Neutral Citation Number: [2019] EWHC 1616 (Admin)

Case No: CO/5285/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2019

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

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

And

THE LORD CHANCELLOR

Interested Party

- -
- -

Charlotte Kilroy Q.C. (instructed by **the Migrants' Law Project, Islington Law Centre**) for the **Claimant**
Penelope Nevill (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing dates: 22 and 23 May 2019

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Approved Judgment

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is a claim for judicial review by PN relating to the determination of her claim for asylum and her detention in an immigration centre between 22 July 2013 and her removal to Uganda on 12 December 2013. In brief, the claimant claimed asylum on the basis that she is a lesbian and will suffer a real risk of persecution in Uganda. The defendant rejected that claim and considered that the claimant is not a lesbian but accepted that if she were and wished to live openly as a lesbian in Uganda she would suffer a real risk of persecution. Her appeal was dismissed by the First-tier Tribunal on 30 August 2013 and the claimant exhausted her rights of appeal on 10 September 2013. The claimant's asylum claim, and her appeal against the refusal of the claim, was processed within what was known as the Detained Fast Track Scheme.

2. In brief, the claimant contends that:

    (1) permission has been granted to challenge the determination of 30 August 2013 and that determination is unlawful as the processing of the appeal within the time limits prescribed by fast track process led to unfairness in her case as (a) she was unable to obtain (a) evidence of lesbian relationships with women in Uganda and (b) a medical report prior to the appeal hearing;

    (2) the decision to remove her on 12 December 2013 was unlawful;

    (3) a remedy should be granted to quash the determination, and the removal decision, and requiring the defendant to use his best endeavours to facilitate her return to the United Kingdom to enable her to continue with an appeal against the refusal of her asylum claim; and

    (4) her detention between 22 July 2013 and 12 December 2013 was unlawful.

THE FACTS

3. The facts are critical in this case. It has not been easy to determine the relevant facts. This is in part because the contemporaneous documentation is not always clear and in part because there is no witness statement from any of those actually involved in the decision-making process at the time. So far as can be ascertained, the factual position is as follows.

The Claimant's Arrival in the United Kingdom and her Detention

4. The claimant is a national of Uganda who was born on 20 July 1993. In about September 2010, at the age of about 17, the claimant came to the United Kingdom as an accompanying child on a visitor's visa. That visa expired on 25 February 2011. The claimant remained in the United Kingdom without leave to do so.

5. On 21 July 2013, enforcement officers went to an address in London. The claimant was upstairs in a bedroom. A male person was present in the bedroom. The enforcement officers forced open the bedroom door. The claimant was arrested as an

overstayer, that is a person who had remained in the United Kingdom after her leave had expired.

6. The contemporaneous documentation records that the claimant admitted being an overstayer and did not give correct details of her identity on arrest. Her true identity was subsequently established. The documentation records that the claimant said that she was single, had no relatives in the United Kingdom, was working as a hairdresser and was paid cash in hand, had not tried to harm herself and was fit and well and not on medication. The documents record that the claimant could be removed to Uganda on the basis of existing documentation (referred to as an EU letter) and that she had no close ties in the United Kingdom and there was nothing to keep her tied to any location. One document dated 21 July 2013 is entitled "IS.91RA Part A:Risk Factors". That document records, amongst other things, that the claimant did not have a psychiatric disorder, medical problems or concerns, was not a vulnerable adult and had no other special needs.

7. An immigration officer determined that the claimant should be detained rather than being granted temporary admission. The claimant was given a written document entitled the notice of detention and reasons for detention and bail rights (known as an IS.91R). That is a template document giving 6 potential reasons for detention. The reason ticked in this case was that removal was imminent. The form sets out 14 factors on which the decision might be made and the officer is to tick all that applied. In this case, the officer ticked 3 boxes, namely the claimant did not have close ties to make it likely that she would remain in one place, had previously failed to comply with the conditions of her stay and had previously failed to leave the UK when required to do so. No challenge is made to the decision to detain the claimant on 21 July 2013.

8. The claimant was taken to the Yarls Wood Immigration Removal Centre. She was seen by healthcare staff on 21 July 2013. The assessment records that the claimant said that she had palpitations and fainting and was upset and stressed. It records that she said that she had never been the victim of any kind of torture outside the UK. The assessment records that the claimant "appears well physically and emotionally". There was also an assessment made under rule 34 of the relevant rules by a general practitioner at 11.20 a.m. on the next day, 22 July 2013. The assessment by the GP was that the claimant "appears physically and mentally alert. She claims she is anxious". The claimant was referred for counselling.

The Period From 22 July 2013 to 29 July 2013

9. On 22 July 2013, the claimant claimed asylum. There were in operation at the time two processes by which a claim for asylum could be dealt with. One was the Detained Fast Track Scheme. I was provided with a copy of the policy document said to govern that process. It provides that the process would only be used if there was power in immigration law to detain and if, on consideration of the known facts relating to the applicant and the applicant's case obtained at a screening interview, it appeared that a quick decision was possible and none of the Detained Fast Track Suitability Exclusion Criteria applied. The document set out an indicative time scale from entry into the process to a decision on the claim of 10 to 14 days. If that process was not used, then it appears that an application for asylum would be considered by the defendant under other processes.

10. The claimant's screening interview was held on 28 July 2013. A decision to process her asylum claim within the Detained Fast Track process was taken on, it seems, 29 July 2013. A document entitled asylum screening interview and biometric residence permit application was completed and records that the claimant said that she came to the UK with a man in September 2010 (when she was 17). It records that the only medical condition she referred to was headaches. It records that she said she came to the UK because she was a lesbian and had to leave Uganda and feared that her uncle would kill her if she returned to Uganda.

11. The record of the screening interview itself notes, amongst other things, that the claimant was asked if she was in a relationship with another person in the UK or abroad. The answer recorded was that the claimant was in a relationship with a woman called Mildred, who was a British citizen, and they had been together for 7 months (i.e. during the claimant's time in the United Kingdom).

12. Between 21 July 2013 and the decision to process the asylum claim within the fast track process, the claimant remained in detention. There were reviews of that detention. On 25 July 2013, an officer reviewed the claimant's case. The officer considered that the claimant's asylum claim may be fast tracked and she could be removed to Uganda on an EU letter. It assessed the claimant as likely to abscond if granted temporary admission. It noted that the claimant did not have enough close ties to make it likely that she would stay in one place. She had breached her conditions of entry by staying in the UK unlawfully and had worked illegally. The officer considered that she had appeared to have applied for asylum in an attempt to frustrate her removal. The officer recommended that detention remained appropriate pending the outcome of acceptance for the detained fast track process. The authorising officer comments are recorded. The comments note that that officer agreed with the reviewing officer. The comments state referral to the detained fast track process was appropriate but also noted that if the claimant was not accepted within that process temporary release was to be considered.

13. During this period, the claimant was also seen in the healthcare centre at Yarls Wood. The notes should be read fairly and in their entirety. Among the medical records is a note for 24 July 2013 noting that the claimant had been observed lying on her back on her bed, breathing and with rapid eye movement and made no response when prompted to open her eyes and explain what was happening. The notes record that officers were advised that there was no medical concerns. On 25 July 2013, a note states that the claimant was seen by a nurse and said that, amongst other things, she felt giddy and occasionally fainted and could not eat. There is a reference to her saying that she had flashbacks which had begun after her grandmother died. There is a note "?PTSD" and to make an appointment for the claimant to have a general practitioner review. On 25 July 2013, the claimant was seen by a counsellor. On 26 July 2013, a note records the claimant as feeling anxious and stressed (which could make her giddy), scared and sleeping poorly. The claimant denied being depressed but was anxious at times. The note records that the claimant was having counselling at present and that was helping. Blood tests were taken on 29 July 2013. There are no substantive entries in the healthcare centre notes between 30 July 2013 and 5 August 2103 inclusive.

14. On 29 July 2013, there was a further review of the detention. On the assessment of removability, the officer noted that the claimant was awaiting acceptance from the

Yarls Wood Fast Track Team. The claimant was assessed as likely to abscond if granted temporary admission for the reasons given previously and again the reviewing officer recommended that detention remained appropriate pending the outcome of the assessment from the Yarls Wood Fast Track Team. The authorising officer's comments were to ask that the officer "speak to DFT and ensure that they are considering the case". The remaining part of the authorising officer's handwritten comments are not easy to read but may say that "no must assess for release". If that is correct, it appears to indicate that the officer was saying that if the claimant's asylum claim was not accepted for processing in the fast track process, then the claimant must be assessed again for temporary release.

15. In the event, on that day, 29 July 2013, the decision was taken to process the claimant's asylum case within the fast track process. Internal notes record that the case had been assessed as suitable by the relevant unit for processing within the fast track procedure and that an updated IS.91R (notice to detainee of the reason for detention) was to be provided to the claimant. The case would be accepted into the fast track process on receipt of a signed copy.

16. A further notice of the reasons of detention form was provided to the claimant on 29 July 2013. The officer ticked the following box "I am satisfied that your application may be decided quickly using the asylum fast track procedures". There is no copy signed by the claimant in the papers. The implication is that either one was signed, or a signature was not insisted upon, as the claimant's asylum claim was subsequently processed within the fast track procedures.

The Assessment of the Claimant's Asylum Claim by the Defendant

17. On Wednesday 31 July 2013, the claimant was allocated a solicitor to represent her and was told that her asylum interview would take place at 2 p.m. on 5 August 2013. The interview was held on that date and there is a record of it. The claimant was asked 263 questions. She was asked if she was feeling fit and well and had understood all the questions put and answered yes. The interview concluded at 17.45 p.m.

18. In her interview, the claimant referred to lesbian relationships that she said that she had had as a child in Uganda. She said that she first realised that she was a lesbian at about the age of 13. She said she had a relationship at the age of about 14 with a woman called Grace who was then about 20 years old and this relationship had lasted about 3 months. Also, at the age of about 14, the claimant said she had a relationship with a woman called Justine who was aged about 22 and they would meet in a forest or at the home of Justine's aunt when she was away. She said they were seen making love in the forest by two youths on about the fifth occasion when they went to the forest. She said those youths told people in the village and her grandmother found out and was angry. The claimant said that the relationship ended when she was about 15 years old. The claimant said her last relationship in Uganda was with a woman called Rose. She said that Rose told her that she was 21 years old. The claimant recounted the difficulties that she had in Uganda after people became aware of her sexuality, including her grandmother being beaten up when the claimant was in a relationship with Justine (i.e. when the claimant was about 15 years old and about two years before she left Uganda). She said that Rose had found a man and had married in order to conceal her sexuality. The claimant said that Rose arranged for her to get a passport to come to the UK. In response to a question about contact with her uncle, the

claimant said that she had gone to live with him at the age of 7. He had started sexually abusing her from the age of 8 and she had left when she was 10 years old. She said that the uncle had threatened to kill her if she ever told anyone. She was asked, and gave an explanation, as to why there was a man in her bedroom when she was arrested on 21 July 2013. She said that she had met him at her birthday party, she had got drunk and they had come back and he had stayed the night. She said that they had not had sex but gave answers which appeared to indicate that she was thinking about having a child and is recorded as saying that this "about the man is just a recent thing because I wanted a child".

19. The records record that the claimant's representative had asked for an extension until mid-day on Wednesday 7 August 2013 to enable them to contact the claimant's partner in the UK and to make a referral to the Helen Bamber Foundation. The defendant agreed to extend the time for representation to 14.00 on 6 August 2013 (giving, at most, a few additional working hours given that the interview had finished at 17.45 on 5 August 2013). The defendant would not extend the time to mid-day on 7 August 2013.

20. On 6 August 2013, the claimant's solicitors wrote to the defendant making representations as to why it was appropriate to grant the claimant asylum or to remove her case from the Detained Fast Track Processes. The letter said that a medico-legal report was required to assess the claimant's mental and physical health, that the claimant had been raped as a child, and that a medico legal report was relevant to determine if she were a victim of torture. Secondly, it indicated that they had been unable to contact the claimant's partner within the short timescales provided. That is a reference to the claimant's partner in the UK, namely, Mildred.

