Case No: C4/2013/1131

Neutral Citation Number: [2014] EWCA Civ 45

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT

The Hon. Mr Justice Sales

[2013] EWHC 682 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2014

Before :

LORD JUSTICE MOSES
LORD JUSTICE BEATSON
and
LORD JUSTICE UNDERHILL

- -

Between :

The Queen on the application of Pratima Das	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
- and -	
(1) Mind	**Interveners**
(2) Medical Justice	

- -

Stephanie Harrison QC and Michelle Brewer (instructed by **Sutovic and Hartigan Solicitors**) for the **Appellant**
Julie Anderson (instructed by **The Treasury Solicitor**) for the **Respondent**
Dinah Rose QC, Tim Buley and Martha Spurrier (instructed by **Bhatt Murphy** and **Deighton Pierce Glynn**) for the **Interveners**

Hearing dates: 12 and 13 November 2013

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Judgment

Lord Justice Beatson

I. Overview of the questions for decision and conclusions:

1. This appeal concerns the circumstances in which a person who the Secretary of State for the Home Department has power to remove from the United Kingdom and intends to do so but who has a mental illness may be detained. Such detention, commonly called "immigration detention", is authorised by the Immigration Act 1971 ("the 1971 Act"). Detainees may be held either at Immigration Removal Centres or in prisons. The broad powers given to the Secretary of State are limited by common law principles reflecting the importance of the liberty of the individual and the right to be free from arbitrary detention. They are also limited by the Secretary of State's own policies about immigration detention. Those policies are now principally contained in a document, *Enforcement Instructions and Guidance* ("the policy"). This appeal concerns one of those policies, the guidance in §55.10 of the policy that those "suffering from a serious mental illness which cannot be satisfactorily managed within detention" are suitable for detention "in only very exceptional circumstances".

2. The Appellant, Ms Pratima Das, an Indian national, claims compensatory damages for false imprisonment in respect of her detention between 7 November 2011 and 12 January 2012, when she was granted immigration bail. She maintains that it was unlawful to detain her because of her mental illness. The Secretary of State has wished to remove her from the United Kingdom since October 2008, when her application for asylum was refused, her claim was certified as clearly unfounded, and she was detained for eleven days. She was lawfully removed from the United Kingdom on 18 June 2012 and since then has pursued these proceedings from India.

3. In an order made on 26 March 2013 and sealed on 5 April, Sales J declared (Order, paragraph 1 and judgment, [42] – [48]) that the detention of Ms Das between 7 November 2011 and 12 January 2012 was unlawful and a false imprisonment. He held the detention was unlawful because, having adopted a policy regarding the detention of those suffering from serious mental illness, the Secretary of State failed to give practical effect to that policy by taking reasonable steps to inform herself sufficiently about Ms Das's mental health so as to be able to decide whether the policy applied in Ms Das's case. He, however, ordered that Ms Das was only entitled to nominal damages (Order, paragraph 2) because (see judgment, [57]) on the facts of her case she could lawfully have been detained and "it was in substance inevitable that she would have been detained had the Secretary of State properly complied with her legal obligations". The judge gave Ms Das permission to appeal on the issue of nominal damages and the correct interpretation of §55.10 of the Secretary of State's policy. Since the judge's order Mind and Medical Justice have been given permission to intervene in these proceedings.

4. There are two issues in this appeal. The first and principal question for decision is whether the judge set a higher threshold for the applicability of §55.10 of the Secretary of State's policy on those suffering from mental illness than that established by previous authority. It was submitted by Miss Harrison QC on behalf of Ms Das, and Miss Rose QC on behalf of the Interveners, that he erred in setting too high a threshold for an illness to qualify as a "serious mental illness", and too low a standard for concluding that mental ill health can be satisfactorily managed in detention.

5. As to "serious mental illness", the judge stated (at [61]) that the term "connotes a serious inability to cope with ordinary life, to the level (or thereabouts) of requiring in-patient medical attention or being liable to be sectioned under the Mental Health Act 1983". The Appellant and the Interveners submitted that confining the term broadly to illness requiring a particular form of medical intervention, hospitalisation, was wrong, particularly since the majority of those with serious mental illnesses are treated in the community.

6. As to "satisfactory management", the judge stated (at [62]) that the Secretary of State was entitled to have regard to what may be expected to be practically effective "in preventing a detainee from slipping into a state of serious inability to cope with ordinary life". Meeting this standard of "practical effectiveness of treatment", as opposed to "treatment which avoids *all* risk of suffering mental ill health or *any* deterioration in an individual's mental well-being" would, he stated, be satisfactory management. It was submitted that to interpret "satisfactory management" as management which permits deterioration up to the point where there is a real risk of a break-down requiring hospitalisation is to deprive the term of any effective meaning.

7. The second issue only arises if the judge did err in relation to the threshold for the applicability of §55.10. On behalf of the Secretary of State, Miss Anderson, submitted that, on the particular facts of this case, if, contrary to her primary case, the judge did err, his error did not affect the outcome of Ms Das's claim. Accordingly, she submitted that paragraph 2 of the order which states that Ms Das is entitled to nominal damages only can be upheld. This part of Miss Anderson's case involved a greater engagement with the facts than was to be expected in an appellate court in what had been identified as a test case about the meaning of "serious mental illness which cannot be satisfactorily managed in detention".

8. For the reasons I give in section VI of this judgment, at [45] – [71], I have concluded that the judge did fall into error by setting too high a threshold for an illness to qualify as a "serious mental illness" so as to engage the policy in §55.10. Notwithstanding the force of Miss Anderson's arguments, and in the absence of any evidence explaining the Secretary of State's decision-making in this case before the court below or before this court, for the reasons I give in section VII of this judgment, at [72] – [80], on the material before the court, I am unable to conclude that the error did not affect the outcome of Ms Das's claim.

II. Evidence and procedural matters:

9. The Interveners have submitted evidence. This consists of the witness statements both dated 21 October 2013 of Vicki Nash, Head of Policy and Campaigns at the mental health charity, Mind, and Emma Mlotshwa, the Co-ordinator of Medical Justice. The supporting documents referred to in the statements include articles, papers and reports on the mental health implications of immigration detention, reports about a number of Immigration Removal Centres, a statement in support of Mind's intervention by Dr Kamaldeep Bhui, Professor of Cultural Psychiatry and Epidemiology and an Honorary Consultant Psychiatrist based at Barts and the London School of Medicine and Dentistry and East London Foundation Trust, and a "position statement" from the Royal College of Psychiatrists on the detention of persons with mental disorders at Immigration Removal Centres.

10. Those representing Ms Das applied to adduce additional evidence in the form of a witness statement of Ms Tori Sicher, a solicitor at Sutovic and Hartigan dated 30 October 2013, and reports of Dr Arvind Sharma and Dr Eileen Walsh respectively dated 21 and 24 October 2013. Both have been involved with Ms Das's case. Dr Sharma is a consultant psychiatrist at the Cheshunt Community Mental Health Trust who treated her between March 2010 and the time she was detained. After she was released on bail in January 2012, he did not resume his care of her because she moved to Southampton. Earlier reports by him were (see [28], [30] and [32] below) considered by the judge. Dr Walsh is a chartered clinical psychologist who treated her. Miss Sicher states that she sought these reports to elicit the comments of Dr Sharma and Dr Walsh on the decision and findings of the judge in the light of their involvement with Ms Das's treatment. Miss Harrison submitted that it was necessary to have this evidence to interpret the policy and its terms "in the correct medical context both generally and in respect of this individual case", and that in respect of the latter it is only "an analysis of the core material already before the Court". The evidence that is the subject of this application all post-dates the decision to detain Ms Das. Some of it concerns her health since the judge's decision. I have not found it necessary to consider it. I have therefore not had to decide whether the evidence should be admitted or whether Miss Anderson was correct to submit that introducing it would turn an appeal on a point of interpretation into a one-sided rehearing of the proceedings below. I observe only that her submission had force. Parts of the reports consist (or appear to consist) of a critique of the judge's decision. Ms Sicher's explanation was not convincing as to why the evidence could not have been made available below or why post-decision evidence of this sort is of assistance in determining this appeal.

