Case No: HQ13X04919

Neutral Citation Number: [2014] EWHC 3497 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 October 2014

Before :

BOBBIE CHEEMA QC
Sitting as a Deputy High Court Judge

- -

Between :

KAMALAN GANESHARAJAH	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Alex Goodman (instructed by **Birnberg Peirce and Partners**) for the **Claimant**
David Blundell (instructed by **the Treasury Solicitors**) for the **Defendant**

Hearing dates: 4, 7 & 8 July 2014

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Judgment

Bobbie Cheema QC :

INTRODUCTION

1. This is a claim in tort for damages for false imprisonment namely, unlawful immigration detention. The Claimant was detained by the Defendant after completing a criminal sentence from 10th July 2008 until 28th February 2013 when he was removed to Sri Lanka, a period of four years and seven months. This length of detention while not unique is plainly exceptional. The Defendant has no unfettered power of detention. The Claimant asserts that this detention was unlawful throughout. The Defendant ("SSHD") contends that apart from the first two months, at all material times the Claimant was lawfully detained.

THE FACTS

2. The Claimant relies on the absence of evidence from any official involved in his detention. The evidence called by the Defendant has been limited to a narrative upon documentary records from one of her caseworkers and an over-view from a team leader in Criminal Casework although the caseworker, Mr Eugene Pereira had responsibility for the Claimants' case for a short while towards the end of his detention and completed detention reviews for that time. During pre-trial preparatory stages there were a number of inaccuracies in factual assertions made on behalf of the Defendant whose case remained littered with late admissions and concessions at trial. However, I am satisfied that despite the inevitable assistance I would have received from hearing evidence from the case-worker who had conduct of the Claimant's case for most of his detention and who has since left the employment of the Defendant, there is no injustice to the Claimant from the Defendant's failure to call him. Accordingly, I decline to draw any adverse inference from the caseworker's absence. The Claimant's solicitor has provided by way of statement an alternative interpretation of some of the documentary records and process which has not ultimately been objected to by the Defendant and which I have found very helpful. No evidence was called from the Claimant who has been removed and is apparently unable to reach a video conference facility in Sri Lanka. The following summary of the relevant facts is taken from the agreed chronology reached by the parties by the end of the evidence.

3. The Claimant arrived in the United Kingdom on 12th October 1991. He claimed asylum as a Sri Lankan and was granted temporary admission after being interviewed with a Tamil interpreter. The asylum claim was refused on 27th February 1993 but he was granted leave to enter until 27th February 1994. In May 1994 an extension of leave was grated until 27th February 1997.

4. The Claimant was issued with a Sri Lankan passport valid from 10th July 1995. He made an application for further leave to remain in person on 7th March 1997. This was granted until 27th February 2000.

5. On 7th August 1997 the Claimant received his first criminal convictions at Ealing Magistrates Court: (1) Obtaining property by deception; (2) attempting to obtain property by deception; (3) handling stolen goods. In total, he achieved 35 convictions for 63 offences between then and 18th June 2008.

6. On 20th May 2004 the Claimant was served with notice of liability for removal as an over-stayer. The next day a detention review took place and preparations were put in train for a Travel Document Interview with the Claimant. Emergency travel document forms IS33, Form 7 LKA, bio data and a cover letter transmitted these within the Home Office but none were sent to the Sri Lankan authorities. He was refused temporary admission on 22nd May 2004. On 24th May 2004 the Claimant made an application for indefinite leave to remain but made only partial disclosure of his criminal convictions.

7. On 7th June 2004 he was granted temporary admission subject to reporting restrictions. He reported two days later but failed to report as required on 9th July 2004 although he reported three days later. He failed to report the following month on 9th August 2004 and thereafter.

8. On 21st March 2006 his solicitors wrote to enquire as to the progress of his application for leave to remain. The Claimant attended appointments with his probation officer throughout this year.

9. On 11th January 2007 his solicitors again wrote to request information about his application.

10. The Claimant's sister arrived in the United Kingdom on 5th March 2007 as the spouse of a British citizen.

11. On 16th May 2008 the Claimant was detained on remand at HMP Wormwood Scrubs.

12. Hereafter began the Claimant's communication of misleading information about his true citizenship. In a Probation interview on 13th June, whilst in prison, he mentioned a brother in Swindon. On 2nd July 2008 he claimed to immigration officers to be a British citizen, born in Swindon. He provided a telephone number for his girlfriend which was actually his own number. The same day he stated that he was Sri Lankan. A note on the Claimant's file dated 9th July 2008 records a decision that he is suitable for release on tagging once his criminal custody ended.

13. This occurred on 10th July 2008 but the Claimant was not released. A minute of the decision to detain refers to Paragraph 2 of Schedule 3 and states:

> *'Mr Ganesharajah has been assessed in line with the current requirements and does not qualify for release under rigorous contact management based on his non-compliance.'*

14. It is agreed that this is a reference to the unlawful 'blanket' policy and the Defendant concedes that from this date until 9th September 2008 the exercise of her statutory power to detain was vitiated by failing to apply published policy governing the exercise of that power and by having regard to unpublished criteria which operated as an unqualified requirement that all foreign nationals who had committed crimes justifying detention should be detained at the end of their custodial sentences irrespective of individual circumstances. On the same day a decision was made to seek emergency travel documentation (ETD) in order to effect a deportation. Another note records that '*A futile attempt at obtaining an ETD was previously made in 2004*'. The Claimant waived his right to appeal by way of notification received on 22nd July

although on 26th July it is noted that he claimed he had not intended to waive it. An appeal was submitted. This was out of time.

15. On 8th August 2008 a detention review recorded,

> *'I am content to authorise detention on the basis of the evidence above. Mr Ganeshara* [sic] *has shown a propensity to re-offend and as such can be considered a harm to the public good. He has also refused to comply with the documentation process, and having previously disregarded immigration control, I am not satisfied that he would comply with conditions of release. At this stage, he is therefore not suitable for release on restrictions.'*

16. On 11th August an Immigration officer tried to meet with the Claimant and GCID notes state: "Subject paged to attend visits at DIRC [Dover Immigration Removal Centre] today. Prison staff spoke to the subject directly and they stated he refused to attend". A decision letter dated 15th August sets out reasons for the deportation order and rejects the May 2004 application for leave to remain.

17. On 20th August 2008 the Claimant was interviewed in connection with the issue of a Sri Lankan ETD but he declined to sign the forms confirming his identity to enable an ETD to be sought.

