Case No: C4/2008/0915

Neutral Citation Number: [2012] EWCA Civ 597
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Bean
[2007] EWHC 2980 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2012

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE RICHARDS
and
LORD JUSTICE KITCHIN

- -

Between :

The Queen (on the application of LE (Jamaica))	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Hugh Southey QC (instructed by **Leigh Day & Co**) for the **Appellant**
Lisa Busch (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 19 April 2012

- -

Judgment

Lord Justice Richards :

1. This is an appeal against an order of Bean J dated 14 December 2007 dismissing a claim for judicial review by which the appellant challenged the lawfulness of his immigration detention from 16 February 2006 to 30 July 2007. The proceedings in this court were stayed pending the judgments of the Supreme Court in *R (Lumba)) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 WLR 671 ("*Lumba*"), and *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299 ("*Kambadzi*"). Following those judgments, permission to appeal was granted by Sullivan LJ on the basis that the applicable principles had changed since Bean J had considered the matter. What we have to determine is whether such changes as have occurred affect Bean J's analysis and conclusion on the particular facts of this case.

Factual overview

2. The appellant was born in Jamaica in 1964. He entered the United Kingdom as a visitor in January 1989. He was granted indefinite leave to remain as the husband of a British citizen. The marriage subsequently broke down. In February 1995 he was charged with possession of crack cocaine with intent to supply and with obtaining a passport by deception. He breached the conditions of his bail several times. Following his arrest for breach of bail in May 1995 he tried to flee the country on a false passport but was arrested again. He was diagnosed as a paranoid schizophrenic and was found unfit to plead. It appears that a hospital order was made. After about two and a half years as an in-patient he was discharged first to a hostel and then, in 2000, to his own flat. In October 2002, however, he was convicted of conspiracy to kidnap and conspiracy to blackmail and was sentenced to seven years' imprisonment. While in prison he made an unsuccessful claim for asylum.

3. In January 2005 he was notified of the Secretary of State's intention to make a deportation order against him. His appeal to an immigration judge was dismissed in October 2005 and a signed deportation order was served on him in January 2006. At this point he was still serving his custodial sentence.

4. He was released from prison on licence on 16 February 2006, a few weeks early. His parole assessment reports contemplated that on release he would be provided with specialist accommodation which would meet his mental health needs and would provide a high level of monitoring and supervision. In that context it was assessed that he was likely to comply with reporting and other conditions of his licence. The actual decision to release him from prison, however, was evidently taken in conjunction with, or in contemplation of, a decision to detain him thereafter under Schedule 3 to the Immigration Act 1971, and provision was made for his licence conditions to be set accordingly. The appellant was notified by letter dated 15 February 2006 of the decision to detain him in immigration detention. He was so detained immediately upon his release from prison.

5. Removal directions had been set at this point for 21 April 2006. An emergency travel document had been issued by the Jamaican High Commission and arrangements had been made by the High Commission for the appellant to be met by hospital staff from a secure mental unit on arrival in Jamaica. As a result of the intervention of the appellant's Member of Parliament, however, the removal directions were cancelled.

They were subsequently reset for 10 August 2006 and then for 8 September 2006 but were again cancelled, this time because of notification and then service of a claim for judicial review challenging the decision to deport the appellant. That claim was withdrawn on 16 January 2007, at the same time as permission was granted for the present claim challenging the appellant's detention pending deportation.

6. Difficulties were then encountered in securing the revalidation of the appellant's emergency travel document. At some point in 2006 the appellant, acting in person and without the knowledge of his solicitors, had lodged an application to the European Court of Human Rights. In March 2007 the Jamaican High Commission refused to revalidate the emergency travel document, saying that they had received a letter from the European Court informing them that the appellant could not be removed from the United Kingdom as he had an outstanding human rights application. That stance was maintained despite a joint letter by the appellant's solicitors and The Treasury Solicitor to the High Commission informing them that there was no bar to the appellant's removal. Bean J found the High Commission's refusal extraordinary but observed that their stance was not one over which the court had any control.

7. That was the position when the appellant was granted bail on 30 July 2007, bringing to an end the period of detention to which these proceedings relate. Previous applications for bail had been refused on 27 October 2006 and 6 June 2007.

8. One other feature I should note about the appellant's detention is that between February and November 2006 there was only one detention review, carried out in July. From and including November 2006 until the time of his release there were regular monthly detention reviews.

9. The appellant's removal from the United Kingdom had still not been effected by the time when the case was before Bean J. Removal eventually took place on 2 December 2009.

