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Case No: CO/9/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2009

Before :

MR C.M.G. OCKELTON
Sitting as a Deputy Judge of the High Court

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Between :

THE QUEEN ON THE APPLICATION OF BENOIT HATEGA	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Alex Goodman (instructed by **Sutovic and Hartigan**) for the **Claimant**
Steven Kovats (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 3 June 2009

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Judgment

Mr C.M.G. Ockelton :

Introduction

1. This claim for judicial review is brought by a Rwandan national who sought asylum here. On the papers, John Howell QC, sitting as a Deputy Judge of this court, granted permission on two of the grounds (grounds 2 and 3), but refused it on ground 1. I thus have before me the oral renewal of the permission application on ground 1, and the substantive claim on two or all three grounds.

History

2. Benoit Hategа was born in 1962. He arrived in the United Kingdom illegally in July 2002 and claimed asylum a few days later. He was interviewed in August. He claimed that he had been an active soldier in a Rwandan army unit and had suffered ill treatment, including beating his stomach with sticks, owing to being suspected of having leaked details of a secret mission in which he had been involved. He had been imprisoned and starved. He had been released in order to provide evidence that he was innocent, but had been unable to collect that evidence. He therefore ran away. He

said that he feared further ill treatment from the authorities if he was returned. He attributed his having been singled out to his being of mixed Hutu and Tutsi parentage.

3. On 13 September 2002 the Secretary of State refused the claim. He observed that if the claimant's story were true, his fear on return would appear to be of prosecution for deserting the army rather than of persecution. He also said he was "unable to attach any credence" to the claim of having been beaten, tortured and slapped, because there was "no corroborative evidence to support this statement", and that the claimant had given no indication during interview that he had felt it necessary to seek any medical treatment after his alleged mistreatment. The Secretary of State went on to say that in this context the appellant's use of a false passport counted against him; and because he had not declared that the passport was false on his presentation of it in the United Kingdom the refused claim was certified under the provisions of the Immigration and Asylum Act 1999. The decision to issue directions for the claimant's removal to Rwanda followed, on 16 September 2002. The claimant appealed: by the time of his appeal the relevant provisions of the 1999 Act had been replaced and the certification under that Act had no effect. The appeal was heard on 2 March 2004, and the Adjudicator's decision was sent to the parties on 14 April 2004. The Adjudicator reached the view that "the whole of the appellant's account is implausible and lacks credibility".

4. He gave a number of reasons for that conclusion. First, the appellant claimed to have been in army for thirteen years, and to have risen to the rank of Sergeant. His mixed parentage had apparently not been the cause of discrimination or ill treatment previously, and he had been chosen to lead the secret mission. The Adjudicator rejected the submission that there had been any racial basis for any claimed ill treatment of the appellant before him. Secondly, the Adjudicator regarded it as incredible that if the army were genuinely concerned about the source of the leak, they would have detained only the claimant, rather than all the five soldiers involved. Thirdly, in the context described by the claimant, the Adjudicator did not regard it as credible that he would have been released for fourteen days in order to make a personal investigation of who had been responsible for the leak. He did not accept that the appellant had been released from custody on those terms. Fourthly, the claimant's account of the actual leaking of the details of the mission was incoherent: journalists who were said to have known about it had not published their information; they had not been detained or questioned, and there had been no investigation of any of the other army personnel who must have planned and overseen the mission.

5. Next, the Adjudicator considered the claim to have been ill treated. He had before him a medical report from the claimant's general practitioner Dr Najim, prepared on 24 February 2004. That report recorded the claimant's claim to have been detained and tortured, and added, rather surprisingly, that the claimant had last seen his family in July 2003. The report then records nine scars, two on his abdomen, two on the back of his left hand, two on his thumb, two on his right leg and one on his big toe. The comment follows "they are almost due to extensive unusual trauma eg beaten". On psychological matters, the report records that "there are times when he feels the only thing left to do is "die"; however, he stated very firmly that he knows he will never do anything to end his life", and "Suicidal risk: he does frequently think about dying, however there is serious risk of actual suicide or harming anyone else". In the

conclusions there is a statement that "he showed significant signs from post traumatic stress disorder".

6. The Immigration Judge's conclusion was that it was mere speculation to say that the scars had been caused by the ill treatment the appellant before him had described.

> "Those scars could just as easily have been caused in a variety of different ways especially in the case of a man who has been a soldier in Rwanda for 13 years during a time of war, civil strife and genocide in his country. I note that the appellant did not need any medical treatment following his temporary release and I therefore attach little weight to the medical report."

7. The Adjudicator added that he did not accept that any ill treatment that the claimant might have incurred was the result of any political opinion imputed to him: if there had been a leak of military secrets the authorities were entitled to investigate it.

