Case No: CO/16717/2013

Neutral Citation Number: [2014] EWHC 4264 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2014

Before :

NEIL GARNHAM QC

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Between :

R (on the application of SAMI FASAYI by his litigation friend THE OFFICIAL SOLICITOR)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Leonie Hirst (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimant**
William Hansen (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 03/12/2014-04/12/2014

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Judgment

Neil Garnham QC:

Introduction

1. The Claimant, Sami Fasayi, was detained, pursuant to powers granted to the Secretary of State by Schedule 3 to the Immigration Act 1971, from 24 August 2012 to 20 November 2013. He claims, on three discrete grounds, that that detention was unlawful.

2. First, he says that the lack of any reasonable prospect of removal, and the effect of detention on his mental health, meant that for the whole of that period detention breached the principles set out by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704. Second, he says that the Secretary of State's failure properly to apply her published policy in chapter 55 of "Enforcement Instructions and Guidance" was an error of public law. Third, he says his detention constituted a breach of the Secretary of State's obligations under articles 3 and 8 of the ECHR.

3. Each of those grounds is vigorously resisted by the Secretary of State. The Secretary of State contends that throughout the relevant period there remained sufficient prospects of removal, having regard, in particular, to the risk of the Claimant's reoffending, the risk of his absconding and his lack of co-operation with the process of removal. The Secretary of State denies that chapter 55 applied to this case because, it is argued on her behalf, the Claimant was not suffering from a serious mental illness which could not satisfactorily be managed in detention. She also denies any breach of ECHR.

4. Permission to apply for judicial review was granted on 15 May 2014 by Ms Geraldine Clark, sitting as a Deputy High Court Judge. She concluded that it was

> "*arguable that (the Claimant) was unlawfully detained between 24.8.12 – 20.11.13, particularly in view of the previous periods of detention between 11.09.09 – 4.12.09 and 24.8.12 – 20.11.13*"

5. At the commencement of this hearing I heard an application on behalf of the Secretary of State for permission to rely on a statement from a Mr Nigel Needs, a case worker in the criminal casework directorate of the Home Office, and a second witness statement from a Mr Michael Hegarty, a senior executive officer employed in the criminal casework investigation team. These witness statements were served very late indeed but it was not alleged the Claimant was prejudiced. I granted permission.

The History

6. At the heart of the dispute in this case is the fact that the Secretary of State does not accept the Claimant's account of his past life. There is, as a result, little by way of agreed history prior to the Claimant's arrival in the United Kingdom.

7. The Claimant alleges that he was born in Algeria, an Algerian national. He says his date of birth was 23 March 1988. He says he lived initially with his family in El Aouana, Jijel, where in 2004, at the age of about 16, he witnessed the shooting of his mother and father by terrorists. He says he moved with his sister and brother to a

village in Dellys for a short period before entering the UK on a false French passport in about May 2004. He says he has never had an Algerian passport or identity card.

8. On 25 July 2009 the Claimant was arrested for fraud, whereupon he claimed asylum. On 11 September 2009 he was convicted of one count of theft and one count of failing to surrender to custody. He was fined by the Court but then detained, that same day, under immigration powers. He remained in immigration detention until, on his account, 4 December 2009, and on the Secretary of State's account, 27 November 2009. Nothing turns on the exact date on which this first period of detention came to an end.

9. On 15 January 2010, the Claimant was convicted of three counts of theft and sentenced to 18 weeks imprisonment. According to the Secretary of State, he was granted temporary release on 12 March 2010, but convicted of three further counts of theft and two counts of possession of a controlled drug one week later. The Secretary of State says he was granted temporary release on 13 May 2010 and that his asylum claim was withdrawn on 2 June 2010.

10. The Claimant was convicted on one count of theft on 14 June 2010. On 20 July he was sentenced at the Central Criminal Court to 6 months imprisonment with a recommendation for deportation. On that occasion the sentencing remarks of the Common Serjeant of London included the following:

> "*Sadly, you have a long record. In September of last year at Camberwell Green for theft from a person you were fined. In January of this year at Camberwell Green Magistrates Court for three separate offences you were given a sentence of 24 weeks. All of the offences apparently appear to be similar in style.*
>
> *On the day you were released you were subsequently arrested for yet more offences, and on 19 March of this year at the Horseferry Road Magistrates Court for three offences of stealing from a person and two offences of possessing of drugs for which you were sentence to 16 weeks….I am afraid in my view this case deserves a prison sentence and an increasing prison sentence because this is, of course, conduct that cannot continue…*
>
> *On the basis that the appropriate papers have been served on you, I recommend to the Secretary of State that you be considered for deportation because, in my view, this series of offences which have happened continually since last September justifies the conclusion that your continued presence in this country is contrary to the public interest.*"

11. On 3 September 2010 the Secretary of State decided to deport the Claimant following the court's recommendation. Between 6 September 2010 and 1 March 2012 the Claimant was subject to his second period of immigration detention. During that period he was repeatedly interviewed by Home Office staff with a view to his being

provided with the emergency travel document ('ETD') necessary for his removal to Algeria.