11. On 14 October 2013 the Secretary of State applied for an extension of time to file a Respondent's notice, and an application for permission to cross-appeal against the declaration that the decision to detain Ms Das was unlawful. Moses LJ refused that application because he considered that the Secretary of State waited too long to cross-appeal, and by the time she made her application it had been agreed that this was to be a test case. He, however, gave her liberty to apply after judgment was handed down. I add to the procedural history that an application to link this case with the case of *O* (C4/2012/1629) was also refused.

III. The legal and policy framework:

12. The principal statutory provisions authorising the detention of those who the Secretary of State wishes to remove from the United Kingdom are contained in the Immigration Act 1971. The provision that is material to these proceedings is paragraph 16 of Schedule 2 of the 1971 Act. It empowers the Secretary of State to detain *inter alia* those in respect of whom removal directions may be given. Paragraph 2(3) of Schedule 3 to the 1971 Act empowers the detention of a person who is the subject of a deportation order pending his or her removal. As many of the recent cases involving the detention of those with mental illnesses concern foreign national prisoners, I should also note that section 36 of the United Kingdom Borders Act 2007 ("the 2007 Act") makes provision for the detention of those foreign national prisoners sentenced to a period of imprisonment of at least 12 months who have completed their sentence and are subject to the "automatic deportation" provisions of sections 32 of the 2007 Act.

13. Because of the fundamentality of the right to be free from arbitrary detention, a rich vein of jurisprudence about the circumstances in which persons may be detained lawfully limits the apparent breadth of the words in the 1971 Act. This appeal does not directly concern those limiting common law principles, commonly known as "the *Hardial Singh*" principles, but it is necessary to state them in order to understand the context.

14. The principles are derived from the decision of Woolf J, as he then was, in *R v. Governor of Durham Prison , ex p. Hardial Singh* [1984] 1 WLR 704. The most widely cited formulation of them is that by Dyson LJ, as he then was, in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ. 888 at [46]. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, at [22] Lord Dyson JSC affirmed the *Hardial Singh* principles and encapsulated them thus:- (1) the Secretary of State can only use the power to detain for the purpose of deporting the detainee; (2) the period of detention must be no longer than that which is reasonable in the circumstances; (3) if before the end of that period it becomes apparent that it will not be possible to effect deportation within it the power should not be exercised; and (4) the Secretary of State should act with reasonable diligence and expedition to effect removal.

15. In *Lumba's* case Lord Dyson stated (at [22]) that the *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose and reasonably in the *Wednesbury* sense. But he also stated (at [30]) that they are not exhaustive, and do not therefore preclude the operation of the public law duty of adherence to published policy. §55.1.1 of the policy is to the same effect. It states that "[t]o be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy". It should be noted that, in *Lumba's* case Lord Dyson went further than stating that published policy must be adhered to. He stated (at [34]) that "immigration detention powers need to be transparently identified through formulated policy statements" (emphasis added). Such policies are therefore required and operate as restrictions on the broad language of the 1971 Act over and above the *Hardial Singh* principles. Failure by the Secretary of State to have regard to a material policy concerning detention would, it was held, render the detention unlawful and a false imprisonment, even where it is certain or inevitable that the person detained could and would have been detained had the power been exercised lawfully: see [2011] UKSC 12, [2012] 1 AC 245, at [26], [34], [64] – [66], [88], [175], [208], [221], [239]. But, if detention was certain or inevitable, while the Secretary of State will have committed the tort of false imprisonment, the person detained will only be entitled to nominal damages: see *ibid.*, at [95], [169], [237], [256], [335].

16. It is clear from the decisions on the *Hardial Singh* principles that the state of a person's mental health will affect the determination of what is a reasonable period for which to detain that person: see Baroness Hale in *Lumba's* case at [218] and Dyson LJ in *M v Secretary of State for the Home Department* [2008] EWCA Civ. 307 at [39]. *M's* case was one in which, before this Court, it was not contended that his detention was in breach of the Secretary of State's policy, at that time contained in §38.10 of her *Operational Enforcement Manual.* Dyson LJ stated that where detention has caused or contributed to a person's suffering mental illness that is a factor which "in principle" should be taken into account in assessing the reasonableness of the

length of the detention. But, he also stated that in such cases "the critical question … is whether facilities for treating the person whilst in detention are available so as to keep the illness under control and prevent suffering".

17. I turn to the policy in §55.10 of the Secretary of State's *Enforcement Instructions and Guidance* which is the subject of the present appeal, and which, as I have stated, deals with "persons normally considered suitable for detention in only very exceptional circumstances". That paragraph replaced the previous policy contained in §38.10 of the Secretary of State's *Operational Enforcement Manual* in April 2008. The guidance was revised in September 2008 and January 2009. From January 2009 until 25 August 2010 the category of those whose state of health brought them within §55.10, was "those suffering from serious medical conditions or the mentally ill".

18. On 25 August 2010 §55.10 was reformulated. Mental illness and medical conditions (i.e. physical illness) are now addressed in separate bullet points in the third sub-paragraph of §55.10. The reformulated provision applies to Ms Das's case. It states:

> "**55.10. Persons considered unsuitable for detention**
>
> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
>
> In CCD [Criminal Cases Directorate] cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> - unaccompanied children and young persons under the age of 18 …
> - the elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;
> - pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);
> - those suffering from serious medical conditions which cannot be satisfactorily managed within detention;
> - **those suffering serious mental illness which cannot be satisfactorily managed within detention** (in CCD cases, please contact the specialist Mentally Disordered Offender Team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
> - those where there is independent evidence that they have been tortured;
> - people with serious disabilities which cannot be satisfactorily managed within detention;
> - persons identified by the Competent Authorities as victims of trafficking … " (emphasis added)

19. The reformulation of the guidance in August 2010 took place without any prior consultation or notice, and without an equality impact assessment. The compliance of the post-August 2010 formulation with the public sector equality duty in section 149 of the Equality Act 2010 came before Singh J in the Administrative Court in *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin). In that case, although the court was told that the Secretary of State was in the process of carrying out an equality impact assessment,[1] the Secretary of State's case was (see the summary of the evidence on her behalf at [187]) that the reformulation did not represent a policy change but that its intention was to align the language of the guidance more accurately with the actual policy and departmental practice; a more explicit statement of existing policy. In the context of the detention of those with serious medical conditions that argument had been accepted by this Court in *R (MD (Angola)) v Secretary of State for the Home Department* [2011] EWCA Civ. 1238 at [17].

20. In *HA (Nigeria)'s* case Singh J held (at [194]) that in the case of mental illness there was a change in at least the stated policy and that the reformulated §55.10 was incompatible with the public sector equality duty because there should have been an equality impact assessment. The Secretary of State launched an appeal against Singh J's decision but the appeal was withdrawn after the decision of this court in *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ. 597, which I discuss later in this judgment.

21. In this court, the Appellant and the Interveners took a different approach to the policy to that taken by the Respondent. But before the judge there was no dispute as to its meaning. It appears that both parties made their submissions on the basis that the approaches of Cranston J in *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin) at [51] – [55] and of this court in *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ. 597 at [41] were correct. I discuss those decisions at [58] – [61] below.