8. The Adjudicator then concluded that the appellant's story was simply a fabrication specifically designed to enable the appellant to make a planned exit to the United Kingdom. He did not believe the appellant's oral statement that his wife and family had been ill treated after he left: nor did he believe that the appellant had travelled on a false passport or that a friend had paid US$2500 to enable him to do so. He thus dismissed the appeal.

9. The claimant applied, out of time, for permission to appeal against the Adjudicator's decision. The application was supported by a letter from a National Health psychotherapist. That letter is short and appears to be based entirely on the truth of the appellant's account: it makes no reference to any reason for disbelieving that account. The Immigration Appeal Tribunal refused permission to appeal: the Adjudicator's findings were open to him on the evidence, clearly set out, and disclosed no error of law. An application to the High Court for statutory review was refused in November 2004, but by that time it appears that the claimant had gone to ground. He was arrested and detained over two years later, on 12 November 2006. It appears from the Secretary of State's factual summary that further submissions were made and rejected shortly thereafter, but I have no details of them. On 8 January 2007 the claimant was released on temporary admission, with a reporting condition.

10. On 11 July 2007 his present solicitors made further submissions on his behalf. Those submissions were supported by a full medical report from Dr Frank Arnold, a specialist in problems of wound healing. That report sets out first the claimant's narrative of his history, which was apparently rather more detailed than he had given on any previous occasion. Under the heading "Current Medical Problems" is this:

> "His mood is low, he has thought repeatedly of killing himself. He has difficulty getting to sleep and is frequently woken by nightmares about his experiences during his imprisonment. He also experiences intrusive memories (which he cannot block) and flashbacks (in which he sees the assaults on him as though they were occurring before his eyes). He tries to associate with others but is now uncomfortable doing so and usually prefers to

> be alone. His concentration and short term memory are impaired."

11. There is then an account of the claimant's scars and other signs of injury. So far as scars are concerned, Dr Arnold specifies eight single scars, as well as areas of multiple scarring and de- or hyper-pigmentation. He also records the claimant's description of tenderness over both heels and at the top and bottom of his spine, pain on lateral flection of his spine and a tendency to walk putting weight markedly onto the forefoot.

12. Dr Arnold's conclusion is that some of the lesions are "highly consistent with blunt trauma, such as beatings as described by him", others are "typical" of treatment described by him, and others are "consistent" with the history he gave. Those terms are the terms specifically recommended in the Istanbul Protocol for use on reports of this kind. The doctor also adds that the claimant's psychological symptoms are "consistent with diagnoses of post-trauma stress disorder and depression", but further assessment and treatment by a specialist psychiatrist are warranted. He concludes:

> "Taken in the round, the history given, his psychological state and physical signs demonstrate a reasonable likelihood that he is a survivor of torture. It is disturbing that his history of torture and consistent signs (and blood pressure) were not recorded at the time of his admission to detention".

13. The letter from the claimant's present solicitors, making the fresh claim, relies in substance entirely on the report. It suggests that the Adjudicator's rejection of the medical evidence is no longer tenable and that the new report therefore gave the basis for saying that an appeal to a Tribunal would have a realistic prospect of success. That is the test formulated by Buxton LJ in WM (DRC) v SSHD [2006] EWCA Civ 1405.

14. There was no immediate response to that letter. The claimant was apparently interviewed on 19 November 2007. Documents produced by the Secretary of State in connection with the present proceedings show that during the course of that interview he stated that he was taking anti-depressant tablets and had suicidal thoughts, but the last time he had in fact had such thoughts was in December 2006. It appears that on 19 November 2007 the claimant was also interviewed by the Rwandan High Commission and the issue of a travel document was authorised. In the circumstances of the case authority was sought to remove the claimant on the same day that he was detained for removal, an expedited procedure available only in certain circumstances. The minute sheet of 19 November 2007 records also that a reasons for refusal letter in respect of the fresh asylum application was "to be served" with no right of appeal. It also records that the claimant's reporting conditions were revised, requiring him to report fortnightly from 30 November 2008.

15. Authority for the "same day" removal of the claimant was granted on 20 November. The documentation seeking escorts indicates that it was envisaged that he would be removed on 30 November. The necessity for escorts was indicated by ticking boxes "suicide risk" and "medical". The person organising escorts indicated that "this subject is suicidal and this same day removal must go ahead".