12. The Claimant's appeal against deportation was dismissed on 29 March 2011 and he became what is described as "appeal rights exhausted" on 8 April 2011. The Claimant was served with a Deportation Order on 27 May 2011. On 2 February 2012 the Claimant contacted the Criminal Casework Directorate indicating a wish to return to Algeria as soon as possible.

13. The Claimant made a number of applications for bail between April and December 2011, all of which were refused. On 1st March 2012, however, the Claimant was granted bail with electronic monitoring and reporting. In the following month he repeatedly breached his immigration bail conditions.

14. On 7th April 2012 he was arrested on suspicion of theft. On 10 April 2012 he was convicted of handling stolen goods and theft, and on 17 May he was sentenced to 6 months imprisonment. On arrival at HMP Feltham, he was assessed as a moderate suicide risk and, in the notes compiled during his criminal sentence, there were further references to the Claimant's mental illness. He continued to demonstrate self-harming behaviour.

15. On 24 August 2012, on his release from his custodial sentence, he was detained again under immigration powers. He remained in immigration detention until 22 November 2013. It is in respect of that period of detention that this claim is pursued.

16. It is of note that on 31 July 2012, during the final period of criminal custody prior to the period of detention in issue, an ETD interview was requested, but that the ETD request was not sent to the Returns Liaison Officer (RLO) until 17 October 2012. On 24 October it was returned with a request for further investigations. A further ETD interview (the Claimant's sixth) took place on 8th November 2012.

17. On 21 March 2013 the Claimant volunteered for an interview with the Algerian authorities in which he expressed the wish to return to Algeria as soon as possible. On 28 March 2013 the United Kingdom Border Agency ("UKBA") received a letter from the Algerian Consulate stating that no application form for identification had been received from them and requesting photographs and fingerprints. A further request from the Algerian consulate was received on 18th April 2013. On 24 April "biodata", fingerprints and a photo were forwarded to the Migration Liaison Officer ("MLO") in Algiers. The Defendant has, to date, sent no information regarding the Claimant to the Algerian authorities or made any request of them for assistance in confirming the Claimant's nationality.

18. On 10 May 2013 the Claimant requested an update from the Algerian Consulate and wrote to the Home Office asking them to follow up the ETD application. On 13 May a further ETD interview was requested by the Home Office. On 20 and 29 May the Claimant wrote to the Algerian consulate and to the Home Office asking for an update on his travel document. On 7 June the Claimant was interviewed by Mr Hegarty for the purposes of an ETD; he stated that he had given all information possible and on request he gave his mobile telephone and personal contact list to Mr Hegarty.

19. On 27 August 2013 an Interpol fingerprint match from Spain revealed the following information:

> "*In response to your above-mentioned message we wish to inform you that checks conducted against our SAID fingerprint database on the fingerprints provided in the name of FASAYI Sami, born 23/03/88 have given a POSITIVE result. The result corresponds to record no. 1819929706, fingerprints recorded under the name of KHAGREDDONE FAYSAI born 23/03/1988 in Morocco; son of Ben Almar & Yesmi. The following summons are listed and valid:*
>
> *Arrest warrant … issued on 18/08/2011 … for burglary*
>
> *Arrest warrant … issued on 03/05/2010*
>
> *Arrest warrant … issued on 09/12/2009 for theft of a vehicle*
>
> *Furthermore when previously arrested this individual has been fingerprinted under the name of KHIREDDINE FAYSAL born 01/01/1987 in Morocco, son of Bel & Vina. For this identity there is an outstanding arrest warrant…for drug trafficking*."

20. On 20 November 2013 the Claimant was released on immigration bail.

The Law

21. There is much common ground between the parties as to the relevant legal principles to be applied to this case.

22. There is no dispute that the Secretary of State had power under Schedule 3 to detain the Claimant as the subject of deportation action. Nor is there any dispute that for the exercise of that power to be lawful it must be exercised in accordance with common law, the defendant's published policy and the ECHR. Furthermore, it is agreed that the burden is on the Secretary of State to prove the legality of detention throughout the period: ***R (I) v Secretary of State*** [2003] INLR 196 at [28], and that when considering the ***Hardial Singh*** factors, the court acts as primary decision-maker in deciding what is reasonable: ***LE (Jamaica)*** [2012] EWCA Civ 597 at [29].

23. It was also common ground that the judgement of Lord Dyson JSC in ***R (Lumba) v. SSHD*** [2012] 1 AC 245 provides the appropriate place to begin any analysis in a case of this sort. At paragraph 22 of his judgment, Lord Dyson set out the principles to be derived from the ***Hardial Singh*** judgment. He said that in the case before him it was:

> "*common ground that my statement in R (I) v Secretary of State for the Home Department [2003] INLR 196, para 46 correctly encapsulates the principles as follows:*
>
> *(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*

> *(ii) the deportee may only be detained for a period that is reasonable in all the circumstances;*
>
> *(iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;*
>
> *(iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.*"

24. The last three of those four principles are in issue in this case.

25. Again referring to his judgment in *R (I) v Secretary of State*, Lord Dyson said, at paragraph 104, that it is*:*

> "*not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971 . But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.*"

26. There was, however, some difference of emphasis between the parties as to the significance of the risk of reoffending, the risk of absconding and of a failure to co-operate.