18. During a Detention Review which took place between 5th and 9th September the following was noted 'Not appropriate to release on reporting restrictions' and 'Case has been assessed according to the current criteria and there are no compelling reasons to believe that he would remain in contact with the UK Border Agency if released…'

19. The Claimant's appeal was heard on 17th September and was dismissed on 29th September.

20. Another attempt was made to obtain the Claimant's signature on the ETD documentation on 2nd October but again he was uncooperative. A GCID note records:

> *'Sub had asked for an update. Because of this had chat with caseowner and I was going to attempt to get sub to sign ETD which he previously refused. However, whilst sub was waiting in interview block to be seen, he was asked by GLS to take back to his own block, his mobile phone, which he knows is not allowed in i/v block. He was unhappy with that and then said 'f*** immigration' and walked off.'*

21. Another Detention Review took place on 6th October and consideration was given to including the Claimant in Operation Hamelia which could include non-cooperating detainees. However on 8th October it was noted that as the Claimant had launched a High Court review of the refusal of his appeal he was not eligible to be included in Operation Hamelia. The High Court application was dismissed on 15th October. The Claimant became appeal rights exhausted on 27th October 2008.

22. He was reconsidered for deportation as part of Operation Hamelia between 13th November and 3rd December 2008. A Detention Review had taken place on 4th December and the Claimant had said he did not want to return to Sri Lanka on 8th December.

23. A Deportation Order was made on 10th December but a GCID note records:

> *'Sub was called to interview block 4 times today so that I could serve DO on him. Finally got message at 1830 hours that he was not going to see me, as he hated UKBA and apparently what he said about immigration could not be repeated over the telephone! As I am about to finish my shift, I will deal tomorrow.'*

24. On 12th December RGDU received an ETD application including IS33, Photos, Application Form, Bio-data and a copy of the Claimant's sister's passport. This was passed on to the Home Office's "LKA team" for further action, but was not sent to the Sri Lanka High Commission. The Deportation order was served on the Claimant on 16th December and on that date the Claimant's details were processed as part of Operation Hamelia.

25. A Detention review on 31st December 2008 found:

> *'Subject does not meet the current criteria for release due to the nature of his convictions and also poses a risk of harm to the public if released due to these convictions. Subject also poses a high risk of non-compliance.'*

26. On 6th January 2009 a GCID note records:

> *'IS151F served on 5/1/9 and confirmation of conveyance returned by fax on 5/1. I am still trying to get sub to sign his ETD application….'*

27. The Claimant made an application for bail to the Defendant on 17th January but disclosed only two driving offences rather than his more serious offending. This application was refused in March.

28. Records show that on 27th January a caseworker sought an email update on progress in including the Claimant in Operation Hamelia. A Detention Review on that date states that detention has been considered in line with the then new detention policy and noted:

> *'Although Mr Kamalan has not committed an offence which makes him exempt from release under rigorous contact management'*
>
> *'Only possible route for documentation has been via Operation Hamelia'*
>
> *'Mr Kamala's non-compliance suggests that he would pose a very high risk of absconding if released. Mr Alex Forbes –*

Please advise whether you consider this case as suitable to be referred for release under rigorous contact management.'

'I am content to authorise detention on the basis of the evidence above. Subject is non-compliant and has no incentive to comply with conditions of release. I am also aware of his propensity to re-offend. Sam – can you please book in some time with me to go through the all avenues toolkit.'

Alex Forbes, Assistant Director

29. On 20th February the Claimant was written to and told (in error) that an application for ETD had been submitted to the Sri Lankan authorities. On 24th February a Detention Review recorded:

'I have considered whether detention is in line with the new detention policy. Although Mr Kamalan has not committed an offence which makes him exempt from release under rigorous contact management, he is a prolific offender and has shown a complete disregard for the laws of the UK'

*"**Authority to maintain detention given***

I agree with your recommendation to maintain detention. The only barrier to removal is the ETD. Sub is not complying with the ETD process, however an Op Hamelia referral has been made to RGDU to see if an ETD can be obtained using information form the Subs [sic] file. Hopefully this will be successful and sub is still not complying.

Once and [sic] ETD has been agreed, RD's will be set and sub deported from the UK.

Based on the presumption of release, I have considered whether the continued detention of Ganesharajah Kamalan is lawful. In light of his risk of further offending and the harm that this may cause, as well as [his] likelihood of absconding, I consider these additional factors outweigh the presumption of release. I therefore authorise his detention for a further 28 days.

Continued detention authorised".

30. The following month, on 23rd March, the Detention review recorded:

'I agree with your recommendation to maintain detention. The only barrier to removal is the ETD. Sub is not complying with the ETD process, and a section 35 referral has been made, Case owner has the country targeting team got no advise they could give you in obtaining a valid travel doc for sub? Can this case be referred to the next CTU stuck cases panel.

Once and ETD has been agreed, RD's will be set and sub deported from the UK.'

31. On 30th March the Facilitated Return Scheme (FRS) was discussed with the Claimant who agreed to consider it. A caseworker chased the immigration officer who had had this conversation with the Claimant on 16th April.

32. A Detention review on 20th April noted that there were no fixed timescales for obtaining an ETD at that stage. It has been conceded by the Defendant that no ETD application had been submitted to the Sri Lankan authorities by this date. Soon after this enforced returns to Sri Lanka were suspended by the Defendant.

33. When the Claimant was interviewed by HM Inspector of Immigration on 19th May "he stated he did not want to go back". He provided a telephone number for his sister who he said was called Sujeetha Thavarajuh. In fact, her name was Abirami Viknaesan. HM Inspector suggested consideration of prosecution under section 35 of Asylum (Treatment of Claimants etc.) Act 2004 for non-compliance. A Detention review for that date noted:

'highly unlikely that the subject will be removed in the next 3 months, he cannot be without a shadow of a doubt regarding his position and what is required of him, in order for him so that he can be returned to Sri Lanka and regain his liberty'

'Although removal is not imminent the risk of absconding and re-offending outweighs the presumption of liberty.'

Karen Abdel-Hady
Deputy Director

34. Records indicate that a caseworker called the number given for the Claimant's sister on 21st May but someone else answered. The next day the number was called again and an answer-phone message said, "Yeh, this is Kam yeh."

35. On 26th May the Claimant was seen by an immigration officer at Oakington detention centre and he said that the number he had provided for his sister was two years old and he had had no contact with her.