22. The Detention Centre Rules 2001, SI No 238 of 2001 is the final piece of the legislative and regulatory framework that is relevant to this appeal. Rule 33 provides that all detention centres shall have a health care team including a general practitioner. Rule 34 provides that every detained person is to be given a physical and mental examination by a medical practitioner within 24 hours of admission. Rule 35 provides:

> "(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> …
>
> [*sub-paragraphs (2) and (3) impose a duty on the medical practitioner to report on the case of a detainee suspected of having suicidal intentions or who he is concerned may have been the victim of torture*]

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[1] It became clear after the hearing in *HA's* case, see [2012] EWHC 979 (Admin) at [197], that, in fact, the equality impact assessment had not started. An undertaking was given to Singh J to commence the assessment by 30 March 2012, (see *ibid* at [199]) and, at the November 2013 hearing of the present case, the court was informed that the assessment has not been completed.

…

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) for his supervision or care".

§55.8A of the policy states that the purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention.

23. Before leaving this summary of the legal and policy framework, I should return to the position of foreign national prisoners and the "automatic deportation" provisions in the 2007 Act, to which I referred at [12] above. The strength and weight of the policy favouring the deportation of foreign national prisoners contained in primary legislation was discussed by Laws LJ in *SS (Nigeria) and others v Secretary of State for the Home Department* [2013] EWCA Civ. 550 at [48] ff. In the present context, its relevance is that, in considering whether it is reasonable to detain a foreign national prisoner and the period for which it is reasonable to detain him or her, assessment of the risk of harm to the public the person poses through further offending is a particularly important factor: see e.g. the discussion in *R (OM) v Secretary of State for the Home Department* [2011] EWCA Civ. 909 at [29] ff., and *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin) at [53] – [55]. See also *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ. 597 at [11], [21] [25] and [28]. The risk of absconding will also be important, although this is a factor not confined to foreign national prisoners.

24. Those cases (further considered at [49]– [56] below) also show that these factors continue to be significant where the foreign national prisoner suffers from mental illness. Even where the policy now contained in §55.10 in principle applies, it will be necessary for the person considering detention to weigh the risk of harm to the public against the reason why that person would normally be regarded as unsuitable for detention. In the cases of those with mental illnesses who are not foreign national prisoners, the strength and weight of the policy concerning them will not be present. This means that, although the broad principles of assessment of the question whether detention is justified will be the same, some care should be taken in reading over from the result of the assessment of a case involving a person with a mental illness who is foreign national prisoner to the case of a person who is not.

IV. The facts:

25. This section of my judgment is principally taken from paragraphs [2] – [12], [19], and [22] – [40] of the judgment below.

26. Ms Das arrived in the United Kingdom in March 2004 with leave to remain as an overseas domestic worker. In June 2008 she left her employment and presented herself to the relevant authorities. She claimed that the family had treated her very badly, including assaulting her, to such an extent that she was a "trafficked person" within the sense of that concept in the Council of Europe's 2005 Convention on

Action Against Trafficking in Human Beings. In a letter dated 13 June 2008, the authorities identified her as someone who had potentially been trafficked.

27. In July 2008, having ceased to work as an overseas domestic worker, Ms Das claimed asylum. On 15 October 2008, the Secretary of State refused her claim and certified it to be clearly unfounded. On 17 October 2008 she was detained and directions were set for her removal from the United Kingdom on 23 October 2008. She challenged those directions in a judicial review, obtained a stay, and was then released from detention. In December 2008, the removal directions and the certification that the claim was "clearly unfounded" were withdrawn by the Secretary of State. Ms Das then appealed to the Tribunal which, in a decision in July 2009, upheld her claim to asylum. The Secretary of State, however, successfully applied to the Upper Tribunal for a reconsideration of that decision. In a decision dated 22 February 2010, the Upper Tribunal dismissed her asylum claim and appeal against removal.

28. In December 2009, while Ms Das's case was pending before the Upper Tribunal, her general practitioner referred her to the Cheshunt Community Mental Health Team. In January 2010 she was assessed by a community psychiatric nurse and, on 2 March 2010, by Dr Arvind Sharma, the consultant psychiatrist I referred to at [10] above. Dr Sharma then diagnosed her as having (a) a Moderate Depressive Episode without psychotic symptoms, (b) reaction to severe stress and adjustment disorder and post-traumatic stress disorder, and (c) mild learning disorder. Thereafter, she received mental health services from the Cheshunt Community Mental Health Team and met Dr Sharma regularly for consultations. She was initially assessed by him once a month, and later every two months. She was waiting to be given treatment by the Complex Post-Traumatic Stress Disorder service, and she was prescribed a number of drugs. The prescriptions were for Citalopram at 60mg daily, Risperidone at 3mg daily, and Temazepam at 10mg daily.

29. It is convenient at this stage to refer to Ms Das's unsuccessful proceedings against her former employers in the Employment Tribunal. She brought these soon after her temporary admission to the United Kingdom in December 2008. For the purposes of those proceedings, a consultant psychiatrist, Dr David Oyewole, was jointly instructed by Ms Das and her former employers. Dr Oyewole did not know of Dr Sharma's March diagnosis. He examined Ms Das on 9 April 2010 and his report is dated 26 April 2010. The report was sceptical about the extent and severity of her symptoms and thus of any mental illness. Dr Oyewole stated (paragraph 12.16) that there was in his view "a possibility of intentional exaggeration of symptoms which may be due to the view that this will be useful" in obtaining compensation. In July 2010 the Employment Tribunal dismissed Ms Das's claims as out of time. It stated that, in the light of her cross-examination at the hearing, it "had grave doubts that it had heard honest evidence from" her.

30. In this period, negotiations to settle the judicial review proceedings instituted in October 2008 at the time of Ms Das's first period of detention were undertaken but were not successful. Those proceedings were concluded on 28 August 2011. In the course of those negotiations, her advisers sent the Secretary of State a report prepared by Dr Sharma to assess any psychological damage caused to her by that period of detention. Dr Sharma's report was prepared without sight of Dr Oyewole's report. It stated that Ms Das's "current mental state does somehow reflect the effect of detention and it appears that the detention has contributed to her distress and the

present symptoms of post-traumatic stress disorder". It also stated that Ms Das's "fear of visiting official places, nightmares and general persecutory feelings can also be attributed to such incidents of detaining her". Dr Sharma's assessment was that there was some improvement in her overall level of functioning since 2009, and in April 2011 he considered that she suffered from "Moderate Depressive Episode without depressive symptoms", "reaction to severe stress and adjustment disorder [PTSD]…" and "mild learning disability". The report stated that the specialist complex PTSD service had been unable to help her because of language difficulties. It also stated that she feared reprisals from her former employers and that she would be killed if she went back to India, and also feared being detained.

31. In the autumn of 2011 Ms Das continued to receive outpatient psychiatric care from Dr Sharma. By the end of October 2011, active consideration was again being given to removing Ms Das and to detaining her pending such removal. An entry dated 31 October 2011 in her UKBA General Case Information Database ("GCID") records noted that she informed UKBA that she could not report as scheduled on 15 November as she had a psychiatric appointment, and stated "we should look into this a bit deeper to ensure we are taking the appropriate action prior to any detention". A further entry in the records dated 4 November 2011 stated that, after checks, "the only issue that could constitute a barrier [to detention on 7 November 2011 and removal] would be the submission of a psychiatric report".