27. As to the risk of absconding, in *R (A) v. SSHD* [2007] EWCA Civ 804 at [54] Toulson LJ said that:

> "*... where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made.*"

28. As to the risk of reoffending, he said at [55]:

> "*A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the*

likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

29. In Lumba, Lord Dyson said at [121]

> "*The risk of absconding and reoffending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place*."

30. He went on at [128] to discuss cases where there was no outstanding legal challenge. He said:

> "*Here, the fact that the detained person has refuse voluntary return should not be regarded as a "trump card" which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be. That is because otherwise, as I said at para 51 of my judgement in I's case, "the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect the deportation". If the refusal of voluntary return has any relevance in such cases even if a risk of absconding cannot be inferred from the refusal, it must be limited.*"

31. The refusal on the part of a person subject to a deportation order or administrative removal to cooperate with the machinery of deportation was discussed in *Chen v. SSHD* [2002] EWHC 2797 (Admin). Goldring J held:

> "*Non-co-operation may not be decisive. It is, however, a relevant, possibly highly relevant, factor. If that were not so, the purpose of these provisions could deliberately be defeated by a determined applicant. It would be open to such a person simply to sit there and do nothing until return was no longer a realistic prospect. Such a person might well then disappear, having been released into the community. That person may, moreover, be somebody convicted of most serious criminal offences (as has the applicant in this case). It cannot have been Parliament's intention that the Act could be frustrated in that way.*"

32. In *R (NAB) v SSHD* [2010] EWHC 3137 (Admin), the Claimant detainee refused to sign a disclaimer which would have facilitated his removal to Iran. Irwin J held at [76]:

> "*However even given those factors, even given that there was a prospect of rapid deportation of this Claimant in the event that he signed the disclaimer, and even given that it was entirely proper to detain him for an extended period while every step was taken to persuade him to agree, or to circumvent his refusal, there must come a time when such a sterile tactic as merely sitting and waiting while repeatedly urging him to change his mind, in the full expectation that he would not, ceases to be detention genuinely for the purpose of deportation.*"

33. From these authorities, I draw the following conclusions:

i) A risk of absconding is bound to be a very important factor, and may be a decisive factor in a challenge to the lawfulness of detention under Schedule 3 to the Immigration Act 1971;

ii) A risk of offending and a propensity to commit serious offences will always be important considerations and may be of paramount consideration;

iii) A failure to co-operate with the process of removal will be a relevant factor; but such a failure cannot justify indefinite detention;

iv) None of these features provides the Secretary of State with a "trump card"; it will always be necessary to consider whether there are real prospects of the Secretary of State effecting a removal within a reasonable time.

34. For the purposes of the present case I have to decide whether the 15 months between August 2012 and November 2013 constituted a reasonable period of detention, given the Claimant's previous behaviour, his conduct whilst in detention and the likelihood of the Secretary of State being able to arrange his removal. In considering that question both parties agree that I am entitled to have regard to the two previous periods of immigration detention, but that my focus must be on those 15 months. I approach the case on that basis.

The competing arguments on *Hardial Singh*

35. Ms Leonie Hirst, for the Claimant, argued that at no point during the period under challenge, was there any realistic prospect of obtaining a travel document for the Claimant. She said that throughout his detention, the bar to the Claimant's removal was the lack of an ETD and that the Defendant failed to act with reasonable diligence and expedition in seeking that document.

36. She said that internal Home Office guidance on the requirements for obtaining an ETD made it clear that the likely timescale for obtaining an ETD was 6-12 months, starting from the date that an ETD application was submitted to the Algerian authorities. The Claimant has been interviewed by the Defendant on at least nine

occasions to obtain information for an ETD. He was also interviewed by the Algerian authorities on 21 March 2013 (at his instigation) and by Home Office officials on the same date. The Claimant's fingerprints were taken as long ago as July 2009.

37. Ms Hirst pointed out that the Defendant's guidance indicates that an ETD application required 'pre-verification' (checks made by British staff in Algeria) before it was sent to the Algerian authorities. She contended, and this was accepted by the Secretary of State, that the Defendant had never submitted an ETD application to the Algerian authorities in this case. She noted that there were repeated assertions in the defendant's papers that the ETD was being progressed, but she asserted that in fact there had been no progress between 2009 and the Claimant's release on bail in March 2012. There was, she said, no new information or change of circumstances, between the Claimant's release on bail in March 2012 and his re-detention in August 2012, which would have made it any more likely that the Defendant's verification checks would be successful.