36. On 18th June the Claimant was booked in to have an interview in connection with a possible prosecution under s.35 of Asylum (Treatment of Claimants etc.) Act 2004 on 9th July but when an immigration officer tried to serve the notice the Claimant could not be found in the detention centre, later he claimed to have been in the gym. When he was served on 7th July he said that he had an application before the European Court. Detention reviews note that this is not a barrier to removal. At his interview on 9th July the Claimant said he was refusing to cooperate with the ETD process because he had a case pending before the European Court.

37. A GCID note dated 6th August 2009 states:

'Subject seen at Dover IRC on 4 August 2009…Subject showed me a copy of an ECHR letter dated 23/07/2009 which gave the

reference number: ECHR-LEO 1R and PHA/CLB/clv. I was unable to take a copy as Dover Visits Centre did not have copier or fax machine to use. Immigration were busy dealing with an incident so will need to request immigration at DIRC to fax over.'

38. Detention notes between August and November thereafter noted that removals to Sri Lanka were postponed. The s.35 action was suspended until the European Court action was resolved however on 10th August a caseworker was advised that the application made by the Claimant was no barrier to removal.

39. The 11th September Detention review noted:

> *'Although the subject has not committed an offence which makes him exempt from release under rigorous contact management…*
>
> *Authority to maintain detention given:*
>
> *Based on the presumption of release, I have considered whether the continued detention is lawful. In light of [his] risk of further offending and harm that this may cause, as well as the detainee's likelihood of absconding, I consider these additional factors outweigh the presumption of release, I therefore authorise [his] detention for a further 28 days.'*

40. Operation Hamelia was suspended on 20th October (*Interim Operational Instruction IG 01 43 90)* and enforced returns to Sri Lanka resumed.

41. In November the Claimant applied for bail claiming to be British but he withdrew the application at the hearing on 9th November.

42. On 17th January 2010 the claimant threatened a member of staff at Dover Immigration centre. Three days later a section 35 interview was arranged and a query was raised as to the progress of the Claimant's European case. A GCID note records *case has had no action for some time, need to clarify what is happening with ECHR application'*

43. A Detention Review on 24th January noted that the Claimant had not committed an offence which made him exempt from release under rigorous contact management conditions. On 30th January the Claimant was involved in a fight with another detainee which resulted in him being placed in segregation.

44. On 25th February the Claimant said he was not interested in FRS.

45. On 3rd March during an interview the Claimant said that he was thinking of withdrawing his European Court case and of returning to Sri Lanka. His sister was to visit Sri Lanka to see if any relatives were there. He was interviewed again at Harmondsworth IRC on 30th April but now said that he wanted to see what the result of his court case would be and that, if it failed, he might consider the FRS.

46. In early June a caseworker made enquiries about the progress of the Claimant's case before the European Court of Human Rights including with the Court itself. To the

latter enquiry there was no reply. However the fax transmission sheet indicates that the fax may not have been successfully transmitted.

47. On 4th June an Assistant Director, Alex Forbes, recorded that a referral for release under rigorous contact management should be made in the Claimant's case:

> *'I am content to authorise detention on the basis of the evidence above. However, it may be that the clear risks of absconding and re-offending may be mitigated by reporting restrictions. Please refer for release.'*

48. Further efforts were made to engage the Claimant in an ETD interview and on 15th June a further Detention review took place. The following is recorded by Alex Forbes:

> *'I support this proposal on the basis of the evidence above there is a significant risk of re-offending and of absconding. However, it may be that the clear risks of absconding and re-offending may be mitigated by reporting restrictions (particularly given the length of detention) – do you have a view?'*

However the following was also recorded from Johnathan Nancekivell-Smith:

> *'Based on the presumption to release I have considered whether to continue the detention of the Mr Kamalan. In light of his risk of further volume offending and the harm that may cause, as well as their likelihood of absconding (given his multiple identities), I consider these factors outweigh the presumption to release. I therefore authorise their detention for a further 28 days. I note the court appearance for possible drug dealing in February, I would expect us to push for prosecution and if necessary a return to prison if convicted. Separately I would encourage the case owner to consult with senior case owners on the treatment of his early age at the time of entry to the UK, this may need specific and further referral depending on circumstances (which I note completely visible to me for just the detention review)'*

49. On 17th June records show that caseworkers reconsidered the appropriateness of deportation given the youth of the Claimant when he entered the United Kingdom. It was decided that efforts to deport should continue. A GCID note dated 23rd June states:

> *'Subject seen at Harmondsworth IRC. I asked subject to complete ETD. I advised him that if he continues to refuse that he will only prolong his detention and his case with the ECHR will not be a priority case. The subject was thinking about it however he said that he needed to speak to his reps first.'*

50. On 29th June the Claimant was interviewed again, he refused to sign the ETD form and stated he would rather stay in detention than return to Sri Lanka.

51. On 14th July an Assistant Director noted during a Detention review "*Please proceed as proposed speaking to CTU about options for re-documentation (while this has become more problematic for Sri Lankan nationals, we are taking forward documentation with CTU input).*"

52. A GCID note on 20th July records:

> *'Subject seen at Harmondsworth IRC today. The first thing the subject said when he entered the interview room was that he spoke to his rep and is not willing to complete the ETD. I went over his ECHR claim and explained the backlog of 30 years and that he is prolonging [sic] his detention.*
>
> *However he informed me that he would rather stay in detention or prison than go home. I asked him why he didn't want to go back he said that he knew no one and it is a foreign country to him. I went over FRS and the benefits and asked him if he had residence in any other country apart from Sri Lanka. He stated he had an uncle in India and at first said he would be willing to try and go back there. When I said I would look into it and speak to his Caseworker about it he changed his mind and said that he didn't want to go anywhere and would rather stay in detention.'*

53. Another GCID note dated 29th July records:

> *'Email to [blank] (POISE), CTU, to enquire about having the subject interviewed by a Sri Lankan official as part of the pilot scheme. Response received on 30 July informing that CTU had recently ran a pilot scheme for barrier free (other than ETD) Sri Lankans where they were interviewed face to face by officials from the LKA HC at Colnbrook…Awaiting feedback from CTU regarding eligibility of this case for the pilot.'*

54. The CTU was chased by the caseworker about the pilot scheme on 6th and 27th September. The caseworker also sent emails to the Investigation and Documentation Team to ask if an 'evidential letter' to the Sri Lankan High Commission including information about the Claimant's sister would assist in obtaining travel documentation for him.

