Neutral Citation Number: [2013] EWCA Civ 1561

Case No: C4/2013/3352

IN THE COURT OF APPEAL (CIVIL DIVISION).
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
MR. JUSTICE OUSELEY
CO/14783/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2013

Before :

LORD JUSTICE LEWISON
LORD JUSTICE LLOYD JONES
and
SIR STANLEY BURNTON

- -

Between :

IM (NIGERIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Elisabeth Laing QC and Nicola Braganza (instructed by **Deighton Pierce Glynn**) for the **Appellant**

Eleanor Grey QC (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : Monday 25th November 2013

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Judgment

LORD JUSTICE LLOYD JONES :

1. IM ("the appellant") is a Nigerian national aged 45. He entered the United Kingdom in July 2007 and became an over-stayer on 23 January 2008 following the expiry of his six months' visitor's visa. He applied unsuccessfully for leave to remain under Article 8 ECHR in May 2011. He attended the respondent's asylum screening unit to make an asylum claim on 25 July 2013 and was then taken into immigration detention. His asylum claim was rejected and certified as clearly unfounded on 7 August 2013. On 27 August 2013 he began to refuse food and has continued to do so save for a brief interruption in October and on a few isolated occasions. He has been refusing fluids intermittently.

2. On 4 October 2013 he issued an application for permission to apply for judicial review, maintaining, at that stage, that his continued detention was unlawful inter alia because it was a breach of the respondent's published policy on detention as his serious medical condition could not be managed satisfactorily in detention and because it was a breach of Articles 2 and/or 3 ECHR.

3. Interim relief in the form of release was refused by Stewart J. on 17 October 2013 in a reserved judgment and by Collins J. on 28 October 2013. Collins J. ordered a rolled-up hearing of the application for permission and, if granted, the substantive application. That hearing took place on 13 and 14 November before Ouseley J. who, on 19 November, in a very detailed judgment granted permission but refused the substantive claim. He also granted leave to appeal to this court.

4. On 21 November this court (Maurice Kay, Moore-Bick and Ryder L.JJ.) refused an application for interim relief and ordered that the substantive appeal be heard on 25 November.

5. Following the hearing before this constitution on 25 November we announced that the appeal would be dismissed and that our judgments would be delivered at a later date.

The appellant's medical history

6. I gratefully adopt the account of the appellant's medical history set out at paragraphs 4 – 25 of the judgment of Ouseley J. At the hearing before us on 25 November 2013 two further medical reports were produced: the report of Dr. Naomi Hartree, instructed on behalf of the appellant, dated 20 November 2013 and the report of Dr. Macfarlane, instructed by the respondent, dated 21 November 2013.

7. I would draw attention to the following matters:

   (1) The appellant began refusal of food on 27 August 2013 and has continued to do so since, save for a brief interruption in mid October and a few other isolated occasions. He has, in addition, been refusing fluids intermittently.

   (2) On the 23 October 2013 he signed an advance decision which stated inter alia that:

      (a) He did not intend to eat.

      (b) He did not want to drink or otherwise receive fluids.

      (c) He did not want to receive any medical treatment.

      (d) He did not consent to the administration of nutrition or hydration or any form of medical treatment.

      (e) He did not consent to medical or nursing care designed to keep him free from pain in the event of a serious deterioration in his condition.

   (3) The appellant has capacity to understand the significance and consequences of his decision. Neither before Ouseley J. nor before us was it contended that he lacked capacity to decide whether to take food or fluid, that he was not aware

of the consequences of such a refusal or that he lacked capacity to decide to refuse medical treatment. (I note that this was the position notwithstanding the statement by Dr. Hartree in her report of 20 November 2013 that the appellant's judgement may now be clouded by the effect of starvation.)

(4) The appellant is considered by doctors at the Harmondsworth Immigration Removal Centre ("the IRC") to be unfit to be detained there because his medical needs cannot be met there.

(5) The appellant has repeatedly been offered a transfer to hospital and hospital treatment for his condition but he has refused, insisting on a condition that he be freed from detention.

(6) On 15 November 2013 nursing staff at the IRC prepared a Nursing Care Plan for the appellant which is described in the accompanying Part C form as an "end of life" plan.

The decisions.

8. Following disclosure by the respondent on the evening of 22 November it now appears that the relevant decisions were taken by Mr. Hugh Ind, Director of Compliance and Returns, Immigration Enforcement Directorate at the Home Office on 30 October, 14 and 15 November.

(1) On 30 October 2013 Mr. Ind received a release referral which included a Part C Form which stated that in view of his general health condition the appellant was unfit for detention at Harmondsworth IRC which could not fulfil his medical needs. Mr. Ind's response included the following passage:

> "Mr. M should continue to be detained at this time. I note that the Dr. has said his condition cannot be fully assessed as he is refusing observations. As long as we continue to offer Mr. M the chance for an escorted visit to hospital and for as long as it is assessed he has mental capacity in his refusal to take this up, then the case for release is not made."

(2) On 14 November Mr. Ind received a further release referral. He responded as follows:

> "The earlier reasons for maintaining detention still appear to pertain. He is able to access medical treatment at hospital whenever he wishes. There continues to be no expressed doubt about his mental capacity to refuse treatment. He refuses medical assessment and he is not co-operating with attempts to re-document which are proceeding regardless. Albeit to a slower timescale due to his non compliance. He has overstayed for some years. Successive judgements have supported our decisions to maintain detention in such circumstances. We should maintain detention but ensure he knows, please, that we think he needs hospital treatment and want to take him there."

(3) On 15 November Mr. Ind received a request to review and clarify the decision to maintain detention. He responded as follows:

> "I considered the IS91RA Part C and Dr. Hartree's report and other relevant information last night. These informed my decision to maintain detention at this time. My reasons remain as reported then.
>
> I do not think this further request from the reps adds anything material. In relation to the offer to ensure he reports to NHC [Nigerian High Commission] when fit, I note the NHC went to visit him this week in detention and he refused to engage. Hence he was served with the indemnity letter. We can have little confidence given his history, his repeated non-compliance to date and his refusal to speak to NHC even when they came to him this week that he would act voluntarily as his reps suggest."

Grounds of appeal.