21. On 6 August 2013, the solicitors also wrote to the Helen Bamber Foundation, referring to the fact that the claimant had been raped at the age of 8 and had been sexually abused on a number of occasions. The solicitors indicated that they believed that she was a victim of ill treatment and rape in Uganda and were writing to the Helen Bamber Foundation to see if they would be prepared to assess her and prepare what they referred to as a medico legal report with a view to corroborating the claimant's claim to have been ill-treated and raped. In that context, the solicitors said that the claimant had not gathered enough evidence in support of her claim.

22. On 6 August 2013, the defendant refused the claimant's claim for asylum and humanitarian protection and considered that return to Uganda would not be incompatible with the claimant's rights under the European Convention on Human Rights. The decision letter noted that the asylum claim was based upon the fear that the claim would face mistreatment if she returned to Uganda by reason of the fact that she was a lesbian. The decision-maker did not accept that the claimant was a lesbian and set out reasons for that conclusion. It noted that there was no evidence of her relationships in Uganda with Grace, Justine or Rose. There was no evidence of a relationship in the UK with a woman called Ruth. The decision-maker noted that the claimant claimed to be in a relationship with Mildred, a married woman, at the time of her arrest. The decision-maker noted that Mildred had not visited the claimant in detention and no evidence had been provided about the relationship. It concluded, in summary, that the claimant had not provided any evidence of any same-sex relationship despite having been in several relationships over the past 6 years. The decision-maker considered that the only reliable evidence was that the claimant had

been found in bed with a man and that the only reasonable conclusion was that she was in heterosexual relationship with this man and was not a lesbian.

23. The decision-maker also considered and rejected the request to remove the case from the fast track process. The decision letter records the claimant's wish to obtain a medico legal report. It referred to the health care records. It notes that there was no report made that the claimant had been the victim of torture in Uganda and summarised the information on health then available. The decision-maker considered that there was nothing to suggest that the claimant had been a victim of torture. The decision-maker also said that the claimant had had ample time to obtain a supporting letter from her current partner (Mildred) with whom she had been in a relationship for well over 6 months and with whom she claimed she had been in contact by telephone on 4 August 2013.

24. During the period when her claim was being considered, the claimant's detention was reviewed. Records for 2 and 5 August 2013 show that on each occasion the reviewing officer noted that the claimant had headaches and had been depressed and would have access to 24 hour health care while detained. The records on each occasion record that "Given her adverse immigration history detention remains appropriate and proportionate within the DFT process".

25. On 6 August 2013, a further notice of reasons for detention was issued. The officer ticked two boxes: "You are likely to abscond if given temporary admission or release" and "I am satisfied that your application may be decided quickly using the asylum fast track procedures".

26. By letter dated 7 August 2013, the Helen Bamber Foundation made an appointment for an initial assessment on 11 November 2013. The letter noted that the Foundation could decide whether or not it would prepare a report after that initial assessment.

The Appeal Process

27. On 8 August 2013 the claimant appealed against the decision to refuse her asylum claim. The appeal was dealt with under the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 ("the 2005 Rules"). Those provided short timescales for the various steps in the appeal process. Those included filing the notice of appeal within two working days of the decision. There was no provision for a case management review. The defendant's bundle had to be filed two working days from service of the notice of appeal. The hearing was to be two working days after service of that bundle. Adjournments for a maximum of 10 days were permitted. The determination of the First-tier Tribunal was then to be served within two working days of the hearing.

28. If an appeal were heard under the rules applicable to appeals not included within the fast track process, that appeal would be governed by other rules (referred to in this judgment as the "Principal Rules"). The time scales were longer. There were ten working days (or five, if the appellant was in detention) for service of the notice of appeal. There was provision for a case management review hearing. The defendant's bundle was to be served in accordance with the First-tier Tribunal's directions. The hearing was to take place 35 days after receipt of the notice of appeal. Adjournments could be granted for up to 28 days in the first instance and could be granted for an

unlimited period in exceptional circumstances. The determination of the First-tier Tribunal was to be served within ten days of the hearing.

29. On 12 August 2013, her solicitors applied for an adjournment on the basis that she needed to have a medio-legal report to substantiate her asylum claim. The letter referred, amongst other things, to the fact the claimant's uncle had raped and abused her at age 8. It said that a medico legal report was required from the Helen Bamber Foundation who specialised in dealing with victims of rape. It included, and referred to the letter from the Foundation fixing an appointment for an initial assessment on 11 November 2013.

30. On 13 August 2013, an immigration judge refused the application but indicated that it could be renewed at the hearing. The material part of the decision says that "it is not at all clear why evidence in relation to historic rape impacts on the core claim which is the appellant's sexual orientation and risk on return".

31. On the 14th August 2013 the hearing before the First-tier Tribunal began. The claimant attended and was represented by counsel who applied for an adjournment and for the case to be taken out of the fast track procedure. The First-tier Tribunal judge did not consider that a report from the Helen Bamber Foundation would assist. He considered that an adjournment was appropriate, primarily, it seems to explore the possibility of obtaining information concerning an earlier visa application which had been refused. The judge, therefore, granted an adjournment and relisted the case for 28 August 2013.

32. On 28th August 2013, the hearing before the First-tier Tribunal took place. The claimant was present and represented by counsel. No application for an adjournment was made on any grounds. The claimant gave evidence, as did the man who was in her bedroom on the day of her arrest, another male friend and a woman who gave evidence that she had had sex with the claimant on two occasions.

33. On 30 August 2013, the First-tier Tribunal gave its determination. It dismissed the appeal. Essentially, the judge did not consider that the claimant was a credible witness and listed the reasons why that was so. Some related to events after the claimant's arrival in the United Kingdom. Others related to her time in Uganda including the relationships that the claimant said she had had there. The judge found it difficult to assess the plausibility of those claims but, it seems, in assessing those claims he took into account his general view of the claimant's credibility. Ultimately, however, he found that she was not a credible witness and was not a lesbian. He dismissed her appeal.

34. On 5 September 2013, an application for permission to appeal against that decision was refused by the First-tier Tribunal. On 10 September 2013, permission to appeal was refused by an Upper Tribunal judge. The claimant had therefore exhausted all her appeal rights on that date.

35. During the appeal process, the claimant's detention was reviewed. On 19 August 2013, the documents record that "Given her adverse immigration history detention remains appropriate and proportionate within the DFT process".

The Period from the exhaustion of appeal right to removal

36. The claimant remained in detention. There was a review of the detention on 16 September 2013 and a monthly progress report dated 16 September 2013 was prepared for the claimant. The detention review records the fact that the claimant's asylum claim had been refused, an appeal dismissed and all application for permission to appeal exhausted. It noted that arrangements would be made for her removal from the United Kingdom and that she could be removed under an EU letter. It records that "Given her adverse immigration history detention remains appropriate and proportionate within the DFT process". The monthly progress report stated that the claimant would remain in detention because there was reason to believe that she would fail to comply with any condition attached to the grant of temporary admission or release and to effect her removal and set out the facts on which that decision had been based. On 23 September 2013, the defendant gave directions for the removal of the claimant to Uganda on 14 October 2013. There was a further review of the claimant's detention on 27 September 2013 which was in similar terms to the 27 September 2013 save that it noted that removal directions had been fixed for 14 October 2013.

37. By a letter dated 8 October 2013, solicitors for the claimant wrote to the defendant seeking to make further representations asking that they be treated as a fresh claim for asylum. The letter may have been sent later as it included a document dated 9 October 2013. The letter said that the claimant had not had the opportunity to obtain this evidence as her claim had been processed within the Fast Track procedures. It asked that the directions fixing the claimant's removal to Uganda be deferred. The letter attached, amongst other things, an affidavit with the signature of Rose, dated 4 October 2013 and sworn before a notary in Kampala. In that affidavit, Rose says that the claimant was her lesbian partner for two years. The letter also attached a statement from the claimant explaining why she had not been able to obtain that statement earlier. She explained that she had been in detention. She said that she had not been in contact with Rose and had asked the woman who took care of her sister's children in Uganda to try to find Rose. The claimant said that Rose had contacted her on 1 October 2013. Also by letter dated 8 October 2013, the claimant's solicitors wrote a pre-action protocol letter indicating that if the removal directions were not deferred, they would seek judicial review.

38. I was referred to the health centre notes and UK Border Agency notes recording the claimant's mental state over this time. By way of example only (and not exhaustive summary), these refer to the fact that the claimant had been found screaming and banging her head on a bedroom wall, that she was refusing meals (often over long periods of time) and was on supervision (sometimes constant, sometimes every hour or every two hours). A letter from a Doctor Beeks dated 10 October 2013 stated that the doctor had spoken to the claimant by mobile telephone. The letter cited extracts from the claimant's medical notes at Yarls Wood and expressed the view that the claimant needed a formal health assessment and that episodes of unresponsiveness needed to be investigated further, and further examination of certain physical symptoms was needed, before she would be fit to fly.

39. On 11 October 2013, the defendant rejected the claimant's submissions and concluded that they did not amount to a fresh claim. A claim for judicial review was issued in the High Court on 13 October 2013 challenging the lawfulness of the removal directions and the rejection of the further submissions. On 14 October 2013, Mr Justice Jeremy

Baker refused an application for interim relief to stay the removal directions and refused permission to apply for judicial review. The reasons for that order noted that on enquiry the health care facility had assessed the claimant as fit to fly. The order also gave reasons for rejecting the challenge to the decision that the representations did not amount to a fresh claim.

40. In the event, removal could not take place on 14 October 2013 for operational reasons. On 11 November 2013, directions were issued for the removal of the claimant to Uganda on 14 November 2013.

41. A report dated 13 November 2013 was provided by Dr Hartree of Medical Justice. The report should be read in its entirety. The report notes that the claimant had described a distressed, traumatised and suicidal state with psychotic experiences. The symptoms suggested, amongst other things, that the clamant suffered from post-traumatic stress disorder. The doctor expressed the view that the claimant was not fit to fly. The recommendations were, amongst others, that the claimant required a psychiatric assessment and may require treatment for post-traumatic stress disorder or psychosis.

42. On 14 November 2013 a second claim for judicial review was issued, this time in the Upper Tribunal, and an application was made for a stay of the removal directions. That application was refused by an undated order of Upper Tribunal Judge Warr. The claimant was not removed on 14 November 2013, however, I was referred to notes indicating that the captain of the aircraft had refused to carry the claimant as she started crying. It is neither possible nor necessary to comment on the accuracy of that note.

43. A report dated 15 November 2013 was made by doctors pursuant to rule 35 of the Detention Centre Rules. That report indicated that the author considered that the claimant may have suicidal tendencies and should be managed within a particular unit (the author did not tick the box indicating that the claimant's health would be likely to be seriously injured by detention). The author also ticked the box indicating that he had concerns that the claimant may have been the victim of torture. The reasons for that conclusion were given. The doctor recorded that the claimant had reported to him that she had been sexually abused by her paternal uncle when aged 8 for two years and that she had been raped by him. It recorded that the claimant said she was a lesbian and, as a result had been threatened and her mother killed and she had described flashbacks. The report noted that the claimant had been referred to the mental health team.

44. On 18 November 2013, an official at the Home Office responded stating that the defendant had decided to maintain the claimant's detention. The response noted, amongst other things, that the claimant had not told the health centre personnel that she had been the victim of torture and had not informed the health centre of the alleged abuse received at the hands of her uncle when she was a child. The response referred to the findings of the First-tier Tribunal on the claimant's lack of credibility. The official concluded that there was no information from health care that showed that the claimant was unfit for continued detention or that she had been the victim of torture and her detention would be maintained to effect her lawful removal from the United Kingdom.