32. The contemporaneous notes concerning the decision to detain Ms Das also show (see judgment, [32]) that the relevant UKBA officials considered it was likely that she would abscond to avoid removal unless she were detained and stated that she had "evinced no health or family grounds to preclude her…detention pending her removal". It is also stated in the records (see judgment, [27] and [22]) that a report, which was in fact Dr Sharma's report, had been received by the judicial review team on 12 October, but that the team considering removal and detention had not received a copy. The note recommended that, before going ahead with detention and removal, the report should be obtained, observing "the relevance of this psychiatric report is even more justified as the subject has already stated that she cannot report on 15/11/11 due to a psychiatric appointment…". Another note, reviewing the circumstances after Ms Das was detained, stated that the psychiatric report "had not been found". The judge (at [28]) concluded that the decision-making unit had failed to obtain and review Dr Sharma's report before issuing instructions for the detention of Ms Das, even though the report was known to be available with the judicial review team. The decision-making unit received a copy of the report from Ms Das's solicitors under cover of a letter dated 22 November 2011 as part of the material in support of her claim to have a fresh claim for asylum which the Secretary of State should consider. The judge found (at [29]) that the report was, however, also not reviewed for that purpose at that stage.

33. When Ms Das was detained on 7 November, a risk assessment was completed, which identified that she represented a potential risk in relation to self-harm/attempted suicide, psychiatric disorder and medical problems. As to Ms Das's condition when detained, the GCID notes state that when detained, she "appeared to collapse" and was "clearly emotional and distressed". They also state that she "claimed to have the following medical issues: psychiatric condition [PTSD], difficulty sleeping/nightmares…memory problem" along with a range of physical ailments. She

showed those detaining her letters giving appointments with Dr Sharma and informed them that she took a range of medication, including antidepressants, had had suicidal thoughts and had been stopped from jumping under a train in 2010 by her boyfriend. The risk assessment led to a doctor seeing Ms Das on 8 November. She was noted as appearing "confused", "tearful", "upset at detention", and it was stated that she was on antidepressants. Under her past medical history it was noted "mental health problems – PTSD". The doctor recommended continuation of her medication but did not recommend release or special treatment. Miss Anderson relied heavily on this and the absence of a report to the Detention Centre manager by the doctor pursuant to the duty under Rule 35 to report on the case of "any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention".

34. On 15 November 2011 eight days after Ms Das was detained, her caseworker received a "fit to fly" if removed from the United Kingdom report from a clinician. That day removal directions, providing for a medical escort, were set for 2 December 2011, but not served on Ms Das until 28 November, six days after the decision-making unit received the further representations on Ms Das's behalf referred to at [32] above. In the light of the further representations, the removal directions were cancelled that day.

35. At the detention centre, Ms Das had access to, and made extensive use of, the health service facilities at the healthcare unit. At various times she was noted as being tearful and distressed, and there was a time when she was reluctant to take the medication she was given, some of which was different to that which had been prescribed by her doctor. The judge stated (at [35]) that "the overall impression one gets from reading the medical notes is that, although sometimes visibly upset or distressed, she copes reasonably well with her detention and that the medication provided to her was reasonably effective at controlling her depression". The notes of the post-detention reviews of Ms Das's case that occurred after 24 hours, and 3, 7, 14, 35 and 49 days state that her detention could be continued as "legal, justified and proportionate", but the judge stated (at [32]) that they did not review her psychiatric condition.

36. The judge stated (at [36]) that the most significant incident during Ms Das's detention was that she became distressed when attending the healthcare unit for a mental health assessment on 29 November and was talking about her deceased mother and husband. Asked about her daily routine, she said she was forgetful and had to ask officers what to do, and at this stage she began hitting herself and calling herself "stupid", and also hit her head on the table with a small amount of force. The records noted that she said that she had regular thoughts of killing herself. A full mental health assessment was undertaken and the outcome was that medication was prescribed which Ms Das agreed to take.

37. The judge also stated (at [38]) that none of the healthcare professionals who saw and assessed Ms Das in detention appeared to have thought that she represented a serious risk of self-harm or identified her as someone suffering from serious mental health issues or anything requiring any intervention greater than taking antidepressant medication. There appeared, he stated, "to have been no significant deterioration in her mental health while in detention or any major cause for concern".

38. The further representations submitted on behalf of Ms Das were rejected on 13 December 2011 and, on 14 December, new removal directions were set for 30

December 2011. On 21 December, after further submissions and a challenge to removal were received, the removal directions were again cancelled. Ms Das was given bail by an Immigration Judge on 12 January 2012 and moved to Southampton, where she was under the care of the Southampton Community Mental Health Trust.

39. In May 2012 in a report to assess whether Ms Das would be fit to fly if removed from the United Kingdom and whether she could cope upon return to India, another psychiatrist, Dr Vinodh Sreeram, noted that she suffered from mood fluctuations, poor noise tolerance, social withdrawal (as a symptom of her PTSD), poor sleep, cognitive impairment and suicidal ideation, and had not responded well to the medication she was then on. The judge stated (at [40]) that Dr Sreeram's assessment was that her mental state was not sufficiently serious to warrant hospitalisation, and that her current treatment, using out-patient services, was appropriate.

V. The judgment below

40. The judge's starting point was that:

> "[59] The term "serious mental ill health" in paragraph 55.10 has to be interpreted in the context of the overall policy statements promulgated by the Secretary of State in the immigration instructions. **Those instructions seek to give guidance to officials and to balance the objectives of ensuring firm and fair application of immigration controls and humane treatment of individuals facing removal** from the United Kingdom. It is a simple fact of life that many individuals who apply for leave to remain or asylum and whose claims are rejected may be tempted to seek to abscond to avoid removal from the country, or may not co-operate in their removal or leave voluntarily. There can be no doubt that detention of a person who faces the prospect of removal and who presents a significant risk that they will not leave voluntarily and may take steps to avoid removal can usually be justified, and will in practice be required if immigration controls are to be given practical effect in a way which is fair as between aspirant immigrants to the United Kingdom." (emphasis added)

41. The judge also stated (at [60]) that "… it is important to give full value to the word 'serious', in the phrase 'serious mental illness' (and indeed in the other cases qualified by that word, in the fourth and seventh bullet points), since that formula defines a class of case to which the 'very exceptional circumstances' test will be applied". He continued:

> "Although **application of the "very exceptional circumstances" test does not prevent detention in all cases, it does – obviously – make it significantly more difficult to justify detention** (and hence increases the risk that a person, not being detained as a result of application of that test, might abscond to avoid his removal and the effective implementation of immigration controls in his case). On a proper interpretation, **the circumstances in which that more restrictive test falls to be applied should be relatively narrowly construed, since otherwise the effective, firm and fair operation of immigration controls may be excessively undermined.**" (judgment, [60] , emphasis added)

42. He stated that:

> "In my view, **'serious mental illness' connotes a serious inability to cope with ordinary life, to the level (or thereabouts) of requiring in-patient medical attention or being liable to be sectioned under the Mental Health Act 1983**, or a mental condition of a character such that there is a real risk that detention could reduce the sufferer to that state – for instance,

> if there were a real risk that they could have a breakdown in prison." (judgment, [61], emphasis added)

He also stated that, in the context of §55.10:

> "the words 'which cannot be satisfactorily managed within detention' indicate **a standard of practical effectiveness of treatment, rather than treatment which avoids all risk of suffering mental ill health or any deterioration in an individual's mental well-being.**" (judgment, [62], emphasis added)

43. His conclusion in the present case was:

> "[63] In my judgment, the Claimant did not suffer from "serious mental illness" when she was taken into detention and during the period of her detention. The best available evidence regarding the Claimant's condition at the relevant time is from the doctor and trained medical staff who actually examined her at or about that time, namely the staff at the medical unit of the detention centre. On a fair reading of the medical notes they compiled, they had no serious concerns that the Claimant's mental state was such as would disable her from coping with detention. Dr Sharma's report, if it had been properly reviewed, would not have changed that assessment. Had the Secretary of State asked a doctor in November 2011 and during the second period of detention to assess whether the Claimant was suffering from serious mental illness, I find that the advice would have been that she was not.