55. On 7th October the CTU confirmed that the Claimant was to be interviewed by the Sir Lankan authorities on 2nd November. In preparation for the interview the caseworker emailed bio-data information about the Claimant and information from the Claimant's landing card was sought, in addition on 29th November the case worker emailed the Claimant's sister's details to the CTU. At the interview on 2nd November he claimed to be an Indian Muslim called Amit Sohail, said that the Sri Lankan identity was false and that he could only speak Hindi and not Tamil. He wanted to return to India. The Sri Lankan High Commission agreed to see the Claimant again if the Defendant obtained any substantial evidence that the Claimant was a Sri Lankan.

56. An evidential letter was completed on 24th November and passed to a senior executive officer for approval and it was submitted on 3rd December.

57. In the meantime the Sri Lankan Department of Immigration and Emigration confirmed the passport application details in respect of the passport issued to the Claimant and on 3rd December 2010 the evidential letter, together with supporting exhibits was sent to the Sri Lankan High Commission in London. On 12th January the SLHC responded negatively to the evidential letter stating, '*Please be informed that on perusal of the accompanied documents, we were not able to ascertain his Sri Lankan identity……We observe that some areas were blocked or deleted. Hence, please send us a clear copy of the whole document with all the pages to enable us to forward this to Colombo to verify his Sri Lankan identity.'*

58. There is no evidence that the Defendant sought any further details from the Sri Lankan High Commission as to why the information provided in the report was inadequate. An un-redacted report was not sent to the High Commission. An un-redacted copy of the evidential report was sent to the Defendant's CSIT unit. Over the ensuing months there was some incredulity on the part of the Defendant's officers about the failure of the SLHC to issue an ETD on the basis of the report which included the confirmation from the Sri Lankan Department of Immigration and Emigration that the Claimant had been issued with a passport.

59. On 11th March 2011 an officer at the British High Commission addressed the case to the Controller General of Immigration in Sri Lanka requesting that he contact the High Commission in London. He also supplied a copy of the evidential report. On 15th April a case officer emailed Richard Coy at CSIT asking for news and stating *'I presume the fact that we haven't heard anything means that there have been no developments? I am currently completing a 26 month detention review which will be authorised at Director Level. It would be nice if I could hint that there has been some progress made with the Sri Lankans.'*

60. On 18th April an update is recorded indicating that there had been no feedback from Sri Lankan officials but that the Controller and Assistant Controller were visiting the UK with the Migration Delivery Officer from the British High Commission. The latter would be requested to raise the case with the Controller and Assistant Controller directly. However, a month later on 12th May 2011 a caseworker was again seeking news from CSIT. The next day Richard Coy CSIT emailed Harsha Malde stating the Controller General of the Department of Immigration and Emigration of Sri Lanka had explained that *'the SLHC in London has the sole authority to decide on the ETDs and that the DIE cannot make any decisions on the same'*. He also informed her that it was understood that DIE took responsibility only when the subject arrived in Sri Lanka. He asked her to check with the High Commission in London why an ETD was not being prepared for the Claimant on the basis of the passport check confirmation from the Sri Lankan DIE. Harsha Malde sought to pursue a response and on 17th May the case worker also emailed the CSIT and RGDU for an update stating that he understood the Claimant's case was being pursued with SLHC as a matter of urgency. Towards the end of the month, on 27th May an RGDU representative Jacqueline Vigor CLT raised the Claimant's case during an in person visit to the SLHC.

61. An official phoned the SLHC on 1st June and again on 13th June seeking an update.

62. In July the Claimant's case was examined at a CSIT surgery. A caseworker chased up both CSIT and RGDU and was told that the officials he had been chasing up no longer worked on Sri Lanka cases and that there was a new officer at the SLHC who was unfamiliar with the Claimant's case. A new caseworker/caseowner took over the case. During an induction interview at Campsfield House IRC on 19th July the Claimant said he wanted to return and a FRS disclaimer was completed. The next day the case was included in a review sent to the SLHC and on 21st July they responded with a request for an interview with the Claimant. This was arranged swiftly and the next day an FRS acceptance letter was served on the Claimant.

63. The interview took place on 29th July as arranged. Prior to that the Defendant arranged for the DIE confirmation of passport details to be provided to the SLHC but the full evidential letter does not appear to have been sent again in redacted form or as requested earlier, in unredacted form. On 2nd August the SLHC wrote to the Defendant to confirm the outcome of the interview. The Claimant had maintained his false Indian identity of Amir Sohail, born in West Bengal and he gave details of his life and how he had come to arrive in the United Kingdom. He also provided alternative family details, including saying that he had a sister called Saleena in the UK. He said that Kamalan Ganesharajah was actually a school friend who had left for Canada in 2001.

64. On 9th August a further request for an ETD interview, this time for an Indian document was sent to the Claimant via his detention centre and he was interviewed on 11th August. He provided some details but refused to provide fingerprints giving the excuse that he wanted to take legal advice on whether to provide fingerprints or not. Plans were made for the Claimant to be part of Operation Tetrya, a charter flight scheduled for 28th August and bail was refused at a hearing on 1st September, the Tribunal having been told that it was planned that he would be removed on 28th September as part of Operation Tetyra. The Defendant's officers were also in touch, still, with the SLHC but on 2nd September the Claimant was withdrawn from the FRS programme for non-compliance with the documentation process.

65. A GCID for 6th September notes:

> *' T/call to FRS prior to speaking to subject to clarify the basis for withdrawal of FRS as the letter refers to non compliance with bail conditions but CID notes indicated bail had been refused. However the file was not available to clarify the position prior to service.'*

66. On the same date he was interviewed about his Indian identity. He continued to deceive, he denied having a sister, refused to give fingerprints because it would assist in returning him to India, and said he wanted to remain in the United Kingdom until his girlfriend had finished her degree, following which he said they would relocate to India. The Claimant was not removed on the Operation Tetyra flight on 28th September.

67. On 19th October during his induction at Brook House IDC the Claimant reverted to saying that he wanted to do anything necessary to get out of detention and gave a London address for his father. This was another false piece of information. The next day he made a complaint about the failure to remove him however when interviewed

on 12th November he claimed he was an Indian who had never even been to India. Throughout the rest of the month the Defendant's officers discussed the prospects of an ETD being issued by the SLHC but on 28th November 2011 the SLHC confirmed that the Claimant would not be recognised as a Sri Lankan national.