The legal and policy framework

10. By paragraph 2(3) of Schedule 3 to the Immigration Act 1971 ("the 1971 Act"), where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom.

11. The Secretary of State's policy concerning the use of immigration detention was contained at the relevant time in Chapter 38 of the Operational Enforcement Manual. Paragraph 38.1, referring to the approach set out in White Papers in 1998 and 2002, indicated the limited purposes for which detention would usually be appropriate (including "to effect removal") and stated that in all cases detention must be used sparingly and for the shortest period necessary. Paragraph 38.3 stated that there was a presumption in favour of temporary release, that there must be strong grounds for believing that a person would not comply with conditions of temporary release for detention to be justified, and that all reasonable alternatives to detention must be considered before detention was authorised. It set out a list of factors which had to be taken into account when considering the need for initial or continued detention. Factors for detention included those relevant to the risk of absconding; factors against

detention included the question whether the subject had a history of physical or mental ill health.

12. The position of the mentally ill was covered more specifically by paragraph 38.10:

> "**38.10 Persons considered unsuitable for detention**
>
> …
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS detention accommodation or elsewhere:
>
> - unaccompanied children and persons under the age of 18 …;
> - the elderly, especially when supervision is required;
> - pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this …;
> - those suffering from serious medical conditions or the mentally ill;
> - those where there is independent evidence that they have been tortured;
> - people with serious disabilities."

13. A central question, to which I will come later in this judgment, is whether that paragraph was engaged in the circumstances of the appellant's case. For that purpose it will be necessary to consider a number of authorities concerning the meaning of the policy as it applies to the mentally ill.

14. Where the decision was taken to detain a person, provision was made in paragraph 38.8 for the carrying out of periodic detention reviews, including reviews on a monthly basis after the first month of detention.

15. It was held in *Lumba* that where a public authority has power to detain but exercises the power in material breach of the principles of public law, the detention is unlawful and it is not a defence to an action for false imprisonment (though it is relevant to the quantum of damages) to show that the lawful exercise of the power could and would have resulted in detention. On the facts of the case, since the detention had been based on unlawful policies, the claims in false imprisonment succeeded; but since it was inevitable that the appellants would have been detained if the power to detain had been exercised by the application of lawful policies, they had suffered no loss and were entitled only to nominal damages. *Kambadzi* was to similar effect: it was held that a failure to carry out regular detention reviews required by the policy rendered detention unlawful and established the tort of false imprisonment; and that the question whether detention would have occurred if lawful detention reviews had been carried out went only to the quantum of damages.

16. The consequence of those decisions for the present case is that if the appellant's initial detention or continued detention was in material breach of the policy, it was not only unlawful in public law terms but also constituted the tort of false imprisonment; but

he would be entitled only to nominal damages if he could and would have been detained in any event on the lawful application of the policy.

17. The exercise of the power of detention is also subject to what are referred to as *Hardial Singh* principles (see *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704), as summarised in *R (I) v Secretary of State for the Home Department* [2003] INLR 196 at [46] and in *Lumba* at [22]: (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. Whilst those principles provide a backdrop to any consideration of immigration detention, their application is not central to the present case: in particular, if detention was otherwise in accordance with the policy, it is not contended that the appellant was detained for a period longer than was reasonable in all the circumstances or that it was apparent that the Secretary of State would not be able to effect deportation within a reasonable period.

The reasons for the appellant's detention

18. A witness statement of Mr John Lambert, a Senior Executive Officer in the Criminal Casework Directorate of the Border and Immigration Agency, records that he took the initial decision to detain the appellant under Schedule 3 to the 1971 Act. Mr Lambert states that he was well aware of the detention policy in force at the time, including the guidance in Chapter 38 of the Operational Enforcement Manual. He continues:

> "I was well aware that Chapter 38 notes that in general terms, in all cases, detention should be used sparingly and for the shortest period necessary and that 38.3 sets out a number of factors which are relevant to the decision to detain. I took into account these factors. In general terms, however, the policy was that detention would normally be justified in circumstances where removal from the United Kingdom was imminent. In the case of [the appellant] his appeal against deportation had been dismissed, he had been issued with a signed deportation order, an application for an Emergency Travel Document had been agreed by the Jamaican High Commission in February 2006 and it was expected that removal would be effected within a reasonable time scale. Removal directions had been set for 21 April 2006. I therefore took the view that detention following the release from prison was justified as I considered that removal was at that time imminent."