9. The grounds of appeal may be summarised as follows:

(1) The judge erred in law in holding that the respondent has power to detain persons, pending their removal from the United Kingdom, in a hospital, save when a direction is made under section 48, Mental Health Act 1983.

(2) The judge erred in law in his interpretation of the respondent's policy on detention and in failing to hold that the continued detention of the appellant is in breach of that policy and therefore unlawful.

(3) The judge erred in law in holding that the continued detention of the appellant is not in breach of ***Hardial Singh*** principles

(4) The judge erred in law in holding that the continued detention of the appellant is not in breach of Articles 2 and/or 3 ECHR.

Ground 1: Statutory power to detain persons, pending their removal from the United Kingdom, in a hospital.

10. On behalf of the appellant it is submitted that the respondent has no power to detain him in a hospital other than detention in a mental hospital under section 48, Mental Health Act 1983. The thrust of this submission is that the appellant cannot be detained under the respondent's immigration powers while receiving medical treatment in hospital and therefore should be released from detention in order to receive treatment in hospital.

The statutory provisions.

11. The appellant faces administrative removal under section 10, Immigration and Asylum Act 1999. Section 4(2)(d), Immigration Act 1971 provides that detention

pending removal is governed by Schedule 2 to that Act. Schedule 2, paragraph 18(1) provides in relevant part:

> "Persons may be detained under paragraph 16 above in such places as the Secretary of State may direct…"

12. The respondent has made a Direction under paragraph 18(1): Immigration (Places of Detention) Direction 2011. Paragraph 3(1) of the Direction provides in relevant part:

> "Subject to paragraph 4 below, the places where a person may be detained under paragraph 16(1)… of Schedule 2 to the Act (detention of persons in order to examine or remove) shall be as follows –
>
> …(c) any short-term holding facility, including:
>
> (i) Any police station:
>
> …
>
> (d) any hospital.
>
> (e) any young offender institution, prison or remand centre or, in the
>
> case of a person under the age of 18, any place of safety;
>
> …"

In sub-paragraphs (f) – (p) paragraph 3(1) lists eleven IRCs by name, including Harmondsworth IRC.

13. "Hospital" is defined in paragraph 2 of the Direction as having, in England and Wales, the same meaning as in the Mental Health Act 1983.

14. Section 145, Mental Health Act 1983 defines "hospital" as follows:

> ""hospital" means –
>
> (a) any health service hospital within the meaning of the National Health Service Act 2006 or the National Health Service (Wales) Act 2006; and
>
> (b) any accommodation provided by a local authority and used as a hospital by or on behalf of the Secretary of State under that Act; and
>
> (c) any hospital as defined by section 206 of the National Health Service (Wales) Act 2006 which is vested in a Local Health Board;…"

15. Section 47, Mental Health Act 1983 confers on the Secretary of State power to make a direction (a transfer direction) that a person serving a sentence of imprisonment shall be removed to and detained in a hospital, on the grounds that that person is suffering from a serious and treatable mental disorder. Section 48, Mental Health Act 1983 confers a further power of the Secretary of State to make a transfer direction, on

grounds that the person concerned is suffering from a serious and treatable mental disorder, in respect of other prisoners defined in section 48(2). These include persons detained under the Immigration Act 1971.

16. Section 22, Prison Act 1952 empowers the Secretary of State to direct that a prisoner be taken to hospital for the purpose of investigation, observation or treatment. The statute provides that the person concerned shall, unless the Secretary of State otherwise directs, be kept in custody while being so taken, while at that place and while being taken back to the prison.

Submissions on behalf of the appellant.

17. On behalf of the appellant, Miss Elisabeth Laing QC points to the detailed statutory scheme in the Mental Health Act 1983 ("MHA 1983") for the detention and treatment of patients who are suffering from treatable and serious mental illness. Similarly, she points in the case of serving prisoners to express statutory provisions which permit their transfer to hospital for treatment for other illnesses. She submits that there is no equivalent in the immigration legislation, apart from the link between immigration detention and a hospital order under the MHA 1983 which is created by section 48 of that Act.

18. She submits that these provisions show that where Parliament wishes to authorise detention in a hospital it does so by expressly conferring such a statutory power. She submits that the general power conferred on the Secretary of State by paragraph 18, Schedule 2 to the 1971 Act does not enable the respondent by direction only to confer such a power on herself and to detain a person in hospital unless section 48, MHA 1983 applies. She submits that that is the reason why the definition of a "hospital" in the Direction deliberately tracks the definition in the MHA 1983. Accordingly she submits that the Direction does not confer on the respondent a general power to detain an immigration detainee in a hospital. Rather, it enables the Secretary of State to detain, in immigration detention, a person who meets the section 48 criteria, in a place in which he could be detained under the MHA 1983.

Discussion.

19. In considering this ground of appeal, I take as my starting point the proposition that a power of detention must be strictly construed. Having said that, however, I agree with the judge that, on its face, the definition in s. 145 MHA 1983 is amply wide enough to cover any hospital, whether or not a mental hospital, and whether or not a person is compulsorily detained in a hospital where people may be compulsorily detained under sections 47 and 48 MHA 1983. There are no express words which impose any such limitation on the power to detain in a hospital.

20. I can see no obvious reason why the statutory trail which defines "hospital" for this purpose travels via the MHA 1983 as opposed to moving directly to the National Health Service Act 2006 ("NHS Act 2006"), section 275. It may be, as the judge suggested, that the explanation lies in the fact that the definition of "hospital" in the Direction is wider than in the NHS Act 2006. However, be that as it may, I find it impossible to draw from the statutory language or the statutory scheme any inference that it was intended that the power to detain in hospital should be limited to a person detained under section 48 MHA. If that had been the intention, I should have expected

clear words to that effect. To my mind, it cannot have been intended that such an important restriction should be left to be inferred from the route followed by the statutory definition of "hospital".

21. Furthermore, as the judge observed, there is no obvious or necessary reason to restrict the scope of hospitals in which a detainee may be compulsorily detained. If the appellant's interpretation is correct, there would be a substantial gap in the respondent's powers of detention. It would follow that in the great majority of cases, once a detainee could not receive suitable medical treatment in a removal centre or in prison he would, in the absence of very exceptional circumstances, have to be released from immigration detention, despite the fact that he was awaiting deportation or administrative removal, and regardless of the risk of his absconding. In normal cases, the very exceptional circumstances would have to be such as to justify preventing effective medical treatment. As the judge observed, such a limitation would be remarkable and pointless. However, in any event, I do not consider that any such limitation is a necessary inference from the statutory provisions or their scheme.

