Neutral Citation Number: [2021] EWHC 1698 (Admin)

Case No: CO/1545/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: June 24th 2021

Before :

CLIVE SHELDON QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between :

R (on the application of MANJIT SINGH)	**Claimant**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Graham Denham (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Nicholas Ostrowski (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: June 9th 2021

- -

Approved Judgment

Clive Sheldon QC (sitting as a Deputy Judge) :

1. The Secretary of State for the Home Department wishes to deport the Claimant, Manjit Singh, to India. The Claimant has been detained in immigration detention at Wormwood Scrubs prison since 19 December 2019; a period of just under 18 months by the time of the hearing before me. The Claimant has previously challenged the lawfulness of his detention. By judgment dated 26 January 2021 ([2021] EWHC 158 (Admin)), Holman J. held that the Claimant's detention at that point in time was lawful, but the learned judge stated that the Secretary of State had to keep the Claimant's case under "very frequent review, applying anxious scrutiny". In fresh proceedings for judicial review, the Claimant challenges the lawfulness of his ongoing detention, and asks the Court to order that he be released from detention by way of interim relief. The Claimant also seeks permission to apply for judicial review.

2. I heard counsel for the Claimant (Mr. Denholm) and counsel for the Defendant (Mr. Ostrowski) at a hearing in open court on 9 June 2021. At that hearing, I was informed that a video interview between the Claimant and a member of the RLO (Returns Logistics Office) team in the British High Commission in India which had been arranged for the previous day had not gone ahead due to the Claimant having to attend an out-patient hospital appointment. A back-up date for that interview had previously been arranged for 11 June 2021, two days after the hearing before me, and there was no indication that that interview would not go ahead. It seemed to me that rather than make a decision on interim relief which included speculation as to what might take place at the interview on 11 June 2021, the Court would benefit from understanding what had actually taken place at that interview before reaching a final decision on the application for interim relief. This was especially so, given that the test for the Court involves a forward-looking assessment as to the prospects of the Secretary of State being able to remove the Claimant to India and the likely timescale for his removal.

3. Accordingly, I informed the parties that, based on the detailed arguments that I had already heard, I would be minded to grant permission for judicial review, but would give them both an opportunity to update the Court as to what had transpired at the interview (if it went ahead) and what impact that had on the prospects of removal, before making a decision as to interim relief. As explained below, the interview did not actually go ahead. The interview is now due to take place at the end of July 2021.

Factual Background

4. The detailed factual background to this matter is set out in Holman J's judgment at paragraphs 7 to 16:

> "7 The claimant is aged 37. He appears to originate from India, where he was brought up and lived until around the age of 20, and he appears to be a citizen of India, but he does not possess a passport. He first came to the attention of the Home Office in April 2008 when he was arrested on suspicion of being an illegal entrant. He stated then that he had entered the United Kingdom the previous year, namely in 2007. He has on other occasions stated that he entered in 2004 or 2005. When he was arrested he was granted temporary release subject to reporting conditions. In breach of those conditions, he failed to report, and his

whereabouts were unknown until January 2014, namely almost six years later, when he was again encountered and arrested on suspicion of overstaying. So that was his first absconding, of almost six years' duration. In January 2014 the claimant was again released and again absconded. So that was his second absconding.

8 In May 2014 the claimant was arrested on suspicion of a serious sexual offence. On 15 December 2014 he pleaded guilty to, and was convicted of, sexually assaulting a 16-year old by penetration. On 23 January 2015 he was sentenced to four years' imprisonment, which I regard as indicating that the facts and circumstances of the offence were serious. He was required to sign the Sex Offenders' Register indefinitely. Also in January 2015, the claimant was convicted of common assault and sentenced to 14 days' imprisonment. So that was a second offence against the person, although of much less gravity.

9 In April 2016 the SSHD [Secretary of State for the Home Department] served a deportation order upon the claimant, which subsists. The claimant had applied for asylum, but his claim was rejected at the same time and he has not appealed from that decision.

10 On 6 July 2016 the claimant was released from his criminal sentence. But he was immediately detained under immigration powers until 21 June 2018, when he was released to approved premises. He failed to attend or remain at those premises, and he failed to report to the Probation Service, as had been required, and he disappeared again until 6 August 2019, when he was encountered and arrested. So that was his third absconding, of about 13 months' duration.