38. Ms Hirst contended that it was or should have been clear to the Defendant, prior to the period of detention under challenge, that the Claimant was not able to provide sufficient information to satisfy the Defendant's requirements. The Defendant took no steps to contact the Algerian authorities to ascertain whether the information that had been provided by the Claimant was sufficient for an ETD. In other words, she argued, adopting my suggested phraseology, the Defendant had never even "given the application for an ETD a shot". Furthermore, the Secretary of State had not enquired as to whether there was any other way of documenting and removing the Claimant. As Ms Hirst put it in oral argument,

> "*the defendant cannot simply continue to detain on the basis of a failure to provide information. She must devise a plan B.*"

39. She disputed the suggestion that the Claimant was 'non-cooperative'. She pointed out that there was no suggestion at or after the ETD interviews on 21 September, 18 February 2011 that the Claimant was not cooperating and that, on 6 October 2011, the Returns Liaison Officer ('RLO') had indicated that the Claimant appeared to be cooperating. She said that the Claimant stated consistently that he wished to return to Algeria, and that he made efforts himself to obtain a travel document and progress his case. As is noted above, he also provided his personal mobile phone and contact list to the defendant on request in June 2013. She observed that the Algerian consulate officials who interviewed the Claimant on 21 March 2013 did not raise any concern that the information provided by the Claimant was insufficient for a travel document.

40. The Claimant, said Ms Hirst, had provided details of his remaining family members. He had provided his last address in Algeria and details of the school he had attended. He had explained in his witness statement how he came to give different information in interviews during the previous period of detention. He had repeatedly stated that he had given all the information he was able to provide. The Defendant had not disclosed what steps had been taken to verify the information provided by the Claimant, nor explained why the information he had provided was insufficient to enable an ETD application to be made.

41. As to the evidence of a fingerprint match obtained from the Spanish authorities in September 2013, Ms Hirst argued that no information has been given about the dates

of the alleged offences. However, on the dates of two of the warrants, the Claimant was in custody in the UK, and on a third had only been released from detention five days previously. (It is to be observed, however, that the Interpol document does not specify the dates of the offences themselves). Ms Hirst said that the Defendant had not taken any further steps to verify the information provided by the Spanish authorities until October 2014; nor taken any steps to ascertain whether the Claimant is in fact Moroccan. She pointed out that officials from the Algerian consulate did not express any concerns that the Claimant was not Algerian during the face-to-face interview conducted on 21 March 2013.

42. The reality of the situation, it was said, was that the Claimant was unable to provide any further information to verify his Algerian nationality. The prospect of obtaining a travel document for him was no greater in August 2012 when the Claimant was re-detained than it was when he was released on bail in March 2012. There was no timescale for when an ETD might be issued. The prospect of obtaining a travel document, and hence of removing the Claimant, was so remote as to be non-existent during the entire period under challenge.

43. Ms Hirst suggested that what the Defendant chose to characterise as 'non-cooperation' was the product of a systemic difficulty in obtaining travel documentation in Algerian cases with limited evidence of identity. She said the defendant could not rely on the difficulty of obtaining documentation for Algerian nationals in order to justify detention where there is no prospect of removal, even where the detainee is not cooperating or has a history of reoffending.

44. Ms Hirst acknowledged that the Claimant has a history of what she called "*acquisitive offending*". But she contends that the offences were "*at the less serious end of the scale"* and none involved violent or sexual assault. In the light of the Claimant's willingness to return to Algeria, and the efforts he had made to bring about his return, reliance on the risk of absconding was irrational.

45. The Claimant relied on the effect of continued detention on his mental health, which Ms Hirst said was a highly relevant factor.

46. Mr Hansen, for the Secretary of State, argued that there remained sufficient prospects of removal throughout the relevant period, having regard to all the relevant factors. Principal amongst those factors were the risk of offending and the risk of absconding.

47. He said that the Secretary of State was entitled to detain the Claimant because he was subject to deportation action on conducive grounds, having been convicted of numerous criminal offences in the UK, and continued to present a high risk of re-offending, as well as a high risk of absconding if released. Were he to abscond, that would defeat the very purpose for which the deportation order was made.

48. Mr Hansen said that there is a Returns Agreement with the Algerian authorities but accepted that there could be difficulties obtaining an ETD from Algeria, in cases where there was no definitive evidence of identity. He explained that in these circumstances, before an application for an ETD could be submitted to the Algerian authorities, verification checks had to be carried out by a MLO in Algeria to check that the information provided was valid and accurate. He said that that had been done on a number of occasions but the information provided had not proved reliable despite

the Claimant's insistence that the information was correct. He said that there was good reason to doubt the reliability of the information provided by the Claimant.

49. Mr Hansen argued that, despite claiming that he wished to return to Algeria and his denials of any lack of cooperation, the Claimant had failed to provide any credible evidence to substantiate his claim to Algerian nationality.

50. He said that the Secretary of State was entitled to take into account the Claimant's conduct during the first two periods of detention and argued that what was apparent from the papers was that the Claimant had provided misinformation and inconsistent information. The result was that the Claimant's case had never progressed to the stage where an ETD could be submitted to the Algerian authorities. He argued that it was important for the government not to submit "*threadbare applications*", because to do so risked "*devaluing the currency*".