16. It is the events of 30 November 2007 that have given rise to the present claim. At 1.30pm the claimant contacted his solicitors and told them that he had been informed he was to be removed at 9.00pm that night. He had been detained when he reported. The solicitor told him that he must be wrong, because of a policy of giving at least 72 hours notice of removal. His solicitor said that he would contact Beckett House, the home of the relevant Home Office agency, and managed to do so at 2.20pm. He was informed that the claimant was indeed due for removal at 9.00pm. When he asked about 72 hours notice, he was told that perhaps the claimant had signed a waiver. The solicitor said that he thought that was extremely unlikely. The telephone call having been cut off, the solicitor then faxed Beckett House and asked why the claimant had been detained, when there was still a fresh claim outstanding to which no reply had been received, and why he was being removed in breach of the policy. An hour later he sought a reply to his fax, and at about 3.50pm the Secretary of State's decision refusing the fresh claim of 11 July 2007 was sent to the claimant's solicitor. There was a factual summary with it, but no removal directions. Shortly afterwards, in a telephone conversation, Beckett House confirmed there were no separate removal directions. Having looked at the file they were now able to say that "same day" removal had been authorised because of the claimant's risk of self harming or suicide.

17. An emergency out of hours application was made to the Duty High Court Judge. By the time the judge came to make a decision it had become apparent that the claimant's travel documents did not match the route on which the Secretary of State had booked his removal, so his removal could not take place after all. At 9.30pm the claimant was released, and was told to report again to Immigration Services on the Monday morning.

The present claim

18. The claimant seeks judicial review of the Secretary of State's actions in three respects. He challenges the refusal of his fresh asylum claim (this is the original ground 2); he challenges the decision to detain him on 13 November 2007 with a view to his removal the same day (ground 3); and he challenges the decision to attempt to remove him on that day without giving a longer period of notice to the claimant or his solicitors, and without serving any separate removal directions (ground 1). As I indicated at the beginning of this judgment, he has permission on grounds 2 and 3 but not on ground 1.

19. Following the issue of proceedings and in the course of correspondence between the parties, the Secretary of State offered to and did withdraw the decision letter refusing to treat the submission of 11 July 2007 as a fresh claim. A new decision letter, again refusing to treat those submissions as a fresh claim, was issued on 8 May 2009. The claimant wishes to challenge that letter too. He seeks to amend his grounds to claim an order to do so. There is no objection from the Secretary of State and it is clearly expedient to allow the amendment. I do so. I agree with the claimant, however, that that is to add an issue rather than substituting one. The status of the letter disclosed to the claimant's solicitors on 30 November is of more than historical interest, because the legality of the other events of that day may depend on it.

The first decision letter

20. The Secretary of State accordingly does not seek to defend this first refusal letter. As a response to the submission which has been made it is in my judgment indefensible. The submission, it will be recalled, was supported by Dr Arnold's report and was on the basis that the report gave grounds for thinking that the Adjudicator's assessment of the claimant's credibility might need to be revisited. The Adjudicator had found no support for the appellant's story in the state of his body: whereas the opinion of Dr Arnold, as an expert in wound healing, was that the marks on the claimant's body were highly consistent with, typical of, or at the very least consistent with aspects of the appellant's story. The first decision letter makes no mention at all of that aspect of the claim. It sets out the Adjudicator's conclusions on the medical evidence, apparently with approval, and without any indication that the new submissions are directed at them. It treats the new submissions as a claim that the claimant's removal now would breach Art 3 or Art 8 of the European Convention on Human Rights, because of his present medical condition, although no such claim was made in the submissions. Thus the first decision letter rejects a claim which had not been made, and fails to deal with the claim which had been made. There is simply no question that it has to be regarded as an entirely inadequate response to the letter of 11 July 2007. Without any doubt it incorporates a decision which took into account immaterial matters and failed to take into account material matters. The claimant accordingly succeeds on ground 2 as originally presented. If it had not already been withdrawn, the decision would have had to be quashed.

21. Mr Goodman made a number of other submissions about that letter and the decisions it incorporated. He asserted that it was evidently produced in haste, and asked me to share his suspicions that it was not in fact drafted until those instructed him raised queries with Beckett House on 30 November. I have looked at the documents disclosed by the Secretary of State, and I have come to the conclusion that there is no basis for that submission. It is not exactly clear when the content of the letter was formulated, but the decision to reject the submission does appear to have been taken on about 12 or 14 November, prior to the claimant's interview on 19 November. Where it was envisaged that that interview might give further information to the claimant's advantage is not clear and does not matter. There is in my judgement no reason to suppose that the decision to remove the claimant was made before the decision to reject the submissions made in the letter of 11 July. On the contrary: the decisions about the claimant's removal were clearly made after it had been decided to reject the latest submissions.

The claimant's detention

22. I turn now to the second of the issues on which the claimant has permission: his detention for a period of time on 13 November 2007.