68. In a Detention review on 22nd December the following was noted under the heading, *Is there a realistic prospect of removal within a reasonable timescale?*

> *'No. Mr Kamalan has continued to frustrate the attempts to document him and now leads us to believe that he is Indian, which I don't agree with. We have his Sisters passport, which is Sri Lankan and a wealth of criminal records, including institution records, and should attempt to document him as a Sri Lankan. Please involve CSIT again in re-documenting him.'*

69. However on 23rd December 2011 an ETD application was sent to the Indian authorities although the Defendant also continued to consider the prospects of obtaining a positive response from the Sri Lankan High Commission. There is no evidence that any further material was sent to the SLHC.

70. On 13th March 2012 a GCID note records some new apparently misleading information from the Claimant:

> *'Healthcare at Morton Hall have advised that subject claims to be addicted to drugs, they cannot carry out any tests on the subject as they do not have a licence to do so, therefore the detainee cannot remain at Morton Hall. I have spoken to Duty CIO at DEPMU who advised that Harmondsworth have confirmed the detainee is not a drug addict. Harmondsworth have also advised that there was a healthcare to healthcare referral made and healthcare accepted. I am awaiting further information from Duty CIO at DEPMU as to the member of healthcare staff at Morton Hall who accepted the subject. The subject was part of a drug ring at Harmondsworth IRC.'*
>
> *'Call to Harmondsworth healthcare…confirmed no healthcare to healthcare referral was made, which would explain why healthcare at Morton Hall have no record of this. Healthcare at Morton Hall cannot manage the detainee as they do not have a licence to detox as of yet. The detainee has stated that he was involved in taking illegal drugs in Harmondsworth (he was moved out of Harmondsworth for being part of a drugs ring).'*

71. A form IS151F was served on the Claimant on 21st May while his return status was described as 'Pending' on 23rd May. On 20th June the Claimant made another application for temporary admission. When interviewed on 28th June he continued to assert an Indian identity saying he had been adopted by a family in India and arrived in the United Kingdom with an uncle. In July the RLO in India was contacted for an update and confirmed that the Claimant's case was being treated as a priority and was

being reviewed with the state authorities every two weeks. In the meantime the Claimant's FRS application was withdrawn.

72. On 31st July a letter before action was issued on behalf of the Claimant. On 1st August 2012 the Defendant received confirmation that the Claimant had been accepted for an ETD interview with the Indian authorities. A pre-action Protocol letter was sent to the Defendant on 3rd August and she replied on 9th August on the same day that the Claimant was interviewed by the Indian authorities. The claimant played off the Indian authorities by claiming in the interview that he was Sri Lankan. This assertion was reflected in the response of the Indian High Commission to the Defendant on 13th August when they stated they could not issue an Indian ETD because the Claimant had told them he was born in the Maldives of parents from Sri Lanka.

73. A letter before action was sent on 7th September 2012 and on 28th September the Claimant's lawyers made a subject access request and material was provided in response. On 30th September the Defendant received confirmation that the Claimant had been issued with a 'prevention of harassment' letter by Kingston Police to prevent him having contact with a Nera Jeyarajam.

74. A Detention review on 2nd October noted the following recommendation for consideration by a Strategic Director:

> *'Recommendation for release with electronic monitoring and weekly reporting on the basis that the prospect of removal in near future is very slim.'*

75. Three days later the Claimant's case was raised with the Sri Lankan authorities again and they agreed to investigate his nationality whilst not initially recognising his case. On 8th October an official at the Sri Lankan High Commission did recall the Claimant, confirmed that he had a report on him and had interviewed him in the past. He sought confirmation from the Defendant that the Claimant's sister could corroborate who he was because the SLHC considered that he was claiming to be "the victim of false identity". An application for urgent interim relief was refused by Mr Justice Collins the same day.

76. By agreement with the SLHC an interview with the Claimant was arranged for 10th October but the Claimant frustrated this interview by refusing to leave Harmondsworth IRC to be taken to the interview at Colnbrook IRC.

77. Another interview was arranged for 7th November 2012. In the meantime on 1st November, the Defendant received information that the Claimant had attempted to assault a female visitor Ms Dilani Mayuri Thevamanagaran. Staff had to intervene and, as the visitor was leaving, the Claimant shouted that if he were on the street he would have punched her in the face. On 7th November, again, the Claimant refused to leave Harmondsworth for interview at Colnbrook. The Claimant was finally interviewed by Sri Lankan officials on 20th November and a referral for the placing of the Claimant on a charter flight to Sri Lanka in December had been received by CROS on 13th November but after the SLHC interview the caseworker received a message from CROS that the Claimant had claimed to be from the Maldives.

78. On 28th November the Claimant was interviewed and said he was unsure of his nationality and that he was born in the Maldives to a Maldivian father and an Indian mother. He claimed his father died when he was 2 and he then lived in Bengal. He said he moved to the UK with a Sri Lankan man on a false passport when he was 9 years old.

79. This led the Defendant to seek assistance from the Indian High Commission in early December and to arrange an interview by Maldavian authorities. At the same time arrangements were made for the police to attempt to obtain verification of the Claimant's identity by visiting his sister and seeking an identification from photographs.

80. On 13th December 2012 the caseworker emailed the police and requested that an interview be carried out with the Claimant's sister in North West London. This was accomplished on 16th December. The sister positively identified the Claimant in a photograph and the information was provided to the Defendant immediately. A bail application was refused on 20th December.

81. On 15th January 2013 an update from the Country Specialist Team confirmed that the 20th November interview with the SLHC was inconclusive because the Claimant switched from one nationality to another in order to frustrate his removal. There was confidence that following the supply of sufficient supporting evidence to verify his identity, the Sri Lankan authorities would not hesitate to issue a travel document. The original photograph identified and signed by the Claimant's sister was couriered to the Sri Lankan High Commission that same day and her contact details were provided on 6th February 2013.

82. On 7th February the Claimant called a hotline number expressing an interest in the FRS, he had been sent a blank FRS disclaimer, leaflet and letter on 17th January. He signed the disclaimer and documentation on 9th February. Thereafter he was interviewed in order to complete the ETD documentation and then by the Sri Lankan authorities on 18th January and the following day the SLHC finally agreed to issue the claimant with an ETD.