44. The judge considered (see [64]) that Dr Sharma's report was well out of date by the time of the detention in issue, and it did not state facts or an opinion which indicated that Ms Das suffered from a serious mental illness "of a kind to which the policy refers". Dr Oyewole's report was older and in any event did not provide support for the contention that Ms Das was suffering from a serious mental illness. He also stated that Dr Sreeram's report did not support the conclusion that she suffered from serious mental illness, and noted that Dr Sreeram thought her treatment as an out-patient was appropriate.

VI. The approach to and interpretation of the policy:

45. The proper interpretation of the phrase "suffering from a serious mental illness which cannot be satisfactorily managed within detention" in §55.10 of the Secretary of State's policy is, as the judge stated at [58], a matter for the court. In interpreting a policy such as this, the court will have regard to its language and to its context and purpose. There is useful guidance in *R (MD (Angola)) v Secretary of State for the Home Department* [2011] EWCA Civ. 1238. In that case the Appellant was HIV positive and the court was concerned with the restriction in §55.10 on the detention of those suffering from serious medical conditions. Maurice Kay LJ (at [14]) stated:

> "I put at the forefront of my reasoning the context of the words and the purpose of the provision. Although … we are not construing a statute, context and purpose remain important. The context is the use of the power to detain in order to effect a lawful removal. It generally arises where there is a risk that the person in question will abscond, fail to co-operate or resort to crime during an anticipated short period prior to removal. The purpose is to ensure that the lawful removal of a person who has no right to remain in this country is not frustrated."

46. In the present case the judge stated (judgment, [59], set out at [40] above) that the purpose of the guidance in §55.10 of the policy is to balance the objectives of

ensuring firm and fair application of immigration controls and the humane treatment of individuals facing removal. At the hearing, Miss Harrison stated that she did not quarrel with that proposition, and that her challenge was to the way the judge balanced the objectives, and the meaning he gave to the word "serious" in "serious mental illness". Her written submissions (skeleton argument paragraphs 23-24) stated that what the judge described (at [60], set out at [40] above) as a "relatively narrow" construction of the policy was contrary to and defeated the humane purpose of the policy "which is effectively disregarded" or which is given "insufficient weight". Miss Harrison and Miss Rose submitted the general principles of construction, reflecting the presumption in favour of the liberty of the individual, mean that the policy should not be interpreted and applied restrictively.

47. Miss Harrison's approach was to analyse the individual components in the relevant bullet point in §55.10; "suffering from", "a serious mental illness", and "satisfactorily managed". But a policy such as that in §55.10 provides broad guidance as to how discretion is to be exercised in the scenarios considered in it. It should not (see e.g. *R v Secretary of State for the Home Department, ex p. Ozminnos* [1994] Imm AR 287, 292) be subjected to fine analysis so as to interpret it in the way one would a statute. Care must also be taken not to stray beyond interpretation into what is in substance policy formation by judicial glosses which unduly circumscribe what is meant to be a discretionary exercise by the executive branch of government. For those reasons, I accept Miss Anderson's submission that the terms of the policy should not be dissected in the way Miss Harrison sought to do. What is needed is what Maurice Kay LJ in *MD (Angola)'s* case (at [16]) described as a "purposive and pragmatic construction". In the light of the purpose of immigration detention identified above, that is enabling lawful removal pursuant to an effective immigration policy, the policy seeks to ensure that account is taken of the health of the individuals affected and (save in very exceptional circumstances) to prevent the detention of those who, because of a serious mental illness are not fit to be detained because their illness cannot be satisfactorily managed in detention.

48. In any event, I do not consider that Miss Harrison is assisted by her dissection. For example, she referred to *MD (Angola)'s* case as supporting the proposition (skeleton argument, paragraph 37) that the phrase "suffering from" adds nothing to "satisfactorily managed". In the next sentence she submitted that anyone who manifests symptoms of a serious mental illness is "suffering" from it even if those symptoms are under control at the point of detention, but that submission is in fact quite inconsistent with the approach approved by this court in the case she cited, *MD (Angola)'s* case. In that case Maurice Kay LJ stated (see [13] – [14]) that a person "suffers" from an illness "if they are significantly affected by that illness", and that those whose serious medical condition is "satisfactorily managed, albeit that its impact may vary, are not suffering from it". A similar approach was taken by Richards LJ in respect of a paranoid schizophrenic whose condition was adequately controlled by medication he was taking: see *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ. 597 discussed at [55] – [56] below.

49. As to the meaning of the term "serious mental illness", Miss Harrison's contention that the decisions reviewed in the Interveners' submissions indicate that anyone who has been assessed by a competent expert as requiring referral to and treatment by specialist secondary services falls within that term, takes those submissions out of

context. The Interveners' submissions were directed to challenge the judge's view that what is required is mental illness at a level which requires treatment in hospital under the Mental Health Act 1983, and this was the point for which a number of the cases were cited: see *R (OM) v Secretary of State for the Home Department* [2011] EWCA Civ. 909 at [33]; *R (AA (Nigeria)) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin) at [39] (depression and PTSD, and five suicide attempts, but the medical view was that AA be treated in the community); *LE (Jamaica)'s* case at [41]; and *Anam's* case at [13] (finding that mental illness not at a level requiring treatment in hospital).

50. It is correct that, since the Secretary of State's contention that the changes in the wording of the policy did not represent a substantive change in the policy but only sought to align the language used more accurately with the actual policy and departmental practice, and with the decisions on §38.10 and the previous version of §55.10, those decisions remain of assistance in understanding of the meaning of §55.10. But the cases cited in the Interveners' skeleton argument do not support the proposition that one can determine whether the policy applies simply by considering the diagnosis, and without also considering the effect of detention upon the illness: see in particular the approaches of this court in *OM's* case and *LE (Jamaica)'s* case. To the extent that any of them do focus on diagnosis alone, they must now be reassessed in the light of the decisions of this court in those two cases, in particular *LE (Jamaica)'s* case.

51. At the hearing, the submissions focussed on the approaches taken in *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin) and *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ. 597. Before summarising them, I should state that I do not consider that, in the light of them, my unreserved decision in *R (MMH) v Secretary of State for the Home Department* [2007] EWHC 2134 (Admin) is of assistance. Richards LJ in *LE's* case and the written submissions in the present case refer to the statement in it (at [48]) about the version of the policy in §38.10 that "it is implicit that, in the reference in §38.10 to those suffering from serious medical conditions or the mentally ill, there is a level of seriousness required to engage the policy for mental illness as well as for physical medical conditions". In that case the Secretary of State did not consider the implications of a diagnosis of PTSD some seven months after MMH's period of immigration detention commenced in the light of the policy in §38.10. I concluded that that failure meant that detention from that time was unlawful. I did not need to consider what level of severity is required for the policy to apply or whether, if the Secretary of State had considered the policy, MMH would have been detained, because the question of compensation was not before the court.

52. *Anam*'s case concerned the detention of a foreign national prisoner who was diagnosed with paranoid psychosis. His history of offending involved some 40 individual offences and 26 convictions, including a serious robbery involving physical violence to a young woman, and a considerable number of offences relating to bail. The policy at the material time was the pre-August 2010 formulation of §55.10. The Secretary of State had (see [65]) failed to apply the "very exceptional circumstances" policy and Cranston J had to conduct an inquiry as to whether Mr Anam had been prejudiced by this or whether, if the Secretary of State had applied the policy, he

would have been detained anyway. He concluded that Mr Anam would have been detained.

53. As to the approach, Cranston J stated (at [51]) that, because of the provision in §55.10 that mentally ill persons falling within it are normally considered suitable for detention in only "very exceptional circumstances", "both a quantitative and qualitative judgment" is required. He also stated (at [52]) that under this paragraph "mental health issues only fall to be considered…where there is available objective medical evidence establishing that a detainee is, at the material time, suffering from mental health issues of sufficient seriousness as to warrant consideration of whether the circumstances are sufficiently exceptional to warrant his detention". Accordingly, "consideration must be given to the nature and severity of any mental health problem and to the impact of continuing detention on it". However (see [53] and [55]), he stated that the upshot of considering the entirety of §55.10 "…is that although a person's mental illness means a strong presumption in favour of release will operate, there are other factors which go into the balance in a decision to detain under the policy…".