23. The claimant is an illegal entrant. He is therefore subject to the setting of directions for his removal to his country of nationality, as permitted by paras 8-10 of Sch 2 to the Immigration Act 1971. Paragraph 16(2) of the same Schedule provides that if there are reasonable grounds for suspecting that a person is someone in respect of whom such removal directions may be given, he may be detained under the authority of an immigration officer pending his removal. That power, on its face quite general and applicable to the claimant, is, however, substantially reduced by policies adopted

by the Secretary of State. There is no doubt about the legality and effect of those policies, for para 1(3) of the same Schedule reads

> "in the exercise of there functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the Immigration Rules) as may be given them by the Secretary of State",

and there is nothing in the Immigration Rules relating to detention. The policies in question are before me in the form of an undated version of chapter 38 of the Secretary of State's Operational Enforcement Manual. It appears to be agreed that that document provides an accurate guide to the policies operative on 30 November 2007. The chapter begins by setting out general principles, of which the most important is that there is a presumption in favour of temporary admission or release and that wherever possible an alternative to detention is to be used; detention must be used sparingly, and for the shortest period necessary. The procedure for exercising the power to detain is set out at para 38.6; and at para 38.6.3 there is a requirement of the use of a form 'IS91R Reasons for Detention'. Six possible reasons are listed in the paragraph and on the form, and it appears clear from the context that detention will not be in accordance with the guidance unless at least one of the six reasons is applicable. They are as follows:

- You are likely to abscond if given temporary admission or release
- there is insufficient reliable information to decide on whether to grant you temporary admission or release
- your removal from the United Kingdom is imminent
- you need to be detained whilst alternative arrangements are made for your care
- your release is not considered conducive to the public good
- I am satisfied that your application may be decided quickly using the fast track procedures.

24. IS91IR was completed for the claimant. The first and third reasons were marked as applicable. Nobody supposes that the first reason - the likelihood of absconding - was of any importance save in the context of the third. The claimant had been released on temporary admission with the reporting condition for some months, and had been again released on similar conditions only about 10 days previously. But the decision to remove him meant that it was thought that his removal was imminent, and that very fact, and that alone, was no doubt thought likely to increase the risk of absconding. The fourth possible reason is not marked: it is clear that in this case the detention was substantially on the ground that removal was imminent. It is for that reason that it is right to consider questions of the legality of the claimant's detention separately from issues relating to the applicability of the "same day" removal process. His removal was "imminent", whether it was going to take place in the next few days or the next few hours.

25. Mr Goodman submits that in truth the claimant's removal was not imminent at all, and the policy permitting detention of a person subject to imminent removal did not apply to him. The claimant had made submissions said to amount to a fresh claim under para 353 of the Statement of Changes in Immigration Rules, HC395. Paragraph 353A reads as follows:

> "Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under para 353 or otherwise."

So, until the submissions have been considered, no removal can be regarded as imminent. In the present case there were in Mr Goodman's submission two problems. First, although there had been a decision to reject the further submissions, it had been made on a wholly inappropriate basis. It could not therefore be said that the Secretary of State had "considered the submissions". Secondly, the actual arrangements made for removal could not be carried out because of the difficulty about the route.

26. It does not seem to me that the latter consideration could effect the legality of detention. Removal could still be imminent if a new flight had to be found, or new documents issued. It is true that because of the mismatch between the documents and the flights, removal could not take place on 30 November, but that is not all itself sufficient to prevent removal being "imminent".

27. The other argument is more substantial. It appears that when Mr Howell QC granted permission, he thought it was arguable that if the rejection of the further submissions was unreasonable, the detention was unlawful. As Mr Kovats points out, the decision to detain the claimant would undoubtedly have been lawful if the rejection of his further submissions was reasonable. The question is therefore what is the effect on the lawfulness of the detention of a finding that the rejection of the claimant's submissions was not reasonable or not lawful.

28. I have been referred to a number of authorities relating to detention in cases where deportation or removal decisions were said to have been made in ignorance of submissions that had been advanced, and one where the refusal of leave to enter was said to be so wrong that it was obvious that an appeal would have to succeed. It is not easy to derive any very clear rule. On the one hand, as Kennedy LJ said in Ullah v Home Office [1995] Imm AR166, giving the leading judgment in a two-judge Court of Appeal in a case where a deportation decision had been made without regard to all the relevant factors, but the claimant had been detained on the strength of it,

> "There is nothing in the wording of ... the statute to suggest that where a notice is withdrawn or set aside by the court as a result of proceedings for judicial review the arrest and the period of detention will be retrospectively rendered unlawful. Such an interpretation would cause serious problems not only for the Secretary of State, but also for those like the [Immigration Officer] who are instructed to act on his behalf".