83. The ETD was collected from the SLHC on 27th February 2013 and the Claimant was removed to Sri Lanka the following day.

84. Despite the efforts of the Defendant to encourage the Claimant to withdraw his claim for judicial review those representing him indicated on 22nd February 2013, prior to his removal, that after four and a half years he had reached a state of desperation and was prepared to move to any country in order to be released from detention.

THE LAW

85. Once the Claimant has established that he was directly and intentionally imprisoned by the Defendant it is for the Defendant to show that there was lawful justification for doing so.

86. The SSHD's powers to detain are contained in Schedule 3 paragraphs 2(2) and 2(3) of the Immigration Act 1971 (as amended):

> *'(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.*
>
> *(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).'*

Hardial Singh principles

87. The power to detain is an exercise of discretion and the Court has a supervisory role. There are limitations on the SSHD's power to detain. These were originally articulated by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704, but then usefully distilled by Dyson LJ in *R (I) v SSHD* [2002] EWCA Civ 888, [2003] INLR196 at [46]. Dyson LJ's distillation was approved by the SC in *R (Lumba and Mighty) v. Home Secretary* [2011] UKSC 12, [2011] 2 WLR 671 at [22]) and is as follows:

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

    (2) The deportee may only be detained for a period that is reasonable in all the circumstances.

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

    (4) The Secretary of State should act with reasonable diligence and expedition to effect removal.

88. The factors relevant to determining what is a 'reasonable' period of detention will include (*per* Dyson LJ at [48]):

- the length of the period of detention;
- the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation;
- the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles;
- the conditions in which the detained person is being kept; the effect of detention on him and his family;
- the risk that if he is released from detention he will abscond; and

- the danger that, if released, he will commit criminal offences.

89. Further useful principles can be gleaned from other leading cases (such as *R (Lumba and Mighty) v SSHD* [2011] UKSC 12 and Richard LJ's judgment in *R (MH) v SSHD* [2010] EWCA Civ 1112):

(1) There can be a 'realistic' prospect of removal without it being possible to specify or predict the date by which removal can reasonably be expected to occur and without any certainty that removal will occur at all (*(MH)* at [65]).

(2) The extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise, but there must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors (*(MH))* at [65]).

(3) The risks of absconding and re-offending are relevant considerations, but the risk of absconding should not be overstated, otherwise it would become a trump card (*Lumba* at [108]-[110] and [121] citing Dyson LJ in *R(I)* at [53]).

(4) The weight to be given to time taken up by an appeal depends on the facts, but much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one (*Lumba* at [121].

(5) A detainee who will not comply with the ETD process or other requirements of detention and is doing everything he can to hinder the deportation process, may reasonably be regarded as likely to abscond (*Lumba* at [123]; *MH* at [68(iii)]).

(6) Refusal of voluntary return does not necessarily permit an inference of risk of absconding (*Lumba* at [123]).

(7) Where return is not possible (for reasons that are extraneous to the person detained), the fact that he is not willing to return voluntarily cannot be held against him, since his refusal has no causal effect (*Lumba* at [127]).

(8) Where a person has issued proceedings challenging his deportation, then it is reasonable that he should remain in the UK pending determination of those proceedings and his refusal to accept an offer of voluntary return is irrelevant (*Lumba* at [127]).

(9) Even where there are no outstanding challenges, refusal of voluntary return should not be regarded as a trump card for the SSHD's wish to detain. If it is relevant, its relevance is limited (*Lumba* at [128]).

(10) A breach of a principle of public law will render the detention unlawful but it must be a material breach, that is, a breach which bears on and is relevant to the decision to detain (*Lumba* at [66,68]).

(11) There is no maximum period after which detention becomes automatically unlawful.

90. Although I have been referred to a considerable number of other cases where periods of detention were or were not held to be unlawful this is plainly an area where the relevant facts will be very specific to the Claimant concerned. There is no maximum period of allowable detention. This case represents one of the longest actual periods of detention, however, apart from principle, there is limited assistance to be drawn from other cases.

GROUNDS OF CHALLENGE

Claimant's Substantive Issues

91. Mr Goodman raises six substantive issues for the Claimant:

(i) Detention in the first two months as well as being unlawful (as is conceded by the Defendant), should give rise to more than nominal damages because the Claimant would not have been detained in any event, in particular the first five days of detention having been the subject of a concession during evidence;

(ii) Detention was unlawful throughout the period of over four and a half years per se and on classic *Hardial Singh* grounds. In particular it was in breach of the second *Hardial Singh* principle and the cognate protection under Article 5;

(iii) Detention was also unlawful because it was in breach of the fourth *Hardial Singh* principle and the cognate protection under Article 5;

(iv) If the detention was not over-long the Defendant should not have exercised the power to detain because it had become apparent that there was no longer a prospect of deportation within a reasonable period of time;

(v) The authorisation of detention was vitiated by material public law errors;

(vi) A particular material error was the failure to refer release of the Claimant to the Chief Executive or Board Member deputising in her absence.

Resisted by SSHD

92. The Claimant's submissions and Grounds were resisted by Mr Blundell on behalf of the SSHD. I turn to analyse and determine each below (taking ii, iii and iv together and v and vi together).

(i) Should the Claimant be compensated in substantial or nominal damages for the admitted unlawful period of detention?

93. The period of two months during which it is agreed that the Claimant was unlawfully detained now falls into two sections. It being accepted latterly by the Defendant that no notice of detention was given to the Claimant until after the first five days of detention it is clear that substantial damages are due to him for that initial period and I determine that £500 in total is the appropriate sum of substantial damages for this first section of unlawful detention.

94. After the fifth day until the end of the second month the Claimant relies on the fact that the originating decision to detain him was as a result of what has been called the 'blanket policy' and the 'Cullen' criteria. The latter were in operation from 25th March 2008 and provided a complete prohibition on the release of those considered to be non-compliant. By contrast the published policy in place at the time the Claimant was detained declared a presumption of release and listed factors for and against detention.

95. The Defendant admitted in her Amended Defence to this claim that the Claimant was initially detained during the currency of the secret, blanket policy declared unlawful in *Lumba* but argues, in respect of this second period, up to 9th September, that even if the Claimant's case had been considered under the published policy he would have been detained and therefore he is entitled to no more than nominal damages for detention under the unlawful policy.