45. On 22 November 2013, the claimant's new solicitors filed a third claim for judicial review, this time seeking to challenge what was described as the failure or refusal of the defendant to provide mental health assessment and treatment. That failure was said to be evidenced in a decision of 21 November 2013.

46. On 25 November 2013, a psychiatrist, Dr Leahy, saw the claimant at the healthcare centre. Dr Leahy's notes are not always easy to read. He had read Dr Hartree's report and noted her formulation of post traumatic stress disorder (abuse in childhood) and agreed that that was a reasonable formulation, noting problems of insomnia, depressive mood with suicidal thoughts and hallucinatory phenomena which warranted treatment with stabilising and anti-psychotic drugs and prescribed particular medication. The medical notes record the subsequent observations of the healthcare staff up to the date of removal.

47. On 28 November 2013, the records indicate that removal directions were served on the claimant providing for the removal of the claimant on 12 December 2013.

48. A report dated 11 December 2013 was provided by a Dr Mounty instructed, it seems, by solicitors for the claimant. That report set out the doctor's opinion and recommendations. It should be read in full. It referred to the claimant meeting the diagnostic criteria for panic disorder, PTSD with secondary psychosis and major depressive disorder. The doctor expressed the view that the claimant's account of her sexual development was consistent with homosexual orientation. The doctor stated that the claimant in her opinion was unfit to fly both for mental and physical health reasons.

49. On 12 December 2012, the claimant's solicitors applied for a stay of the removal directions due to be carried out that day. They attached the report of Dr Mounty. On 12 December 2013, Upper Tribunal Judge Southern refused the application. On that day, the claimant was removed to Uganda. The claimant remains in Uganda.

The Present Proceedings

50. On 30 October 2015, different solicitors acting for the claimant filed a claim for judicial review identifying in section 3 of the claim form, and in the detailed grounds, that the claimant challenged (1) the decision to remove the claimant on 12 December 2013 (2) the claimant's detention in the fast track procedure between 22 July 2013 and 10 September 2013 and (3) the claimant's detention between 10 September 2013 and removal on 12 December 2013. The claim form did not seek to challenge the determination of the First-tier Tribunal dated 30 August 2013 to dismiss the appeal against the refusal of the claimant's asylum claim. Indeed, the detailed grounds noted that the claimant had written to the First-tier Tribunal asking it to set aside the appeal decision.

51. On 5 November 2015, Mr Justice William Davis refused permission to apply for judicial review. The reasons noted, amongst other things, that the claim was out of time as the decisions challenged were taken in 2013.

52. On 11 November 2015, the claimant applied for a reconsideration of the refusal of permission. By a consent order dated 1 December 2015, that application was stayed pending the outcome of the claimant's application to the First-tier Tribunal to set

aside the determination dismissing her appeal against the refusal of her asylum claim. By a further consent order dated 10 May 2017, the application for reconsideration of the refusal of permission was stayed pending the outcome of applications before the First-tier Tribunal to set aside determinations on appeals in the case of *TN (Vietnam) and US (Pakistan)*. On 30 May 2017, the First-tier Tribunal gave judgment in those two cases finding that it did not have jurisdiction to set aside the determinations on appeals. Further proceedings in those cases were contemplated.

53. On 21 September 2017, the matter came before a Deputy High Court Judge. At that hearing, it appears that the claimant was seeking permission to apply for judicial review and the defendant was seeking a further stay of proceedings. In any event, the Deputy High Court Judge ordered that permission to apply for judicial review be granted. The order also provided that the substantive hearing of the claim be stayed pending the outcome of the judicial review claims in *R (TN and US) v First-tier Tribunal & Secretary of State*. Neither the order, nor the transcript of the judgment given, refers to the fact that the claim had been filed outside the time for bringing the claim provided for by CPR 54.5. It is implicit in that grant of permission that an extension of time to bring the claim was granted as, otherwise, the claim would have been filed out of time (that is not promptly, and not more than three months after the grounds of challenge first arose). A further application to lift the stay was made but refused by order of Mostyn J. on 25 July 2018.

54. The claims in *R (TN) (Vietnam) v Secretary of State for Home Department* and *R (TN (Vietnam) v First-tier Tribunal (Immigration and Asylum Chamber)* were dealt with and judgment given by the Court of Appeal and the Divisional Court on 19 December 2018: see [2019] 1 W.L.R. 2647 and [2019] 1 W.L.R. 2675.

55. By an application notice dated 7 January 2019, the claimant's solicitors applied for an order that the substantive hearing of the claimant's judicial review claim be listed forthwith. The application was considered at an oral hearing before Supperstone J. It was common ground that the stay granted by the Deputy High Court Judge on 21 September 2017 had now come an end. Supperstone J. was provided at the hearing with draft directions by the claimant's counsel. Those included a provision dealing with amendment. The transcript of the hearing does not record that any objection was made to that draft direction. Supperstone J. therefore made an order which included the following provisions:

> "1. The substantive hearing be listed on the first available day after 6 May 2019.
>
> "2. The Claimant have permission to amend her Detailed Grounds of Claim to reflect the judgments of the Court of Appeal and Divisional Court in *R (TN (Vietnam) v SSHD* [2018] EWHC 3546; *R (TN (Vietnam) v SSHD* [2018] EWCA Civ 2838 by 15 February 2019"

56. On 15 March 2018, the claimant provided a document entitled amended detailed grounds. Reading the document as a whole, the claimant had amended her claim form to include a claim that the determination of the First-tier Tribunal of 30 August 2013 dismissing her appeal should be quashed.

57. Paragraph 3 of the order of Supperstone J. of 6 February 2019 required the defendant to provide his detailed grounds and written evidence by 22 March 2019. The

defendant did provide detailed grounds on 22 March 2019 and a witness statement of Mr Peter Wright-Smith. He had not been involved in any of the decisions under challenge but he exhibited many of the contemporaneous documentation. Although not provided for in the order of Supperstone J, the defendant provided further evidence on 20 May 2019 (a few days before the hearing) in the form of further contemporaneous documentation in what the defendant called a supplementary bundle. The claimant did not object to that evidence being adduced and the documents were referred to at the hearing by both sides. By an application dated 12 April 2019, the defendant applied to file amended grounds of defence. In part they expanded on the arguments relating to the scope of the permission granted, and in part they provided responses to points raised by the claimant. I am satisfied that permitting the defendant to rely on the amended grounds would not be unfair to the claimant. The claimant will not need further evidence to deal with the points. The points raised are largely points of legal argument which would be raised in writing or orally at the substantive hearing of the claim for judicial review in any event. Allowing the defendant to amend his grounds of defence would not, in any way, prejudice the claimant in terms of her ability to put forward her claim or require further evidence. I therefore, grant permission to the defendant to rely on the amended grounds of defence dated 12 April 2019.

THE ISSUES

58. Against that background, and having regard to the terms of the amended claim form, amended detailed grounds of defence and the written and oral submission of the parties, the issues that fall for determination are the following:

(1) Does the claimant have permission to seek judicial review of the determination of the First-tier Tribunal of the 30 August 2013?;

(2) If so, is that determination, and/or the decision to remove the claimant on 12 December 2013, unlawful?;

(3) If so, do the appropriate remedies include an order requiring the defendant to use his best endeavours to facilitate the return of the claimant to the United Kingdom?;

(4) Was the claimant unlawfully detained during any of the following periods:

(a) 22 July 2013 to 6 August 2013 (i.e. the period pending the decision on 29 July 2013 to include her asylum claim within the fast track procedures and the period of consideration of the asylum claim within those procedures leading to a decision to reject the asylum claim on 6 August 2013);

(b) 6 August 2013 to 10 September 2013 (during which time the claimant was pursuing her appeal against the decision of the defendant to reject her asylum claim); or

(c) 10 September 2013 to 12 December 2013 (when the claimant was removed to Uganda?

THE FIRST ISSUE - THE SCOPE OF THE CHALLENGE

59. Ms Kilroy Q.C. for the claimant submits that permission was granted to advance grounds 1 and 2 of the challenge, namely that removal was unlawful and the detention was unlawful, by the decision of the Deputy High Court Judge of 21 September 2013. Ms Nevill for the defendant poses the question differently and contends that the Deputy High Court Judge did not grant permission to challenge the determination of the 30 August 2013 of the First-tier Tribunal.

60. The position is, in fact, simple. In the present case, the claim for judicial review as originally drafted did not identify, or include any challenge to, the determination of the First-tier Tribunal of 30 August 2013, and did not seek any remedy in relation to that determination. Indeed, the claim form indicated that the claimant was seeking to have that determination set-aside by the First-tier Tribunal. On 21 September 2017, the Deputy High Court Judge granted permission to apply for judicial review as appears from her order of that date. That was permission to proceed with the claim for judicial review that had been made. That claim did not include a challenge to the determination of the First-tier Tribunal and did not seek any remedy in relation to that decision. The permission granted on that date did not, therefore, include permission to challenge the determination of the First-tier Tribunal of 30 August 2013.

61. The order of Supperstone J. of 6 February 2019, however, granted permission to amend the claim to reflect the judgments of the Court of Appeal and the Divisional Court in *R (TN and US) v Secretary of State for the Home Department* and *R (TN and US) v First-tier Tribunal (immigration and Asylum Chamber)*. The principal points of those decisions, respectively, were first that a determination of a First-tier Tribunal would be liable to be quashed if in that particular case the procedure leading to the decision was unfair as a result of the use of the fast track process and secondly that the High Court, not the First-tier Tribunal, had jurisdiction to determine if the procedure was unfair and whether the determination should be quashed. In the light of the order of the Supperstone J., the claimant was granted permission to amend the claim form to challenge the determination of the First-tier Tribunal on the grounds that the procedure leading to the determination was unfair. The amended grounds of claim did make those amendments. The amended claim for judicial review, therefore, did include a claim for an order to quash the determination of the First-tier Tribunal.

62. For completeness, I note that at the hearing on 6 February 2019, the claimant did not supply any document setting out the terms of the proposed amendment but simply provided a draft order granting permission to amend the grounds to reflect the judgments in certain specified cases. Applications to amend should be accompanied by a statement identifying any additional decision which it is sought to challenge and details of the grounds of challenge. Applications simply seeking permission to amend in unspecified terms, for example to reflect judgments in particular cases, should be discouraged and it would not, in general, be appropriate to grant permission to amend in those terms. It is important that the parties, and the courts, know what decision or other measure the claim seeks to challenge and on what specific grounds. That will enable the courts to determine if there is any bar to bringing the claim (such as time limits or any discretionary remedy) and whether the proposed amendments raise grounds that are arguable.

THE SECOND ISSUE – THE LAWFULNESS OF THE DETERMINATION OF THE FIRST-TIER TRIBUNAL AND/OR THE DECISION TO REMOVE

63. Ms Kilroy for the claimant contended that the procedure before the First-tier Tribunal was procedurally unfair and the determination was, therefore, unlawful. There were two principal strands to the complaint of unfairness (although Ms Kilroy raised a number of points of criticism). First, she submitted that the claimant did not have sufficient opportunity under the 2005 Rules to obtain evidence from Uganda to establish that she had had lesbian relationships in Uganda in order to support her claim that she was a lesbian and so would face a risk of persecution if she returned to Uganda. Secondly, she submitted that the claimant was a person who had experienced a history of childhood sexual abuse including rape and the fast track procedures prevented her from obtaining evidence of that, for example, from the Helen Bamber Foundation. Ms Kilroy submitted that that was relevant to the fairness of the determination as it prevented the First-tier Tribunal having the whole story (what Ms Kilroy described as the "human story") when considering her claim and that the claimant, because of what was submitted was her vulnerability, would not have been able, or would have been less able, to present her evidence in a cogent fashion.