29. Similarly, as Nicol J said in R (Kullas) v SSHD [2009] EWHC 735 (Admin), a case where the claimant was detained following a decision refusing him leave to enter that he claimed was clearly wrong, it was right to agree with the Secretary of State's submission that

> "it is unhelpful and unnecessary for the Immigration Officer to have to go through the exercise of trying to predict whether an appeal against refusal of leave to enter was bound to succeed".

30. On the other hand, as Brooke LJ in ID and others v Home Office [2005] EWCA 38], giving a judgment with which Thomas LJ and Jacob LJ agreed, said at [120] after reviewing the authorities up to that date

> "[I]t seems entirely wrong that someone who has been wrongly detained by the executive because of a filing error or some other incompetence in their offices should not be entitled to compensation as of right."

He continued:

> "I see no reason, incidentally, in relation to a claim against a first actor, to obtain first either a declaration that the detention was unlawful or a quashing order: it is sufficient that the claimant was unlawfully detained on his authority and suffered damage as a result."

31. One of the difficulties in analysing and interpreting the authorities results, I think, from the development of the practice of the Home Office in the period covered by reports. In most of them there is no reference to any policy that might make the determination of whether the claimant was *liable* to be detained a difficult rather than an easy job. Thus, in Ullah, Millett LJ had no difficulty in saying simply that where the requirements of the statute were satisfied, the detention was lawful. Paragraph 2(2) of Sch 3 to the 1971 Act provided that where a person had been given notice of a decision to make a deportation order against him he might be detained. The claimant had been given notice of such a decision, so his detention was formally lawful, provided that the notice was "true", that is to say directed to the person who was detained, and that that person was liable to deportation. Millett LJ said that in order to render the detention lawful it was not required that it be the right decision, or without flaw, or otherwise impervious to successful challenge by way of judicial review.

32. Similarly, in W v Home Office [1997] Imm AR 302, (one of the cases analysed by Brooke LJ in ID), an immigrant was wrongfully detained for nine days because of a filing error. Lord Woolf MR, giving the judgment of the court, listed features of the detention scheme which were common ground between the parties, including the following:

> "(1) ... [I]ndividuals requiring leave to enter enjoy no right or presumption that they should be entitled to be at large before leave is granted;

> (2) A wide discretion is given to the Immigration Officers not only whether to admit detain or release but also in respect of the investigations they are entitled to make;
>
> ...
>
> (4) It is not contested in this case that the plaintiff was lawfully detained at all times; and
>
> (5) It is not contended that an invalid decision authorising detention makes the detention unlawful".

33. The advent of detailed published directions and guidance in the dozen years or so since those cases were decided makes it difficult to be confident that the decisions or the concessions would be the same now. As I have explained, the general statutory power to detain is still derived from the 1971 Act, but in essence is now confined to those cases in which the Secretary of State's directions permit detention. It is no longer sufficient for the statutory power formally to have arisen: there must also be a reason for detaining that is valid as an application of the Secretary of State's directions.

34. Kullas is the most recent case on the topic, and Mr Kovats relies on it strongly. In that case, as I have said, the claimant was detained on the strength of a decision refusing him leave to enter. In the judicial review proceedings his position was that the refusal was obviously wrong, and that he had an overwhelmingly strong claim to be granted leave to enter. What had happened was that, after an investigation, an Immigration Officer had refused him leave to enter and, on the strength of that decision, another Immigration Officer had authorised his detention. At [5], Nicol J records that counsel for the Secretary of State accepted that

> "the decision to detain can be rendered unlawful if the underlying refusal of leave to enter is tainted. However, ... the taint must take the form of either bad faith (which is not alleged in this case) or irrationality. Thus ... it the refusal of leave to enter is one which no reasonable Immigration Officer could make in the traditional Wednesbury sense, the decision to detain which is dependent on it, will also be unlawful and the claim for unlawful detention can succeed."

The Judge agreed with that. He went on to give his view on the second point on which Mr Palmer, appearing for the Secretary of State, disagreed with Mr Cox who appeared for the claimant.