11 On 13 September 2019 the claimant was convicted of, and sentenced to 8 months' imprisonment for, failing to comply with his sex offender notification requirement. That was his third criminal conviction, and the offence, which was serious, indicates a disregard for reporting requirements and the criminal law which, in turn, increases the risk of future absconding if released. The custodial term of that criminal sentence ended on 19 December 2019, since when, as I have said, the claimant has been detained at Wormwood Scrubs Prison under immigration detention powers. Immigration bail has been refused by tribunal judges on 31 December 2019, 11 June 2020 and 26 November 2020.

12 There appears currently to be only one obstacle to removal, namely the absence of an ETD [Emergency Travel Document] for entry into India. The claimant does not possess a passport. There has been reference in the documents and, indeed, in the skeleton argument of Ms Hirst at paragraph 65, to the non-

availability or paucity of flights to India as a result of the COVID-19 pandemic. The very recent witness statement of Mabs Uddin, an assistant director of returns logistics and head of the Asia country liaison team (which includes India) in the Croydon office of the Home Office, satisfies me that if an ETD is obtained there are, currently, some regular flights to India, and both voluntary and enforced returns are currently being effected. There would, of course, be requirements as to a very recent negative COVID test which (if positive) could, at the last minute, derail a planned return, but the SSHD, who is keen to deport this person, would obviously facilitate and fund the providing of the necessary test or tests, and in my view, neither the relative paucity of flights nor any issues around the need for COVID tests impact upon the current reasonableness of the past or any further future detention.

13 The problem and obstacle is the ETD. If and when that is obtained the claimant is likely to be removed rapidly. The process of trying to obtain an ETD has undoubtedly been protracted for several reasons, some of which are not the responsibility of the claimant, but others of which are or may be. A file note dated 14 January 2020 . . . records that the claimant refused or declined to complete the required form. However, on or about 18 April 2020 . . . he did do so. Unfortunately (and certainly not the responsibility of the claimant), that form was returned by the Indian authorities on the grounds that the photograph was not of acceptable quality. A further form was returned by the Indian authorities as being a copy, not an original. Finally, on 14 September 2020, an application was submitted which lacked these formal defects.

14 In these forms, including that submitted on 14 September 2020, the claimant gave as his permanent address in India "39, 8 Anjala Road, Kennedy Avenue, Amritsar, Punjab 143001". On 7 December 2020, the Indian High Commission notified that the address provided on the form was "not correct" and that the identity of the claimant had not been verified. Faced with this, the claimant gave a different "permanent address in India", namely, "Raja Sansi Road, Amritsar, Punjab 143001". The postcode or ZIP code, 143001, remains the same, but the name of the road appears to be quite different. This new address is the address contained in the further application form finally signed by the claimant on 22 January 2021, as I will describe below. I appreciate that it may be as long as about 17 years since the claimant was last in India. At that time, roads and addresses may have been imprecisely defined; and/or the memory of the claimant may have become genuinely confused with the long passage of time. So I do not conclude that the claimant has deliberately supplied a false address or addresses. But the fact remains that he has now provided two, and it appears unlikely

> that both are right. There may or may not be fault or non-cooperation by the claimant in relation to the address, but it is certainly not the responsibility of the SSHD if a wrong address has been given.
>
> 15 On 16 December 2020 the claimant was provided with, and asked to sign, a yet further ETD application form . . . giving the Raja Sansi Road address. He signed in three places with specimen signatures, but declined to sign the obviously critical "self declaration" at the end of the form. He maintained his refusal on 4 January 2021 . . . NB I read the entries on this page as evidencing a single occasion of refusal on 4 January, not refusals on 4 and 6 January 2021). Through the first and second witness statements, dated 19 November 2020 and 13 January 2021, of his solicitor, Mr Adam Hundt, the claimant variously explains these refusals to sign as being due to his being fed up with being asked to sign forms, and/or not having an interpreter present, and/or on one unspecified occasion, the prison officer being rude and making an (unspecified) racist remark.
>
> 16 . . . I have been informed that the claimant has now, on 22 January 2021, duly signed the form in the required space. The form will, in turn, be sent to the Indian authorities as soon as practicable. The way is now open for the Indian High Commission to consider whether to grant an ETD, although (as to which I can have no view) that may depend upon a correct address having been given."

5. At the hearing before me, Mr. Denholm explained that there were a couple of matters in Holman J's factual analysis which needed correcting. First, he pointed out that although both parties had referred to the victim of the sexual offence by the Claimant as being 16 years old, the Offender Assessment System information (the *Oasys* report) refers to the victim as being 15 at the time of the offence. Second, Mr. Denholm stated that the first period of absconding by the Claimant had not lasted for a full 6 years, as there was evidence that the Claimant had reported for a period of 7 months within that 6 year period. It does not seem to me that either of these points makes any material difference to the matters that I have to consider, but I add them for completeness.