64. Ms Nevill submitted that the evidence did not establish any unfairness due to the difference between the 2005 Rules and the Principal Rules that would otherwise have applied. She emphasised the need to ensure that there was a causal link between the unfairness and the 2005 Rules. Ms Nevill also cautioned against the use of hindsight without any regard to how matters might reasonably have been perceived at the time relying on the observations of Davis L.J at paragraph 49 of the decision of the Court of Appeal in *R (Hameed) v Secretary of State for the Home Department* [2019] EWCA Civ 456.

Discussion

65. The 2005 Rules, and the successor rules, the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the 2014 Rules") have been considered in a number of cases. In *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber* [2015] EWCA 840, [2015] 1 WLR 5341 (known as "DA6"), the Court of Appeal considered an appeal against a finding by Nicol J. that the 2014 Rules were unlawful. As Lord Dyson M.R. noted at paragraph 15 of his judgment, the detained fast track system (contained first in the 2005 and then the 2014 Rules) was a system for the quick processing of asylum claims. He set out in tabular form the various periods for taking relevant steps under the 2014 Rules as compared with the Principal Rules which would be applicable if the appeal was not included within the fast track processes (see the summary at paragraphs 27 to 28 above). He identified the tasks that legal representatives would have to complete within those time scales, noting that an appeal hearing before the First-tier Tribunal involved a full adversarial hearing based on evidence. Lord Dyson M.R. concluded that:

> "37. These asylum appeals are often factually complex and difficult. They sometimes raise difficult issues of law too. I am unpersuaded that the safeguards are sufficient to overcome the unfairness inherent in a system which requires asylum seekers to prepare and present their appeals within 7 days of the decisions which they seek to challenge.

> "38. I have no doubt whatsoever about the independence and impartiality of the tribunal judges who deal with the appeals. I accept that they are specialist judges who can usually be trusted to get the right answer on the basis of the material that is presented to them. I am also sure that they do their best to comply with the overriding objective of dealing with appeals justly. Nevertheless, in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform (see para 20 above) the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the FTR regime. "

66. The Master of the Rolls considered the safeguards against potential unfairness included within the 2014 Rules and, in particular, the power in rule 14 to transfer appeals out of the fast track procedure if the tribunal was satisfied that the case could not be justly concluded within the timescales provided for in the fast track rules. He considered that the provision was insufficient to ensure fairness overall for three reasons. First, there may not have been sufficient time to complete inquiries into possible further evidence. Secondly, it was only possible to seek a transfer out at the appeal hearing itself. That was unfair to appellants as they had to identify all the gaps in their evidence to strengthen their application for a transfer out, and if that application was refused, appellants would then have to persuade the tribunal to allow the appeal notwithstanding the gaps in the evidence that appellants had themselves identified. Thirdly, it was likely that judges would regard the time provisions as the ones usually to be applied and there was likely to be a reluctance to postpone or transfer an appeal on the day of the appeal hearing. Lord Dyson M.R. said that:

> "45. To summarise, in my view the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases. For the reasons that I have given, the safeguards on which the SSHD and the Lord Chancellor rely do not provide a sufficient answer. The system is therefore structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention. It seems to me that some relaxation of the time limits is necessary, but it is not for the court to prescribe what is required to remedy the problem. A lawful scheme must, however, properly take into account the factors to which I have referred whilst, I acknowledge, giving effect to the entirely proper aim of processing asylum appeals as quickly as possible consistently with fairness and justice."

67. Consequently, he held that the 2014 Rules were ultra vires the powers conferred by section 22 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Briggs L.J., as he then was, and Bean L.J. agreed.

68. That case concerned the vires of the 2014 Rules themselves. The question of the lawfulness of an individual determination made under the 2005 Rules was considered by the Court of Appeal in *R (TN (Vietnam) and US (Pakistan) v Fist Tier Tribunal* [2018] EWCA Civ 2838, [2019] 1 WLR 2747. It had been held at first instance by Ouseley J. that the 2005 Rules were ultra vires the 2007 Act as there were no material differences between the 2005 Rules and the 2014 Rules. Singh L.J., with whom Sharp and Peter Jackson L.JJ. agreed, held that a determination made under the 2005 Rules was not automatically invalid because the 2005 Rules were ultra vires. Rather it was necessary to assess whether there was any procedural unfairness on the facts of that

particular case: see paragraph 89 of the judgment. In terms of approaching an application to set aside an earlier appeal determination, Singh L.J. recommended the court approach its task in the following way:

"103. For the future I would recommend that a court which has to consider an application to set aside an earlier appeal decision made under the 2005 Rules should approach its task having regard to the following:-

(1) A high degree of fairness is required in this context.

(2) What the Court of Appeal said in DA6 should be borne in mind: that the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases.

(3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there was a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

(4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was after the appeal decision was taken before any complaint was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on (for example medical evidence) and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

"104. The above should not be regarded as an exhaustive checklist. At the end of the day, there can be no substitute for asking the only question which has to be determined: was the procedure unfair in the particular case? That has to be determined by reference to all the facts of the individual case."

69. I turn then to the first of the claimant's two principal issues, namely that the appeal procedures under the 2005 Rules prevented her from having a fair opportunity to obtain evidence to support her claim that she had been in lesbian relationships in Uganda and that that supported her claim that she was a lesbian.

70. First, I bear in mind that the claimant's asylum claim necessarily involved obtaining evidence from external sources, that is, sources other than the claimant herself. Furthermore, as at least some of the lesbian relationships relied upon were said to

have taken place in Uganda, it would realistically be necessary to obtain evidence from one or more persons in Uganda.

71. Secondly, in the present case, the timescales provided for by the 2005 Rules did not provide sufficient time to enable the claimant, who was in detention, to obtain such evidence. The claimant was allocated a lawyer on Wednesday 31 July 2013. The asylum interview took place on Monday 5 August 2013 and the decision was given on 6 August 2013. The appeal had to be lodged within 2 working days. The appeal was listed to be heard on 14 August 2013 although it was adjourned for 14 days (oddly, as the maximum permitted was 10 days) to enable inquiries about a different matter to be conducted. The hearing then took place on 28 August 2013 and the determination was given on 30 August 2013. That was a very short period for legal representatives to obtain evidence from Uganda about the claimant's claimed previous relationships.

72. Thirdly, the claimant did produce the material relatively quickly after the appeal hearing and has made a statement dated 9 October 2013 explaining why she had not been able to provide any supporting material from ex-partners in Uganda. She explained that she was not in contact with Rose (the claimant had left Uganda in 2010, about 2 to 3 years prior to her detention). She explained that as she was in detention she was not able to obtain information in the timescale required. She explained that she had contacted the woman who looked after her sister's children and asked her to go to Rose's address and ask Rose to contact the claimant. It took that woman a while to find Rose who made contact with the claimant on 1 October 2013. Rose provided an affidavit dated 4 October 2013. At that stage, the claimant did make a fresh claim and did submit the affidavit from Rose.

73. Fourthly, I accept that the claimant did not apply to take the case out of the fast track procedure (or to adjourn it) on the basis that she was seeking evidence from Uganda. She did do so on another basis. But, as Lord Dyson M.R. recognised in his judgment in the *DA6* case, it puts an individual in an unfair position if she has to apply for an adjournment or a transfer out of the fast track on the basis that she needs evidence from abroad to substantiate her claim because, if the application is refused, she will have highlighted deficiencies in her appeal.

74. Ms Nevill pointed out that the affidavit from Rose was dated 4 October 2013. That would, if the time scales in the Principal Rules been followed, mean that the affidavit would have been received after the date for the hearing (there would have been 5 working days from the 6 August 2013 to lodge the notice of appeal and the hearing of the appeal would be scheduled for 35 days after receipt of the notice of appeal – that would be 17 September 2013). That is correct, but there is provision for an adjournment of up to 28 days in the first instance and for an unlimited period in exceptional circumstances. In all likelihood, if the timetable in the Principal Rules had applied, the claimant would have been able to adduce the evidence from Rose at her appeal hearing. The evidence would then have been for the First-tier Tribunal to assess. (I stress that it is not for this court to assess the evidence adduced on behalf of the claimant or to determine whether or not any particular witness is credible or whether the appeal would have succeeded: this court is simply considering whether the claimant had a fair opportunity to put her case to the First-tier Tribunal).

75. For those reasons, I consider that there was procedural unfairness in the process for determining the claimant's appeal to the First-tier Tribunal and that unfairness was

caused by the short time scales provided for by the 2005 Rules. The claimant did not have the opportunity to adduce the evidence of Rose relating to the nature of their relationship in Uganda. For that reason alone I consider that the determination of the First-tier Tribunal should be quashed.

76. I am reinforced in that conclusion by the approach taken in the Court of Appeal in *R(JB (Jamaica)) v Secretary of State for the Home Department* [2014] 1 WLR 836 at paragraph 39 in relation to a male claimant from Jamaica where Moore-Bick L.J. observed that:

> "Homosexuality is a characteristic that cannot be readily established without evidence from sources extrinsic to the claimant himself. On the face of it, therefore, the claimant did need evidence to support his claim, and since some of that evidence was likely to be available only in Jamaica or elsewhere abroad it was likely that he would need additional time to obtain it. A failure to allow him that time was likely to lead ….. to a decision that was neither fair nor sustainable."

77. I do not consider that the second complaint of unfairness is established on the facts. Ms Kilroy relies on the time taken to obtain medical evidence in particular following the referral to the Helen Bamber Foundation. First, it is important to bear in mind the essence of the claimant's appeal. This was that she is a lesbian and would be at risk of persecution if she returned to Uganda. It is correct that she claimed that she had been the subject of abuse, including rape, when she was a child between 8 and 10 (that is, about 7 years before she came to the United Kingdom). A First-tier Tribunal refused to remove the appeal from the fast track process as it was not clear why evidence in relation to historic rape impacted on the core claim of sexual orientation. That was a fair, reasonable and, in my judgment, correct decision. Ms Kilroy submitted that, in the ordinary appeal procedure, such evidence would ordinarily be adduced and would be part of the claimant's overall story and relevant to her credibility. I do not consider that the absence of this evidence gave rise to any material unfairness in relation to the assessment of the claim arising out of the claimant's claimed sexuality. The unfairness arose out of the absence of a fair opportunity to obtain evidence relating to relationships in Uganda not the absence of evidence about historic child sexual abuse, including rape. It was suggested in argument that the claimant was not able to present her own evidence or give instructions or otherwise participate in the appeal hearing because of the effects of what had happened to her as a child. There is no proper basis for reaching such a conclusion. The medical notes, read fairly and as a whole, do not support such a conclusion. The claimant was represented by counsel at the appeal hearing and no concern was expressed about the ability of the claimant to participate in the hearing. I would not have concluded that the procedure was unfair because of the absence of an opportunity to obtain medical evidence, including in particular, evidence following the referral to the Helen Bamber Foundation.

The Decision to Remove

78. The claim challenges the decision to remove the claimant on 12 December 2013. That decision is contained in removal directions served on 28 November 2013. The claimant contends that she was removed without having an effective right of appeal as required by section 82 of the Nationality, Immigration and Asylum Act ("the 2002 Act") or Article 39 of Council Directive 2005/85/EC of 1 December 2005 on

minimum standards on procedure for granting and withdrawing refugee status. The claimant seeks an order requiring the defendant to use his best endeavours to facilitate the return of the claimant to the United Kingdom on the basis that the decision to remove her on 12 December 2013 was unlawful.