54. Cranston J considered (see [55]) that there is a general spectrum which requires the mental illness to be balanced against factors such as the risk of further offending or public harm and the risk of absconding, and that "in effect §55.10 demands that, with mental illness, the balance of those factors has to be substantial indeed for detention to be justified". In this court Black LJ ([2010] EWCA Civ. 1140 at [81]) stated that Cranston J's approach, which she approved, was that the Guidance "contemplated that what was very exceptional should be judged taking account the whole spectrum of those who are liable to be removed in the immigration context … with the average asylum seeker at one end and high risk terrorists near the other end". Cranston J considered (at [69]) the claimant's prolific history of offending and the risk of absconding demonstrated by the number of offences relating to bail and failure to surrender, his disruptive behaviour to frustrate removal, his failure to co-operate in obtaining a passport, and his numerous unmeritorious applications for asylum and judicial review. Having balanced those factors against Mr Anam's mental illness, he concluded that the balance was against release; i.e. that the "very exceptional circumstances" requirement was met and detention was not in breach of the policy.

55. This court accepted and adopted Cranston J's approach in *Anam's* case in *R (LE (Jamaica)) v Secretary of State for the Home Department.* That case concerned the detention of a foreign national prisoner who was diagnosed as a paranoid schizophrenic and whose condition was adequately controlled by medication he was taking. The policy at the material time was not that in §55.10 but the earlier version in §38.10 of the Secretary of State's *Operational Enforcement Manual*. Richards LJ (with whom Maurice Kay and Kitchin LJJ agreed) acknowledged "the contrast in language between "those suffering from serious medical conditions" and "the mentally ill". Notwithstanding that contrast, Richards LJ rejected the submission (see [40] – [41]) that the mere existence of a diagnosable mental illness sufficed to bring a person within the scope of the policy contained in §38.10 (and *a fortiori* the pre-August 2010 version of §55.10) so as to require the existence of very exceptional

circumstances to justify detention.[2] Richards LJ approved, in particular, what Cranston J stated in *Anam's* case at [52] about §55.10. This court thus clearly rejected the submission that because the mentally ill are inherently more likely to find detention difficult, those diagnosed with a mental illness fall within the policy.

56. In relation to the seriousness threshold, in *LE (Jamaica)'s* case Richards LJ stated (at [41]) that the post-August formulation of §55.10 made explicit what had been implicit in the previous policy. Although he stated that the approach in *Anam's* case (to the pre-August §55.10) "involves reading in a substantial qualification which is not expressed in the original policy", he was "satisfied that such a qualification was implicit and gives effect to the true meaning of the policy". He was, moreover, not at all prescriptive about the level of severity, stating only, in the course of rejecting Mr Southey QC's submissions on behalf of LE, that "it [was] difficult to see why special provision requiring detention to be justified by very exceptional circumstances should have been made for those with a mental illness that could be satisfactorily managed in detention, so that the illness was not significantly affected by detention and did not make detention significantly more burdensome".

57. These cases take the words of the phrase "suffering from a serious mental illness which cannot be satisfactorily managed within detention" as a whole. It is clear from them that the diagnosis is not in itself the key to the applicability of the policy, even if the individual has been referred for treatment by specialist secondary services. It is also necessary for the individual concerned to be "suffering" and for the illness to be one which "cannot be satisfactorily managed within detention". Accordingly, although (see Sullivan LJ in *R (MC (Algeria)) v Secretary of State for the Home Department* [2010] EWCA Civ. 347 at [41]) the policy is in principle capable of applying to anyone with a "mental disorder" within the definition in the Mental Health Act 1983 as amended by the Mental Health Act 2007, the mere fact that they are does not suffice. The effects of the illness on the particular individual, the effect of detention on him or her, and on the way that person's illness would be managed if detained must also be considered.

58. The effect of mental illness on an individual does not follow as a necessary consequence of a particular diagnosis. It can vary according to its particular features, the particular characteristics and circumstances of the individual, and the treatment provided. The Royal College of Psychiatrists' position statement states (p 6) that whether mental illness is serious is a fact-sensitive question. The facilities for managing detainees may also vary. For example, the court was informed that some detention centres do not have counselling services. Additionally, as Miss Rose recognised, whether mental illness can be "satisfactorily managed" in detention may depend on the duration of detention contemplated. Where it is clear that there is only to be a very short time of detention before removal, there may well be no significant difference to the patient's condition during that short period.

59. The judge was correct to consider the effect of Ms Das's illness on her and on the ability of the authorities to manage it if she was detained. But I have concluded that he did fall into error in considering that it had to be of "the level (or thereabouts) of

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[2] Maurice Kay LJ's view in *R (MD (Angola)) v Secretary of State for the Home Department* [2011] EWCA Civ. 1238 at [16] that the contrast was significant has been overtaken by his agreement with Richards LJ in *LE (Jamaica)'s* case.

requiring in-patient medical attention or being liable to be sectioned under the Mental Health Act 1983, or a mental condition of a character such that there is a real risk that detention could reduce" her to that state.

60. Miss Anderson did not suggest that illness at "the level (or thereabouts)" of requiring in-patient medical attention or being liable to be sectioned was an appropriate test. Her submission was that the judge was not laying down a test of what constitutes a serious mental illness. His comments at [61] may have been ill-advised because they may give the impression that he was doing so but in fact he was only giving an example of circumstances which are indisputably serious mental illness. I reject this submission. The comments in [61] cannot be explained and discounted in this way. The language is not the language of example. Secondly, what the judge stated in [63] can only be understood as assessing the evidence about Ms Das in the light of the interpretation of the policy given in [61] and [62] and concluding that her illness was not of that severity. Thirdly, since there is no other indication of the level of severity required to engage the policy in §55.10, the reference in [64] to Dr Sharma's report not stating facts or an opinion which indicated Ms Das suffered from "a serious mental illness of the kind to which the policy refers" can only be a reference to what was stated about its interpretation in [61] and [62]. Fourthly, the judge's statement in [64] that Dr Sreeram's report did not support the conclusion that Ms Das suffered from serious mental illness at the time of her detention immediately before he stated "Dr Sreeram thought that her treatment as an out-patient was appropriate" is inconsistent with the "only an example" explanation of [61]. What the judge stated about Dr Sreenam's report is particularly telling because it saw a mental illness requiring treatment as an out-patient as insufficient to engage the policy.

61. As to the substance of the matter, my starting point is that the authorities, in particular *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin) and *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ. 597 do not support a link to hospitalisation or "sectioning" under the Mental Health Act 1983, even in rough and ready terms. I note that neither decision is referred to in the judgment below.

62. Secondly, care needs to be taken before using criteria developed for one purpose for a very different purpose. The purposes of and criteria for detention under the Mental Health Act 1983 differ substantially from the purposes of and criteria for immigration detention and for the operation of the policy in the bullet point in §55.10 of the policy about those with mental illness. The 1983 Act does not use the concept of a "serious" mental illness. Moreover, as a result of section 3(2) of the Mental Health Act 1983 and its requirement that "appropriate medical treatment" is available, those whose condition is serious but whose condition is not treatable cannot be detained in hospital under the Act. As Miss Rose submitted, the criteria in the 1983 Act seek to identify those who, because of their mental illness, <u>are suitable</u> for detention in a hospital in order to enable treatment to be given for the benefit of the patient, whereas the policy seeks to identify those who, because of their mental illness, <u>are not suitable</u> for detention in an immigration centre. To in substance align the criteria in the policy with those in the 1983 Act by regarding the policy as broadly only applicable where the criteria in the 1983 Act are met glosses over these important differences.