96. I agree with the submissions made on behalf of the Defendant. The Claimant has what the Asylum and Immigration Tribunal described in its 29th September 2008 deportation appeal decision as an 'appalling criminal record' consisting of 35 convictions for 63 offences committed between 7th August 1997 and 18th June 2008. He provided misleading information about his true familial relationships and citizenship as early as 13th June 2008 and persistently thereafter. He refused to comply with voluntary removal procedures and was considered someone who would not comply with conditions of release. This is against a history of being present as an over-stayer since the expiry of his last grant of exceptional leave to remain on 27th February 2000. It is plain that if the published policy had been applied in his case over this second period the Defendant would almost certainly have detained him and such a decision would not have been unreasonable. In the circumstances I assess the nominal damages due for the second period of detention until 9th September 2008 as £100.

(ii)-(iv) Does the blanket policy still taint the detention of the Claimant from 9th September 2008 until his return to Sri Lanka on 28th February 2013 and was there a breach of the *Hardial Singh* principles ?

97. The secret, blanket policy declared unlawful in *Lumba* (supra) only applied until 9th September 2008 when a new version of the Enforcement Instructions and Guidance (EIG) was publicly published on the Home Office internet and intranet. This brought to an end the policy held to be unlawful in *Lumba*. It is also necessary to understand the nature of the illegality which was that it was an unpublished policy, contrary to the published policy and operated in a blanket fashion. The presumption of detention was not, in the judgment of the Court of Appeal and approved by the Supreme Court, an additional element of illegality. The difference between the unpublished policy in force prior to 9th September 2008 and the new version of Chapter 55 EIG published on that date was that the latter was a published policy and not a blanket policy.

98. The Claimant asserts that irrespective of the publishing of the new Chapter 55 EIG his detention thereafter remained unlawful because although it is accepted it was the intention of the Secretary of State to deport him,

    (1) His individual circumstances were not taken to account properly or at all after 9th September, so that it was unreasonable to detain him and

(2) The Secretary of State did not act with reasonable diligence and expedition to remove him.

It is therefore claimed that the 2nd and 4th *Hardial Singh* principles have been breached.

99. I have measured the Defendant's conduct throughout the period of detention against each of the *Hardial Singh* principles. After anxious consideration especially in light of the remarkably lengthy total period for which the Claimant awaited deportation I disagree with his submissions and find as a fact that throughout the period and particularly when reviews of his detention were undertaken, the Claimant's individual circumstances, as far as they were relevant, were taken appropriately into account. I also find as a fact that at all material times the SSHD acted with reasonable diligence and expedition and reasonably believed that the Claimant could be removed from the United Kingdom within a reasonable time.

100. In *I*, Dyson LJ held that although it was impossible to produce an exhaustive list of those circumstances which are relevant to the length of detention they included at least [48]:

> *'…the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that if released he will commit criminal offences.'*

101. In *Lumba* Dyson LJ confirmed that the period which is reasonable will depend on the circumstances of the individual case and "*the likelihood or otherwise of the detainee re-offending is an obviously relevant circumstance*"[108]. Equally, in determining whether the period in detention has become unreasonable at any point in time, "*much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one*" [120]. Also where return is not possible for reasons extraneous to the detainee the fact that he was unwilling to be returned voluntarily could not be held against him but where return was possible but the detainee was unwilling to go despite having no outstanding legal challenges or none with any merit, this was a relevant factor if a risk of absconding could be inferred[54]. It is striking that the Claimant did not acknowledge the extent of his obstruction to the Defendant at any point in his pleaded case, indeed his witness statement provides information about his early life which has never previously been divulged and is inconsistent with accounts that he has given. This deliberate fabrication of important historical detail is unattractive and although he could not be cross-examined and thus given the opportunity of explaining the many glaring inconsistent accounts he has provided, I have no hesitation in concluding that he is an unreliable witness.

102. In my judgement extensive efforts were made to limit the detention of this Claimant and at all material times it was reasonable for the Secretary of State to maintain her stance that the Claimant would be deported within a reasonable period of time. It is

axiomatic that the SSHD's belief has to be judged (a) by reference to her knowledge at the time of each relevant decision, and not with the benefit of hindsight, and (b) by reference to the characteristics of the Claimant and the risks he was reasonably thought to present at the time.

103. The issuing of an emergency travel document by a country of origin was not within the Defendant's power and although with the benefit of hindsight such length of detention as in this Claimant's case must be exceptional and appears contrary to good and efficacious administration, it is not possible in my judgement to say that there came any point during the detention when the Secretary of State should have realised that it was not going to be possible to effect deportation within a reasonable period. Such periods of relative inactivity as are disclosed by the chronology are not unreasonable when the court stands back and looks at the overall circumstances.

104. The Secretary of State began the process of deporting the Claimant by way of attempting to identify him at a meeting with an Immigration Officer on 2nd July 2008 before his criminal sentence came to an end. This is plainly a demonstration of due diligence and expedition. The factual chronology demonstrates that efforts to obtain documentation continued consistently thereafter. Although a failure to comply with voluntary return, fears of the commission of further offences and the issuing of unwarranted litigation on the part of the detainee are not trump cards justifying otherwise unreasonable detention, the Claimant was equally consistent in his efforts to frustrate the Secretary of State's attempts to deport him. As well as claiming different nationalities he refused to attend interviews with the Defendant's officials and he refused to sign documents pertaining to emergency travel documents until shortly before his actual deportation in 2013. These are all relevant factors which form part of the complete picture against which to measure the Defendant's conduct.

105. The Secretary of State had the details of a passport issued to the Claimant by Si Lanka in 1995 but this was an expired passport and the Claimant's refusal to sign the emergency travel documentation forms prevented the progress of his deportation. When he was interviewed by the Sri Lankan authorities he lied and claimed to be Indian, so frustrating their attempts to verify his identity and issue an ETD. A full evidential report was provided by the Defendant on 3rd December 2010 to the Sri Lankan authorities in the UK. This was not accepted but a fully unredacted copy was sent to the Sri Lankan authorities in Colombo on 11th March 2011, however this was still not sufficient. The fact that the Defendant's officers made this further step despite the failure of the report to achieve its aim in London is in my view a sign of the dedicated efforts made by the Defendant rather than worthy of criticism.

106. The same analysis applies to the details of the Claimant's sister which were in the possession of the Defendant from at least September 2008 but the Claimant variously provided false information about her contact details or disowned her entirely. Equally the Sir Lankan authorities were not prepared to rely on the Claimant's sister's details including her passport, her visa application details etc as reliable in the cause of verifying the Claimant's identity. The Defendant cannot be held responsible for this.