22. Just as the existence of an express power of detention in a hospital under section 48 MHA 1983 cannot be used to limit the more general power to detain in such places as the respondent may direct conferred by Schedule 2, para. 18(1), I consider that the express provisions in the Prison Act 1952 do not assist the appellant. These powers are contained in a separate set of statutory provisions and are differently expressed. I can see why in the case of a serving prisoner it might be thought appropriate to have an express power to transfer him to hospital for treatment. However, I agree with the judge that in the case of immigration detention it was simply not necessary to spell out the power to take a detained person to hospital for the purpose of treatment and to detain him there. That is achieved by the provision in the Direction which, contrary to the submission of Miss Laing, is not ultra vires.

23. For these reasons, I consider that the Secretary of State has the power to detain the appellant in hospital in order that he receives the treatment he needs for his medical condition.

Ground 2: The continued detention of appellant is in breach of the respondent's published policy on detention.

24. The appellant submits that, whether or not the respondent has power to detain an immigration detainee in hospital, her published policy is not to detain in hospital, but to release the detainee, unless there are very exceptional circumstances which require that detention be maintained. On this basis she submits that the continued detention of the appellant in an IRC is unlawful.

25. Here the appellant relies on the respondent's "Enforcement Instructions and Guidance, Chapter 55: Detention and Temporary Release" ("EIG") and the respondent's "Detention Service Order 03/2013: Food and Fluid Refusal in Immigration Removal Centres: Guidance" ("DSO").

EIG.

EIG, Chapter 55 provides in relevant part:

"55.1 Policy

55.1.1 General

"The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used … Detention is **most** usually appropriate:

- To effect removal;
- Initially to establish a person's identity or basis of claim; or
- Where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release."

…

55.1.3 Use of detention

General

Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.

…

55.1.4 Implied Limitations on the Statutory Powers to Detain

In order to be lawful, immigration detention must be for one of the statutory purposes for which the power is given and must accord with the limitations implied by domestic and ECHR case law. Detention must also be in accordance with stated policy on the use of detention.

…

55.3 Decision to detain (excluding pre-decision fast track and criminal casework cases)

"1. There is a presumption in favour of temporary admission or temporary release – there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

2. All reasonable alternatives to detention must be considered before detention is authorised.
3. Each case must be considered on its individual merits, including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved." (original emphasis)

26. Chapter 55.3.1 provides that all relevant factors must be taken into account when considering the need for initial or continued detention. It lists some relevant factors including, the likelihood of the person being removed and, if so, in what timescale, the risk of absconding, previous failure to comply with conditions, whether the subject has taken part in a determined effort to breach the immigration laws, a history of compliance, ties with the United Kingdom, the risk of offending or harm to the public and whether the subject has a history of physical or mental ill health. It also provides that once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

27. Chapter 55.6.3 provides that there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases.

28. Chapter 55.8 provides that at each review robust and formally documented consideration should be given to the removability of the detainee and all other information relevant to the decision to detain.

29. Chapter 55. 10 provides in relevant part:

"55.10 Person 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.

...

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 …
- Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
- Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in criminal casework 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 …

If a decision is made to detain a person in any of the above categories, the caseworker must set out the very exceptional circumstances for doing so on file.

30. Chapter 55.13 provides in relevant part:

> "55.13 Places of detention
> Persons detained under Immigration Act powers may be detained in any place of detention named in the Immigration (Places of Detention) Direction 2011. This includes police cells, immigration removal centres, prisons or hospitals. Unaccompanied children or young persons under the age of 18 may only be held in a place of safety …"

31. The appellant submits that Chapter 55 of EIG is engaged because on three occasions IRC doctors have sent a Part C form to the respondent, saying that the appellant is unfit for detention as his medical needs cannot be met in the IRC.

DSO.

32. The DSO provides in relevant part:

> "This Order describes the procedures that must be adopted for handling food and fluid refusal by detainees in Immigration Removal Centres. The procedures apply to all Immigration Removal Centres."

Part D, Case Management includes the following passages:

> "46. Some detainees choose to refuse food and/or fluids as a protest against their detention. The law presumes that an adult has the capacity to take their own healthcare decisions unless the opposite is proved. A decision to refuse food and/or fluids will not automatically entitle that individual to be released from detention. Genuine refusal of food and/or fluids can, however, in some cases lead to medical conditions that are so serious that they can no longer be satisfactorily managed in detention. In such a case the detainee may become unsuitable for detention (although other factors may also be relevant to this decision). It is therefore important that sufficient information is available to enable a decision to be made as to continued detention.
>
> …

55. Where the IRC doctor has given an opinion that a detainee is no longer fit to be removed and/or no longer fit to be detained as a consequence of their food and/or fluid refusal, the doctor should be asked by the HO Immigration Enforcement Manager for details, if they have not been provided or are unclear, of the basis on which this assessment has been made. In particular, the doctor should be asked whether the assessment is based on:

- physical examinations or tests and, if so, their results and the conclusions drawn from them; or
- limited or visual observations only and, if so, the information obtained and conclusions drawn; or
- the detainee's own account or information alone.

56. This will ensure that the doctor's opinion can be given due weight in deciding how to proceed, particularly when balanced against other evidence or information that may exist (eg that the detainee is in fact eating and/or drinking, even if only covertly or infrequently, or that their generally observed demeanour or behaviour does not support the doctor's assessment). Use by healthcare professionals of the sample food and/or fluid refusal assessment record attached to this guidance will assist this process.

57. This is **not** about challenging the doctor's professional opinion on medical grounds. It is simply to ensure that the basis for that opinion is clear and is understood by HO Immigration Enforcement so that it can be given due weight in deciding how best to manage the detainee. Whilst it is important for doctors to express their professional view as to whether a detainee is unfit to be removed or detained as a consequence of prolonged food and/or fluid refusal, and such views must be considered very carefully, the Secretary of State has an independent decision to make in such cases, specifically, is the individual concerned suffering from a serious medical condition (ie the consequences of prolonged food and/or fluid refusal) which cannot be managed satisfactorily in detention and, if so, are there nevertheless very exceptional reasons for maintaining detention (eg high risk of public harm if released)?

