Neutral Citation Number: [2019] EWCA Civ 456

Case No: C4/2016/2999

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HH JUDGE ANTHONY THORNTON QC
[2016] EWHC 1579 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2019

Before :

LORD JUSTICE DAVIS
LORD JUSTICE SINGH
and
SIR JACK BEATSON

- -

Between :

THE QUEEN (on the application of ABDUL HAMEED and RASHIDA JABEEN)	**Claimants / Respondents**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant / Appellant**

- -
- -

Mr Robin Tam QC and Ms Julie Anderson (instructed by **Government Legal Department**) for the **Appellant**
Mr Gordon Lee (instructed by **Duncan Lewis**) for the **Respondents**

Hearing date: 6th March 2019

- -

Approved Judgment

Lord Justice Davis:

Introduction

1. This appeal relates to the Asylum and Immigration (Fast Track Procedure) Rules 2005 ("the 2005 Rules") and to the circumstances in which the respondents were detained at Yarl's Wood IRC pending disposal of their appeals under the Detained Fast Track ("DFT") process between 9 July 2013 and 22 October 2013.

2. The judge, HHJ Anthony Thornton QC sitting in the Administrative Court, by judgment handed down on 7 July 2016, among other things declared the 2005 Rules to be unlawful; declared the respondents' detention between 9 July 2013 and 22 October 2013 to have been unlawful; and awarded the respondents substantial damages in respect of such detention, with quantum to be assessed in the County Court if not agreed.

3. It has to be said that the judgment was, unfortunately, produced in circumstances of unsatisfactory overall delay (over 18 months after the hearing date of 15 December 2014). Further, it was produced in, on any view, unsatisfactory procedural circumstances: the judge's reasoning being primarily based on decisions reported after the hearing, without any further oral hearing being directed.

4. Although one ground of the appeal of the appellant Secretary of State is based on assertions of the procedural unfairness involved, the oral arguments before us were, pragmatically, focused on the substance of the judge's actual reasoning and conclusions. It is said on behalf of the Secretary of State that the judgment is unsustainable and cannot stand. On behalf of the respondents, on the other hand, while it is frankly acknowledged that aspects of the judgment were and are "problematic", it is said that the conclusions reached as to wrongful detention can, at all events for the most part, be sustained.

5. Before us the Secretary of State was represented by Mr Robin Tam QC and Ms Julie Anderson, neither of whom had appeared below. The respondents were represented before us by Mr Gordon Lee, who had appeared below. I would like to place on record that the respective arguments advanced to us were excellent.

Factual Background

6. I will set out the factual background relatively shortly.

7. The respondents (whom I will style respectively as AH and RJ) are husband and wife. They both were born in Pakistan: AH was born in 1952 and RJ in 1955. They were married in Pakistan in 1980. It was in due course accepted that they at all times were and are of the Ahmadi faith. As is widely known, there has been significant discrimination against and persecution of Ahmadis in Pakistan.

8. Although initially based in Karachi, AH thereafter, from around 1989 to 2013, worked in various posts in Saudi Arabia, returning from time to time to Pakistan for family visits. For part of that time RJ remained in Pakistan with the children of the marriage but in 2007 she went to live with AH in Saudi Arabia. When his employment ended in

Saudi Arabia they returned to Pakistan on 16 June 2013. On 9 July 2013 they then left Pakistan for the United Kingdom, having valid visitor visas (it appears that they had in fact on previous occasions visited the United Kingdom with valid visas and had on those occasions left in compliance with the visas). On arrival, AH immediately claimed asylum. He did so on the footing of a claimed risk of persecution in Pakistan by reason of his Ahmadi faith. RJ was treated as his dependant. They were both immediately detained and placed in Yarl's Wood IRC. Their cases were assessed as being suitable for the DFT process then extant.

The DFT proceedings

9. AH was substantively interviewed on 19 July 2013. RJ herself claimed asylum on that date. She was then substantively interviewed on 22 July 2013. They by this time had experienced solicitors acting for them.