19. Mr Lambert deals next with the implications of the appellant's mental illness. He states that he was well aware of the policy referred to in paragraph 38.10. He had had sight of the appellant's Home Office case file and reports from the Probation Service and Prison Service. The risk assessment showed that the appellant had been diagnosed with schizophrenia which was controlled by medication he was taking. Advice had been received from the prison that the appellant's psychiatric disorder did

not indicate a potential risk and he was fit to be removed. The witness statement continues:

> "In reaching a decision I accepted that [the appellant] suffered from schizophrenia, I also considered that his condition was controlled by medication and that he was detained in a prison and not a secure unit, and while serving his custodial sentence [the appellant] had had only one adjudication in 2004.
>
> I understood that if [the appellant] was considered in need of treatment in a mental health secure unit, this would have been arranged under the Mental Health Act but had not been. The fact that this had not happened led me to believe that while a relevant factor, this meant that he was currently mentally stable and could therefore be detained under immigration detention given the other factors involved."

20. In the final paragraphs of his statement Mr Lambert pulls the threads together in this way:

> "Ultimately, I took the view that because removal was imminent, and because his mental health was being adequately controlled by medication (added to the other factors I have mentioned), detention in his case was appropriate.
>
> I also considered alternatives to detention, such as temporary release or bail with or without electronic monitoring. However, given his background and the prospect of his imminent removal – I was aware that removal directions were in place for 21 April 2006 – my view was that [the appellant] could be detained for a reasonable period to effect his deportation. Taking into account all the facts of the case known to me I decided that [the appellant] should be detained under the Act to effect his deportation to Jamaica. I authorised detention on 15 February 2006."

21. The reasons given in that witness statement are generally fuller than those to be found in the contemporaneous documents, though they also suffer from one material omission, relating to the risk of absconding. An undated and unsigned minute of a decision to detain the appellant referred to the appellant's mental illness in terms consistent with those in the witness statement but also considered factors relevant to the risk of absconding, noting *inter alia* that there were "no factors in this case that would provide him with an incentive to remain in contact with the Home Office if released" but that there was no known evidence of previous absconding or of failure to comply with conditions of temporary admission or release or immigration bail. On the other hand, a decision letter dated 15 February 2006 from the Home Office to the appellant (signed by someone other than Mr Lambert) made no reference to the appellant's mental illness but dealt expressly with the risk of absconding:

> "**It has been decided that you should be detained because:**

> You are likely to abscond if given temporary admission or release.
>
> Your removal from the United Kingdom can be effected within a reasonable time scale.
>
> **The decision to detain you has been reached on the basis of the following factors:**
>
> It is noted that you are married to a British Citizen and have 3 children who are currently resident in the United Kingdom. Your marriage is no longer subsisting however you have maintained contact with your children whilst you have been in custody. You have failed to provide a suitable release address and evidence that the owner/occupier of that address would be willing and able to accommodate you.
>
> You have previously failed or refused to leave the United Kingdom when required to do so. You entered the United Kingdom on 16 January 1989 and were granted leave to remain as a visitor for 6 months. You overstayed your leave and failed to embark from the United Kingdom. Nothing further was heard from you until March 1992 when you made an application to the Home Office for leave to remain as a spouse of a British Citizen."

Neither the minute of decision nor the decision letter contained any explicit reference to the policy, though the factors listed in the minute of decision reflected many of those set out in paragraph 38.3 of the policy as factors to be taken into account when considering the need for detention.

22. It seems to me that the witness statement and contemporaneous documents need to be read together in order to obtain a complete account of the reasons for the initial decision to detain. None of them is entirely satisfactory in itself but there is no inconsistency between them and there is no basis for discounting the later statement as containing *ex post facto* reasoning in support of a decision taken on different grounds. As explained below, this accords with the approach taken by Bean J.

23. I need say very little about the content of the monthly reviews of the appellant's detention, to the extent that such reviews were undertaken. The reviews indicated that it had been decided that the appellant should remain in detention to effect his removal from the United Kingdom, and that the decision had been reached on the basis of the fact that he had exhausted all his rights of appeal and his removal was pending, and that he had previously failed or refused to leave the United Kingdom when required to do so. The considerations taken into account from February 2007 included, in addition, further issues concerning the appellant's medical condition and the problem of securing revalidation of his emergency travel document by the Jamaican High Commission, but the assessment continued to be made that he could be removed within a reasonable time scale.