> "Mr Palmer's second disagreement with Mr Cox's formulation concerns the identity of the holder of the information in respect of which a rationality judgment is to be made. Mr Cox, as I have said, submits that I should look at the facts known to the Secretary of State, in other words, knowledge held by any immigration official. Mr Palmer argues that this is too wide. What matters is the information available to the actual Immigration Officer who took the decision to refuse leave to

> enter. Of course, immigration officials will consult their colleagues, but the Home Office is a vast repository of information and even diligent and conscientious officials will not always be aware of something which is held elsewhere in the organisation. There are examples of that in this case. ... [A letter had gone astray] but it cannot be shown that the Immigration Officer who authorised the claimant's detention was aware of this. Mr Palmer would say that the rationality of the decision should not therefore be judged by reference to it. [Another letter had been sent to an unknown addressee in the Home Office, and had since emerged.] But it as well cannot be shown to have been known to the Immigration Officer who authorised detention. Mr Palmer would say that this, too, should be ignored in considering the rationality of the decision to refuse leave to enter.
>
> 8. Again, I agree with Mr Palmer on this matter. It is, of course, always open to an applicant for leave to enter to provide the Immigration Officer with any information which he or she considers would assist their case. If information or documents have already been sent to the Home Office that can be drawn to the Immigration Officers' attention. In other situations there may be a question as to whether the Immigration Officer has made sufficiently diligent enquiries in order to obtain information held elsewhere in his organisation, but in this case I do not think that any such criticism could be made."

35. Mr Kovats seeks to apply the reasoning of Nicol J to the present case. The decision to reject the submissions of 11 July, the drafting of the refusal letter, its finalisation and signature were dealt with in a department of the Home Office that was different from that which dealt with the decision to detain. The "detainor" was, in Mr Kovats' submission, entitled to rely on the letter refusing the submissions and to take it as showing that the claimant's removal was imminent.

36. I see without any difficulty the force of the argument that in the usual case an individual working in one department of the Home Office ought to be entitled to act on the strength of documents produced by his colleagues. If everybody taking any decision against a claimant had to satisfy himself that every preceding step had been taken properly, the executive would grind to a halt. But this is not a case like Ullah where the issue of the document necessarily settles the question of lawfulness, because of the policy. Nor is it a case like Kullas where the argument as to legality depended (despite the claimant's assertion) on a nicely judged prediction as to the possibility of an appeal succeeding. Nor is it a case like ID (and, indeed, Kullas also), where the claimant sought a remedy specifically against the Immigration Officer who had detained him. This is a case where the Secretary of State is the only defendant, and the Secretary of State having made a decision albeit in good faith but obviously bad, seeks to distance himself from responsibility for the consequent detention by pointing to the division of authorities in his own department. It seems to me that there are rare circumstances, of which the present case is one, where relying on a division of responsibilities will be not a proper recognition of the demands of executive

efficiency, but rather an argument that is repugnant both to common sense and to the right to liberty.

37. It would only be with the greatest of hesitation that I would suggest the introduction of a further psychological element into any aspect of the adjudication of fresh claim decisions. As WM (DRC) is usually applied, (but subject now to the decision of the House of Lords in ZT (Kosovo) v SSHD [2009] UKHL 6) judicial reviews or fresh claim decisions typically involve a judge deciding whether he thinks that the Secretary of State was entitled to think that the Tribunal would think that the claimant could not succeed. But the relevant state of mind in the present case is of quite a different order. This was not a case where submissions had been sent in and a decision was accidentally made in ignorance of them, so that a decision maker might say he did the best he could on the material that was to hand. Nor is it a case where the decision is on one view capable of being an adequate response to the material that was available. In this case a letter which was to hand, and which quite clearly said one thing, was responded to as though it said something completely different.

38. In these circumstances it appears to me that no reasonable Secretary of State could take the view that the submissions had been considered within the meaning of para 353A of the Immigration Rules, and accordingly no reasonable Secretary of State could regard removal as imminent. Such cases will no doubt be very rare, and it seems to me that if they do occur a detention purporting to be based on the imminence of removal cannot be rendered lawful simply by its being authorised by a person other than the one who dealt – or rather failed to deal – with the submissions.

39. For those reasons I have come to the conclusion that the claimant's detention was unlawful. The record of detention notes that it began at 15.05 on 30 November 2007 and there appears to be little doubt that the claimant was released from detention at about 9.30 that evening. I therefore conclude that he was unlawfully detained for a period of a little under six and half hours.

The "same day" removal process and its mechanism

40. The Operational Enforcement Manual and its successor state that when it is decided to remove a person, 72 hours notice must be given, including at least one working day in the last 24 hours of the period. If the claimant has a solicitor on record, the solicitor is to be informed of the decision. The declared aim is to ensure that those facing removal have a proper opportunity to make their final legal challenge to the process invoked against them.

41. The Manual also sets out two exceptions. One is not relevant to this case. The other is that an exception to the minimum 72 hour notification period may be made where prompt removal is in the best interests of the person concerned. One of the two possibilities is "medically documented cases of either potential suicide or risk of self harm". This was the procedure invoked in the present case. The claimant challenges it on a number of fronts. Through Mr Goodman he says that it was inappropriate in his case in any event. He says that its inappropriateness was confirmed by the fact that when removal did not take place he was immediately released again. He says that the decision not to serve the first decision letter on his solicitors until the last possible minute was an improper attempt to deprive him of legal assistance. He says that he

could not lawfully be removed without service of a notice of removal directions on him.