6. Although the form, referred to by Holman J. at paragraph 16 of his judgment, was sent to the British High Commission for pre-verification checks – that is, a process by which the British High Commission checks to see if the information provided is sufficient or complete enough to allow the application to be processed by the Indian authorities – the Home Office was informed on 25 January 2021 that the Emergency Travel Document ("ETD") forms had been refused by the British High Commission in New Delhi. It was said that the new address provided by the Claimant – Raja Sansi Road, Amritsar, was "incomplete". It was explained that "Raja Sansi is the airport in Amritsar and the road that leads to the airport from the city is Raja Sansi Road. There are localities on both sides. Address should have house number, street number or name, name of locality and area."

7. As a result, an immigration officer was asked to visit the Claimant again to clarify the address with him. The Claimant informed the immigration officer that the address he had given was his uncle's address, where he had lived for a time. The Claimant stated that he could not provide any further details regarding an address in India.

8. A telephone interview was carried out with the Claimant on 17 February 2021 with an official at the British High Commission. At that interview, the Claimant was reported to have said to the interviewer that: "I can't trust you as I don't know who I am talking to. Moreover I have given the information to the officer and not willing to give any further details. . . . I can't see you so how I know that you are calling from the HO. Don't wish to speak to you."

9. It was suggested that a video interview should take place with an officer at the British High Commission. The Claimant agreed to this. The video interview was arranged to take place on 16 April 2021 but was cancelled due to the illness of the interviewer. A further telephone interview was conducted with the Claimant on 7 May 2021 with the same interviewer from 17 February 2021. The Claimant stated that he did not know where on Raja Sansi Road, Amritsar, he had lived. A video interview was arranged for 8 June 2021, with a back-up date of 12 June.

10. In the meantime, the Claimant spoke with his solicitor, Adam Hundt, on 19 February 2021. Based on that conversation, Mr. Hundt was of the view that "the Claimant was not mentally well", and he arranged for the Claimant to see a psychiatrist. On 1 March 2021, the Claimant was interviewed by Dr. Nuwan Galappathie, a Consultant Forensic Psychiatrist. On 6 April 2021, Dr. Galappathie produced a report on the state of the Claimant's mental health, in which he set out diagnoses of a depressive episode, generalized anxiety disorder and post-traumatic stress disorder, in each case expressed to be "severe". Dr. Galappathie expressed the view that the Claimant's current immigration detention was "worsening his symptoms", and that "continued detention is likely to cause further harm to his mental health . . . and his condition will become harder to treat and he will present with an increased risk of self-harm and suicide". Dr. Galappathie said that, in his view, the Claimant was not receiving adequate treatment to address his mental health difficulties: the Claimant had not received treatment with anti-depressant medication or psychological therapy, he had not been reviewed by a consultant psychiatrist, and a detailed psychiatric assessment had not taken place. Dr. Galappathie expressed the view that if the Claimant was required to remain detained under immigration powers, the impact on his mental health would be partially mitigated by transferring him to an Immigration Removal Centre ("IRC), where he would have more freedom and a greater ability to communicate with the outside world.

11. The Claimant's solicitors sent a copy of Dr. Galappathie's report to the Defendant, and the Defendant was asked to review the Claimant's detention in light of the report's contents. The Claimant's solicitors argued that Dr. Galappathie's report demonstrated that the Claimant was at Level 3 within the Defendant's *Adults at Risk in Immigration Detention* policy guidance. It was also noted that the prospects of removing the Claimant were remote. In the circumstances, it was contended that the Claimant should be granted immigration bail so that he could apply for bail accommodation.

12. On 8 April 2021, the Case Progression Panel (a separate panel of civil servants not involved with the case who independently consider the detainee's detention and suggest that he be released or detained) recommended that the Claimant should be released from

detention because of the barriers in place for gaining an EDT. A release referral was submitted on 13 April 2021. This was refused by an Assistant Director on 15 April 2021, due to the ongoing video link arrangements.

13. On 11 April 2021, the Claimant was put on ACCT (Assessment, Care in Custody and Teamwork) watch. This was said to have been as a result of the Claimant barricading himself in his cell and attempting to self-harm with a screwdriver. Prison officers are stated to have observed that the Claimant appeared to be high on "spice".