51. Mr Hansen contended that the Spanish Interpol results served to prove what the Home Office had long suspected, namely that notwithstanding his protestations of cooperation, the Claimant was in fact deliberately providing incorrect, and therefore unverifiable, information. He points out further that when confronted with the Spanish evidence, the Claimant denied, in his Reply, ever having been arrested or fingerprinted in Spain.

Analysis

52. It seems to me plain beyond argument that were Mr Fasayi to be at liberty there is a high probability of him committing further offences of dishonesty of the sort that he has committed in the past. I place particular reliance upon what was said by the Common Serjeant in 2010; those observations seem to me accurately to set out the position both then and in 2012-13, particularly in light of the Claimant's further offending since 2010.

53. Whilst it is right to say that those offences were not of the gravest nature, they were far from trivial. Of particular weight, in my view, is the persistent nature of the Claimant's offending. Mr Hansen is right to submit that acquisitive crime of this sort by a foreign national is not behaviour which the public ought to be expected simply to tolerate. The Secretary of State was entitled to act on the recommendation for deportation and was entitled to take the persistent nature of the offending into account in deciding to keep the Claimant in detention. More importantly, since the judgement on this issue is mine, it seems to me that I should give substantial weight to the high likelihood of further offending, in determining the lawfulness of these 15 months of detention.

54. Even more significant, it seems to me, is the risk of absconding. There is no appeal pending in this case. There is no real incentive for the Claimant to stay in touch with the authorities. He has a long history of offending. He has been guilty of repeated breaches of bail conditions. Were he to have been released there seem to me there would have been a significant risk that the Claimant would have disappeared from view and the authorities would have been unable to enforce his removal when that removal became practicable.

55. Equally important in this case is the evidence going to the Claimant's alleged efforts to co-operate with the Home Office. If his efforts throughout had been genuine I would have been minded to say that, taking into account the two previous periods, the length of the detention had reached the point, by September 2012, when he should have been released. Faced with a cooperative detainee, doing his best to provide the evidence required by a foreign state, the obligation was on the Home Office to find a way to effect removal. If that could not be done, despite the detainee's assistance over a prolonged period, then the detention could not continue.

56. However in my judgment, on the facts of this case, the Claimant was not genuinely cooperating with the Home Office, nor honestly attempting to provide them with the information they required. Protestations of cooperation, even when supported by requests that he be permitted to leave, are insufficient if, in fact, the detained person fails to provide the crucial information required. Particularly important, was information the Claimant was providing as to his nationality, name, and last permanent address in Algeria. Of some, but lesser, significance was the evidence he was giving about his family members and his school.

57. In considering this evidence, however, I accept the submission of Ms Hirst that regard has to be had to the fact that the Claimant was speaking Arabic and his answers were being both translated and, as necessary, transliterated. Accordingly, where the differences are potentially differences of pronunciation, spelling or transliteration I disregard them.

58. The Claimant now maintains that he is of Algerian nationality. That has been his case throughout his periods of detention. However, in his first asylum screening interview of 25 July 2009 the Claimant appears to have told the interviewing officer initially that he was Moroccan by nationality and born in Morocco. Those entries, however, have been crossed out and replaced by references to Algeria. On his admission to HMP Birmingham following his conviction in January 2010, he appears to have given his place and country of birth as "Kasablanca, Morocco". In a "GCID" case record sheet entry dated 17 August 2010 it is noted that the Claimant told an official that he was a Moroccan national, born in Morocco who moved to Algeria as a child.

59. In the first asylum screening interview, the Claimant gave his name as "Sami Fasayi" and says he has used no other name, assertions he repeated in the second screening interview. On his Home Office statement of evidence form dated 21 September 2010, however, he gives his name as Fasayi Sami, but says that he has used the name "Abadlia Illias". It seems to me extremely unlikely that the Claimant would have forgotten he sometimes used an alias; on one occasion or the other, he was lying.

60. According to the Claimant in his first screening interview, his last permanent address in Algeria was "flat 42, hay 1200, Boumeras, Algiers". In the screening interview of September 2010 he gives his last permanent address as "42-3, Zamori, Dless, East Algeria". In the first set of bio-data dated 18 February 2011 he says he does not know his last address in his country of origin. In the bio-data of 21 December 2011 he gives his last known address as "42 Draa Mohamed Bin Yahya". In the bio-data of 31 July 2012 he gives his last known address in Algeria as "Boulvard Mohamed, El Aouana, Jijel". In the bio-data of 8 November 2012 he gives his last known address in Algeria as "42 Dar Mohammed Sadik Porte 3, El Aouana, Jijel". Those various alternatives were offered, in my judgment, as attempts to mislead.

61. In the first interview he identified his mother as "Yasmine Fasayi" nee Belhaj, born 1953, of the same address. In the screening interview of September 2010 he identified his mother as "Yassmin Sami, born 1959". In the first bio-data dated 18 February 2011 he says his mother's name was "Ghania Fasayi", nee Fasayi, that she was born in 1959 and died in 2004. In the bio data of 21 December 2011 he says his mother's name was "Yasmine Fasay", born 1959, died March 2004. In the bio-data of 31 July 2012 he gives the same name for his mother. In the bio data of 8 November 2012 he gives his mother's date of birth is 1949.