10. By very detailed decision letters of 24 July 2013 the Secretary of State rejected their claims for asylum. It was accepted that they were of the Ahmadi faith. However, aspects of their accounts – for example, assertions of actual threats and persecution by Mulvis and others – were rejected as not credible or reliable. It was noted that, for example, RJ had lived in Pakistan until 2007 without persecution; and that both had from time to time returned from Saudi Arabia to Pakistan without apparent problem. It was not accepted that AH would have been targeted in Pakistan on his return in June 2013 because of his alleged prominent role in the Ahmadi community in Saudi Arabia. Consideration was given to the guidance set out in the Upper Tribunal decision of *MN and others (Ahmadis) Pakistan CG* [2012] UKUT 00389 (IAC) in refusing the claims. Representations to the effect that their cases should be removed from the DFT process were also rejected by those decision letters.

11. They thus remained in detention.

12. On 26 July 2013 they appealed. On 29 July 2013 they applied for removal of their cases from the DFT process and for an adjournment of the proceedings. It was among other things said (as it previously had been said to the Secretary of State) that further evidence was needed, including translations of documents. That application was refused by a First-tier Tribunal judge (Judge Appleyard) on 30 July 2013.

13. The appeals were heard in the First-tier Tribunal on 2 August 2013. The respondents continued to be legally represented. A further application was made on that occasion to remove their cases from the DFT process and for an adjournment. That was rejected. Both then gave oral evidence through an interpreter. They also produced various documents in support of their claims.

14. The determination of the First-tier Tribunal judge (Judge Herlihy) was promulgated on 5 August 2013. It extended to 67 paragraphs. It is demonstrably a careful and thorough determination.

15. The evidence was fully summarised in the determination as were the objective evidence materials, including the country guidance case of *MN (Ahmadis)*. There was a detailed review of the competing submissions. Full reasons were given by the judge to explain the refusal to adjourn (it being noted that it was by now accepted by the Secretary of State that AH had indeed been involved with Ahmadi organisations in Saudi Arabia).

Having considered the evidence, the judge made adverse credibility findings. The judge, for example, rejected as not credible the respondents' assertions that they had been threatened in Saudi Arabia (causing them to leave) and then threatened again in Pakistan on their return in June 2013. The judge also found that they had not openly practised or manifested their faith in public; nor had they experienced any problems in the practice of their Ahmadi faith. Accordingly, the claim to asylum, and related claims, were rejected.

16. Permission to appeal was thereafter refused by the First-tier Tribunal but was granted by the Upper Tribunal on 13 August 2013. On 19 August 2013 a bail application was lodged; but it was withdrawn on 21 August 2013, the day of the appeal hearing in the Upper Tribunal. By determination promulgated on 6 September 2013, the Upper Tribunal judge (Judge Clive Lane) dismissed the appeals. He upheld the decision of Judge Herlihy to refuse to remove the case from the DFT process and to adjourn. He also found no error of law in the judge's appraisal of the evidence and application of the country guidance.

17. An application for permission to the Court of Appeal was then made. That was refused by the Upper Tribunal. Application was then made to the Court of Appeal itself for permission to appeal. In the event, and following the issue of judicial review proceedings on 21 October 2013, bail was then granted to the respondents on 22 October 2013: by which time AH and RJ had been in detention for 106 days.

18. On 30 October 2013, Sullivan LJ granted permission to appeal on the papers. He took the view that an appeal had a real prospect of success. In his remarks he among other things said: "this is a troubling case". In the result, there was no substantive appeal: because on 27 January 2014 the Secretary of State granted asylum to AH and RJ, with (an initial) five years leave to remain. The reasons given included acceptance of further information since submitted by the Ahmadi Association as to AH's activities in Saudi Arabia. It was concluded that it was not reasonable to expect the respondents to compromise their beliefs by disengaging from their activities with regard to the Ahmadi faith. In consequence, the appeal to the Court of Appeal was (by consent) on 28 April 2014 allowed: it had become academic.

The DFT process and the DA litigation

19. It is convenient here to say something about the DFT process.

20. It is important at the outset to note three particular points:

    (1) First, the administrative power to detain asylum seekers (and others), pending a decision to give or refuse leave to enter, is conferred by statute: see, for present purposes, paragraph 16 of Schedule 2 to the Immigration Act 1971. Such a power is not of itself in any way required to be linked to use of a DFT process.