Discussion

24. The appellant's case before Bean J was that the detention was contrary to the policy because, in summary, (a) the reason for detention was simply that removal was thought to be imminent, which is not an adequate reason under the policy, and (b) the appellant fell within paragraph 38.10 of the policy by reason of his mental illness, and there were no "very exceptional circumstances" to justify his detention.

25. The first way in which the case was put was based in part on the passage in Mr Lambert's witness statement in which he said that detention was normally justified when removal was imminent and that he took the view that the appellant's detention was justified as he considered that removal was imminent. But there was a further point that, even if the risk of absconding was also taken into account, it did not justify detention pending removal. The judge dealt with the argument as follows:

> "14. Despite the inept wording of Mr Lambert's statement, I accept the submission of [counsel] on behalf of the Defendant that the decision maker had in mind both the risk of failure to comply with any conditions attached to the grant of temporary admission or release (that is to say of absconding) and what was thought to be the imminence of removal.
>
> 15. Mr Hugh Southey, for the Claimant, submits that there was no strong evidence of a risk of absconding, since the Claimant had been released from his sentence of imprisonment; it was therefore clear, counsel submits, that the Secretary of State accepted that the Claimant could be trusted to comply with the conditions of his licence. But I do not regard the notional release from the sentence of imprisonment as incompatible with a view that the Claimant was likely to disappear if given temporary admission or release from immigration detention as well. The decision set out in the letter of 15 February 2006 was in my judgment a rational one, even on the basis of the history enumerated in the letter. If the decision maker had addressed his mind to the full facts of the Claimant's history, including the incident of obtaining a passport by deception and trying to leave the country with a false passport, the basis for a conclusion that the Claimant was likely to abscond or disappear would have become even stronger."

26. In his skeleton argument for this appeal, Mr Southey QC continued to rely on the wording of Mr Lambert's witness statement as indicating that the decision to detain was taken simply on the basis that detention was justified when removal was imminent. Mr Southey did not press the point in his oral submissions but he did not abandon it. In my view the point is a bad one and the judge was right to reject it. I have already said that the witness statement and contemporaneous documents must be read together. The decision letter makes clear that the decision was based not on the mere imminence of removal but on the view that, because of the risk of absconding if the appellant were given temporary release, his detention was necessary in order to effect removal. Although the point is not spelled out in Mr Lambert's witness statement, it fits with what he says about having been well aware of the policy and

having taken into account the factors set out in paragraph 38.3 of the Operational Enforcement Manual.

27. Mr Southey also took issue with the judge's finding that, having regard to the risk of absconding, the decision was a rational one. There were two aspects to this line of argument. The first was one of principle, that the judge was wrong to analyse the matter in terms of the rationality of the decision to detain: the court is not limited to applying a *Wednesbury* test but is required to act as primary decision-maker in deciding on the evidence before it whether detention was in accordance with the policy. The second was case-specific, that the judge was wrong on the facts to find a strong risk of absconding.

28. I can deal shortly with the second point. It is based largely on the parole assessments that if the appellant was released early from prison he could be supervised satisfactorily within the community and was likely to comply with reporting and other conditions of his licence; and it is submitted in any event that the decision to release him early would not have been taken unless the Secretary of State was satisfied that he would comply with his licence conditions. That is said to militate strongly against the view that he was at risk of absconding. The judge was in my view correct to reject the argument. The parole assessments did not factor in the decision to deport the appellant or the incentive to abscond arising from that decision and the imminence of deportation. The actual decision to release him early from prison was taken, as I have said, in conjunction with, or in contemplation of, a decision to detain him thereafter under the 1971 Act (subject, of course, to the possibility of his applying for immigration bail). There was good reason, both in his immigration history and in his criminal antecedents to which the judge referred, for the view that he was at risk of absconding if he was not detained under the 1971 Act following his release from prison.

29. Mr Southey's submission that the judge was wrong to apply a *Wednesbury* test in determining the lawfulness of the decision to detain the appellant requires somewhat fuller consideration:

    i) It is common ground that the *construction* of the policy is a matter for the court rather than being subject to a *Wednesbury* test (see, for example, *R (MD (Angola)) v Secretary of State for the Home Department* [2011] EWCA Civ 1238 at [12]). But on this aspect of the case, unlike the issue considered next concerning the application of the policy to those with a mental illness, no question arises as to the construction of the policy: it is not contended here that the decision-maker misunderstood the meaning of the policy.