62. In the first interview he identified his father as "Jamal Fasayi", born 1951. In the second screening interview he identified his father as "Omar Sami", born 1949 of the same address. In the first set of bio-data dated 18 February 2011 he says his father's name is "Amar Fasayi", born 1940. In the bio-data of 21 December 2011 he repeats the information given in the earlier form. In the bio-data of 31 July 2012 he gives his father's name as "Omar Fasaye". In the bio data of 8 November 2012 he gives his father's date of birth as 1942. I agree with Miss Hirst that "Omar" might easily have been recorded as "Amar" or vice versa.

63. In the first screening interview he identified his sister as "Sara Oscar" born 1979 of the same address. In the second screening interview he identified his sister as "Radia Oscar" born 1979. In the first set of bio-data dated 18 February 2011 he says his sister's name is "Amina Fasayi" born 1976. In the bio-data of 21 December 2011 he says his sister's name is "Radiya Fasayi" born in 1976. In the bio-data of 31 July 2012 he gives sister's name as "Rada Fasaye". I accept that "Radia" might well be the equivalent of "Radiya" or "Rada". In the bio-data of 8 November 2012 he gives his sister's date of birth as 1971.

64. In the first set of bio-data dated 18 February 2011 he says he did not attend school. In the bio-data of 21 December 2011 he says he attended "Draa Mohamed Saddiq School". In the bio-data of 8 November 2012 he says he went to school at "Dar Mohamed Raisia" from 1994 to 2000 and at "CEM Mohamed Benyamy" from 2000-2001. I see no acceptable explanation for the changed information about his schooling.

65. In my judgment, the differences in nationality, name, last address and schooling, in particular, point firmly to the conclusion that the Claimant was not being honest with the authorities. I see no acceptable explanation for these changes. It was suggested that they can be accounted for by the fact that until late 2011 the Claimant was not cooperating with the authorities whereas thereafter he was. But the court has nothing but the Claimant's word for it that the latest versions are true. Furthermore, on no occasion, as far as I can see, did the Claimant ever explain that he had been dishonest or inaccurate in his earlier answers so that those answers should be disregarded. Nor does he appear to have explained to the Home Office at the time which answers were true and which were not. There remains, in my view, substantial grounds, as is now demonstrated by the Interpol letter, for doubting whether the Claimant is yet being honest about his identity information.

66. I am driven to the conclusion that the Claimant has repeatedly given the incorrect information, and has done so with an intention to deceive. The effect of that deception was to make it impossible for the Secretary of State to put forward to the

Algerian authorities a complete or coherent account sufficient to justify provision of the necessary travel documentation.

67. I was concerned, at one stage, that the Home Office had not made clear to the Claimant what it was they regarded as deficient in the information he was providing. However, in a letter to the Claimant dated 8 February 2012, the UKBA noted that the Claimant was willing to co-operate and listed the actions he could take to assist his case. He was urged to consider whether he could provide, amongst other things, his full last known address in Algeria and the full address of his school.

68. Furthermore, in the minute of a telephone conversation between a Home Office official and the Claimant dated 4 February 2013, the following note appears:

> "*He stated that he wants to return to Algeria and I explained to him that we needed verifiable information for this to happen and it appears that at the moment none of the information given to us* ***is genuine****" (my emphasis).*

69. In a letter dated 14 May 2013, to an organisation called "Bail for Immigration Detainees", who were then acting for the Claimant, UKBA wrote:

> "*Although you claim that your client has repeatedly stated that he wishes to return to Algeria, unfortunately he has consistently failed to provide sufficient or correct information with regard to his identity.…Your client appears unable to supply a simple verifiable name and address.*"

70. In a letter dated 30 May 2013, Mr Needs wrote to the Claimant. His letter included the following:

> "*We are continuing to make arrangements to obtain a travel document of your removal the United Kingdom. However, this is taking longer than we would like because in the past you appear to have given inaccurate information about your identity.*"

71. In my judgment, even if, which I doubt, the Claimant was unaware of the fact that he had provided different information on different occasions in the past and that would make difficult the obtaining of travel documentation, these communications alerted him both to the doubts about the accuracy of that past information and the need to provide complete and accurate information in the future.

72. I accept, of course, that even in the face of non-cooperation by a detainee, detention cannot be indefinite. The Secretary of State cannot simply sit on her hands and wait for the detainee to co-operate; there remains an obligation on the Secretary of State to explore other ways to remove him. Ultimately if these are unsuccessful the detainee will have to be released. But the Secretary of State did not just sit on her hands; the efforts taken by the Home Office, as revealed by the communications set out above, the monthly detention reviews and the witness statements of Messrs Hogarty and Needs demonstrate that the removal of this detainee was being pursued with reasonable vigour and urgency.