    (2) Second, there is no objection in principle to use of a fast track process in such a context, albeit appropriate safeguards needed to be in place and to be observed: see *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131 and *Saadi v United Kingdom* (2008) 47 EHRR 17.

(3) Third, the 2005 Rules themselves – to the details of which I do not think, for present purposes, I need refer – essentially relate to the appeal process within the DFT process then applicable. It is right to say, however, that the 2005 Rules are predicated on the appellant in question remaining in detention.

21. For perhaps very understandable reasons, significant concerns have always been raised as to the fairness of the various DFT processes as operated over the years and as to their capacity to produce unfair results or unreasonable periods of detention. These concerns generated a body of litigation: in particular, for present purposes, what before us was styled the "DA litigation": this representing a series of cases brought with regard to the then DFT process by the charity Detention Action.

22. The first of such cases ("DA1") was decided by Ouseley J on 9 July 2014: [2014] EWHC 2245 (Admin). In substance, that decided that the DFT policy guidance in place at the time, and inclusive of the appeal elements in that process, was not of itself unlawful; and that the various identified shortcomings in the operation of the scheme did not connote an unacceptable risk of unfairness save in one respect (a respect which, I add, was not argued to be material to the instant case).

23. That decision was the subject of appeal. The relevant decision of the Court of Appeal ("DA4") was handed down on 16 December 2014: [2014] EWCA Civ 1634. In his judgment, Beatson LJ (with whom Floyd LJ and Fulford LJ agreed) held that detention of an appellant under the DFT criteria after a decision by the Secretary of State and pending appeal was not of itself objectionable in principle: see in particular paragraph 63 of the judgment. However, the published relevant DFT policy guidance failed to meet the necessary requirements of clarity and transparency: see paragraph 70. It was further concluded (obiter) that, on the generic evidence adduced, there was no lawful justification for detaining *all* those within the quick-processing criteria pending disposal of their appeals even where they did not otherwise meet the general detention criteria (risk of re-offending, risk of absconding etc.)

24. Next came DA5, a decision of Nicol J handed down on 12 June 2015: [2015] EWHC 1689 (Admin). The issue in that case was whether the DFT procedures contained in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 – which had in these respects superseded the 2005 Rules – were ultra vires and unlawful. He decided that they were: essentially because they were structurally unfair in that appellants were placed at a serious procedural disadvantage, productive of unfairness, by reason of the stringent and truncated timetable which was imposed by the rules.

25. That decision was upheld in the Court of Appeal on 29 July 2015 ("DA6"): [2015] EWCA Civ 840, [2015] 1 WLR 5341. It was there confirmed that the 2014 Rules were to be regarded as structurally and systemically unfair and inherently unjust: and were ultra vires.

26. DA5 and DA6, whilst decision on the 2014 Rules, clearly had potential implications for the lawfulness of the 2005 Rules. A challenge was duly launched as to their validity and was the subject of decision by Ouseley J on 20 January 2017 in the case of *R (TN (Vietnam)) v Secretary of State for the Home Department*: [2017] EWHC 59 (Admin), [2017] 1 WLR 2595. (The case, with a related case, were taken as lead cases, there

being many other applicants in such a position.) He decided, following and applying DA6, that the 2005 Rules were likewise ultra vires and unlawful.

27. Having so decided, Ouseley J then had to confront the consequences for cases decided by reference to the 2005 Rules. In particular, were decisions of tribunals purportedly made under the procedures laid down in the 2005 Rules themselves necessarily, in consequence, also unlawful? Ouseley J decided that they were not: see paragraph 95 of the judgment. It followed that if any particular previous decision was to be set aside an application for that purpose was first required. Further, even if such a challenge was not precluded by lapse of time or other considerations of the good administration of justice, there still would need to be a basis for holding the particular decision in question to have been unfair, over and above the fact that it was reached under the 2005 Rules: "there is no presumption of unfairness in relation to appeal decisions under the 2005 [Rules]" (paragraph 114).