    ii) It is also common ground that the power to detain is limited by the *Hardial Singh* principles, in particular that detention is lawful only if it is for a reasonable period, and that it is for the court itself to determine whether a reasonable period has been exceeded. This was spelled out in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, most clearly by Keene LJ at [71]-[75]. Although Mr Southey placed considerable weight on that authority, it does not appear to me to be directly in point since the reasonableness of the period of detention and the application of the *Hardial Singh* principles are not in issue here.

iii) Subject to the limits imposed by the *Hardial Singh* principles, the power to detain is discretionary and the decision whether to detain a person in the particular circumstances of the case involves a true exercise of discretion. That discretion is vested by the 1971 Act in the Secretary of State, not in the court. The role of the court is supervisory, not that of a primary decision-maker: the court is required to review the decision in accordance with the ordinary principles of public law, including *Wednesbury* principles, in order to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by the statute.

iv) That accords with the approach taken in *R (OM) v Secretary of State for the Home Department* [2011] EWCA Civ 909. In that case the detention was held to be unlawful for failure to take into account the paragraph of the then current policy relating to mental illness, but the court held that if due consideration had been given to the policy the appellant could and would lawfully have been detained and that she was entitled only to nominal damages. In my judgment, with which Ward LJ and Hughes LJ agreed, I said at [24] that the question whether the appellant *could* lawfully have been detained was a matter of legal assessment which had two separate strands to it:

> "The first, concerning the policy itself, depends on normal *Wednesbury* principles: would it have been open to a reasonable decision-maker, directing himself correctly in relation to the policy, to detain the appellant in the circumstances of the case? The second requires the lawfulness of continued detention to be assessed by reference to *Hardial Singh* principles."

Although that analysis was applied in a context where detention had already been found to be unlawful and the issue was one of damages, I can see no basis for adopting a different approach when determining whether the initial decision to detain was itself a lawful one. Mr Southey was not able to point to any sensible point of distinction.

v) I accept that there are observations in the judgment of Black LJ in *Anam v Secretary of State for the Home Department* [2010] EWCA Civ 1140 (a case considered further below in relation to the issue of mental illness) that run counter to the views I have expressed. In particular, at [77], Black LJ took a broader view of what was said in *R (A) v Secretary of State for the Home Department*, treating it as "binding authority that the court must assume the role of primary decision maker when considering the lawfulness of detention rather than simply reviewing the decision of the Secretary of State along traditional public law lines", and she went on to indicate that this involved the court "attaching appropriate weight in its deliberation to matters such as government policies, risk assessments, and the evidence as to likely time-scales for the deportation of the individual". All this arose in the context of deciding on the correct approach of the court to determining the lawfulness of detention in circumstances where the decision-maker had failed to have regard to the published policy. The other members of the court (Longmore LJ and Maurice Kay LJ) agreed with Black LJ's conclusion that the appeal should be dismissed but gave reasons of their own for that conclusion. In any event, the

decision pre-dated the decisions of the Supreme Court in *Lumba* and *Kambadzi*, and it appears from *R (Moussaoui) v Secretary of State for the Home Department* [2012] EWHC 126 (Admin) at [98] that the appeal in *Anam* was re-opened following those decisions and that the appeal was then allowed. Although that may not directly undermine what Black LJ said in *Anam* about the role of the court as primary decision-maker, it does suggest the need to approach the case with a degree of caution.

vi) Our attention has also been drawn by counsel to the judgment of the Court of Appeal in *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521, handed down after the hearing of the present appeal. The case related to the appellant's detention in alleged breach of the policy in paragraph 55.10 of the Enforcement Instructions and Guidance (considered below in the context of mental illness). Applying the principles in *Lumba* and *Kambadzi*, the court held that the detention had been contrary to the policy and unlawful, in that there was independent evidence that the appellant had been tortured and there were no very exceptional circumstances why detention should have been maintained. It was common ground between the parties that the decision on such questions was for the court itself and did not depend on the application of *Wednesbury* principles: see [23] and [26]. The authorities referred to for that proposition were *R (A) v Secretary of State for the Home Department* at [71] per Keene LJ, and *Anam v Secretary of State for the Home Department*, at [77] (mistakenly attributed to Maurice Kay LJ). I have considered both those authorities above. *R (AM) v Secretary of State for the Home Department* does not take the matter any further, since the court proceeded in it on the basis agreed between the parties and did not engage in any reasoned consideration of the point.

vii) Accordingly, I see nothing in the decided cases to cause or require me to depart from the views expressed above or in *R (OM) v Secretary of State for the Home Department*.