14. On 14 April 2021, in response to Dr. Galappathie's report, the Healthcare team at Wormwood Scrubs stated that the Claimant "has never been referred to the mental health team whilst in the prison. The mental health Manager attended an ACCT review for him (enhanced observations document) and this is the only input he has received thus far." On 22 April 2021, a referral to suitable avenues of support and treatment was made, and it was noted that the Claimant "has been here since August 2019, and there have not been any concerns raised by prison staff or healthcare".

15. On 26 April 2021, the Claimant's solicitor, Mr. Hundt, saw the Claimant. In a witness statement, Mr. Hundt says that the Claimant "was visibly unwell, and it was not possible to question him in significant detail, as he was agitated and at times quite unwell. He was clearly in some discomfort, both physical and mental". The Claimant told Mr. Hundt that on some days he was not allowed out of his cell at all; and that, when he was allowed out, it was for 30 minutes only, and there was not usually enough time to wash and also get his medication. Mr. Hundt stated that the Claimant occupied a single occupancy cell, and had been self-harming. The Claimant informed Mr. Hundt that he had been assaulted by a prison officer, and had also been assaulted by two prisoners.

16. A Detention Review carried out by the Defendant on 27 April 2021 made reference to Dr. Galappathie's report and the update from the mental health team based at Wormwood Scrubs. It also referred to the fact that the Claimant had "experienced mental health issues in the past, including issues of self-harm and suicidal thoughts. He has previously refused food and fluids for 48 hour periods and uses illegal substances, which have led to concerns regarding his behaviour." The conclusion of the Detention Review was that the Claimant was assessed as being at Level 2 of the *Adults at Risk* guidance.

17. On 8 May 2021, an immigration officer on the prison wing contacted the Defendant's casework section to say that the Claimant was observed abusing drugs and self-harming, and that detention was having a negative impact on his mental health. It was reported that a prison officer was "concerned that the length of detention is having a detrimental effect on the health of" the Claimant, and that the Claimant was "on a downward spiral".

18. A further update received on 11 May 2021 from the In-Reach Mental Health team at Wormwood Scrubs confirmed that the Claimant had been referred to "Atrium, a mental health support group within the prison who provide interventions to help prisoners improve their mental wellbeing by getting them to address their problems etc. They would be covering his depression and the reasons for it."

19. At the hearing before me, I was informed that the Claimant had been placed in the prison's segregation unit. Documents sent to me after the hearing indicated that this

was a result of an allegation that the Claimant had damaged the cell buzzer and some furniture in his cell. The Claimant had been the subject of an adjudication and was given a sanction of 5 days in Cellular Confinement. (I have not heard any evidence from the Claimant about this matter).

20. As I have already stated, the video-link interview with the Claimant did not, in fact, go ahead on 11 June 2021. I was informed that staff at the "Family Services Contact Centre, HMPPS Safety and Rehabilitation Directorate" had failed to assign the facility room for the Claimant's interview on their database. As a result, the legal visit room was inadvertently given to another prisoner to use for the same slot. I am told that further interviews with the Claimant have now been booked for 28, 29 and 30 July 2021, the latter two being contingency days in the event that the interview is not effective on 28 July.

21. Carolyn Comer, a Senior Executive Officer at the Home Office, has provided a witness statement in which she explains the ETD process. She has stated that

> "Given the current circumstances, provided the Claimant provides accurate and complete information required of him, it would take a minimum of three months for the Indian authorities to complete their nationality and identity checks and communicate the outcome as the usual timescales do not apply in light of the pandemic. Once a positive verification outcome is received, we can request removal directions and remove the Claimant to India within 10 working days, subject to airline company flight availability, re scheduling and changes".

Ms. Comer confirmed that these timescales applied even to the current situation with Covid-19 in India.

Legal Framework

(i) *The Hardial Singh principles*

22. The Claimant has been served with a deportation order, and so he can be detained under paragraph 2(3) of Schedule 3 to the Immigration Act 1971. It is well established that the power to detain may only be exercised for such a period as is reasonably necessary to fulfil the purpose for which it exists: *R v. Governor of Durham Prison, ex parte Hardial Singh* [1984] WLR 704.

23. The principles in *Hardial Singh* were explained by Dyson LJ in *R(I) v. Secretary of State for the Home Department* [2003] INLR 196 at [46]:

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 that reasonable period, he should not seek to exercise the power of detention;

iv) The Secretary of State should act with reasonable diligence and expedition.