79. There would be at least two difficulties with that course of action. First, the Court of Appeal in *R (AB) v Secretary of State for the Home Department* [2017] EWCA Civ 59 decided that where a decision (here, the decision to remove the claimant on 12 December 2013) followed an earlier decision (here the determination of 30 August 2013), then a later finding that the earlier decision was unlawful would not invalidate the later decision. Ms Kilroy submitted that that decision was not binding on me in this case (that submission is discussed below in the context of a challenge to the lawfulness of the claimant's detention). Secondly, and in any event, even if the removal decision was in some way flawed, quashing that decision in the present case would not have any practical effect. The claimant has already been removed to Uganda and quashing the decision to remove her would not alter that fact. The relevant legal decision is the determination of the First-tier Tribunal dismissing the claimant's appeal against the refusal of her asylum claim. Unless that determination were quashed, the claimant's position would still be that her claim for asylum had been rejected and an appeal dismissed, and she has no other basis for being in the United Kingdom. In those circumstances, I would in any event refuse a remedy in relation to the decision to remove the claimant to Uganda on 12 December 2013 (even assuming that the claimant could establish the decision was unlawful) as that matter is academic. In those circumstances, it is not necessary to consider further the challenge to the decision to remove the claimant on 12 December 2013.

THE THIRD ISSUE – THE APPROPRIATE REMEDY

80. For the reasons given above, the determination of the First-tier Tribunal of 30 August 2013 is unlawful as the procedure leading to that decision was unfair. It is appropriate to grant an order quashing, or setting aside, that determination. The position then is that the claimant's appeal against the refusal by the defendant of her asylum claim remains outstanding and undetermined. The question then is whether the defendant should be ordered to use his best endeavours to facilitate the return of the claimant to the United Kingdom to enable her to continue with her appeal. The relevant principles are set out in the decisions the Court of Appeal in *R (YZ (China) v Secretary of State for the Home Department* [2012] EWCA Civ 1022, [2013] INLR 60, and the obiter dicta in *R (AB) v Secretary of State for the Home Department* [2017] EWCA Civ 59 at paragraphs 86 to 90.

81. It is appropriate to make a mandatory order requiring the defendant to use his best endeavours to facilitate the claimant's return to the United Kingdom to pursue her appeal. First, the claimant has a right of appeal which she is entitled to pursue from within this country by reason of section 92(1) and (4) of the 2002 Act. The fact that a person has been unlawfully deprived of her statutory in-country right of appeal "is a strong factor in favour of return" (per Richards L.J. in *R (YZ (China)) v Secretary of State* [2012] EWCA Civ 1022 at paragraph 49).

82. Secondly, the claimant's asylum claim is based on the fact that she says that she is a lesbian and would face persecution if she were to live openly as a lesbian woman in Uganda. The defendant accepts that, if she is a lesbian, she would face a real risk of

persecution but denies that she is a lesbian. There is a strong interest in allowing the claimant's appeal to be pursued from within the United Kingdom rather than requiring her to pursue that appeal in Uganda where, if her claim for asylum is subsequently successful, she would face a real risk of persecution in the interim. Section 77 of the 2002 Act provides that a person may not be removed from the United Kingdom whilst his or her claim for asylum is pending. That provision reflects the importance of allowing a person to remain in the United Kingdom until the claim is assessed. Here, of course, the authorities believed that her claim had been determined at the time they removed her. Now, however, it is recognised that the determination is unlawful and that the appeal emains undetermined as there is an outstanding appeal. Those circumstances point strongly in favour of seeking to enable the claimant to return to the United Kingdom until her appeal is finally determined. That is consistent with the observation of McFarlane L.J., as he then was, in *R (AB) v Secretary of State for the Home Department* [2017] EWCA Civ 59 at paragraph 87 that "it is hard to justify his appeal proceeding while he remains as an asylum seeker in his "country of persecution"".

83. As the appeal is likely to depend to a large extent of the assessment of whether the claimant is a credible witness, the likelihood is that the claimant is likely to need to give oral evidence at the appeal hearing. There is little or no evidence on the ability of the claimant to give evidence by video link from Uganda. I note that the Supreme Court in *Kiarie v Secretary of State for the Home Department* [2017] 1 W.L.R. 2380 referred, in a different context, to the fact that evidence by way of video link may not be as satisfactory as live evidence given by a person at hearing. Whilst not seeking to elevate that observation into a general rule, the fact that the claimant is likely to have to give oral evidence, and that her credibility will be a key (possibly the key) issue, her return is, as a minimum, consistent with ensuring the fair determination of her claim for asylum. I have not had evidence about whether or not the claimant would be eligible for legal aid, or her ability to give effective instructions to her legal representations (although they are in contact with the claimant).

84. Ms Nevill points to the period of time that has passed since the original determination and relies on the factors in section 31(6) of the Senior Courts Act 1981 as justifying the refusal of this remedy. That section provides that, if there is undue delay the courts may refuse a remedy if, amongst other things, granting the remedy would be prejudicial to good administration. The fact that the claim was brought out of time, albeit that an extension of time was (impliedly) granted by the Deputy High Court Judge, when granting permission means that there was undue delay for the purposes of this section: see *R v Dairy Produce Quota Tribunal for England and Wales ex p. Caswell* [1990] 2 A.C. 738 (and there would be a common law discretion to refuse a remedy in appropriate circumstances even if the claim were brought promptly: see *R v Brent LBC ex p. O'Malley* (1998) 30 H.L.R. 328). In the present case, however, it could not be said to be contrary to good administration to require the defendant to use his best endeavours to enable the claimant to return to the United Kingdom to proceed with her appeal in circumstances where the appeal was, initially, dealt with unfairly.

85. In all the circumstances, and principally because the claimant had been unlawfully deprived of her statutory right of appeal within the United Kingdom and would be required to appeal from a country where she claims she faces a real risk of persecution, it is appropriate to order that the defendant use his best endeavours to

facilitate the claimant's return to the United Kingdom to proceed with her appeal against the rejection of her claim for asylum. The other factors relied upon do not outweigh those conclusions and, at least in one respect (the ability of the claimant to give live evidence at the appeal hearing) are consistent with facilitating the return of the claimant to proceed with her appeal.

THE FOURTH ISSUE – THE LAWFULNESS OF THE CLAIMANT'S DETENTION

86. The claimant was detained from 21 July 2013, when enforcement officers found her in London, until 12 December 2013 when she was removed from the United Kingdom. The claimant does not challenge her detention on 21 July 2013 when she was first arrested and detained. The claimant does challenge her detention from 22 July 2013, when she first claimed asylum, until her removal. There are, in fact, different periods of detention each of which needs to be considered carefully to determine whether the defendant can establish that the detention of the claimant during that particular period was lawful.

87. The various periods of detention are these. First, there is the period from 22 July 2013 to 6 August 2013. That period included the time from claiming asylum on 22 July 2013 to 28 July 2013, when the defendant carried out a screening interview and decided on 29 July 2013 that her claim could be dealt with in the fast track procedure, and the period from 29 July 2013 to the 6 August 2013 inclusive when the defendant was considering her claim for asylum. Secondly, there is the period from 6 August 2013 until 10 September 2013 inclusive (when the claimant was pursuing an appeal against the decision rejecting her asylum claim). Thirdly, there is the period from 10 September 2013 until removal on 12 December 2013.

88. Ms Kilroy, and Ms Nevill each makes a number of submissions in relation to the particular periods and it is sensible to consider those as each period is considered.

The Legal Framework.

89. Section 10 of the Immigration and Asylum Act 1999 provides, so far as material sub-paragraphs provide that:

> "(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person require leave to enter or remain in the United Kingdom and does not have it."

90. The statutory power providing for detention in the present case is contained in paragraph 16 of schedule 2 to the Immigration Act 1971 ("the 1971 Act"). The material provides that:

> "(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse leave to enter.
>
> …..
>
> "(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending –

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions."

91. The exercise of that power is governed in part by policies developed by the defendant and in part by common law principles developed by the courts.

92. In terms of policy, one relevant policy document in force at the material time was contained in chapter 55 of a document called "Enforcement Instructions and Guidance" ("the EIG"). I was provided with a copy with the implication that that copy was the version in force at the material time, i.e. 2013.

93. That policy makes it clear that there is a presumption in favour of temporary admission or release and, whenever possible, alternatives to detention are to be used. It notes that detention is most usually appropriate to effect removal, establish identity or the basis of a claim, or where there are good reasons to believe that a person will fail to comply with any conditions attached to temporary admission or release. It provides that detention must be used sparingly and for the shortest period necessary. Those general considerations are then reflected in the paragraph dealing with the decision to detain which provides that:

> "1. There is a presumption in favour of temporary admission or release – there must be strong grounds for believing that a person will not comply with conditions of temporary admissions or temporary release for detention to be justified.
>
> "2. All reasonable alternatives to detention must be considered before detention is authorised.
>
> "Each case must be considered on its individual merits, including the consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved."

94. The EIG sets out relevant factors to be taken into account when considering the need for initial or continued detention. These include the likelihood of the person being removed and if so in what timescale, evidence of previous absconding or a previous failure to comply with conditions of temporary admission, a previous history of failing to comply with the requirements of immigration control, the person's ties with the United Kingdom (including the presence of relatives, or having a settled address or employment), and factors relating to the individual's expectations about the outcome of the case (such as an outstanding appeal or application or representations which afford an incentive to keep in touch). Section 55.10 deals with persons who are normally considered unsuitable for detention and `lists the categories of such persons. They include:

> "those suffering from serious medical conditions which cannot be satisfactorily managed within detention
>
> "those suffering from serious mental illnesses which cannot be satisfactorily managed within detention (in CCD cases, please contact the spealist Mentally Disordered Offender Team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are waiting to be assessed, or awaiting transfer under the Mental Health Act;

"those where there is independent evidence of torture…."

95. Those criteria, referred to in the case law as the general criteria, do not apply in cases included within the fast track process. There is other policy, included within a document entitled the Detained Fast Track Processes ("the DFTP Guidance") governing such cases. Paragraph 2.1 of the version that I was provided with (which I assume, as neither counsel has suggested otherwise, applied at the material time) provides that:

> "2.1 Detained Fast Track Process Suitability Policy
>
> An applicant may enter into or remain in DFT/DNSA processes only if there is a power in immigration law to detain, and only if on consideration of the known facts relating to the applicant and their case obtained at asylum screening (and, where relevant, subsequently) it appears that a quick decision is possible, and none of the Detained Fast Track Suitability Exclusion Criteria apply."

96. The DFTP Guidance provides that the assessment of whether a quick decision is likely in a case must be based on the facts raised in each individual case. It gives non-exhaustive examples of cases where a quick decision is likely. The DFTP Guidance also sets out the categories of person who are unlikely to be suitable for entry. These are the detained fast track suitability criteria and they include (but are not limited to) the following categories of persons:

> "Those with a physical or mental condition which cannot be adequately treated within a detained environment, or which for practical reasons, including infectiousness or contagiousness, cannot be properly managed within a detained environment …
>
> "Those who clearly lack mental capacity or coherence to sufficiently understand the asylum process and/or cogently present their claim. This consideration will usually be based on medical information, but where medical information is unavailable, officers must apply their judgment as to an individual's capacity;
>
> …..
>
> "Those in respect of whom there is independent evidence of torture".

97. There is also case law governing the exercise of the power to detain including, most notably, the principles established in *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704 and *R (I) v Secretary of State for the Home Department* [2003] INLR 196. In very brief summary, these principles require that (1) the defendant must intend to remove the person and can only use the power to detain for the purposes of removing a person (2) the person may only be detained for a period that is reasonable in all the circumstances, (3) if, before the expiry of that period, it becomes apparent that the Secretary of State will not be able to effect removal within a reasonable period, he should not seek to exercise the power to detain a person and (4) the Secretary of State should act with reasonable diligence and expedition to effect removal.

False Imprisonment

98. The claimant contends that each period of detention was unlawful and seeks a declaration to that effect and also damages for false imprisonment. At common law, false imprisonment is a tort, that is, it is a civil wrong giving rise to a claim for damages. The tort "has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it" (per Lord Bridge of Harwich in *R v Deputy Governor of Parkhurst Prison ex p. Hague* [1992] A.C. 58 at 162CD and see *R (Lumba) v Secretary of State for the Home Department* [2012] A.C. 245 at paragraph 65.