viii) In summary, it seems to me that in submitting that it is for the court to determine as primary decision-maker whether detention was in accordance with the policy, Mr Southey has elided the question whether the decision-maker directed himself correctly as to the meaning of the policy (a matter on which the court is the ultimate decision-maker) and the question whether, if so, the decision-maker acted within the limits of his discretion when applying the policy to the facts of the case (a matter in relation to which a *Wednesbury* test applies).

ix) Whilst I have thought it right to set out at some length where I stand on this issue, a decision on it is not necessary for the purposes of the present case. That is because it makes no difference on the particular facts whether the court adopts a *Wednesbury* test or makes its own independent assessment of the justification for detention. I think it plain that, had Bean J thought it necessary to decide for himself whether the appellant's detention was justified in the light of the policy, he would have found that it was: a strong pointer in that direction is given by his observation that the full facts of the appellant's history provided an even stronger basis for finding a risk of absconding than the considerations actually addressed by the decision-maker. For my part, I

not only agree with the judge that the decision was rational but would also have no difficulty in concluding, if necessary, that the detention was justified.

30. All of the above is subject to consideration of the separate issue raised by Mr Southey concerning the implications of the appellant's mental illness, to which I now turn.

31. Mr Southey's case on this issue is that the appellant was at all material times "mentally ill" within the meaning of paragraph 38.10 of the Operational Enforcement Manual and that he should therefore have been considered suitable for detention only if there existed "very exceptional circumstances" to justify it; but no consideration was given to whether very exceptional circumstances existed, and in any event no such circumstances did exist.

32. The term "mentally ill" in paragraph 38.10 was apt to include any form of diagnosable mental illness, and there can be no doubt that the appellant's paranoid schizophrenia was a mental illness within the meaning of the policy. But the question is whether there was an implicit requirement that a mental illness had to attain a minimum level of seriousness before paragraph 38.10 was engaged. There is a line of authority that there was such a requirement.

33. In *R (MMH) v Secretary of State for the Home Department* [2007] EWHC 2134 (Admin), Beatson J was considering the same version of the policy as applies to this case. He took the view at [48] that "it is implicit that, in the reference in paragraph 38.10 to those suffering from serious medical conditions or the mentally ill, there is a level of seriousness required to engage the policy for mental illness as well as for physical medical conditions"; but that did not assist the Secretary of State on the facts, since the decision-maker had failed to engage with the policy or to consider whether the claimant's diagnosis of PTSD was insufficiently serious to bring him within the policy.

34. The same approach was taken by Cranston J in *Anam v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin). He was dealing with a later version of the policy, contained within Chapter 55 of the Enforcement Instructions and Guidance. Paragraph 55.10 included an additional introductory provision to the effect that in Criminal Cases Directorate cases (which *Anam* was) the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. The text that followed, however, was materially the same as in paragraph 38.10 of the version of the policy with which we are concerned in the present case: thus, the list of those who were normally considered suitable for detention only in very exceptional circumstances included "those suffering from serious medical conditions or the mentally ill". Cranston J dealt with the meaning of the policy in this way:

> "51. Paragraph 55.10 provides that those mentally ill are normally considered suitable for detention in only 'very exceptional circumstances'. To my mind the existence of very exceptional circumstances demands both a quantitative and qualitative judgment. Were this provision to stand in isolation in the policy the power to detain the mentally ill could only be used infrequently, and the circumstances would have to have a quality about them which distinguished them from the

> circumstances where the power is frequently used. Otherwise effect would not be given to the requirement that the circumstances not simply be exceptional but very exceptional.
>
> 52. There are two points to be made. The first is that in my view mental health issues only fall to be considered under Chapter 55 where there is available objective medical evidence establishing that a detainee is, at the material time, suffering from mental health issues of sufficient seriousness as to warrant consideration of whether his circumstances are sufficiently exceptional to warrant his detention. [Thus] consideration must be given to the nature and severity of any mental health problem and to the impact of continuing detention on it.
>
> 53. Secondly, the provision that the mentally ill be detained only in very exceptional circumstances does not stand in isolation. The opening part of paragraph 55.10 provides that for Criminal Casework Directorate cases 'the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention' ….
>
> …
>
> 55. The upshot of all this is that although a person's mental illness means a strong presumption in favour of release will operate, there are other factors which go into the balance in a decision to detain under the policy …."