28. That decision was in turn upheld (in the respects material to the present appeal) in this court on 19 December 2018: [2018] EWCA Civ 2838. In his judgment Singh LJ (with whom Peter Jackson LJ and Sharp LJ agreed) confirmed that tribunal decisions made under the 2005 Rules were not to be regarded as a nullity simply by reason of the 2005 Rules having been declared to be ultra vires. Rather, the ultimate question was whether the procedure in an individual appeal decision was unfair: see, in particular, paragraphs 83 and 90 of his judgment. Whether there was such unfairness would, it was emphasised, depend upon the facts of the particular case: paragraphs 97 and 100 – 104. For this purpose, it was (among other things) necessary to consider whether there was a causal link between the risk of unfairness created by the 2005 Rules and what actually happened in the particular case: paragraph 103.

The Judicial Review proceedings

29. On 21 October 2013 the respondents had applied for judicial review. The decision sought to be challenged was identified in the claim forms as the decision that the respondents should be detained on the basis that their claims could be decided quickly (that is, by the DFT process). A declaration that their detention had been unlawful and damages were claimed. It may be noted that the claims did not seek to say that the entire DFT process and the 2005 Rules were, in principle and by their very nature, unlawful or ultra vires. It may also be noted that the claim was put on the basis that if the detention had not been from the outset unlawful and unreasonable then it had thereafter, at some stage, become so. What was said in the grounds of claim was that compliance with the requisite safeguards needed to justify the decision to detain had not been observed in the circumstances of this particular case: that there had been unreasonable delay in the processing of the respondents' claims; and that it had not been reasonable to conclude that this case could be decided quickly. Immediate release from detention was also sought (and, as I have said, in fact was procured the following day).

30. The claims for judicial review were opposed in their entirety. The matter came on for hearing before Judge Anthony Thornton QC on 15 December 2014. He reserved his decision.

31. Now arises the procedural complexity.

32. The day after the hearing before the judge the decision in DA4 was handed down by the Court of Appeal. In consequence, the respondents lodged further, short, written submissions on 24 December 2015, amongst other things contending that, by reason of DA4, detention under the then published DFT policy guidance could not be justified. By short written submissions in response, the Secretary of State among other things objected that no challenge to the lawfulness of the policy of detaining applicants under the DFT process had been raised in the claim form nor had there been any amendment to include such a claim. It was also said that the Secretary of State in any event could lawfully, and would, have detained the respondents and so they would be entitled to no more than nominal damages.

33. It may be that there was at least some element of delay in those submissions reaching the judge, through administrative error. Be that as it may, without any intervening progress in a judgment being produced in this case, the judgment of the Court of Appeal in DA6 was then published on 29 July 2015. (The DFT process, I add, had by now been entirely suspended on 2 July 2015.) On 25 October 2015 the judge then sought further written submissions on DA6. The parties' respective written submissions were lodged in December 2015. Those of the respondents in substance maintained the stance previously taken. Those of the Secretary of State among other things repeated the lack of any pleaded case challenging the DFT policy guidance or the vires of the 2005 Rules; emphasised that DA6 related to the 2014 Rules (not the 2005 Rules) in any event; and also said that in all the circumstances "it would be inappropriate to address such a difficult issue on the papers a year after oral argument has been concluded".

34. In May 2016 the judge then circulated a draft judgment. Certain amendments were then made to it pursuant to representations of counsel. There was then a hand-down hearing on 5 July 2016. However, it appears that yet further amendments were then mooted and incorporated thereafter, albeit the final approved judgment bears the date of 5 July 2016.

The Judgment

35. In his judgment, the judge fully set out the background and fully dealt with the issue of Ahmadi persecution by reference to the objective materials and included lengthy citation from the country guidance decision in *MN (Ahmadis)* (cited above). (I should add that that decision has itself been the subject of recent modification by the decision of this court in *WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 30: but counsel before us were agreed that had no real bearing for present purposes.) The judge then fully recorded the version of events being put forward by each of AH and RJ; and reviewed the course of the tribunal proceedings.

36. Having done that, he dealt first with the point as to whether the respondents should be permitted to rely on DA4 and DA6. He decided that they should and also decided that no amendment to the pleaded case was needed. In the course of so deciding, he said that the effect of the DA decisions was that "the entire FT process is unfair"; that "the FT procedure is now known to been unlawful from the outset"; and that AH and RJ "have always maintained a claim based on the generic unlawfulness of the FT procedure".