63. The judge's approach of linking the engagement of the policy with a condition of such severity that in substance requires admission to hospital also fails to reflect mental

health practice. The evidence put before the court by the Interveners is that many of those with what are serious mental illnesses (including schizophrenia and bipolar disorder) are treated in the community, are best so treated, and have been so treated for many years. Moreover, (see e.g. Dr Bhui's statement in support of Mind's intervention, paragraph 5(i)) some mental illnesses are exacerbated if the individual is placed in hospital.

64. Miss Harrison and Miss Rose also relied on what Miss Harrison referred to as a "revolving door syndrome" of:- detention centre and deterioration, in-patient admission and stabilisation, and return to detention centre where there is again deterioration resulting in admission to hospital. The submission was that, on the judge's interpretation, §55.10 would never apply to anyone because once the person's condition reaches the required level of severity, he or she will have to be transferred to hospital. This submission may appear to have forensic attractions. In particular, in *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) the claimant was transferred from immigration detention to hospital on two occasions and was re-transferred to detention when discharged from hospital. But, in my view the submission contemplates an extreme scenario which on the facts of Ms Das's case is not a realistic possibility. *R (HA (Nigeria)) v. Secretary of State for the Home Department* [2012] EWHC 979 (Admin), the other case relied on by Miss Harrison, is a troubling case in part because the claimant had been moved within the estate of detention centres about half a dozen times because of his mental health and in part because of the way the Secretary of State sought to pass responsibility to others such as the Primary Health Trust. I note that Miss Anderson maintained that, in that case, the door did not revolve fully. Although there was one transfer into hospital from a detention centre and one transfer out of hospital into a detention centre, Miss Anderson stated that the second transfer only happened because HA had not provided a bail address, but this was not accepted by the appellant or the interveners.

65. The court was invited by the Appellant and the Interveners to provide detailed guidance as to the interpretation of the policy, but the fact-sensitivity to which I have referred (at [58]) means that there are limits both as to what is desirable and as to what is possible. The authorities, and in particular the approaches of the Administrative Court in *Anam's* case and of this court in *LE (Jamaica)'s* case, are not prescriptive or in closed terms, and there is good reason for that. Miss Rose, relying on the warning of Lord Mustill in *R v Monopolies and Mergers Commission, ex p. South Yorkshire Transport Ltd.* [1993] 1 WLR 23 of the danger of taking an inherently imprecise word and thrusting on it a spurious degree of precision, maintained that the judge in this case erred by giving the language "a spurious precision which it does not have", and in so doing substantially reformulating the policy. This consideration in itself points away from a prescriptive definition.

66. With that caveat, it is possible to make a number of general points. The authorities show that it is necessary for the Secretary of State to consider whether the policy in §55.10 applies to the case of the individual whose detention is being considered. In this case the judge found that she did not consider it adequately because she did not take reasonable steps (either before or during Ms Das's detention) to inform herself sufficiently about Ms Das's mental health so as to be able to make an informed judgment about whether the policy applied to her. The stark example of this is that, notwithstanding the awareness in general terms of a psychiatric report about Ms Das

at the time she was detained and its receipt by those responsible for her detention towards the end of November (see [33] above), her frequent attendance at the health centre, and that the medication she was prescribed included Risperidone, an anti-psychotic drug, the reviews of her detention did not (see [35] above) consider or review her psychiatric condition.

67. The authorities also show that the threshold for the applicability of the policy is that the mental illness must be serious enough to mean it cannot be satisfactorily managed in detention. As to satisfactory management, at the time detention is being considered, the Secretary of State, through her officials, should consider matters such as the medication the person is taking, and whether his or her demonstrated needs at that time are such that they can or cannot be provided in detention. Account should be taken of the facilities available at the centre at which the individual is to be detained, and the expected period of detention before he or she is lawfully removed. *R (OM) v Secretary of State for the Home Department* [2011] EWCA Civ. 909 at [33] shows that some of those suffering significant adverse effects from mental illness may be managed appropriately in detention. OM had attempted suicide by hanging herself. She was diagnosed as having recurrent depressive disorder and emotionally unstable personality disorder which was not suitable for treatment under the Mental Health Act 1983. The views of the experts were divided but Richards LJ stated that the balance of expert advice was that her illness could be managed appropriately in detention.

68. Where the policy does apply, there is, as shown by *Anam's* case (see [52] – [54] above) a high hurdle to overcome to justify detention. It is self-evident that the mere liability to be removed and refusal to leave voluntarily cannot constitute the "very exceptional circumstances" required or the policy would be denuded of virtually all its operation: see *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ. 521 at [34], *per* Rix LJ. Similarly, *AA (Nigeria)'s* case suggests (see [2010] EWHC 2265 (Admin) at [40]) that the detention of a person cannot be justified by reference to that person's own well-being (in that case to prevent suicide attempts) either in general or as an exceptional circumstance.[3] But the balancing process described in *Anam*'s case may, particularly where the case concerns a foreign national prisoner who poses a serious risk to the public, for example a person who poses a high risk of killing someone else, or where there are cogent grounds for believing that removal will take place in a very short time, mean that detention will be justified. In the case of a person who poses a high risk of killing someone else, this will be because the circumstances can be regarded as 'very exceptional' so that detention pursuant to the policy of ensuring the firm and fair application of immigration controls is justified. Where there are cogent grounds for believing that removal will take place in a very short time, detention will be justified because a short period of detention of that character is not likely to raise questions of 'satisfactory management', as Miss Rose accepted.

69. I add that, whether or not the policy is strictly engaged, as part of the operation of the *Hardial Singh* principles (see [16] above), in assessing whether to detain a person known to have a mental illness, particular care is needed. The Secretary of State, through her officials, should consider whether, if the decision is taken to detain,

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[3] Note, however, a possible qualification to this in *OM's* case ([2011] EWCA Civ. 909 at [32]). Richards LJ was only prepared "to assume" what was stated in *AA's* case was correct.

particular arrangements will need to be made for the detainee's welfare and to monitor him or her for signs of deterioration.

70. The Secretary of State is not entitled to abdicate her statutory and public law responsibilities to the relevant health authorities or clinicians in the way deprecated by Singh J in *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) at [155] and [181]. However, where (unlike the present case) the Secretary of State through the UKBA officials has conscientiously made reasonable inquiries as to the physical and mental health of the person who is being considered for detention, has obtained such reports of clinicians who had previously treated the person as have been made available, and considered the implications of the policy in §55.10 for the detention of that person, leaving aside cases in which there has been negligence by the clinicians at the detention centre, she should generally be entitled to rely on the responsible clinician: see, albeit in the context of the European Convention of Human Rights, *R (P) v Secretary of State for Justice* [2009] EWCA Civ. 701 at [49] – [50].

71. It has not been necessary for the determination of this appeal to consider the submission that a restrictive interpretation of the policy risks conduct in breach of Article 3 of the European Convention on Human Rights. Nor has it been necessary to decide whether it suffices for satisfactory management of mental illness in detention that deterioration is prevented or whether, as Miss Rose submitted, it involves facilitating recovery, so far as is possible. Mind's view (see Ms Nash's statement, paragraph 35) is that there would not be satisfactory management where a person's mental health could be improved by a particular treatment, such as counselling, but that treatment is not available in detention, or is not available without delay. I strongly doubt that the framers of the policy intended it to have this meaning or that it is the natural construction of the words used. It also appears inconsistent with the view taken in the previous decisions of this court and the Administrative Court where the question addressed was whether detention would result in deterioration. It raises broad policy questions of a kind which Miss Anderson informed the court is the subject of an investigation being undertaken on behalf of the Secretary of State by the Tavistock Institute. It also seems impractical as a test given the likely effect on an individual's mental health of the prospect of his or her involuntary removal from the United Kingdom in the very near future and given the variability of what treatment is available in different parts of the country to those with mental illnesses who are not detained. If Mind's position represents a general view among mental health clinicians, it may be an example of where legal policy and medical opinion diverge.

