constitutes a reason why it would be proper to conclude that the policy cannot be made to operate lawfully in practice. I agree. I should also repeat that the existence and application of the Detention Centre Rules 2001 provide significant safeguards to detainees once they have been taken into detention.

217. It is clear that from time to time the employees of UKBA fail to apply the Defendant's policy when making decisions relating to the detention of families with children. That emerges with clarity from the observations of HM Inspector of Prisons, the Children's Commissioner, Members of Parliament, the Independent Inspector of UKBA and the detailed evidence of Mr. Makhlouf. It may very well be that the reasons for this unhappy state of affairs are accurately encapsulated in the observations of Mr John Vine, the Independent Chief Inspector of the UKBA, which are set out above.

218. I have asked myself the question whether the failings identified by Mr Vine and others are inevitable consequences of the Defendant's policy or, rather, consequences which can be avoided by a rigorous implementation of the policy together with an implementation of Mr. Vine's recommendations. On the basis of the evidence presented to me I am not persuaded that the criticisms of UKBA levelled against it by Mr Vine and others are inevitable consequences of the Defendant's policy which cannot be avoided even with appropriate training and the implementation of Mr Vine's recommendations (if that has not already occurred). I remind myself that I am considering the lawfulness of the Defendant's policy as at February 2010 and going forward from that date. Mr Vine's criticisms relate very much to the period in early 2010 which, of course, is a period in time shortly after the coming into force of section 55 of the 2009 Act. I remind myself that the criticisms of others straddle the period before and after the section came into force (e.g. the evidence of Mr. Makhlouf).

219. It may very well be that in the immediate aftermath of the coming into force of this section some decision-makers were less inclined than they should have been to give that statutory provision its full weight. However, once the true significance of this section is understood by decision-makers and properly applied, there will, inevitably, be much greater focus in decision-making upon the welfare of children and upon how detention will impact upon their welfare in any given case. In these circumstances I regard it as premature to conclude definitively that the Defendant's policy cannot operate lawfully in practice. The reality is that I have been asked to conclude that the Defendant's policy cannot operate lawfully in practice a very short time after the enactment of an important statutory provision which had been reflected in the Defendant's policy for no more than about four months when these proceedings were issued. Further, as is clear from the evidence of Mr. Wood, the working out of that policy in practice is currently the subject of detailed scrutiny by the Defendant and senior employees of UKBA.

220. I have also reached the conclusion that the criticisms of decision-makers expressed by the judiciary in cases concerning the lawfulness of detention cannot alone or in combination with Mr. Singh's other points justify a conclusion that the Defendant's policy cannot operate lawfully in practice. I do not propose to analyse or identify the cases relied upon by Mr. Singh QC. They are identified in paragraphs 84 to 86 of the Claimants' Skeleton Argument. A number of the cases relate not to families with children but to adult males. In any event, these cases are concerned with a minute fraction of the total number of persons detained since my decision in S and are usually heavily fact specific. One case relied upon, Muuse v SSHD [2010] EWCA Civ 453, is a very good

example; in that case the Defendant's employees were subject to criticism in the most trenchant terms yet it is difficult to see how any of those criticisms could have any bearing upon the legality of the Defendant's policy as it relates to the detaining of families with children. I accept that there are a very small number of decided cases (very small when measured against the numbers of families with children detained since my decision in S) where this court has decided that detention was unlawful from the outset or became unlawful before release and that in those cases UKBA decision-makers have been the subject of criticism; in a few of those very small number of cases the criticism has been expressed in trenchant terms. As is clear, I hope, I am far from happy with aspects of the decision-making processes in this case and I have been readily convinced that the Claimants should not have been detained. However, I do not consider that the individual views of judges expressed essentially upon the facts of the cases before them can be made a sound base for the conclusion that a policy cannot be operated lawfully in practice especially since, as I have said, the policy must now be applied in a manner which is consistent with a statutory provision which is comparatively recent.

221. The alternative argument advanced on behalf of the Claimants is that there is such a risk of unlawful decision-making when the Defendant's policy is applied in practice that the policy is unlawful on that ground. As Mr. Singh QC readily acknowledges the material and arguments which support that submission are identical to those which are said to justify the conclusion that the policy cannot operate lawfully in practice.

222. I acknowledge that it may be somewhat easier for the Claimants to demonstrate the existence of a substantial risk of unlawful decision-making than it would be to establish that the policy cannot operate lawfully in practice. In my judgment, however, it is still a formidable hurdle. Essentially all the reasons which have led me to conclude that the Claimants cannot establish that the policy cannot work lawfully in practice persuade me that they cannot demonstrate that there is such a risk of unlawful decision-making when the policy is applied that it ought to be declared unlawful on that ground. I am satisfied that from time to time the Defendant's policy has been applied erroneously but I am not prepared to go further.

Ministerial Pronouncements

223. Not surprisingly the Claimant's Skeleton Argument begins with a reference to a pronouncement in Parliament by the Deputy Prime Minister to the effect that immigration detention of children is "a moral outrage" and that ending it is essential to restoring "a sense of decency and liberty to the way in which we conduct ourselves." I am also aware that in the week commencing 13 December an announcement was made by the Deputy Prime Minister relating to the policy of detaining children pending removal as it may be formulated and/or applied in the future although I have no greater knowledge about what he said than has appeared in the media. I raise the issue of these ministerial pronouncements for one reason only. I recognise that there are very strong feelings about whether detaining children pending removal can ever be justified. However, I cannot stress too heavily that it has not been part of the Claimants' case as presented to me that a policy which permits the detention of families with children can never

be lawful or that detention of children can never be lawful whatever the terms of the Defendant's policy. At an earlier stage of these proceedings it seemed at least possible that the Claimants would argue that detention could never be lawful and that a policy which permitted it would always be unlawful. To repeat, however, that has not been the case presented to me. Rather, the starting point for my inquiry in this case has been the acceptance that detention of families with children, although certainly undesirable and potentially harmful to children can, nonetheless, be lawful.

Conclusion

224. The Claimants were detained unlawfully from the time that they were taken into custody until their release. Their rights under Articles 5 and 8 ECHR were infringed in the manner described earlier in this judgment; their rights under Article 3 were not infringed. The Defendant's current policy relating to detaining families with children is not unlawful. There is, nonetheless, a significant body of evidence which demonstrates that employees of UKBA have failed to apply that policy with the rigour it deserves. The cases of the two families involved in this litigation provide good examples of the failure by UKBA to apply important aspects of the policy both when the decisions were taken to detain each family and when decisions were taken to maintain detention after removal directions had been cancelled.

225. The Claimants confirmed during the course of the hearing that they did not seek any relief against the Interested Party.