24. As for what is a reasonable period, the Supreme Court in *R(Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245 at [104] approved the following passage from Dyson LJ's judgment in *R(I)*:

> "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… 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."

25. The risk of absconding, the risk of offending, and the risk of public harm should a person offend are regarded as matters of paramount importance, but they are not trump cards justifying indefinite detention regardless of other factors at play: *Lumba* at [121], and [131].

26. With respect to the third *Hardial Singh* principle, Dyson LJ said in *R(I)* that "once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."

27. In *R(MH) v. Secretary of State for the Home Department* [2010] EWCA Civ 1112 at [64], Richards LJ observed that the Secretary of State does not need to show certainty of removal within a specific timeframe to establish lawful detention, but there must be "sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors".

28. Where there has been non-compliance by a detainee, this can be a factor which weighs against them when considering the length of detention which is reasonable: see e.g. *R(Sino) v. Secretary of State for the Home Department* [2011] EWHC 2249 (Admin) at [56], per John Howell QC (sitting as a deputy judge).

> "Nonetheless, although an individual who has only himself to blame for his detention being prolonged by virtue of his own conduct may not attract sympathy, in my judgment his conduct cannot be regarded as providing a trump card justifying his detention indefinitely. The Secretary of State may not detain a person pending deportation for more than a reasonable period

> even in the case of an individual who is deliberately seeking to sabotage any efforts to deport him."

29. In *R(Mahboubian) v. Secretary of State for the Home Department* [2020] EWHC 3289 (Admin), Mostyn J. stated at [24]:

> "If the detainee refuses to cooperate with the process to enable his deportation then such resistance can properly be taken into account as demonstrating a heightened risk of absconding justifying a prolongation, perhaps for years, of the reasonable period of detention. Of course, throughout that extended period it remains incumbent on the Secretary of State to act with reasonable diligence to try to implement the removal. Provided that she does so, then a lengthy extension of the detention of a recalcitrant detainee may well be justified."

30. In *R(NAB) v. Secretary of State for the Home Department* [2010] EWHC 3137 (Admin), Irwin J. observed at [39 -41] that:

> "39. The authorities are in a difficult position in relation to people such as this claimant, who refuse to take steps which would enable them to be deported voluntarily. The combination of the limitation of powers granted to the Secretary of State under the 1971 Act, and the operation of Article 5 of the European Convention on Human Rights imported into our law by the Human Rights Act 1998 , means that they cannot indefinitely detain someone who is the subject of attempts to deport. They can only detain such a person while there is a realistic and active prospect of deportation, since the root of the power is to detain for the purpose of deportation and nothing else.
>
> 40. If someone is recalcitrant, then there are limited steps legally open to the Secretary of State. The public might find that surprising, but nevertheless it is the law. It is familiar law. It is based on a decision by Parliament, not the courts.
>
> 41. Faced with a recalcitrant person whom it is proposed to deport, the authorities can and should be free to make strenuous efforts to obtain the assent of the individual concerned. They can and should seek any way around his consent, for example by persuading his country of origin to issue travel documents without a disclaimer or any other indication of willingness on the part of the subject. But if no such action produces results, then, depending upon the facts of the case, it may be necessary for the authorities to face up to the fact that all of the shots in their locker, if I may use that expression, have been expended."

(ii) *The Adults at Risk Policy Guidance*

31. Section 59 of the Immigration Act 2016 requires the Secretary of State to issue guidance specifying matters to be taken into account in determining whether a person would be

particularly vulnerable if detained or remained in detention and, if so identified, whether that person should be detained or remain in detention. The relevant guidance is entitled *Immigration Act 2016: Guidance on adults at risk in immigration detention* (July 2018) ('the Statutory Guidance'). It is supplemented by more detailed guidance to caseworkers, entitled *Adults at risk in immigration detention* (currently Version 5.0).

32. The Statutory Guidance categorises evidence of risk into three levels, with Level 1 evidence attracting the least weight and Level 3 evidence the most. With respect to Level 3, paragraph 9 of the Statutory Guidance states

> "professional evidence (e.g. from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm – for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk - should be afforded significant weight. Individuals in these circumstances will be regarded as being at evidence level 3."