42. This is the ground upon which the claimant needs permission. I have decided not to give permission.

43. The claimant's release from detention when his removal could not be effected does not begin to show that the "same day" removal process was not appropriate. By the time of his release he was no longer facing imminent removal and it was perfectly reasonable to suppose that the risk of self harm had substantially diminished.

44. Whatever else was or was not in the material before the Secretary of State, it was clear that the medical report submitted on 11 July and the claimant's answers at interview on 19 November included references to a disturbed mental state. The claimant was taking regular medication for depression and, when asked, apparently consistently referred to suicidal thoughts, even if he then indicated retreat from them. In these circumstances it does not seem to me to be arguable that it was irrational or otherwise unlawful to adopt the process designed for those with medical needs or a risk of self harm. It may be necessary in such circumstances for the Secretary of State to have the confidence of his convictions as to the appropriateness of removal: the intervention of the claimant's lawyers may destabilise the claimant's psychological state and increase the risk of harm. And I do not regard either the judgment of Munby J in R (Karas) v SSHD [2006] EWHC 747 Admin or the speech of Lord Steyn in R (Anufrijeva) v SSHD [2003] UKHL 36 as demonstrating that in this case it is arguable that the claimant should have been served with the relevant notices earlier than he was. Cases outside the general 72 hour rule must each depend on their own facts.

45. It is clear that the claimant was given access to a telephone in order to phone his lawyers. He was able to inform them, accurately, that his removal that evening was proposed, and they then took the matter up on his behalf. So this is not a case like Karas where the intervention of the lawyers was fortuitous and unintended.

46. Like Mr Howell QC who refused permission of this point, I do not regard the grounds raised as properly arguable. If I had regarded them as arguable, I should have refused permission on the ground that no useful purpose would be served by reaching a decision on them. The claimant did have access to legal representation. He was able effectively to challenge the notices. He was not removed the same day. All the decisions which might be quashed under this head became ineffective within the course of the day.

47. That concludes my judgment on the points raised in the original grounds for review. In view of the materials before me and the conclusions I have reached on them, it is not necessary for me to take a view on Mr Goodman's applications for further disclosure of documents held by the Secretary of State.

The second decision letter

48. The final issue in these proceedings relates to the Secretary of State's second response to the submissions of 11 July 2007. That response is contained in the second decision letter, dated 8 May 2009. This is a substantial document, extending to 12 pages, albeit

in large type well spaced out. There can be no doubt that it does purport to deal with the submissions made in the 11 July 2007 letter. The second decision letter refers in detail to Dr Arnold's report, and compares the narrative given to Dr Arnold with the claimant's recorded evidence before the Immigration Judge, and compares the lesions recorded by Dr Arnold with the lesions recorded by Dr Najim and with the account of his ill treatment that the claimant gave to the Immigration Judge. The letter concludes that looking at the matter as a whole, Dr Arnold's report does not give the claimant a realistic prospect of success if his appeal were to be heard again by the Tribunal.

49. The second decision letter is challenged on two principal grounds. It is said, first, that the claimant's description of his ill treatment is not different from what it was earlier; it is simply more circumstantial, as might be expected when, after a lapse of some years he is invited to give his account in the calm of a doctor's consulting room. Secondly, it is said that it is wrong to take account of Dr Najim's report as it appears incompetent on its face. The arguments are supported by a witness statement by the claimant. He says that his impression was that Dr Najim did not take care when examining him and did not make a full examination, whereas Dr Arnold did. He says that he was still raw from the torture when he gave his original account, that he had said that he was beaten with the butt of a gun but does not remember the exact words he used to describe being beaten with sticks.

50. In my judgement it would be quite wrong to disregard the statement of Dr Najim. Evidently his English leaves something to be desired, and equally evidently there is a "not" missed out in the sentence I have cited above giving his opinion of the claimant's suicide risk at the time his report was written. But it was a report produced for the hearing before the Immigration Judge, and the claimant had had many months since he gave his notice of appeal in order procure a proper report. The report contains a description that purports to be a description of the scars on the claimant's body as they were when that report was made in 2004. It was not suggested then that the report was inaccurate in describing scars that were not there or failing to describe scars of other lesions that were on the claimant's body. There is simply no basis for treating it as other than an accurate account of the claimant's body then.