…

60. Consideration may be given to transferring detainees to a prison medical facility at the point where they are clinically assessed to require in-patient care. Such a transfer may be appropriate or necessary for clinical reasons in order to access the more extensive medical facilities available in the prison

estate and to ensure the better care and management of the individual in question. ...” (original emphasis)

33. The appellant submits that paragraphs 46, 56 and 57 of the DSO make clear that the respondent considers that the policy in Chapter 55.10 of EIG applies in food refusal cases.

Discussion.

34. Miss Laing placed at the forefront of her oral submissions on the EIG policy document the observation that it fails to provide any criteria relating to detention in hospital (other than under the Mental Health Act) or to make detailed provision for such detention in hospital. This, she suggests, is a clear indication either that there is no power in the respondent to detain a person in hospital or, if there is such a power, that the respondent has renounced the possibility of exercising it by failing to provide for the manner of its exercise in Chapter 55. This submission proceeds on an assumption that Chapter 55 is intended to be a comprehensive code governing in detail all situations in which decisions may have to be taken as to where a person should be detained. However, as became clear during the course of argument from instances suggested by members of the court, this assumption is not well founded. For example, Chapter 55 does not make comprehensive provision for the circumstances in which children may be detained. Similarly, there is no detailed provision in Chapter 55 for the circumstances in which detainees may be held in police cells, notwithstanding the express statement in the Direction that a person may be detained at any short-term holding facility including any police station (at paragraph 3(1)(c)(i)). In these circumstances, I do not consider that it is possible to draw the inference for which the appellant contends.

35. The appellant submits that the clear effect of the words used in Chapter 55.10 is that, if a detainee falls within one of the categories set out in bullet points in that paragraph, then unless there are very exceptional circumstances (which must be adverted to and expressly recorded by the respondent in her decision) he is unsuitable for detention and cannot be detained. Thus, it is submitted, Chapter 55.10 is a statement of policy by the respondent that, save in very exceptional circumstances, those suffering from serious medical conditions which cannot be satisfactorily be managed within detention must be released from detention.

36. However, it seems to me that this submission proceeds on a false basis. The policy stated in EIG Chapter 55.10 does not address the continuation of detention generally but the continuation of detention in an IRC or prison. The particular bullet points on which Miss Laing relies have to be read in the context of the whole of Chapter 55.10. This makes clear that the passage is addressing detention in dedicated immigration accommodation or prison. It says so in the opening paragraph of Chapter 55.10 and a second time in the words prefacing the bullet points on which the appellant relies. The introductory words govern what follows. The references to “detention” in the bullet points which follow therefore have to be read subject to this limitation.

37. As the judge held, Chapter 55.10 is clearly directed to the normal circumstances in which the policy is required, i.e. detention in removal centres and prisons. When read in this way, the consequence of the applicability of the policy is not that those to whom it applies become unsuitable for detention anywhere simply because their

conditions are unsuitable for treatment in a removal centre or prison. Its effect is not that, in the absence of very exceptional circumstances, continued detention is unsuitable but that the detention in the removal centre or prison is unsuitable. As both Ouseley J. and Stewart J. observed, the result is not that a detainee must be released unless there are very unusual circumstances but that the detainee must be moved to a suitable place of detention. A person may be fit to be detained in hospital even if not fit to be detained in an IRC.

38. The judge went on to observe that it would be odd if someone whose medical condition made him unsuitable for detention in an IRC or prison but who could readily be treated in hospital whilst still remaining in detention had to be released from all detention on temporary admission even though the unsuitability for detention related only to detention in an IRC or prison. (at [45]) I entirely agree. The failure of the policy to make express provision for those who require removal to hospital but who should otherwise remain in detention is, as the judge observed, because it was so obvious as to be not worth saying that those who need medical treatment not available in an IRC or prison would pursuant to the proper application of the policy be transferred to hospital in detention. Furthermore, any failure to state in a published policy that those not suitable for detention in an IRC should be removed in detention to hospital where their medical needs could more suitably be met does not limit the exercise of the power conferred on the respondent. She does not need to announce a policy covering a particular situation or to act in accordance with it in order to make the exercise of her powers lawful.

39. Like the judge, I am unable to see that the terms of the policy stated in the DSO take matters any further. The language of the DSO and Chapter 55 mirror each other to a large extent and the DSO, to my mind, reflects the approach of Chapter 55. As in the case of 55.10, the statements of the DSO are limited by their context. The preamble to the DSO makes clear that it is concerned with procedures "for handling food and fluid refusals by detainees in Immigration Removal Centres". Consequently, the reference in paragraph 46 to those suffering from medical conditions "that are so serious that they cannot be satisfactorily managed in detention", with the result that they "may become unsuitable for detention", when read in context, must be taken to refer to detention in an IRC, the subject of the policy document. The same is true of the reference in paragraph 55 to a person who is "no longer fit to be detained" as a consequence of food or fluid refusal.

40. Paragraph 57 goes further in that it refers to the decision to be made as follows: "… is the individual concerned suffering from a serious medical condition (i.e. the consequences of prolonged food and/or fluid refusal) which cannot be managed satisfactorily in detention and, if so, are there nevertheless very exceptional reasons for maintaining detention (e.g. high risk of public harm if released)?" This could be read as suggesting that in that situation, unless there are very exceptional circumstances, release should follow. However, the absence of any reference here to the possibility of continuing detention in a non-prison hospital is, to my mind, a slender basis on which to conclude that the respondent was, to use the judge's term, forswearing such an obvious course. I agree with the judge that such a conclusion cannot be drawn from the failure of paragraph 57 to refer to the option of hospital. Similarly, the fact that express provision is made in paragraph 60 to the option of

transfer to a prison medical facility does not, to my mind, exclude the possibility of transfer in detention to a non-prison hospital.

41. I should record that, in the light of the further documents received from the respondent after the hearing before Ouseley J., the appellant's team sought to make submissions as to the true effect of these policy statements by reference to the manner in which, it was said, they had been understood by officials concerned in this case. I have been unable to derive any assistance from this source. The meaning and effect of these statements are a matter of law for decision by the court.