37. The judge then went on to hold that the decision of the Court of Appeal in DA6 was applicable in full in the present case involving the 2005 Rules. The judge, after referring to DA6, stated at paragraph 66:

> "Furthermore, the factual and legal difficulties and the impossibility of adequately and fairly preparing for a FtT appeal were also the same or, possibly, were even more difficult in [AH's] and [RJ's] cases."

He then said this at paragraph 67:

> "67. These similarities can be seen by an examination of a summary of the procedural history that I have set out in detail earlier in this judgment. The following conclusions may be drawn from that summary:
>
> (1) The applications for asylum and for international protection from the faith-based persecution of Ahmadis by state-based action and private zealotry were the subject of the Country Guidance case of **MN** that had been promulgated only 9 months previously. Despite that detailed guidance, which the interviewers, decision-makers and FtT and UT judges deciding the appeals in this case all stated that they had had in mind, the salient requirements identified by the guidance were ignored. The failure is highlighted by the reasoned decision of Sullivan LJ in granting Abdul and Rashida permission to appeal the UT decision to the Court of Appeal. The failure at each previous level of decision-making occurred because of the rushed timetable imposed on each decision-maker by the FT Rules which prevented adequate evidence-gathering, submission drafting, preparation, presentation, consideration and decision-making by all concerned.
>
> (2) The adverse decisions that were made at each level below the Court of Appeal were all based on a minute examination of inadequately prepared secondary parts of Abdul's and Rashida's cases leading to questionable adverse credibility findings which should not have been but were determinative of each decision.
>
> (3) The inadequate preparation of all the required evidence, including the evidence relied on by the decision-makers, occurred through no fault of Abdul and Rashida or of their legal representative. Indeed, the work of their legal representative in preparing and conducting procedure, for an adjournment, for bail and for temporary admission were of an exceptionally high standard. This was particularly so given the impossibly short timescales and exceptionally difficult working conditions governing all of that representative's work. These arose as a result of the decisions taken by the SSHD on 9 July 2013 and not subsequently revoked that Abdul's and Rashida's asylum applications would be dealt with under the FT Rules."

38. Having so stated, the judge went on say this at paragraphs 68 - 71:

> "68. **Conclusion.** The applicable FT Rules were systematically unfair and unlawful due to the inability that they created of a hearing in the FtT or the UT that provided minimum acceptable standards of fairness and which enabled Abdul's and Rashida's cases to be presented fairly and adequately and to be decided following an appropriate consideration of all available evidence.
>
> 69. Moreover, the manner in which their cases were considered and the procedure adopted for their cases by both the FtT and UT was such that, even if the FT Rules were not systemically unfair, they operated in their particular cases so as to prevent them from obtaining a fair hearing.
>
> 70. It follows that their asylum applications were referred to a decision-making process that was inherently flawed in all its principal respects and that that process was unlawfully applied and operated. Thus, their asylum applications were never lawfully considered with the result that neither Abdul nor Rashida could or should have been removed or deported from the UK unless and until decisions had been taken following appropriate and lawful consideration of their asylum claims had occurred.
>
> 71. The overall conclusion is that no part of the period of their detention was lawful insofar as it was based on their likely removal from the UK within a reasonable timescale. This was because any lawful consideration of their asylum applications would have taken far longer to resolve than they could lawfully have been detained for. It also follows that they are entitled to substantial and not merely nominal damages."

39. As to the argument that the respondents had properly been assessed as absconding risks and that a sustainable decision had been made that removal could be achieved within a reasonable time and so their detention was in any event justified and lawful, the judge trenchantly said this:

> "73. **Discussion.** These submissions are unsustainable for these reasons:
>
> (1) The FT procedure was imposed on their arrival in the UK on 9 July 2013. The timescales started to run from that date. Had it been appreciated, as it should have been, that the FT procedure was both inappropriate and systemically unlawful, the ordinary procedure applicable to asylum applications would have applied. Subject to there being a risk that Abdul and Rashida would abscond, that procedure would inherently have taken longer than the maximum lawfully permissible period of detention pending removal.
>
> (2) The only other basis for detention that was asserted was that each was an absconding risk. However, both Abdul and Rashida

> had claimed asylum as soon as they arrived at Birmingham airport, both had completely unblemished immigration histories, both were on any considered basis honest and reliable individuals claiming asylum for faith-based reasons and both had reliable friends, potential sureties and accommodation who were all apparently available to them.
>
> (3) No structured risk assessment of their absconding risk was put in evidence and, by inference, was never carried out.
>
> 74. **Conclusion.** No alternative basis for lawfully detaining Abdul and Rashida for any part of the period between 9 July and 22 October 2013 has been made out. Indeed, there was no such lawful basis."