51. The claimant's body as described by Dr Arnold is in a completely different state. Hardly any of the lesions appear in both reports. There is no information about what the claimant was doing in the three years between the reports, nor is there any indication that Dr Arnold had available to him the medical description of the claimant's body as it was in the Spring of 2004. Dr Arnold gives his opinions, valuable as they are, on the basis that the lesions he notes might be referable to the claimant's accounts of his ill treatment. But unless Dr Najim's description of the claimant is to be completely disregarded, Dr Arnold needed to take account the fact that certain of the lesions appear not to have been on the claimant's body in 2004, two years after he had left Rwanda. His opinions as to the cause of the lesions reduce almost to irrelevance in this circumstances. It would almost be right to say that his opinions simply go to show how wrong he could be.

52. A particular feature of the difference between the two medical reports is the difference in description of the appellant's abdomen. Dr Najim observed two scars. One was roughly circular, 2cms x 5cms. The other was 22cms long. Dr Arnold observed that "over the upper abdomen, bi-laterally and extending across the mid line, there are numerous (approximately 20) linear scars measuring 1-2cms in length.

These he described as "unusual. They are typical of trauma with a sharp object as described by him". The description to which he referred was the claimant's claim to have been "stabbed repeatedly with sharp sticks".

53. But the Secretary of State is entirely right to say that the claimant had not previously mentioned being stabbed with sharp sticks. He said he had been beaten with sticks. It is not for us to speculate about what caused the injuries seen by Dr Arnold, but the fact that they were not noticed by Dr Najim, coupled with the fact that repeated stabbing had not previously been mentioned means, as it seems to me, that a rational decision maker would be very unlikely indeed to take them into account as evidence of something that had happened two years before Dr Najim's report. If when the claimant made his claim, he indeed showed scars from 20 separate stabbings in his abdomen, it is quite inconceivable that he would not have ensured that he mentioned that ill treatment specifically, that the doctor examining him after he had been in this country for about 21 months saw them, and that they were in his report. And it also seems to me that there is a world of difference between a vague allegation of having been beaten with sticks and the new claim that the claimant was stabbed repeatedly. The latter claim cannot properly be regarded as mere expansion of the former.

54. The instances of irregularity of pigmentation, some of which are described by Dr Arnold as "highly consistent" with beatings the claimant described, and others as "typical of changes found following falaka" (a form of ill treatment not previously mentioned by the claimant.) are again all matters which were not seen by Dr Najim. When the lesions occurred which caused the irregularities of pigmentation is again not a matter on which I (or indeed an Immigration Judge) ought to speculate. The evidence simply points to their being post-2004. Further, despite Dr Arnold's obvious credentials, it cannot be assumed that his report is perfect. Scars seen by Dr Najim appear not to have been observed by Dr Arnold. In his opinions, Dr Arnold said that the pain and tenderness in the claimant's spine were "unusual in a young man", but that description is a surprising one of the appellant, who was 44 years old when Dr Arnold examined him.

55. It will be recalled that the Immigration Judge gave a considerable number of reasons for his view that the appellant before him lacked credibility. Of course it is right to say that if there is, after all, a good reason for supposing that part at any rate of the appellant's story was credible, an appeal to the Tribunal might have a different outcome. But it seems to me that no tribunal taking all the evidence into account would think that Dr Arnold's view of the aetiology of the claimant's lesions as they were at the very end of 2006 ought to be preferred to a judgment on a completely different set of lesions observed on the claimant's body nearer the date of his alleged ill treatment, more consistent with the account he then gave of that ill treatment, and produced by the appellant, who was legally represented and was assembling material for his appeal.

56. In that context the other reasons given by the Adjudicator retain their full force. In my judgment, not only was the Secretary of State entitled to take the view that an appeal would have no realistic prospect of success: that view was inevitable.

57. In a subsidiary argument, Mr Goodman submits that it was irrational for the Secretary of State to adopt the opinion of Dr Arnold in relation to post traumatic stress disorder and suicidal thought for the purposes of deciding that the claimant should be subject

to "same day" removal, whilst rejecting Dr Arnold's opinion of the claimant's history. I reject that submission. A moment's reflection will show that it cannot be said to be irrational to accept that a person has a particular medical condition whilst rejecting an account of how he came to have that condition. In making arrangements for the claimant's removal, the Secretary of State was entitled and bound to have regard to his present medical condition. Almost the only thing on which Dr Najim and Dr Arnold clearly agreed was the potential diagnosis of post traumatic stress disorder and the suicidal thoughts. The claimant himself provided further information in his interview on 19 November 2007. The Secretary of State was clearly entitled to take those matters into account in arranging the appellant's removal even whilst disbelieving the appellant's account of his history.

Conclusion

58. For those reasons the challenge to the second decision letter fails and this claim succeeds on the third original ground only. I will hear counsel on the appropriate order.