99. It is for the claimant to demonstrate that he or she was directly and intentionally imprisoned by the defendant. Once the claimant had done so, the burden then shifts to the defendant to show that there was lawful justification for the defendant. If the defendant cannot do so, the claimant will have been falsely imprisoned and the claimant will then be entitled to damages for the tort of false imprisonment.

100. In certain circumstances, even if the detention were unlawful, the claimant will only receive nominal damages. That will occur if the defendant can demonstrate that the claimant *would* have been subjected to the detention not merely that the claimant *could* have been subjected to such detention. The burden is on the defendant to show that the claimant would have been detained. That involves, in essence, two questions. The defendant must establish that there is a power which, used lawfully, permitted the detention. The defendant must show, on the balance or probabilities, that the power would, not could, have been used and that the claimant would have been detained.

101. In the present case, the claimant has established that she was detained between 22 July 2013 and 12 December 2013. It is for the defendant to demonstrate that each period of detention was lawful.

The First Contested Period – 22 July to 6 August 2013

102. This period includes the claimant's continued detention following the claim for asylum on 22 July 2013 to the 29 July 2019 when the decision was taken to process that asylum claim within the fast track process and the continued detention during the process of consideration of that asylum claim by the defendant up to the decision to reject the claim on 6 August 2013.

103. The claimant contends in her amended grounds of claim, and her written skeleton argument, that detention during this period was unlawful for a number of reasons. These include the fast track process was not operating lawfully in relation to vulnerable persons, and the claimant was such a vulnerable person. She further relies on the fact that she was detained for 13 days before the substantive asylum interview. She says that the screening interview carried out on 28 July 2019 was inadequate and incapable of soliciting the necessary information to determine if her claim should be fast tracked which, she submits, is a pre-condition for a lawful detention. She relies upon the fact that she had only two working days notice of the interview which did not give her sufficient time to ensure that her case was transferred out of the detained fast track process. She relies on the fact that in her substantive asylum interview (on 5th August 2013) it became plain that her case was unsuitable for inclusion within the fast track process. In oral submissions, Ms Kilroy also submitted that, once the claimant claimed asylum on 22 July 2013, the defendant should have assessed her detention again, and should have considered, for example, the fact that there was now an asylum claim in place which gave the claimant an incentive to remain in touch and

not abscond. Ms Kilroy emphasised that the claimant was, in her submission, a person who was vulnerable within the categories described by Ouseley J. in paragraph 114 of his judgment in *R (Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (referred to in this judgment as *DA1*). Ms Kilroy also relied upon the fact that a referral had been made to the Helen Bamber Foundation on 6 August 2013 requesting an assessment with a view to preparation of a medico-legal report. Ms Nevill contended that the detention was lawful during this period, and that none of the criticisms made justify the conclusion that the defendant had failed to justify the detention.

104. By way of preliminary observation, the defendant first detained the claimant on 21 July 2013. At that stage, the claimant was a person who had overstayed her leave. She was working illegally in the United Kingdom. She had not claimed asylum. The notice of reasons stated that the reason for refusal was that her removal from the United Kingdom was imminent. It referred to three factors on which the decision was based: the absence of close ties in the United Kingdom, previous failure to comply with the conditions of her leave, and to leave the United Kingdom. The claimant does not challenge the decision to detain her or the detention on 21 July 2013 until she claimed asylum on 22 July 2013. The claimant accepts, therefore, that the initial detention was lawful and complied with the requirements of the EIG.

105. Turning then to the period from 22 July 2013 to 6 August 2013, the starting point is to establish why the defendant continued to detain the claimant. The best source of information is the contemporaneous documentation. On 25 July 2013, a review of the detention was carried out. The reviewing office considered that the claimant was likely to abscond if granted temporary admission as she did not have enough ties to make it likely that she would stay in one place. She had breached the conditions of her leave by remaining in the United Kingdom and by working illegally. The reviewing officer considered that the claimant appeared to have claimed asylum in an attempt to frustrate her removal. That was a view the reviewing officer was entitled to come to, given the circumstances of her stay in the United Kingdom, the circumstances in which she was arrested and given the fact that she did not claim asylum until after she was encountered by enforcement officers and detained. The reviewing officer considered barriers to removability. There was no difficulty over documentation for travel – the claimant could be removed on an EU letter. The potential barrier to removal was the asylum claim. The reviewing officer was of the view that the asylum claim could be dealt with within the fast track procedures. He considered that detention remained appropriate pending the decision on acceptance of the claim within the fast track process. The authorising officer agreed. He stated that referral to the detained fast track was appropriate. He recognised that if the claimant's case was not accepted within the fast track, then the matter would need to be considered afresh and temporary release considered.

106. Reading those documents fairly, in my judgment, the position between 22 July 2013 and 29 July 2013 was that those detaining the claimant considered that the presumption against granting temporary admission was rebutted because the claimant was likely to abscond. They were entitled to reach that conclusion on the material before them. They were of the view that the claimant's asylum claim was suitable for referral to the detained fast track process and, if accepted, any decision on the claim would be taken quickly. They were entitled on the information before them to

conclude that the claim may be suitable for processing within the fast track and detention pending a decision was justified. The authorising office recognised that if the claimant's claim were not for some reason accepted within the fast track process, then removal might not be capable of being effected within a reasonable and so he entered the caveat that, if not accepted, temporary release was to be considered. Detention between 22 July and 29 July 2013 was, in my judgment, justified in the circumstances. It was a proper exercise of the statutory power to detain and was in accordance with the EIG.

107. On 28 July 2013, the claimant had a screening interview to determine if her asylum claim was suitable for processing within the fast track process. The claimant did say that she came to the United Kingdom because of her sexuality as she was a lesbian and feared returning to Uganda as her uncle would kill her. She did refer to a female partner in Uganda having helped her get a passport. However, in the remainder of her interview, in response to a question as to whether she was in a relationship with another person in the UK or abroad, the claimant referred to her partner as Mildred, a British citizen with whom she had been together for 7 months and whom she had last seen approximately 1 week ago. On balance, reading that interview fairly, it is clear that the focus of what she was saying about her relationship was that it was with a person, Mildred, in the United Kingdom The claimant had been in the UK for over two years – and this relationship was current and had lasted for 7 months. That person was in contact with the claimant a week previously. In all the circumstances, it was reasonable to regard the claim at that stage as one suitable for determination within the fast track process. The fact that the claimant made an asylum claim did not itself automatically mean that the claim could not be processed with the fast track process. The emphasis was on the current partnership, in the UK, with a person with whom the claimant had had recent contact.

108. It was reasonable at that stage, on the information available, for the defendant's officer to conclude, as the relevant officer did on 29 July 2013, that the claim was suitable for processing within the fast track process as the claim, on the information then available was one where a quick decision was likely. In those circumstances, the defendant acted lawfully on 29 July 2013, having reviewed the detention, to conclude that the claimant should be detained as "her application may be decided quickly using the asylum fast track procedures".

109. I consider next some of the principal criticisms made by the claimant. In doing so, it is important to bear in mind that it is the defendant who bears the burden of proving that the detention is justified – it is not for the claimant to prove it is unjustified. I look at the criticisms, therefore, as an additional, and helpful, way of considering whether the defendant had discharged the burden of justifying the detention.

110. First, there is the question of whether the claimant was a vulnerable person who should not have been detained in the period 22 July 2013 to 6 August 2013. The claimant was not a person who fell within the Detained Fast Track Suitability Exclusion Criteria relied upon and referred to above. The medical evidence between these dates (summarised above) does not begin to justify a conclusion that the claimant had a physical or mental medical condition which could not adequately be managed within a detained environment. There is nothing which begins to justify a conclusion that the claimant lacked the mental capacity or coherence sufficiently to understand the asylum process or present their case. That conclusion is reinforced by,

but not dependent upon, the fact that the claimant had legal representatives allocated on 31 July 2013 and they attended the asylum interview on 5 August 2013 and they did not suggest that the claimant fell within these categories. There was no independent evidence of torture (i.e. that the claimant had been tortured rather than the risk of persecution on return because of her sexuality: see *DAI* at paragraph 116). Her asylum claim in fact did not rely on her having been subject to torture.

111. Ms Kilroy relied upon paragraph 114 of the decision of Ouseley J. in *DA1*. That paragraph, and paragraphs 198 and 221, and the declaration granted, indicated that there was too a high risk of unfair determinations for certain categories of vulnerable persons given the shortcomings in the system. These included two categories upon which Ms Kilroy relied in particular, namely victims of "torture and other serious violence" (which can include rape or sexual abuse: see *EO and Others v Secretary of State for the Home* Department [2013] EWHC 1236 (Admin)) and "women asylum seekers who had been sexually abused should receive particular care in detention". She submitted that the claimant was a victim of serious violence (the sexual abuse and rape that she said she had experienced between the age of 8 and 10) and she was a female asylum seeker who had been sexually abused. The sexual abuse relied upon was not referred to by the claimant in her screening interview and did not become known until 5 August 2013 when the claimant gave the information when asked about her uncle during the asylum. The reality is that the claim of historic sexual abuse, including rape, as a child did not make it unfair to process the asylum claim (that the claimant is a lesbian who would suffer a risk of persecution if returned to Uganda) within the fast track processes, largely for the reasons given at paragraph 77 above.

112. Paragraph 114 of *DA1* refers also to persons with long-term physical, mental, intellectual and sensory impairments. Ms Kilroy did not specifically submit that the claimant fell into that group but I have considered whether she did so. The medical evidence relied upon (both within this period, and that emerging later, including in particular, the report of Dr Hartree) does not justify a conclusion that the claimant fell within this category. On all the evidence, the claimant was not prevented from having her asylum claim fairly dealt with by reason of any physical or mental condition. Furthermore, the claimant could be managed in detention, notwithstanding any mental health problems that she suffered (whether arising from the historic sex abuse, or other factors, or a combination of all those matters), and the medical evidence does not justify a different conclusion.

113. The claimant referred to the time taken for the screening and substantive asylum interview. There are indicative timescales in the DFTP Guidance which indicates that an appeal in such cases would usually be dealt with in a period which was quicker than 10 to 14 days. Here, there was a period of 6 days before the screening interview with a decision on the next day to include the claimant's case within the fast track processes. There was a period of approximately 15 days between the claim for asylum and the decision on that claim. The guidelines are indicative not a legal minimum. The period of time taken in this case did not of itself render the use of the detained fast track process up to decision on 6 August 2013 unfair. That conclusion is reinforced by, but not dependent on the observations of Ouseley J. in *DA1* at paragraphs 81 to 86. The time taken did not render the detention in this period unlawful.

114. The claimant complains about the adequacy of the questioning at the screening interview. I do not regard the questioning as leading to the conclusion that the decision to include the claimant's claim within the fast track process, or the detention during consideration of the claim, was unlawful largely for the reasons given at paragraph 107 and 108 above. Again, that conclusion is reinforced by but not dependent on the observations of Ouseley J. in *DA1* at paragraphs 94 to 112.

115. The claimant complains about the limited time for her legal representatives to act. They were appointed on Wednesday 31 July 2013 and had two working days before the asylum interview. That fact does not cause me to doubt the conclusion that the defendant has justified the detention of the claimant during this period. I recognise that Ouseley J. in *DA1* considered that the limited time from allocation of lawyers to the substantive hearing would give rise to an unacceptably high risk of unfairness for vulnerable applicants because of their greater difficulty in presenting their claim: see paragraphs 196 to 198 and paragraph 221 of the judgment in *DA1*. I do not, however, regard the evidence as indicating that the claimant was vulnerable in the sense that word is used in *DA1* or the relevant policies at the time.