42. There is therefore, no reason to conclude that the respondent has by these statements of policy in any way renounced her statutory powers or limited them in the manner suggested. The respondent's published policy does not prevent the removal to hospital in detention of a detainee whose serious medical condition cannot be managed satisfactorily in a removal centre and, accordingly, it does not require his release from detention to enable him to receive hospital treatment.

43. How, if at all, do these policies apply in this case? In normal circumstances where a detainee is suffering from a serious medical condition which cannot be satisfactorily managed in an IRC, the policy would require his removal in detention to hospital, save in very exceptional circumstances. However, as the judge explained, the premise for the assessment of an individual as unfit for detention in a removal centre leading to removal to a hospital for treatment is that the detainee will consent to treatment. In light of the appellant's refusal to receive medical treatment (a refusal which, it should be noted, extends not only to treatment of his condition but also to any medical care that would make him more comfortable) I consider that the respondent is entitled to conclude, as matters presently stand, that notwithstanding the appellant's serious medical condition, the policy does not require his removal in detention to hospital. While it could be concluded, as the judge did, that as long as the appellant continues to refuse medical treatment of any kind his condition can be as satisfactorily managed within an IRC as in a hospital, I should prefer to put it on the ground that the continuing refusal of the appellant to accept any medical treatment removes his case from the scope of the policy statements relied on by the appellant because they simply did not envisage such a case.

44. It should be noted that counsel for the respondent has at no point in these proceedings maintained that the decision to continue the appellant's detention was made on the basis of the existence of very exceptional circumstances, as referred to in Chapter 55.10. However, she has submitted that, if necessary, it would be open to the respondent to conclude that such circumstances do exist in the present case and that the continued detention of the appellant could be justified on that basis. In the light of the conclusion to which I have come on the effect and applicability of the published policies, it is not necessary to decide whether there are present here very exceptional circumstances which would justify departure from them. However, if it were necessary to decide it I should conclude, in agreement with the judge, that the facts of the present case are capable of amounting to very exceptional circumstances justifying such a departure. I come to that conclusion, not because the appellant's condition can be considered to be self-inflicted, but because of his continuing refusal to consent to medical treatment unless released, a refusal which, as matters presently stand, is a matter of his free choice made with capacity to make it.

45. The judge was correct to reject the submission that the continuing detention of the appellant is unlawful by reason of a failure to comply with the respondent's policy.

Ground 3: The continued detention is in breach of *Hardial Singh* principles.

46. There is clearly a limit to the length of time during which a person may be held in detention pending administrative removal by the respondent. The principles enunciated in relation to deportation by Woolf J. in ***R. v. Governor of Durham Prison, ex parte Hardial Singh*** [1984] 1 WLR 704 and developed by Lord Dyson in ***Lumba v. SSHD*** [2011] UKSC 12, apply with equal force to those detained pending administrative removal. There has to be a limit to the duration of the permitted detention set by the need for the detention to be for the statutory purpose and by the need to effect removal within a reasonable time. Clearly a detainee could not be detained to the point of death.

47. In ***Lumba*** the principles were summarised by Lord Dyson in the following terms.

> "It is common ground that my statement in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196, para. 46 correctly encapsulates the principles as follows:
>
> (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

48. Setting to one side for a moment considerations arising from the appellant's refusal to take food or fluids, it is common ground that this is not a case where the ***Hardial Singh*** principles have been breached. However, the question which arises here is how those principles apply in a case of food and fluid refusal where the medical condition may be regarded as self-inflicted and where the detainee may choose to end that refusal.

49. The judge accepted that once there is no reasonable prospect of removal within a reasonable period of time because of the health of the individual, self-induced or otherwise, there would be no further power to detain. He continued:

> "Judging whether that stage has been reached involves a judgement either (i) that the individual has reached the stage where death is unavoidable by treatment and would occur within such a short space of time that there was no reasonable prospect of the removal of the claimant at all, even were he now to consent to treatment, or (ii) that the permanent

> condition of survival in which the individual would live extinguishes reasonable prospects of his removal including on Article 2, 3 or 8 grounds, within a reasonable time, or (iii) that the length of time in treatment required before he could be removed, would be so long that there were no reasonable prospects of removal within a reasonable time." (at [62])

50. Miss Laing's submission on this ground is founded principally on the production of an end of life plan by the IRC. She submits that this is objective evidence that that line has been crossed. She submits that it demonstrates that detention is no longer serving the statutory purpose and is therefore unlawful.

51. The application of ***Hardial Singh*** principles requires an assessment of the prospects of removal within a reasonable time in the light of all the available evidence. Contrary to the submission on behalf of the appellant, I do not accept that the fact of the production of the end of life plan of itself means that the point has been reached beyond which detention becomes unlawful. This "Nursing Care Plan" – which is described in the Part C report to the R of the same date as "an end of life plan" - was produced on 14 November. The summary at the start of the document states:

> "Mr. [M] has been declining to take diet and regular fluids for a prolonged period. He states he would rather die than be deported.
>
> As a result of Mr. [M]'s refusal to take sufficient nutrition, he has been assessed by the medical staff as being unfit for detention.
>
> Mr. [M] remains in detention and is at risk of further deterioration to his physical and mental well-being. Mr. [M]'s continued refusal of diet and fluid may result in irreversible organ damage or death.
>
> Mr. [M] presents with a risk of re-feeding syndrome. Mr. [M] declines a transfer to hospital, this is against medical advice.
>
> Mr. [M] has been assessed by our in house medical team as having mental capacity in accordance with the mental capacity act, he has made a verbal advance decision that he does not wish to receive treatment should his health decline to the point that emergency/lifesaving treatment is required. This is recorded in his medical notes. Mr. [M] states he understands the risk associated with his advance decision and accepts that this will eventually lead to his death. It has also been explained that the validity of any advance decision can be questioned by the health team if the circumstance in which the advance directive was made change."