73. Two examples from the many pages of Detention Reviews and GCID notes will suffice to illustrate the point. On 8 August 2013, there was a direction to consider prosecuting the Claimant under section 35 of Asylum and Immigration (Treatment of Claimants) Act 2004. That that was seen as a measure of last resort seems to me reasonable, but the fact that it was contemplated demonstrates a determination to progress matters. In the Detention Review of 16 November 2013, shortly before the Claimant's release, there is reference to the fact that investigations were being pursued in Spain "*concerning the applicant's residence in that country and indications are that the applicant may not be Algerian after all*"; again, evidence of the pursuit of enquiries aimed at effecting the Claimant's removal. I can see here no breach of the fourth *Hardial Singh* principle (as articulated in R (I)).

74. In my view, in the circumstances of this case, it was legitimate to continue detaining the Claimant and to continue pressing him to provide the information which would have permitted removal. It is important to consider the position of the Secretary of State month by month as detention was reviewed. On each occasion, it appears to me, the Secretary of State was properly reviewing the case and taking the steps she could to progress the case towards resolution. On each occasion the Secretary of State could reasonably conclude that it was still open to the Claimant to provide the necessary information whereupon removal could immediately have been effected.

75. Against a background of a Claimant who posed a high risk of reoffending and a high risk of absconding, the period of detention until November 2013 was entirely reasonable.

76. I accept that a Claimant's mental health condition may be relevant to an assessment of the propriety of continued detention. It seems to me, however, that it is unlikely that mental ill-health which can adequately be managed in accordance with the policy to which I turn below, will turn lawful detention into unlawful detention. Be that as it may, subject to compliance with the policy discussed below, there is nothing in the Claimants mental health condition here that seems to me to make this period of detention unreasonable or otherwise unlawful.

Chapter 55

77. Ms Hirst began her oral submissions by indicating that the *Hardial* Singh challenge was the central issue in this case. Nonetheless, she did develop the second of her grounds of challenge at a little length orally and it is to that that I now turn.

78. Ms Hirst contends that the Claimant's detention was in breach of the Secretary of State's published policy in Chapter 55.10 EIG in relation to the detention of those with serious mental illness. As relevant, the policy provides as follows:

> "*The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:…*
>
> *Those suffering from serious mental illness which cannot be satisfactorily managed within detention… In exceptional cases it may be necessary for the detention at a removal centre or prison to continue while individuals are being or waiting to be*

> *assessed, or are awaiting transfer under the Mental Health Act…*
>
> *If a decision is made to detain a person in any of the above categories, the caseworker must set out the very exceptional circumstances for doing so on file.*"

79. Ms Hirst argues that during the second period of detention, the Claimant was diagnosed, both in prison and immigration detention, with serious mental illnesses, namely post-traumatic stress disorder (PTSD) and depression, symptoms of psychosis, and borderline personality disorder. She points to references in the notes to the Claimant experiencing symptoms of serious mental illness, including auditory hallucinations, thought blocking, anxiety, poor sleep, and tearful and irritable behaviour. She says that there were episodes where the Claimant self-harmed by cutting and/or setting light to his arms, and at least one episode of attempted self-strangulation with bed sheets.

80. Miss Hirst relies, in particular, on the report of Dr Hunt-Grubbe dated 22 July 2013. She says that on any reasonable view the policy in Chapter 55 was potentially engaged by the Claimant's detention. The Defendant was therefore obliged, she says, when deciding to detain the Claimant in August 2012 and/or to continue detention thereafter, to make reasonable enquiries as to the Claimant's mental illness and to consider whether the policy applied to the Claimant.

81. Ms Hirst says the Claimant's mental ill health was not adequately considered and not adequately treated. She says detention exacerbated the Claimant's mental health problems.

82. Dr Hunt-Grubbe concludes at paragraph 12.4, following her examination of the Claimant, that he was

> "*currently experiencing symptoms of a moderate depressive episode aggravated by the ongoing stresses of his current legal situation, including detention. He experiences thoughts of suicide on a regular basis and self-harms on a frequent basis. He has no active plans to end his life, although at times feels that life is not worth living… A depressive episode of moderate severity is one where the individual typically suffers from depressed mood, loss of interest and enjoyment and reduced energy leading to increased fatiguability and diminished activity.…*
>
> *12.5 I could find no convincing evidence of current symptoms that would support a diagnosis of post-traumatic stress disorder.… I am additionally of the opinion that he has borderline personality traits (emotionally unstable type)… Mr Faysai's distress is borne out by what appears to be hallucinating experiences (that are experientially real although not distressing to him). He has a low threshold for discharge of anger, and it would appear that his propensity to self-harm occurs in response to perceived or actual stress or challenging*

> *environmental factors, rather than in response to psychotic experiences….*
>
> *12.10 Ongoing detention is likely to continue to exacerbate Mr Faysai's low mood, although a review of his medication and commencement of appropriate antidepressant medication should help to alleviate this substantially. His risk of self-harming behaviour is likely to remain... The risk of suicide, albeit a theoretical one, is present and the current risk is moderate. He has no active plans but he may require close monitoring…*"