116. The claimant also relies on the fact that in her substantive asylum interview on 5 August 2013 it became plain that her case was unsuitable for inclusion with the detained fast track processes. It was in that interview that the claimant indicated that she was relying on lesbian relationships abroad. Reference in that interview on 5 August 2013 to those facts would not, of itself, affect the lawfulness of the detention prior to the interview. Furthermore, time would have been needed to assess that information. Given that the interview finished at 17.45 on 5 August 2013, it should only have become reasonably apparent until the next day, 6 August 2013, at the earliest that her asylum claim was not suitable for inclusion within the fast track process and that any appeal against the dismissal of her asylum claim would necessarily have required more time than was provided under the 2005 Rules. Detention on 5 August 2013 was, therefore, lawful.

117. Ms Kilroy relied on the fact that a referral had been made to the Helen Bamber Foundation by letter dated 6 August 2013 and that on 7 August the Foundation gave the claimant an appointment for an initial assessment on 11 November 2013. There are a number of separate reasons why this fact does not invalidate the inclusion of the claimant's asylum claim within the fast track procedures, and why it does not affect the lawfulness of the detention between 22 July 2013 and 6 August 2013. First, the claimant did not receive the appointment until 7 August 2013 (that is after the decision to reject her asylum claim had been taken on 6 August 2013). The receipt of notice of an appointment on 7 August 2013 does not cast doubt upon the lawfulness of the detention before that date. Secondly, I was shown a Home Office policy (the implication being, it seems, that it or a similar policy was in place at the material time in July to August 2013). That provides that a substantive decision on an asylum claim would usually be given on the day following the substantive asylum interview. The policy further indicates that where what is described as a pre-assessment is confirmed the decision on the asylum claim will be postponed. Here the defendant acted in accordance with that policy. The interview was held on 5 August 2013. The decision was given on the following day, 6 August 2013. A pre-assessment, as the policy calls it, was not fixed until 7 August 2013, the day after the decision. The fact that the claimant had asked for an appointment by letter dated 6 August 2013 (and that the

defendant was informed of that) does not alter the fact that there was no requirement in the guidance to postpone consideration of the decision on the asylum claim because the applicant had requested (as opposed to having been given) an appointment for a pre-assessment. It does not affect the lawfulness of the inclusion of the claimant asylum claim within the detained fast track process (nor, by implication, detention while the asylum claim was considered within that process). Thirdly, and most significantly, for the reason given above in relation to the challenge to the determination of the First-tier Tribunal of 30 August 2013, the fact that the claimant was seeking referral to the Helen Bamber Foundation did not, on the facts of this case, render the consideration of the asylum claim within the fast track process, nor the determination of the First-tier Tribunal itself, unfair and does not undermine the justification for the detention during this first period.

118. For all those reasons, the defendant has, in my judgment, justified the detention of the claimant between 22 July 2013 up to and including 5 August 2013. The defendant was justified in deciding to detain her up to the point of the screening interview on 28 July 2013 and the decision to place her claim in the fast track process on 29 July 2013. The defendant was justified in considering on 29 July 2013, on the information then available, that the claimant's claim could be dealt with in the fast track process. Detention from 29 July 2013 up and including 5 August 2013 for the purpose of enabling the claimant's claim to be processed within the fast track process was, accordingly, lawful.

The Period Between 6 August 2013 the exhaustion of appeal rights on 10 September 2013.

119. Ms Kilroy submits that detention during the period for appealing to the First-tier Tribunal, and pursuing any further avenues of appeal to the Upper Tribunal was unlawful in the light of the decision of the Court of Appeal in *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634 (referred to in this judgment as *DA4*). Ms Nevill submits in her skeleton argument that, in any event, the claimant would have been detained pursuant to the general criteria in the EIG.

120. In *DA4*, Beatson L.J., with whom Floyd and Fulford L.JJ. agreed, upheld the finding that the policy governing detention changed in 2008. From that time, individuals who met the criteria for inclusion within the fast track procedure were held in detention while they appealed to the First-tier Tribunal and pursued any further avenues for seeking permission to appeal to the Upper Tribunal. Previously, the policy only provided for detention pending the determination of their asylum claim by the Secretary of State (not appeals against his decision). That change in policy was found to be unlawful as it lacked the clarity and transparency required of such policies. In those circumstances, it was not necessary for the Court of Appeal to consider, separately, whether such claimants could be detained pending consideration of their appeals within the fast track process. Beatson L.J. considered that, on the evidence available, detention pending the exhaustion of rights of appeal was not justified in the light of the principles identified in *Hardial Singh* and *R (I) v Secretary of State for the Home Department.* Consequently, unless the cases satisfied the general criteria for detention under the EIG, detention of an individual pending an appeal and the exhaustion of appeal rights, would not be not justified or reasonable in the *Hardial Singh* sense.

121. In the present case, the defendant served notice of the reasons for detention on 6 August 2013. That notice stated that the claimant was being detained for two reasons; first, that the claimant was likely to abscond if given temporary admission and secondly that her application may be decided quickly using the asylum fast track procedures.

122. In the light of the judgment in *DA4*, the detention of the claimant from (and including) 6 August 2013 up to 10 September 2013 was influenced at least in part by the application of an unlawful policy, namely the use of detention for those within the fast track process who were appealing refusals of their asylum claim. That was at least one of the two reasons for detaining the claimant. The policy was unlawful as it was not transparent. The claimant is therefore entitled to claim damages for false imprisonment for the period from (and including) 6 August 2013 to 10 September 2013 as the legal justification for her detention was flawed.

123. The next question is whether the defendant can establish that he could lawfully, and would in fact, have detained the claimant, even if the defendant had not been influenced by the unlawful policy. If so, the claimant would be limited to recovering nominal damages for this period.

124. First, I am satisfied that the defendant could not lawfully have detained the claimant on the basis of a policy of detaining persons whose claims satisfied the criteria for inclusion in the fast track procedures. Not only did that policy lack clarity and transparency, Beatson L.J. considered that the policy was not justified in terms of compliance with the principles established in *Hardial Singh.* Although those comments were obiter, I have seen no evidence, and heard no argument, that would persuade me to depart from those observations. I, therefore, conclude on the evidence before me that a policy of detaining persons such as the claimant within the fast track process pending the outcome of her appeal would not be lawful. Furthermore, I am satisfied that, on the facts of this case, the claimant could not lawfully have been included within the fast track process from 6 August 2013 onwards. By that date, it should have been clear that the claimant was relying on lesbian relationships abroad (as revealed in the interview which finished at 17.45 on 5 August 2013) and that any appeal against a refusal of her asylum claim could not lawfully be included within the fast track process as the claimant would necessarily have needed more time for preparing her appeal than was provided under the 2005 Rules. Consequently, detention from 6 August 2013 on the basis that the claimant could conduct her appeal under the under the fast track process was unlawful. From 6 August 2013, the detention became unlawful.

125. It is necessary, therefore, for the defendant to establish that, on a balance of probabilities, the claimant could lawfully, and would in fact, have been detained applying the general criteria in the EIG. I accept that that is a possibility. One of the reasons for the detention after 6 August 2013 was that the claimant was likely to abscond. Two of the factors relied upon were that the claimant did not have close enough ties to make it likely that she would stay in one place and had previously failed to comply with the conditions of her leave. The defendant could, lawfully, have detained the claimant. However, I cannot be satisfied, on the balance of probabilities, that the defendant would in fact have detained her. First, the reviewing officers at the very outset of the detention (in the reviews of 25 and 29 July 2013) recognised that if the claimant were not for some reason included within the fast track, it would be

necessary to consider again the question of temporary admission. Secondly, once the prospect of determining the appeal quickly, that is within the time frame set by the 2005 Rules, had disappeared there would need to be an assessment of how long the appeal process was likely to last given the need to provide an opportunity to obtain evidence from Uganda. That process was not carried out. I cannot know what the conclusion of the defendant would have been if that had been done. Thirdly, although far less significantly, there is the possibility that the defendant would have reconsidered his view about absconding once it was realised that there was a lengthy appeal process in place and that the claimant was seeking to obtain evidence from Uganda and might have an incentive to comply with the process. The belated asylum claim in the circumstances in which it was made had, initially, been viewed as an attempt to frustrate removal. Given the unfolding events, and the basis of the claim set out in the asylum interview, it is possible that those considering detention might well have taken a different view of whether they would detain the claimant. In any event, the burden is on the defendant to show, on a balance of probabilities, that he would have detained the claimant, applying the general criteria in the EIG pending the determination of the appeal and the exhaustion of appeal rights. I cannot be sure, on all the evidence, that, on the balance of probabilities, he would have done so. Consequently, the claimant is entitled to damages for the unlawful detention from (and including) 6 August 2013 up to 10 September 2013.

The Period from 10 September 2013 until Removal on 12 December 2013

126. The defendant had power under paragraph 16(2) of Schedule 2 to the 1971 Act to detain if there were "reasonable grounds for suspecting that a person is someone in respect of whom directions may be given" either pending a decision on whether to remove or in order to effect removal. Detention for those purposes would need to comply with the principles set out in *Hardial Singh* and be in accordance with relevant policies unless a reason existed to justify departing from such policies.

127. In the present case, it is clear from the detention reviews carried out from 16 September 2013 onwards that the defendant considered that arrangements for the claimant's removal would now be made as her asylum claim had been refused by the defendant, and her appeal against that decision had been refused by the First-tier Tribunal and she had exhausted all further appeal rights on 10 September 2013. The defendant considered that the necessary documentation to enable the claimant to be removed (the EU letter) was in place. The reviews say that given the claimant's "adverse immigration detention remains appropriate and proportionate within the DFT processes". The references to adverse immigration history can only realistically mean that the claimant was considered to be a person likely to abscond if given temporary admission. That had been one of the reasons given for the detention on 6 August 2013 and had been a consistent theme in the assessment of the claimant. Furthermore, that conclusion is reinforced by the wording in the monthly progress report dated 16 September 2013 which says that the claimant has been detained because there was reason to believe she would fail to comply with the conditions of temporary admission and in order to effect removal from the United Kingdom. The reference in the detention reviews to the case being "within the DFT processes" adds little as those processes had, now finished.

128. The defendant did fix removal directions. Initially, directions were given for removal on 14 October 2013. The High Court refused to stay those directions. In the event, the

claimant could not be removed on that day for operational reasons. On 11 November 2013, removal directions were fixed for 14 November 2013 and the Upper Tribunal refused to stay removal. In the event, the claimant was not removed on that day as the captain of the aircraft refused to carry the claimant. Finally, removal directions were issued on 28 November 2103. An application for a stay was refused by the Upper Tribunal. The claimant was removed on 12 December 2013.

129. In those circumstances, the defendant did have a statutory power to remove the claimant. On the evidence before the defendant there were reasonable grounds for believing that she was someone to whom removal directions could be issued. The defendant complied with the *Hardial Singh* principles. The defendant did intend to remove the claimant and was using the powers for that purpose. The period of this detention from 10 September 2013 to 12 December 2013 was reasonable. There was no reason to believe that the defendant would be unable to remove the claimant within a reasonable period and the defendant did act with reasonable diligence and expedition.

130. The defendant was entitled to conclude that detention complied with the EIG. The presumption against temporary admission was rebutted as there was a risk of absconding: the claimant had no ties to the United Kingdom and had previously not complied with the requirements of immigration law and had no incentive to remain in contact with immigration authorities. For completeness, I note the claim that the continued detention of the claimant was not in accordance with policy by reason of her mental condition. Paragraph 55.10 EIG provides, amongst other things, that those suffering from serious medical conditions, or serious mental illnesses, which cannot be satisfactorily managed within detention should not be detained. In this case, the claimant's health conditions were kept under consideration during the period in question and clinicians, including a psychiatrist (who considered the report from Dr Hartree) concluded that whilst the claimant suffered from mental health conditions (including Post-traumatic Stress Disorder with psychotic symptoms) that could be managed within the detention centre. They were entitled to reach that conclusion on the material before them. In the circumstances, the detention did not involve any failure to comply with relevant policy in relation to those with serious medical conditions or mental illnesses.