Having so stated, he rejected any suggestion that at least some part of the period of detention was lawful. He in terms found that no part of the period of detention was lawful.

40. In the sealed order drawn up in consequence of this decision the following was declared in paragraphs (1) – (4):

> "(1) The Detained Fast Track process as constituted between the 9th July 2013 and 22nd October 2013 is unlawful.
>
> (2) The Asylum and Immigration (Fast Track Procedure) Rules 2005 are unlawful.
>
> (3) The Claimants' detention between 9th July 2013 and 22nd October 2013 was unlawful and the Claimants are entitled to substantial damages for this period of detention.
>
> (4) The Claimants' detention was in any event unlawful between the 9th July 2013 and 22nd October 2013 as their claims were not suitable for the Detained Fast Track process for the reasons set out at paragraphs [70 – 72] of the Judgment."

41. Permission to appeal from that decision was thereafter granted by Underhill LJ. It was subsequently directed that this appeal should come on for hearing after the decision in the *TN (Vietnam)* appeal.

Disposal

42. That being the background I propose to deal with matters relatively shortly.

43. I am in no real doubt but that this appeal has to be allowed.

44. It was, on any view, unfortunate that this case was ultimately decided – nearly 18 months after the hearing – to a considerable extent in reliance, or purported reliance, on the subsequent decisions in DA4 and DA6 without a further oral hearing and without full submissions, tested in argument, on such matters. This was particularly unfortunate when it is to be gathered that the judge must have had it in mind to declare the 2005

Rules unlawful: as he ultimately did so declare. But Mr Lee had never, either in his pleaded case or in his short written submissions lodged after the hearing, sought such a (generic) outcome (he instead, understandably, concentrated on the circumstances of the instant case). Moreover such a declaration as to the 2005 Rules would potentially have been of very great importance for many other cases. It matters not for this purpose that subsequently Ouseley J – on far fuller argument than the judge in the present case had received – reached the same conclusion in the *TN (Vietnam)* case. The point is that such an issue called for the fullest written and oral arguments before the judge. That never happened.

45. I do not, however, decide the outcome of this appeal simply on procedural grounds. In fact, as I have said, Mr Tam, did not really press the procedural points in oral argument (whilst by no means withdrawing his criticisms); and we also did not hear full oral argument from Mr Lee on those procedural points. But at the very least this was an unsatisfactory way for so important a point to be decided as it was.

46. In the event, it may be that the lack of full argument (through no fault of counsel) contributed to what I consider were, with respect, substantive errors in the judge's reasoning and approach: errors which resulted in conclusions which, in my judgment, cannot stand.

47. The first point is that the judge evidently thought that because, as he concluded, the 2005 Rules were systemically unfair and were unlawful it necessarily followed that the tribunal decisions themselves were unlawful: see, for instance, paragraph 68 of his judgment. Moreover, he then further moved on from that to presume that detention from the outset likewise was also unlawful. That approach of the judge, as Mr Tam put it, "infected" the whole of his judgment. But it was wrong in at least two important respects. First, the subsequent decisions of Ouseley J and of the Court of Appeal in *TN (Vietnam)* have established that the unlawfulness of the 2005 Rules did *not* mean that decisions made under those 2005 Rules were also necessarily unlawful: rather, each such case was fact specific. Second, and as should have been clear from the decision in DA4, handed down the day after the hearing in this case, the Court of Appeal in DA4 had not sought to say – indeed it would not have been entitled to say in the light of the decisions in *Saadi* (cited above) – that *any* DFT process is in principle legally objectionable (which is virtually the position the judge took). To the contrary, the Court of Appeal confirmed that there was no objection in principle. Indeed, the court's decision, on its evaluation of the then extant DFT policy guidance, related only to the position at the appeal stage: it thus did not purport, for instance, to extend to the prior initial decision to detain. But in places the judge seems to approach matters on the basis that *any* DFT process (and any detention thereunder) is in all respects objectionable: which is wrong.