VII. Can Paragraph 2 of the Order be upheld on the ground that any error by the judge did not affect the outcome of the claim for damages?

72. I have stated that my rejection of Miss Anderson's submission that the judge's reference to "sectioning" was only an example of what would be serious mental illness, means that it is not possible to excise [61] of the judgment and find that the judge's error in it was not material to the result he reached. It concerned a determinative part of the issue, and for the reasons I have given (see [59] above) his view of the meaning of "serious mental illness" affected his approach to the facts.

73. What remains is the alternative submission that, on the facts found by the judge, it was inevitable that the appellant would be detained had the Secretary of State

considered and applied the policy concerning those with mental illness in §55.10. Much time at the hearing was spent in considering this question. At the invitation of the court, Miss Harrison dealt with it in her reply, rather than when opening the appeal. Miss Anderson urged the court to stand back, look at the evidence before it in the round applying common sense, as this court did in *R (OM (Nigeria)) v Secretary of State for the Home Department* [2011] EWCA Civ. 909, and conclude that the order should be upheld.

74. There were two limbs to this part of Miss Anderson's submissions. The first is that, on the evidence before the judge, it was absolutely clear that the policy in §55.10 did not apply because Ms Das had not shown that she suffered from a serious mental illness that was not managed satisfactorily in detention. The second limb is that, even if Ms Das did suffer from such an illness, there were "very exceptional circumstances" in her case which justified detention. Those circumstances were, she submitted, that Ms Das was detained to effect an imminent removal which had been delayed by three and a half years and which it was very unlikely would take place without detention.

75. As to whether Ms Das had shown that she suffered from a serious mental illness that was not managed satisfactorily in detention, Miss Anderson principally relied on the Rule 34 medical assessment by a general practitioner at the time of her detention, and the absence of a Rule 35 report at that time or thereafter. None of the medical professionals who saw her expressed concerns about her fitness to be detained or whether her illness was being satisfactorily managed. There was no report from the responsible clinician that Ms Das's health was being injured by detention. Miss Anderson also relied on what the judge stated at [35], [36] and [38] of his judgment, as to which see [37] – [39] above.

76. Miss Harrison submitted that in order to accept Miss Anderson's alternative case, it must be absolutely clear to this court that on the facts of this case, had the Secretary of State's officials considered the policy, it was inevitable that they would have detained Ms Das. I note, however, that, in *OM (Nigeria's* case, Richards LJ put the matter less absolutely. He asked (at [37]) whether "it would have been open to a reasonable decision-maker, directing himself correctly in relation to the policy, to detain [OM] in the circumstances of the case". Whatever the test, on the assumption that the clinicians working at the detention centre had the relevant information and were not in breach of their reporting duties, Miss Anderson's arguments are powerful. But in the light of Miss Harrison's cogent submissions in reply I have concluded that it is not possible to say that Ms Das (in Richards LJ's words) "would and could have been detained in any event in the lawful exercise of the power of detention". Accordingly, and with some regret, I have concluded that the case must be remitted for further consideration and determination of this question.

77. Miss Harrison relied on Dr Sharma's reports, in particular his diagnosis of Ms Das in 2009 as suffering from severe depression. Ms Das met him, at first monthly and later bimonthly. She also received counselling. It was that treatment, together with her medicine (including Risperidone, an anti-psychotic drug) which managed her condition. Miss Harrison also relied on Dr Sharma's diagnosis that Ms Das has a mild learning disability, and the fact that she had been referred for specialist PTSD counselling, which did not take place only because of language difficulties. Finally, she maintained that one could not place much weight on the absence of Rule 35

reports. The assessments by medical practitioners at the detention centre were conducted without Ms Das's medical records or Dr Sharma's reports, and the records state that the report-writers needed those records. It is true that the statement in one of Dr Sharma's reports that Ms Das's "current mental state does somehow reflect the effect of [her first period of] detention and it appears that the detention has contributed to her distress and the present symptoms of post-traumatic stress disorder" (emphasis added) (see [30] above) does not provide particularly strong evidence of adverse effect from detention, but the other matters relied on by Miss Harrison and an overall assessment of the evidence before the court have persuaded me that this matter should be remitted.

78. I am fortified in my conclusion by comparing the circumstances of this case with those in *OM's* case, on which Miss Anderson relied, and *Anam's* case in which (see [52] above) Cranston J was also able to conclude that, had the Secretary of State applied the policy, Mr Anam would have been detained anyway. The overall picture in this case is far less one-sided than it was in those cases. The individuals in both those cases were foreign national prisoners. Mr Anam had a prolific offending history including violence to a young woman, and bail offences and failures to surrender. OM posed a risk of harm to others and was assessed as having a high risk of absconding. There was additionally no question of releasing her into the community. The balance of expert opinion was that she could be appropriately managed in detention, and the consultant who was of a different view recommended a transfer to hospital.

79. Ms Das is not an offender, and so the particular policy factors applicable to many foreign national prisoners which tilt the balance towards detention do not apply to her. The first of the two factors relied on as showing "very exceptional circumstances" in her case was the risk of absconding. Although (see [32] above) the relevant UKBA officials considered she was likely to abscond to avoid removal unless she was detained, there was no evidence that she had not complied with her bail conditions after her releases from detention in October 2008 and in January 2012. If proximity of removal in itself is, regardless of the individual's record and other circumstances, to be regarded as posing a risk of absconding which qualifies as "very exceptional circumstances", the "high hurdle" the authorities state must be met for there to be "very exceptional circumstances" will be significantly lowered. The second factor relied on as constituting as "very exceptional circumstances" is that the Secretary of State has been attempting to remove Ms Das since late 2008. Those familiar with immigration cases that come before this court, the Administrative Court, and the Immigration and Asylum Chamber of the Upper Tribunal know that it is not unusual for it to take a considerable time for the Secretary of State to succeed in removing a person. In itself, and absent some positive evidence of unmeritorious attempts to frustrate removal, the simple effluxion of time since an initial decision to remove is unlikely to qualify as a "very exceptional circumstance". I do not consider that in all the circumstances of this case it is possible for an appellate court to reach the firm conclusion on this factual matter that the Administrative Court and this court were able to in the cases of *OM* and *Anam*. This is particularly so given the absence of any evidence on behalf of the Secretary of State before the court below or before this court to explain her decision-making in this case.

80. Miss Anderson submitted that there is no obligation to file witness evidence in relation to whether or not there is an entitlement to compensatory or nominal

damages, and that question is a matter for the court to assess. She also urged the court not to punish the Secretary of State for not filing evidence, and referred to the scarcity of resources, the heavy litigation burden on the Secretary of State, and the need to prioritise resources on those currently detained. The latter submission may reflect the position in which this part of the public service finds itself, but it was not and could not have been an invitation to the court to give the Secretary of State a privileged position in litigation. There is equally no question of the court punishing the Secretary of State or treating her less favourably than other litigants. The judge stated the correct position clearly. He observed (at [21]) that:

> "Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk". In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party …. The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, [in the words of Lord Walker of Gestingthorpe in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 at [86])] 'to co-operate and to make candid disclosure by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. …"

VIII. Conclusion

81. For the reasons given in sections VI and VII above, I would allow the appeal and remit the matter to the Administrative Court.

Lord Justice Underhill

82. I agree.

Lord Justice Moses

83. I also agree.