52. This sympathetic and thoughtful document is essentially prospective. It addresses difficulties that the appellant may experience in the future if he maintains his present stance and how these may be dealt with so as to secure his greater comfort. Miss Grey

QC for the respondent correctly points out that there is no evidence before us as to the precise triggers for the formulation of such a plan as a matter of good medical or nursing practice. It does not seem to me that this document, of itself, can be decisive of the issue before us. Rather it requires to be taken into account as part of the evidence of the overall situation.

53. Considering the matter in the round, on the basis of the evidence that was before the judge, I agree with his conclusion that the stage at which there is no longer a reasonable prospect of the appellant's removal within a reasonable time had not yet been reached, although in the absence of hospital treatment it would not be far off. In particular, there was no evidence that the condition of the appellant had become irreversible or that, should the appellant now change his stance and accept treatment, he could not be removed from the United Kingdom within a reasonable time.

54. In fact, we were addressed by counsel for both the appellant and the respondent on the basis of the further developments which have taken place since the hearing before Ouseley J. last week. These may be summarised as follows.

(1) A further medical report by Dr. Hartree, instructed on behalf of the appellant, and dated 20 November 2013 reports that on her visit to the appellant on 19 November she found him weak and dangerously malnourished. She considered that he was probably mildly dehydrated, but less so than during her previous visit. She considered that this probably reflected the fact that he had been motivated to drink more water. His weight loss had continued and he had now lost 35% of his body weight. He was at high risk of complications or collapse from malnutrition although it was not possible to predict a timescale of survival. His cognition appeared adequate and he was able to understand and retain information. However, she was concerned that his judgement may be clouded by the effects of starvation. She considered that he was physically unfit to fly, as he is physically so debilitated that he would be at risk of collapse in flight. It would be difficult for him to tolerate the prolonged upright posture and reduced oxygen pressure of the flight and these could precipitate an abrupt deterioration. There was also a risk of deep vein thrombosis which in his case would be life threatening. She went on to state:

> "Mr. [M] is so malnourished that even if he accepted hospital treatment and re-feeding, I estimate that he would need a few weeks at least, perhaps several weeks, of re-feeding and rest before he would be well enough to travel"

(2) A medical report by Dr. Macfarlane, dated 21 November 2013 states:

> "Mr. [M] is able to walk unaided and appears well hydrated. He admits to taking small amounts of water to help with keeping his mouth and throat hydrated. His appearance is consistent in my opinion of someone who is currently keeping hydrated, even if refusing food. I would estimate that even if he were to start refusing fluid (for example after learning of his impending removal) that this assessment would still hold for a further 7 days from that time, unless healthcare HW identify any new issues."

Dr. Macfarlane considered that the appellant is currently fit for flight and travel.

> "Mr. [M] is currently fit for flight and travel. His condition should not be affected adversely by altitude. There are no contraindications to the use of

control and restraint techniques from a medical viewpoint. Mr [M] would be suitable for a scheduled flight accompanied by a paramedic trained medical escort with iv access competency."

(3) In a separate development the Nigerian High Commission has stated that it will produce on Tuesday 26 November travel documentation for the appellant.

(4) On Sunday 24 November the appellant was served with removal directions for Wednesday 27 November 2013.

55. There are clearly differences of opinion between the two doctors who have recently seen the appellant, in particular as to his fitness to fly. However, the lawfulness of the removal directions is not an issue before this court and I should not be taken to express any view on that issue. For present purposes, it is clearly significant that, in Dr. Hartree's view, if the appellant were now to accept treatment and re-feeding he would be well enough to fly in "a few" or "several" weeks. Accordingly, I do not consider that this is a case in which it could be said that, as matters presently stand, if the appellant changed his mind, his state of health is such that there would be no reasonable prospect of removal within a reasonable period of time.

56. How then should the court approach the issue of the likelihood of his changing his mind? For the appellant it is said that the court should approach this as a question of what is likely on the balance of probability, at the point at which the ELP was produced. Miss Laing accepts that it is not certain that a person who has persisted in food and fluid refusal to this point will not give up, but that it is probable that he will not.

57. I do not consider it appropriate to embark on an assessment of the likelihood of the appellant abandoning his present stance beyond stating that having regard to all the circumstances of the case as they presently stand – and in particular the further information as to the modifications in the appellant's stance in recent days – there is at the very least a real possibility that he will abandon his stance. Accordingly, it seems to me that, in the circumstances prevailing at the date of the hearing before Ouseley J. and at the date of the hearing in this court, there was and remains a reasonable prospect that the appellant can be removed from the United Kingdom within a reasonable time.

58. I consider, therefore, that the judge was correct to hold that the application of ***Hardial Singh*** principles did not lead to the conclusion that detention had become unlawful.

59. Before leaving this ground I should refer to a further submission by Miss Laing on behalf of the appellant, that to confer an entitlement on the respondent to "test" a person's resolve beyond the point of the preparation of an end of life plan and to the point suggested by the judge is repugnant. She submits that detention is no longer for the statutory purpose but for the purpose of breaking the detainee's will.

60. This arises out of a passage in the judgment where the judge observed:

> "The claimant cannot simply say that there is no reasonable prospect of his consenting either to taking food and fluid or to the hospital treatment and therefore he must be released, any more than a refusal to co-operate in the

documentation process of itself requires release. The defendant is entitled to test the refusal to the stage I have described. Otherwise a detainee can simply assert a refusal of treatment as a basis for requiring release, even though the circumstances of imminent death or serious harm, when eventually faced may create a reasonable prospect of a change of mind." (at [63])

61. To my mind, it is a misreading of this passage to suggest that the judge was stating that detention could continue for the purpose of breaking the appellant's will. The pressure on the appellant is self-inflicted. It seems to me that the judge was saying no more than that, as matters then stood, the respondent is entitled to wait and see whether the appellant would persist in his current stance.

Ground 4: The continued detention is in breach of Articles 2 and/or 3 ECHR.

62. On behalf of the appellant it is submitted that the judge erred in rejecting the submission that his continuing detention involves a breach of the positive obligations under Articles 2 and 3 ECHR.

63. The starting point for considering the application of Articles 2 and 3 is the common ground that, notwithstanding the fact that the appellant with full mental capacity has embarked on and maintained a refusal of food and fluids, the positive obligations of Articles 2 and 3 continue to apply and positive steps must be taken to preserve life and to avoid inhuman and degrading treatment.