48. As to the first point, it is true that, in paragraph 69 of his judgment, the judge did in some respects purport to address the specifics of this case in terms of the fairness of the procedure adopted. But his conclusion was in such bald terms, without any supporting reasons or explanation or any sufficient analysis of the evidential position as it then stood, as not to withstand scrutiny.

49. In fact, as it seems to me, the judge's approach throughout appears to operate almost entirely at a level of hindsight and without any, or any obvious, reference as to how things could reasonably be perceived to be at the time. In particular, it pays scant, or

even no, regard to the initial judicial decisions of two judges of the First-tier Tribunal to refuse to take the appeals out of the DFT process or to grant an adjournment. It also seems to pay no real regard to the carefully considered determination of Judge Herlihy – a determination reached in the light of all the evidence then adduced, including the oral evidence of the respondents: evidence which, in material respects, was rejected by Judge Herlihy as not credible.

50. The judge at all events nowhere really explained just how the adoption of the DFT process ought to have been seen at the time to prevent a fair hearing in this particular case. It is true that – no doubt in the light of the observations of Sullivan LJ in granting permission to appeal to the Court of Appeal and also in the light of the further representations (in particular based on points since made by the Ahmadi Association) – the Secretary of State did indeed decide on 27 January 2014 to accord asylum status to the respondents. But that did not of itself show that, as matters stood and were reasonably perceived at the time, the use of the DFT process in this case was necessarily unfair and unlawful. In essence, the judge in this regard had for the most part simply relied on his conclusions as to the generic unfairness of the 2005 Rules to sustain his ultimate conclusions.

51. Moreover, it seems, doubtless because of his view that the unlawfulness of the 2005 Rules rendered invalid all decisions made and steps taken under those rules (including, by implication, detention), that the judge nowhere distinguished between the period of detention antedating the decision of the Secretary of State to refuse asylum (and the initiation of the appeal process in consequence) and the period of detention occurring in the period after the Secretary of State's decision on asylum and pending appeals. As I have said, DA4 and DA6 simply did not have the width the judged ascribed to them in this respect. But that also, as I see it, is very problematic in terms of the judge's whole approach.

52. There are other problems as well.

53. Thus the judge's pronouncement in paragraph 69 of his judgment to the affect that the 2005 Rules had operated in the respondents' cases as to prevent them from obtaining a fair hearing had, as I have already indicated, in effect involved him, on a hindsight basis, substituting his own view for the views of the Tribunal judges. Moreover, he did so without giving any real reasons as to why they had been disentitled from ruling as they did, on the evidence before them, in refusing an adjournment.

54. The same can be said, as I see it, of the judge's findings expressed in paragraphs 67(1) and (2) of his judgment. He pronounced, without any real reasons, that all involved – including First-tier Tribunal and Upper Tribunal judges – had "ignored the salient requirements" of the *MN* country guidance decision. This criticism is in my opinion wholly unfair both to Judge Herlihy and to Judge Clive Lane, who had demonstrably considered such guidance and had given full and carefully reasoned judgments to explain their ultimate conclusions: and certainly the decision in *MN* nowhere is to the effect that *all* Ahmadis are necessarily at risk of persecution in Pakistan. The same is also to be said of the judge's pronouncement that those tribunal decisions were made by reference to "inadequately prepared" parts of the case leading (as the judge said) to "questionable adverse credibility findings which should not have been but were determinative." Here, too, the judge – again seemingly on a hindsight basis – simply

substituted his own views for those of the Tribunal judges: indeed, had done so when he had not himself even heard the oral evidence.

55. It is also, to my mind, in this regard most surprising that the judge felt able to say, as he did say in paragraph 73(2) of his judgment, that AH and RJ were "on any considered basis honest and reliable individuals claiming asylum for faith-based reasons". That might perhaps be capable of being said in the light of the reasons given for the eventual grant of asylum in January 2014. But it cannot be so readily said, as matters stood in 2013, in the light of the reasoned adverse credibility findings first of the Secretary of State in the decision letters of 24 July 2013 and then of Judge Herlihy.