107. As to application of the second *Hardial Singh* principle it is noteworthy that the Claimant claimed at different points in his detention to be four different nationalities: British, Sri Lankan, Indian and Maldivian. He provided sophisticated details in support of these nationality claims all of which had to go through the process of

investigation where possible. This required the involvement of foreign States and their administration. He made it plain that he did not wish to be deported to Sri Lanka and would rather stay in detention than leave the United Kingdom. This was a case of deliberate obstruction over a very significant period of time. The Secretary of State could not predict how long his obstruction would last but throughout efforts were made to obtain appropriate documentation from which ever State the Claimant adopted.

108. In addition, where a detainee wages a "*deliberate campaign of misinformation and deception*", all other things being equal, a longer period of detention may be lawful, per Irwin J in *R (Amougou-Mbarga) v. SSHD* [2012] EWHC 1081 (Admin) at [41]. In my view the fact that a detained person will not even engage honestly in acts preparatory to his return naturally gives rise to an inference that he presents a potentially greater risk as regards frustrating the process by absconding. In these circumstances, absent countervailing indication, the SSHD will normally be entitled to draw such an inference.

109. Does it make any difference that the Claimant's detention was not expressly reviewed on the now agreed basis that it had been unlawful until 9th September 2008 and does this show that in fact the unlawful policy continued to be applied in this Claimant's case? In my judgment there was no need for a specific reference to be made to the fact of new policy. What mattered was that the new policy should be fairly and obviously applied. There was no requirement for the Secretary of State to communicate directly with caseworkers to tell them not to apply the unpublished policy criticised in *Lumba*. She was entitled to rely on the fact that the new policy was published on the Home Office intranet to which caseworkers all have access.

110. Furthermore, the parties having taken the court through the many detention reviews present in the documentation, it is obvious that the use of the phrase 'exempt from release under rigorous contact management' which the Claimant asserted was an indication of the taint left by the unlawful period of detention, began to be used only in January 2009 and so cannot be a coded reference to the continued application of the unlawful policy pre-September 2008. This phrase is indeed used in all versions of Chapter 55 from 9th September 2008 onwards until the current time. It means simply that where the policy makes a distinction between serious and less serious offences at section 55.3 of the 9th September 2008 version of Chapter 55, those who have committed the former are exempt from release under rigorous contact management.

111. Other references to such terms as 'the current criteria' do not properly carry the ominous reading given to them by the Claimant. They simply mean that the reviewer was applying the then current criteria. By way of example in the Claimant's six month review on 31st December 2008 the Operations Manager section contains the following perfectly reasonable case specific assessment:

> *'Subject does not meet the current criteria for release due to the nature of his convictions and also poses a risk of harm to the public if released due to these convictions. Subject also poses a high risk of non-compliance. Subject's removal should be within a reasonable timescale once an ETD has been granted.'*

112. In my view then, there is no merit in the claim that the totality of the Claimant's detention was unlawful because it was tainted by the initial unlawful detention or because there were breaches of the second or fourth *Hardial Singh* principles.

(v) & (vi) Was the authorisation of detention itself vitiated by public law errors

113. The Claimant next argues that the Secretary of State made decisions to continue detention which were of insufficient quality and inherently unreasonable because at no time was his detention reviewed by a person empowered to release him. This part of the claim relies on *Kambadzi v SSHD* [2011] 1 W.L.R. 1299. The Claimant had argued that there was no evidence of regular monthly reviews of his detention. Following service of such reviews (albeit extremely late service on the part of the Defendant) the Claimant has amended the allegation. Any lawful review of detention must be such as to justify the continuance of detention, so much is self-evident. The Claimant further relies on the judgment of His Honour Judge McKenna in *R (Francis) v SSHD* [2013] 1 All E. R. 68 insofar as he accepted the Claimant's contention that the Defendant had acted in breach of her policy in that case because no referrals had been made to the CEO for consideration in circumstances where it was considered that the Claimant should be considered for release (per paragraph 138.) His Honour Judge McKenna concluded that such reviews ceased to have the character required to justify continued detention.

114. The Defendant submits that this part of His Honour Judge McKenna's judgment is strictly obiter, he having found the detention in that case authorised by statutory warrant. It is submitted that the relevant passage in Chapter 55, section 55.3.2.2 has been misread by the Claimant and it does not introduce a requirement for supervision by Assistant Directors or the Chief Executive of decisions to maintain detention or a requirement to refer to such individuals for approval of continuing detention. The hierarchy of approval for detention is set out in section 55.8, not 55.3.2.2. For the entire duration of the Claimant's detention section 55.3.2.2 said:

> *'Any decision not to detain or to release a time served foreign national prisoner on restrictions must be agreed at Grade 7/ Assistant Director level and authorised by the UK Border Agency's Chief Executive or board member deputising in her absence. Cases should be referred on the form below, which should cover all relevant facts in the case history, including any reasons why bail was refused previously.'*

115. I agree with the Defendant's argument. This passage has no particular application to monthly detention reviews. It bites only when those charged with authorising detention decide that the detainee should be released, it is a necessary layer of ultimate senior approval before the release of a former prisoner into the community where that detainee is the subject of a deportation order. This high level approval is only engaged when the caseworker and relevant supervisor decide that a detainee should be released. In this Claimant's case there never came a time when his release required that grade of approval.

116. If I am wrong in my interpretation of the significance and fair interpretation of section 55.3.2.2 and His Honour Judge McKenna's interpretation is correct then I am equally certain that an error of this degree, the failure of an official of sufficient seniority to

review detention or consider release, is not a sufficiently material error to justify success in this claim as expressed by Lord Dyson in *Lumba* [68].

117. I have also considered the impact of Article 5 to Schedule 1 to the Human Rights Act 1998. I am satisfied that in the circumstances of this claim the protections afforded by proper and full adherence to the *Hardial Singh* principles sufficiently reflect the requirements for detention to be lawful under Article 5.

THE RESULT

118. In the result, the Claimant's claim for damages for unlawful immigration detention is dismissed except insofar as the first five days were unlawful in that no notice had been served substantial damages of £500 are awarded and the remainder of the first two months of detention post-service of the criminal sentence is agreed to be unlawful for which nominal damages in the sum of £100 are awarded.

Costs

119. Unless submissions are received in writing within 28 days of this judgment there will be no order for costs.