64. The judge was referred, as we have been, to ***Kudla v Poland*** [2002] 35 EHRR 11 and ***Rappaz v Switzerland*** [2013] ECHR 508. ***Kudla*** concerned a depressive held in prison on remand who attempted suicide in prison and alleged that he had received inadequate psychiatric treatment leading to a breach of Article 3. The Strasbourg court stated in its judgment:

> "92. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> 93. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.

> 94. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measures do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance."

65. The facts of ***Kudla*** were rather different from the present case. Mr. Kudla faced criminal charges and was held on remand whereas the appellant is simply in immigration detention. Mr. Kudla had applied for and been granted release from detention on remand on medical grounds and had then absconded. A further application for release on medical grounds was later refused because he had absconded. His complaint was about the length of his detention and that he had not been given adequate psychiatric help; he did not complain that his further application for release on medical grounds had been refused. Nevertheless, the decision is authority for the proposition that there is no general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain any particular kind of medical treatment. Rather, Article 3 requires the State adequately to secure the wellbeing of prisoners (and therefore detainees) by providing the required medical assistance.

66. ***Rappaz*** concerned a convicted prisoner on hunger strike in protest against the length of his sentence and the cannabis laws under which he had been convicted. He had at different times been removed to hospital for treatment. A summary of the judgment in English, with which we have helpfully been supplied, includes the following passages in relation to Article 2.

> "9. The European Court of Human Rights noted (paragraph 47) that Article 2 can import a duty to take positive steps. These can include, [for] those who are particularly vulnerable, such as prisoners, a duty to protect them against actions by which they put their own lives at risk (paragraph 48). This duty must not be interpreted as subjecting the authorities to an intolerable or excessive burden. It is not every threat to life which imposes a duty on the authorities to take specific measures to prevent its materialising. In the case of threats presented by the person himself, the Court has to consider whether, at the relevant time, the authorities knew, or ought to have known that there was a real and immediate risk to the life of the person concerned, and whether, if so, they did everything which could reasonably have been expected of them to avert that risk (paragraph 49).
>
> 10. In the case of prisoners (the French word "*detenus*" is used) who, voluntarily, or involuntarily, put their lives at risk, the Court recalls that the authorities must discharge their functions in a way which is compatible with the rights and freedoms of the individual. That being so, article 2 does not oblige a State to release a prisoner (again, "*detenu*" is used) on health

grounds. The Court may not substitute its own assessment for that of the domestic authorities, provided that they have broadly met their duty to protect the physical integrity of the prisoner, in particular by providing appropriate medical treatment (paragraph 50).

11. With regard to prisoners who risk their own lives by going on hunger strike, the Court recalls that the consequences of putting pressure on the authorities will not entail a breach of the Convention, in so far as they have properly examined and handled matters. This applies just as much when a prisoner clearly refuses all interventions, even if his state of health would threaten his life. Finally, the Court recalls that when it considers whether there is a causal like between the death of a prisoner on hunger strike, and the refusal of the authorities to release him, it takes into account whether, in the prison setting, the prisoner has been deprived of such medical attention as he could have obtained when at large (paragraph 51).

12. The Court recalled, in relation to the facts, that the applicant's hunger strike was motivated not by a desire to end his life, but by a desire to put pressure on the authorities, in order to achieve a change to the drugs laws and to obtain a shorter sentence. This was not a case in which the Court had to consider whether the State had violated the applicant's right to decide on the time and manner of his death, as it might do within the framework of Article 8, but to ensure that the State had properly observed the positive duty imposed on it by article 2, to preserve the applicant's life (paragraph 52).

13. When a prisoner embarks on hunger strike, the consequences for his health will not entail a breach of the Convention so long as the domestic authorities have properly investigated and managed the situation. This is particularly so when the prisoner persists in refusing food, despite the deterioration in his health. The Court referred to Horoz v Turkey application no 22913/2004, 10 November 2005, in which it did not find a breach of Article 2. The applicant's son had died in the penal unit of a hospital, where he had been hospitalised, from the consequences of a hunger strike which he had refused to abandon. In the light of the facts that the authorities had properly investigated and managed the situation, that the individual had refused all treatment, and nothing indicated that he had not benefited, in the prison setting, from any medical care which would have been available outside, the Court concluded that the refusal to release him did not entail a violation of Article 2 (paragraph 53)."

67. Article 3 is considered at paragraphs 16, 17 and 19.

> "16. As to Article 3, the Court noted that treatment must attain a minimum level of severity for Article 3 purposes and recalled that the fact that those on hunger strike have inflicted harm on themselves does not in any way absolve the State from its duties under Article 3 (paragraphs 60-62). Moreover, though the Convention does not in principle entail an obligation to release a prisoner on health grounds, a decision to order the return to custody of a person on hunger strike may disclose a breach of Article 3 if the person is suffering from permanent health consequences, such as, for example, Wernicke-Korsakoff syndrome, among others (see Uyan v Turkey application no 7454/2004, 10 November 2005, paragraphs 44-54 and Balyemez v Turkey application no 32495/2003, 22 December 2005, paragraphs 90-96) (paragraph 63).
>
> 17. The Court also recalled that the consequences of putting pressure on the authorities will not entail a breach of the Convention, in so far as the authorities have properly investigated and managed the situation. Such is the case with a clear rejection of all intervention expressed by a hunger striker, even if his state of health is a threat to his own life (paragraph 64).
>
> …
>
> 19. The Court, applying those principles to the facts, recalled that the physical and mental suffering of the applicant were a direct consequence of his choice not to eat, a choice he could have reversed at any time. But the Court was, nevertheless, not relieved of the obligation to ensure that the domestic authorities had complied with their obligation to provide the applicant with conditions of detention which were compatible with his state of health (paragraph 66). The applicant was returned to custody twice, but did not claim to be suffering from any permanent ill effects such as Wernicke-Korsakoff syndrome. The Court concluded that returning the applicant to custody did not, of itself, constitute a breach of Article 3 (paragraph 67)."

68. Here, once again, it appears that there is no general obligation to release a prisoner or detainee on health grounds. The emphasis is, rather, on the obligation of the State properly to handle the case and secure the same medical care which would have been available outside prison. In the present case Ouseley J. drew particular attention to paragraph 11 of the summary and emphasised that the true comparator is the person who is on hunger strike when at large, a view with which I agree.