56. Mr Tam nevertheless accepted that this court was in no position itself to determine the issue of wrongful detention. His case has always been that, in the light of the judge's erroneous overall approach, the whole matter should be remitted to the Administrative Court for a fresh hearing: where proper and appropriate findings could be made in the context of a properly directed legal approach. I agree with him.

57. Mr Lee in the course of his excellent submissions – submissions which were further enhanced, I might add, by being presented in a thoroughly measured and even-handed way – frankly acknowledged that there were indeed problems in many aspects of the judge's reasoning. As he also acknowledged, the judge's conclusion (that the 2005 Rules were ultra vires and unlawful and in consequence that all decisions made pursuant to the DFT process in accordance with such rules were necessarily also unlawful) was not a conclusion which Mr Lee himself had at any stage sought to advance before the judge.

58. Mr Lee, however, said (albeit he had put in no Respondent's Notice to this effect) that the judge's overall conclusion as to wrongful detention could, on the facts of this case, be sustained at all events for the period after the decision to refuse asylum had been made and the appeal process initiated. He submitted that it was wholly unreasonable for the Secretary of State to have concluded that the appeals could be dealt with sufficiently quickly and wholly unreasonable for the respondents then to have been kept in detention. Demonstrably there was no risk of offending; and there was, he further said, no reasonable basis for concluding that there was a risk of absconding either. He maintained that the judge's findings were at least sufficient in this respect. He emphasised, in this regard, that the initial detention decision and initial detention reviews nowhere alluded to a risk of absconding: rather, the detention was justified in effect simply by reason of the assignment of the respondents' cases to the DFT process. He further emphasised that the Court of Appeal in DA4 had held that the then extant DFT policy guidance was unlawful for lack of transparency and clarity; and (obiter) had also stated that a policy whereby all those within the DFT process were to be detained, even where they did not fulfil the general detention criteria (risk of re-offending or absconding etc), could not be justified. He thus submitted that, on the principles of *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 24, the respondents were entitled to damages for wrongful detention accordingly.

59. I understand the argument. But I do not think that it can prevail, in the circumstances of this case, for the purposes of determining the proper outcome of this appeal. It would not, in my opinion, be appropriate for this court to accede to Mr Lee's suggestion that at least it should uphold the judge's decision in so far as it related to detention after the

decision on asylum had been made and the appeal process initiated. It would not be appropriate for a number of reasons.

(1) First, it is unsatisfactory for there to be one adjudication for one part of the overall detention period and a second and separate adjudication for the other part or parts.

(2) Second, the question of when (if at all) the detention became unlawful needs to be considered at various stages throughout the detention period. Indeed the Secretary of State in the court below had complained that the respondents had never precisely identified a date from which the detention was said to have become unlawful.

(3) Third, Mr Lee's argument was predicated on there not being any risk of absconding which could justify detention and on there being no proper consideration or application of the general detention criteria. But while it seems to be the case that, prior to the decisions refusing asylum being made and the appeal process being initiated, the risk of absconding did not appear in the UK Border Agency documentation relating to detention, there *do* appear (on and after 24 July 2013) in the 1S.91R forms provided to the respondents notifications that they were assessed as likely to abscond: one reason given (among others) for that assessment being lack of close ties sufficient to make it likely they would stay in one place. Moreover, by that time their claims had now been rejected as not credible. Mr Lee mounted a strong attack on that assessment as to risk of absconding and on the stated reasons given for it. Suffice it to say, however, that such matters are, in my view, much better left to the first instance appraisal of a judge of the Administrative Court in the light of the evidence taken as a whole.

Conclusion

60. I therefore would allow this appeal by the Secretary of State. I would set aside the Order of the judge. The judicial review claims of AH and RJ are to be remitted for a fresh hearing in the Administrative Court, to be heard by a puisne judge of the High Court. It will be for that judge to decide whether there has been any unlawful detention and, if so, it will be for that judge to decide the period of such unlawful detention. It will further be for that judge (depending on whether unlawful detention is found to have occurred) to decide whether substantial damages are payable and, if so, in what amount.

61. The parties should seek to agree, and then lodge, an appropriate Minute of Order accordingly.

Lord Justice Singh:

62. I agree.

Sir Jack Beatson:

63. I also agree.