131. On 15 November 2013, a doctor reported, in accordance with rule 35 that there was evidence that the claimant had been tortured. That report was based on the fact that the claimant said that she had been sexually abused and raped. There were no physical signs of torture such as scarring. The defendant considered this report and a Home Office official responded by letter dated 18 November 2013. The official had considered the medical evidence available. She considered that there was no information from the health centre to show that the claimant was unfit to be detained. She did not consider the claimant to be a victim of torture and considered that she could lawfully be removed from the United Kingdom. The asylum claim was not, of course, based on any past incidents of torture but relied on the claim that the claimant is a lesbian who would face a risk of persecution on return by reason of her sexual orientation (not by reason of any sexual abuse whilst a child). The defendant was entitled to conclude on 18 November 2013 that the material referred to in the rule 35 report did not constitute independent evidence of torture within paragraph 55.10 of

the EIG. This factor did not render the detention unlawful or result in any failure to comply with the EIG.

132. The report from Dr Hartree dated 13 November 2013 set out the doctor's view of the claimant's mental health. That report was considered by Dr Leahy as recorded above. As I have indicated, the defendant was entitled to conclude, so far as the claimant had mental health conditions (arising out of sexual abuse, including rape, as a child or otherwise), that the claimant could be managed within detention. Dr Hartree also refers to the mental illnesses as being consistent with a history of ill-treatment or interpersonal trauma such as torture. Neither the amended grounds of claim nor the claimant's skeleton argument suggest that this meant that continued detention became unlawful because at that point there was now independent evidence of torture within the meaning of paragraph 55.10 of EIG. It did not appear that Ms Kilroy was submitting in her oral submissions that that was the position. Any such submission would, on the facts, have been misconceived. While paragraph 55.10 of the EIG provides that a person would not normally be considered suitable for detention if there were independent evidence of torture, that proviso does not in truth apply here where the events said to amount to torture (the historic childhood sex abuse and rape) were not the basis of the asylum claim, any mental health condition could be managed in detention and the claimant was due to be removed imminently. I consider that the defendant has demonstrated that the detention was consistent with the relevant policy applicable to the exercise of the power to detain.

133. The one potential barrier to removal would have been an outstanding asylum claim. The claimant could not have been removed pending any determination of that claim. Here, however, the claimant's appeal against the refusal of her asylum had been dismissed by the First-tier Tribunal on 30 August 2013. The fact that the determination of the appeal is now to be quashed does not, in my judgment, render the decision to detain unlawful. The defendant was entitled to proceed on the evidence available at the time of the detention and was entitled to conclude that removal was imminent and could be effected. Whilst the existence of an asylum claim would have been a bar to removal, the apparent result of the dismissal of the appeal, and the exhaustion of any further rights of appeal meant that, on the evidence before the defendant, there was no such apparent barrier to removal. The fact that the claimant could be removed was confirmed by the refusals of first the High Court, and then the Upper Tribunal on two occasions, to order a stay of removal. In the words of paragraph 16(2) of Schedule 2 to the 1971 Act, there were "reasonable grounds for suspecting" that the claimant was a person in respect of whom removal directions could be given, and so could be detained pending the decision on giving directions or pending removal. The fact that, ultimately, the determination of the First-tier Tribunal was set aside does not affect the lawfulness of the detention from 10 September 2013 onwards.

134. This case, therefore, is not akin to the situation in *Lumba*, or the other cases relied upon by the claimant. In *Lumba*, the defendant decided to detain the claimants relying on an unpublished policy whereby foreign national prisoners were to be detained save in compassionate circumstances. The use of an unpublished policy to govern the exercise of the power to detain was unlawful. For an error of law to render detention unlawful, the error "must bear upon and be relevant to the decision to detain" (per Lord Dyson at paragraph 68 of the his judgment in *Lumba)*. The error in that case did

bear on the decision to detain. Indeed, the justification for the detention was contained in the unpublished policy which was applied, unlawfully, to the claimants. Similarly, in *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 W.LR. 1299, a majority of the Supreme Court considered that a failure to conduct periodic reviews of continued detention, as required by the policy governing detention, was a public law error which bore on and was relevant to the decision to detain throughout the period (see per Lord Hope at paragraph 43, per Lady Hale at paragraph 77 and per Lord Kerr at paragraph 89). The policy governing the exercise of the power to detain itself required continued review of the detention and those reviews were essential to the legality of the continued justification.

135. The situation in this case is more akin to that in *R (AB) v Secretary of State for the Home Department* [2017] EWCA Civ 59. There, AB arrived in the United Kingdom on 15 June 2014. He claimed asylum and his application was included within the fast track process. He was refused asylum by the defendant on the 16 October 2014. An appeal was dismissed on 10 November 2014. Removal directions were fixed on 27 November 2014. AB sought judicial review of those removal directions on 5 December 2014. An application for a stay of removal was refused. AB was removed on 6 December 2014. The judicial review continued. It was ultimately dismissed by the Upper Tribunal who noted that AB's appeal had not been properly determined (in fact, on 12 November 2015, the determination of the appeal in AB's case had been set aside and his appeal against the refusal of his claim for asylum had once again became live before the First-tier Tribunal). AB appealed to the Court of Appeal. Initially, his challenge had been to the removal directions of 27 November 2014 (although in the Court of Appeal, AB sought to recast the challenge as being to a different decision, namely the refusal of the defendant in December 2015 to use best endeavours to facilitate AB's return to the United Kingdom). The Court of Appeal considered that the starting point for addressing the appeal was that:

> "Absent any separate basis for holding that the SSHD acted unlawfully in making and implementing the decision to remove AB to the Cameroon in December 2014, the fact that, subsequently, the DFT regime and his FTT appeal have been held to be unlawful does not render the separate removal decision unlawful or establish that the SSHD was not entitled, at the time, to rely upon the legal validity of the DFT scheme and the tribunal decisions relating to their application".

136. The decision in *AB* concerns the lawfulness of a removal decision not detention. However, three things follow from that decision. First, the decision to remove the claimant to Uganda in this case, and the removal directions made to implement that decision, would not of themselves be unlawful because of a later realisation that the determination of the First-tier Tribunal was legally flawed. Secondly, that fact would have the logical consequence that the exercise of a power of detention in this case was done to effect a lawful removal. Thirdly, the decision provides strong support for the view that detention for a lawful purpose would not become unlawful because it is subsequently established that a determination of an appeal was unlawful and should be quashed, so that as a matter of law, the appeal remains outstanding.

137. Ms Kilroy submitted that the decision in *AB* is not binding on me as the principle of law referred to in that decision was assumed by the Court of Appeal to be correct on the basis of a concession on the part of the claimant and was not the subject of

argument or consideration. Ms Kilroy relied on the decision in *R (Khadim) v Brent Housing Board* [2011] Q.B. 955 especially at paragraph 33, to establish that in such circumstances a first instance court is not bound by a Court of Appeal decision.

138. First, as the Court of Appeal in *AB* records, counsel for the claimant did not formally concede that the removal direction would not be unlawful simply because of the subsequent finding that the appeal determination was unlawful but noted that counsel appeared to accept that that was the correct position: see paragraph 57 of the judgment in *AB*. Secondly, the Court of Appeal did consider the issue of law in question. The Court regarded the proposition as emerging from earlier decisions of the Court of Appeal and treated those as the starting point for the reasoning as to whether the removal decision in *AB's* case was unlawful: see paragraph 69. I would, therefore, regard the proposition of law established in *AB* as emerging after consideration and I would regard that proposition of law as binding on me. Thirdly, even if that proposition were not formally binding, I would have accepted and applied the reasoning of the Court of Appeal in this regard. Its decision is reasoned and based on pre-existing case law. Fourthly, in one sense the decision in *AB* is not determinative of this case as it dealt with the lawfulness of the removal direction not a decision to detain. However, the decision provides strong support for the conclusion that detention pending removal is not rendered unlawful by the fact that an appeal determination is subsequently found to be unlawful and is quashed. In the cases both of a power to remove, and a power to detain, the validity of the exercise of the power is not conditional on a tribunal determination made during the process being valid.

139. I was also referred to the decision in *Secretary of State for The Home Department v Draga* [2012] EWCA Civ 842. That concerned a different statutory regime involving deportation. The material facts in summary are as follows. On 2 August 2006, the defendant gave notice of an intention to make a deportation order in respect of Mr Draga as he had been convicted of a particular drugs offence which was listed in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 ("the 2004 Order") as being one giving rise to a presumption that he had been convicted of a particularly serious crime and was a danger to the community. Mr Draga appealed against the decision to make a deportation order and that appeal was dismissed on 15 February 2007 (and the time for applying for permission to appeal expired on 26 October 2007). On 6 November 2007, a deportation order was made and signed. Removal directions were set for 26 June 2008. Shortly before that date, on 24 June 2008, it was held in other proceedings that the 2004 Order was ultra vires. Mr Draga applied to the defendant to revoke the deportation order and that was refused although, ultimately, an appeal against the refusal to revoke was successful. For present purposes, the relevant issue concerned the validity of the detention. At first instance, the Deputy High Court Judge held that the detention was unlawful. The deportation order was unlawful as it was based on the 2004 Order which had been determined to be ultra vires. The detention was, in turn, based on that unlawful deportation order. The Deputy High Court Judge considered that the error of law which made the 2004 Order unlawful bore on, and was material to, the decision to detain. Consequently, the Deputy High Court Judge held that, as the 2004 Order was unlawful, it could not be relied upon to justify the detention and the detention was itself therefore unlawful.

140. The Court of Appeal allowed an appeal. Sullivan L.J, with whom Kitchin L.J., as he then was, and Pill L.J. agreed, considered that Parliament had established a comprehensive scheme for determining the lawfulness of a deportation order. That involved giving notice of an intention to make an order and, until any appeal was determined, the Secretary of State could not make a deportation order. Sullivan L.J. held that, in order to give effect to the statutory scheme, there was a strong case for treating the tribunal's decision on an appeal as determinative (subject to any rights of appeal). He held that the Secretary of State was entitled to rely upon the determination of the tribunal dismissing the appeal when making the order and when deciding to detain Mr Draga (see paragraphs 61 and 66 of the judgment of Sullivan L.J.). For completeness, I note that the Court of Appeal has held that this decision was binding on the Court of Appeal: see *R (DN (Rwanda)) v Secretary of State for the Home Department* [2018] EWCA Civ 273, [2019] Q.B. 71, although permission has been granted to appeal to the Supreme Court. The decision of the Court of Appeal in *Draga* does not directly concern the present case as it involves a different statutory scheme and a very different set of facts. I have not, therefore, found this decision to be of assistance in resolving the present case.

141. Ultimately, the question is whether the power to detain in this case was exercised lawfully between 10 October 2013 and the 12 December 2013. For the reasons given, the defendant was exercising the powers for the purpose conferred by the relevant statutory provisions. The defendant complied with the relevant policy and the relevant common law principles recognised in *Hardial Singh*. The defendant thought there was no barrier to removal, because of the determination of the First-tier Tribunal of 30 August 2013 dismissing the claimant's asylum claim. In fact, that determination now falls to be quashed as it is unlawful. That subsequent recognition by this court in 2019 of the invalidity of the determination of 30 August 2013 does not render the claimant's detention between 10 October and 12 December 2013 unlawful.

CONCLUSION

142. The determination of the First-tier Tribunal to dismiss the claimant's appeal against the refusal of her asylum claim was reached by a process which was procedurally unfair as it did not give her sufficient opportunity to obtain evidence from Uganda to support her claim. The determination will be quashed and the defendant will be ordered to use his best endeavours to facilitate the return of the claimant to the United Kingdom to enable her to continue with her appeal. The claimant was lawfully detained from 21 July 2013 to 6 August 2013 and from 10 September 2013 until her removal to Uganda on 12 December 2013. The claimant was unlawfully detained from (and including) 6 August 2013 up to 10 September 2013. I will hear submissions on the appropriate means of calculating damages for that period.