69. I do not consider that the respondent is under any obligation under Articles 2 or 3 to release the appellant to enable him to obtain treatment. I have firmly in mind that the appellant is not a convicted prisoner, that he is not charged with any criminal offence and that he is simply in immigration detention pending removal from the United Kingdom. Nevertheless, the Secretary of State is entitled to conclude in the light of the appellant's immigration history that there is a risk of his absconding. Stewart J. so

held. Notwithstanding that the appellant's physical condition has deteriorated since that decision, I consider that the respondent is not under any duty under Articles 2 or 3 ECHR to release the appellant from detention at this time.

70. Moreover, I consider that the respondent has taken reasonable steps to avoid a breach of Articles 2 and 3 in the circumstances arising from the appellant's refusal of food and fluids. In particular I would draw attention to the following matters.

(1) The appellant's reasons for going on hunger strike have been investigated.

(2) He has been encouraged throughout to end his refusal of food and fluids.

(3) Steps have been taken on at least two occasions to determine whether the appellant has full capacity and it has been determined that he does.

(4) The appellant has been given facilities to make an advance decision.

(5) The appellant has had legal advice throughout the period of his refusal to eat or drink.

(6) The appellant has been examined by doctors and psychiatrists on a number of occasions and would have been examined more frequently had he permitted it.

(7) The appellant has been kept under medical assessment and has had access to a doctor from Medical Justice and to a psychologist.

(8) He has been offered food and fluid and medical assessment on many occasions. He has repeatedly been offered hospital treatment which he has repeatedly refused.

(9) An end of life plan has been prepared for the appellant.

71. It is difficult to see what further positive steps the respondent could have taken other than to release the appellant from detention. In my judgement she is, as matters presently stand, under no obligation under Articles 2 or 3 to take that step.

Further submissions relating to the decisions taken by Mr. Ind.

72. As a result of the disclosure provided by the respondent on the evening of 22 November, i.e. after the decision of Ouseley J. at first instance, the appellant now seeks to advance further arguments in support of the appeal. These all relate to the decisions taken by Mr. Hugh Ind on 30 October, 14 and 15 November, to which reference has been made earlier in this judgment.

73. First, it is submitted that Mr. Ind's decisions were taken in breach of the respondent's policy. The appellant complains that at no point in the decisions of Mr. Ind or the material referred to him is any reference made to the policy statements in the EIG or the DSO and that, crucially, there is no file note of the "very exceptional circumstances" which justify detention. For the reasons set out earlier in this judgment, I consider that the decisions taken were not in conflict with the published policy because that policy did not address the particular circumstances which arise in this case where the appellant would refuse treatment if removed to hospital. In these

circumstances it was not necessary for the respondent to address whether there were "very exceptional circumstances" as referred to in Chapter 55.10. Indeed, this has been the position of the respondent throughout this litigation. The respondent has not suggested that the policy was read so as to require consideration of "very exceptional circumstances". Her case has been that the course followed was not in conflict with the policy but that if it were necessary to justify her decisions on this basis it would be open to her to do so. Accordingly, it was not necessary for Mr. Ind to consider whether "very exceptional circumstances" existed.

74. Secondly, Miss Laing draws attention to two errors in the information supplied to Mr. Ind before he took his decision on 30 October. A record prepared on 29 October states that appellant's risk of reoffending is low; in fact he has no criminal record and no allegation of criminal activity is made against him. Moreover the same document states that there is no private address to which he could be released whereas, we are told, that was not the case. I do not consider that these errors were material. The respondent has consistently maintained that the risk of absconding arises from the appellant's immigration history, coupled with the lack of incentive to comply with any conditions placed on him if released. The errors do not appear to have had any bearing on the decision of 30 October. Furthermore, that decision was maintained on 14 and 15 November when it is not suggested that the errors were repeated.

75. Thirdly, Miss Laing submits that the decisions were taken by officials at the wrong level. Here she points to EIG, Chapter 55.8 which deals with detention reviews and the fact that the decision on the review should have been taken by an official at the level of Inspector / SEO. In fact the decisions were taken by Mr. Ind who is Director of Compliance and Returns at the Immigration Enforcement Directorate at the Home Office. She refers to the statement in Mr Ind's witness statement that since June 2013 all decisions to release detainees who are refusing food and fluid, where that is the principal or sole reason for proposing release, have also required authorisation of a Strategic Director. Miss Laing complains that this is a secret policy which could have been published in the latest version of EIG but which was not. She also claims that the officials reporting to Mr. Ind would, if left to take the decision, have ordered the release of the appellant.

76. I do not consider that this departure from the published policy is material in public law terms. As Lord Dyson explained in ***Lumba*** (at [68]) for a breach of public law to give rise to a cause of action in false imprisonment it must bear on and be relevant to the decision to detain. Lord Dyson then went on to give examples of errors which do not bear on the decision to detain, including "a decision made by an official of a different grade from that specified in a detention policy". I consider that in the present case the fact that the decision was taken at a different grade is not capable of affecting the lawfulness of the decision to continue detention.

77. Fourthly, the appellant seeks to challenge the decisions of Mr. Ind on grounds of irrationality. Miss Laing points to Mr. Ind's acceptance that the appellant needs to go to hospital. However, he insists on the continuation of his detention notwithstanding the fact that it is this which prevents him from receiving hospital treatment. It is said that if Mr. Ind had really wanted the appellant to go to hospital he would have released him. I am unable to see that there is anything irrational in the stance taken by Mr. Ind in his decisions. He was faced with a situation in which the only thing which prevented the appellant from receiving hospital treatment was the appellant's refusal

to receive it, save on the condition that he should first be released from detention. There is nothing irrational in concluding, as Mr. Ind did, that the Appellant should be facilitated in accessing treatment but that the case for release is not made out.

Conclusion.

78. For these reasons I joined in the decision to dismiss the appeal.

SIR STANLEY BURNTON:

79. I agree with the reasons given by Lord Justice Lloyd Jones for having dismissed this appeal.

LORD JUSTICE LEWISON:

80. I joined in the decision to dismiss the appeal for the reasons given by Lord Justice Lloyd Jones.