35. Cranston J held that the claimant's mental health issues were such that the policy was engaged but that, in the light of the balancing exercise to which he referred at [55] of his judgment (the detail of which I have omitted) the claimant had not demonstrated that his detention was in breach of the policy. Mr Southey suggested that the point made by Cranston J in [52] about a seriousness threshold for the application of the policy to the mentally ill was affected by the separate provision of the policy relating to the balancing exercise. I disagree. In my judgment, the point about a seriousness threshold was a separate one and is equally applicable to the version of the policy in issue in the present case. It is the same point, more fully expressed, as that articulated by Beatson J in *R (MMH) v Secretary of State for the Home Department*.

36. Cranston J's decision was upheld by the Court of Appeal in a judgment to which I have already made reference ([2010] EWCA Civ 1140). Whilst Black LJ evidently approved of his general approach and, at [81], specifically endorsed what he said at [55] of his judgment about the balancing exercise in cases involving the mentally ill, the point he made in [52] about a seriousness threshold for the application of the policy to the mentally ill did not arise for decision on the appeal, which proceeded on the basis that, as found by the judge, the policy was engaged.

37. In *R (MD (Angola)) v Secretary of State for the Home Department* (also cited above) the Court of Appeal upheld the similar approach adopted in that case by Cranston J towards the application of the policy to those "suffering from serious medical

conditions". The version of the policy under consideration was the same as in *Anam*, namely paragraph 55.10 of the Enforcement Instructions and Guidance. Cranston J had held that a person suffered from an illness if he or she was "significantly affected" by that illness, and that those with a serious medical condition which was "satisfactorily managed" were not suffering from it. Maurice Kay LJ, with whom Arden LJ and Patten LJ agreed, described that construction as essentially correct. He observed at [15] that:

> "… there is no reason why a person whose diabetes or epilepsy is well controlled by medication but who constitutes a significant absconding risk should not be detained for an anticipated short period during which detention is unlikely to have a significant effect on his condition and there are facilities for its satisfactory management".

38. The same reasoning might be thought to apply with equal force to mental illness, but it is fair to say that at [16] Maurice Kay LJ attached significance to the fact that the words "serious medical condition" were qualified in the policy by the words "suffering from", whereas the words "mentally ill" were not. Further, at [17] he noted that with effect from August 2010 paragraph 55.10 had been amended so that the words were qualified in each case by the words "which cannot be satisfactorily managed within detention". In relation to those suffering from serious medical conditions he accepted a submission on behalf of the Secretary of State that the amendment did not constitute a change of policy but represented merely a more explicit statement of existing policy; but he left open whether the same applied in relation to the mentally ill (where the full amended wording referred to "those suffering from serious mental illness which cannot be satisfactorily managed within detention").

39. There have been more recent decisions at first instance following, or at least consistent with, the approach of Cranston J in *Anam* as regards the existence of a threshold of seriousness for paragraph 55.10 to be engaged in relation to the mentally ill, even before the August 2010 amendment of that paragraph: see *R (Moussaoui) v Secretary of State for the Home Department* [2012] EWHC 126 (Admin) at [121]-[122]; and *R (Sino) v Secretary of State for the Home Department* [2011] EWHC 2249 (Admin) at [221]-[224].

40. Mr Southey submitted that the consistent approach of judges in the Administrative Court is wrong and that, in the absence of any authority binding on us, we can and should so hold. In his submission, paragraph 38.10 of the Operational Enforcement Manual (and indeed the successor paragraph 55.10 of the Enforcement Instructions and Guidance prior to the August 2010 amendment) contained no implicit threshold of seriousness in relation to the mentally ill; the mere existence of a diagnosable mental illness was sufficient to bring a person within the scope of the policy and to require the existence of very exceptional circumstances to justify detention. He submitted that the purpose of paragraph 38.10 was to identify categories of person (including for example the young, the elderly and the pregnant, as well as the mentally ill) who for compassionate reasons should not be detained in the absence of very exceptional circumstances, and in this way to set priorities for the use of limited detention facilities. He also suggested that the mentally ill were inherently likely to

find detention difficult and that the absence of any seriousness threshold avoided undesirable uncertainty as to whether the policy was engaged or not.