83. Miss Hirst relied on the Court of Appeal decision in Pratima Das [2013] EWCA 682 and in particular on paragraph 67 in the judgement of Beatson LJ:

> "*The authorities also show that the threshold from the applicability of the policy is that the mental illness must be serious enough to mean it cannot be satisfactorily managed in detention. As to satisfactory management, at the time detention is being considered, the Secretary of State, through her officials, should consider matters such as the medication person is taking and whether his or her demonstrated needs at that time are such that they can or cannot be provided in detention. Account shall be taken of the facilities available at the centre at which the individual is to be detained and the expected period of detention before he or she is lawfully removed. R (OM) v. SSHD [2011] EWCA Civ 909 at [33] shows that some of those suffering significant adverse effects from mental illness may be managed appropriately in detention.*"

84. Mr Hansen, for the Secretary of State, argued that the Claimant was not suffering from serious mental illness which could not be satisfactorily managed in detention. He says the Claimant's mental health was not static. There were serious incidents in early 2012 when the Claimant was self-harming and had suicidal ideation. But during the period with which I am primarily concerned the position was stable. He says that there was nothing prior to receipt of Dr Hunt-Grubbe's report in July 2013 that could have alerted the defendant to the issue and that, on analysis of that report, the Secretary of State reasonably concluded that the policy was not engaged.

85. In my judgment, Mr Hansen's analysis is substantially correct. There were indications of mental illness both before and after August 2012, but nothing in my view that engaged the policy during the period with which I am primarily concerned. Dr Grubb's report is an impressive piece of work and provides a compelling account of the Claimant's condition, but it did not mandate a decision under the policy that the Claimant was suffering from a serious mental illness which could not be treated in detention.

86. The Court of Appeal in Das overturned the decision of Sales J at first instance. But it did so on one ground only, namely Sales J's interpretation of "serious mental illness". The observations in [62] of Sales J's judgement stands. There the judge held that

> "*on proper interpretation in the context of para 55.10 the words "which cannot be satisfactorily managed within detention" indicate a standard of practical effectiveness of treatment rather than treatment which avoids all the risks of suffering mental ill health or any deterioration in an individual's mental well-being. In assessing what is satisfactory, the Secretary of State is entitled to have regard to what may be expected to be effective in preventing a detainee from slipping into a state of serious inability to cope with ordinary life.*"

87. In my view that was the position here. As Mr Hansen argued in his skeleton argument, the records demonstrate that those responsible for the Claimant's detention were aware of the Claimant's mental health condition; there was active and continuing monitoring, assessment and management of that condition. I note, in particular, the psychiatric assessment by Dr Sultan, Consultant Psychiatrist dated 29/9/12 which noted that the Claimant was "*relaxed and calm, maintained GEC* (good eye contact) *and was cooperative*"; that he "*denies any thoughts of DSH"* (which I take to be a reference to deliberate self-harm); that there was "*no evidence of any psychotic symptoms*" and that his "*depression/anxiety [was] in remission*". I also note that, in an entry in the mental health records dated 2 August 2013, the Claimant was assessed as being "*fit for detention*" and there being "*no concern with mental state"* This was mental illness that could be, and was being, managed in detention.

88. Mr Hansen submitted that even if the Claimant was suffering from a serious mental illness that could not satisfactorily be managed in detention, this was, nonetheless, an exceptional case in which detention would have been permissible, that notwithstanding. Had I been against him on his primary submission on the applicability of the policy, I would not have accepted that alternative submission. Despite the real risk of acquisitive re-offending and of absconding, had the Claimant's mental health been such that it could not have been adequately managed in detention, I would have concluded that release from detention was the only option and that, as a result, continued detention would have been unlawful. For the reasons set out above, however, that analysis is not relevant to my determination in this case.

ECHR

89. In her skeleton argument Miss Hirst submitted that the Claimant's detention during the period under challenge breached articles 3 and 8 of the ECHR. She developed neither argument orally but maintained her case as set out in writing.

90. I accept Miss Hirst's submission that it is for the Court to determine whether there has been a breach of article 3 (*R (Wilkinson) v Responsible Medical Officer Broadmoor* [2002] 1 WLR 419 at [26]). In my judgment, there is nothing of substance in an argument based on either article.

91. As Miss Hirst rightly concedes article 3 imposes a high threshold. Given my conclusion on the application of the policy, it seems to me simply unarguable that that threshold has been reached on the facts of this case. The Claimant was suffering from some mental ill health but the symptoms of that condition were adequately managed in detention. This case does not get close to a breach of article 3. Mr Hansen relies

on R (on the application of) v University College London Hospitals NHS Foundation Trust & Anor [2013] EWHC 198 (Admin); I agree that that decision provides support for the conclusion set out above.

92. The article 8 argument is even more forlorn. Whilst "physical and psychological integrity" is indeed an aspect of private life protected by Article 8, there is nothing in this case to support an argument either that that integrity was threatened by detention or that that detention was not justifiable under article 8(2) as a proportionate response to the objective in view, namely detention pending removal.

Conclusion

93. In those circumstances, this application fails. I will hear counsel on the question of costs.