41. I am not persuaded by those submissions. In my judgment, the construction of the policy adopted in the first instance decisions referred to is correct. I would endorse in particular the way the point was put by Cranston J at [52] of his judgment in *Anam*. It is difficult to see why special provision requiring detention to be justified by very exceptional circumstances should have been made for those with a mental illness that could be satisfactorily managed in detention so that the illness was not significantly affected by detention and did not make detention significantly more burdensome. I acknowledge the contrast in language between "those suffering from serious medical conditions" and "the mentally ill", and that some significance was attached to this contrast in *R (MD (Angola)) v Secretary of State for the Home Department*, but I do not consider that to be a sufficient reason for giving the policy the meaning for which Mr Southey contended. The court in that case was careful to leave open how the policy was to be construed in relation to the mentally ill. I am not impressed by Mr Southey's argument based on the uncertainty involved in the application of a seriousness threshold: a threshold of that kind had to be applied in any event under the original policy in relation to serious medical conditions, and has to be applied to mental illness as well as to medical conditions under the August 2010 amendment to the policy. Although the approach in *Anam* involves reading in a substantial qualification which is not expressed in the original policy, I am satisfied that such a qualification was implicit and gives effect to the true meaning of the policy.

42. I turn to consider the consequences of that construction of the policy for the present case.

43. Bean J referred to what Beatson J had said in *R (MMH) v Secretary of State for the Home Department*, and then set out the relevant passage from Mr Lambert's witness statement, before concluding:

> " I agree with Beatson J that there is a level of seriousness required to engage the policy for mental illness as well as for physical conditions. Otherwise there would be insoluble problems of definition. Some people describe as mental illness what others would simply call depression. I also consider it a highly relevant factor that a condition is satisfactorily controlled by medication, as was the position here. … Moreover in the present case, unlike the *MMH* case, the decision maker did properly engage with the policy."

44. That passage dealt with the matter in short order, but it seems to me that the judge followed *R (MMH) v Secretary of State for the Home Department* as regards the construction of the policy and that he found in substance that the decision-maker had given due consideration to the policy and had reached a lawful conclusion that the policy was not engaged on the particular facts of the appellant's case. I can see nothing wrong with those findings. It is true that neither in Mr Lambert's witness statement nor in the contemporaneous documents is there any explicit consideration of the meaning of paragraph 38.10 or of whether the policy was engaged. There are, however, sufficient indicators to warrant the conclusion that the matter was duly considered and that the policy was found not to be engaged. The witness statement

shows that consideration was given to relevant factors in the context of the policy, including the assessment that the appellant's condition was controlled by medication and that he was currently stable. It is evident that Mr Lambert found nothing in the appellant's condition to militate against detention. If he had taken the view that the policy was engaged, it would have been necessary for him to consider whether there existed very exceptional circumstances justifying detention; and in that event I would have expected the point to be addressed in the statement. The conclusion that the policy was not engaged was rational and accords in any event with the conclusion that I myself would reach on the material before us if it were necessary for the court to act as primary decision-maker rather than to apply a *Wednesbury* test.

45. It follows that the initial detention of the appellant was lawful, as Bean J held.

46. There remains for consideration a point that was raised only peripherally before Bean J and did not feature in his judgment, for the simple reason that it was only brought into focus by the decision of the Supreme Court in *Kambadzi*. I have explained that between February 2006, when the appellant was first detained, and November 2006 there was only one detention review, in July. The policy required monthly reviews. On the reasoning in *Kambadzi*, the failure to carry out regular reviews in accordance with the policy rendered the continuing detention unlawful. The period of unlawful detention can be taken to have run from about April to October inclusive. Mr Southey submitted that a single review in July was not sufficient to render the detention lawful during that period, but he was prepared to accept that the detention became lawful from about November 2006 when regular monthly reviews were resumed.

47. It is not necessary to determine with any greater precision the period of unlawful detention arising from the lack of monthly reviews, since I am satisfied that it gives rise to an entitlement only to nominal damages. That is because there can be no doubt that detention could and would have been lawfully maintained if monthly reviews had taken place. I have already found that the initial detention was lawful. The July 2006 review and the monthly reviews from November 2006 all favoured continuation of the detention, up to the point of the appellant's release on bail in July 2007; and as I have previously indicated, it is not contended that the appellant was detained for a period longer than was reasonable in all the circumstances or that his continued detention was otherwise in breach of the *Hardial Singh* principles. Indeed, Mr Southey did not argue that the failure to carry out regular detention reviews would lead in this case to anything more than nominal damages.

48. Accordingly, I would grant the appellant a declaration that he is entitled to nominal damages of £1 for the period of unlawful detention. Only to that very limited extent do I think that the developments in the law since Bean J's judgment affect the order he made. Save to that extent I would dismiss the appeal.

Lord Justice Kitchin :

49. I agree.

Lord Justice Maurice Kay :

50. I also agree.