33. Caseworker Guidance for Level 3 provides that:

> "Where on the basis of professional and/or official documentary evidence, detention likely to lead to a risk of harm to the individual if detained for the period identified as necessary to effect removal, they should be considered for detention only if one of the following applies:
>
> - removal has been set for a date in the immediate future, there are no barriers to removal, and escorts and any other appropriate arrangements are (or will be) in place to ensure the safe management of the individual's return and the individual has not complied with voluntary or ensured return
>
> - the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or the individual presents a current public protection concern
>
> It is very unlikely that compliance issues, on their own, would warrant detention of individuals falling into this category. Non-compliance should be taken into account if there are also public protection issues or if the individual can be removed quickly.
>
> The above is intended as a guide rather than a prescriptive template for dealing with cases. Each case must be decided on its own merits, taking into account the full range of factors, on the basis of the available evidence.
>
> In each case the length of likely detention will be a key factor in determining whether an individual should be detained.

> As part of the determination of whether an individual should be detained, consideration must be given to whether there are alternative measures, such as residence or reporting restrictions, which could be taken to ensure an individual's compliance whilst removal is being planned or arranged and to reduce to the minimum any period of detention that may be necessary to support that removal – for example, by detaining much closer to the time of removal."

Grounds of Challenge

34. The Claimant challenges his ongoing detention on three grounds.

35. First, the Claimant contends that his ongoing detention is unlawful as it breaches the third *Hardial Singh* principle. He argues that there is now no prospect of an ETD being granted unless there is a fundamental change of approach on the part of the Indian authorities, and there is no suggestion of this. Further, that there is evidence that the Claimant is severely mentally ill, and that continued detention is likely to cause further harm to his mental health. It is argued that the *Hardial Singh* factors have now shifted decisively in the Claimant's favour since Holman J's judgment. In his judgment, Holman J. had found that:

> "39 Viewing all the above factors in the round, and performing the necessary balance, I am persuaded by the SSHD and do myself consider that, as of today, the continued detention of the claimant remains lawful. Although the risk of absconding is not a trump card, the risk in the present case is high or very high. It does not trump, but in my view it does, in this case, outweigh the many other factors which all favour release. Echoing Lord Dyson in Lumba at paragraph 121, if the claimant is now released he will be highly likely to frustrate the deportation for which purpose he was detained in the first place. The SSHD has, for good and justifiable reasons, been trying to deport the claimant since 2016. He has a significant criminal record, and he does not have, and never has had, any right to remain here. There is, in my view, a sufficient prospect of removal within the next six months that it is currently reasonable to continue to detain him during that period, even when aggregated with the previous 13 months, and giving full weight to the category B prison conditions in which he is being detained.
>
> 40 I thus dismiss the present claim for judicial review. In doing so, I wish to stress, however, that my decision is based squarely on the facts and circumstances as they currently are or appear to be. The SSHD must continue to keep this case under very frequent review, applying anxious scrutiny. The assessment of the risk of absconding may not change, but the Indian High Commission may again refuse the application for an ETD. The psychological state of the claimant may deteriorate. The threat and risk from COVID in the prison may increase. The impact of any of these, or other, changes will require to be carefully

> considered by the SSHD with an open mind, and may require and impel that the claimant is later released, subject to whatever conditions the Secretary of State may then lawfully impose to attempt to minimise the risk of absconding. But for now, the present claim is dismissed."

36. Second, the Claimant contends that no rational, properly self-directing decision maker would conclude that detention could be maintained consistently with the *Adults at Risk Guidance* in light of the evidence from Dr. Galappathie that the Claimant is at Level 3; and that (a) there is a low risk of re-offending; (b) the timescale to removal is effectively indefinite.

37. Third, the Claimant contends that detention in prison (as opposed to an IRC) is unlawful and/or in breach of Article 5 of the European Convention of Human Rights.

Test for interim relief

38. It is common ground between the parties that the approach to be adopted in an application for interim relief is a modified *American Cyannamid* test. The essential steps for the Court to consider are (i) whether there is a serious issue to be tried; and, if so, (ii) where does the balance of convenience lie. This will include weighing up the public interest considerations that apply: including absconding risk, the offending risk, the question of individual liberty, and the question of the Claimant's mental health.

39. Where the interim relief stage is likely to be dispositive of the substantive issue in the proceedings (even if a claim for damages may still need to be determined), the balance of convenience requires looking closely at the legal merits of the claim: see *R(Mohammed) v. Secretary of State for the Home Department* [2020] EWHC 1337 (Admin), per Fordham J.

Discussion

40. In considering the evidence and arguments in accordance with the modified *American Cyannamid* test, it is clear to me that in the instant case there is clearly a serious issue to be tried as to the lawfulness of the Claimant's ongoing detention. The Claimant has been detained in prison for 18 months, and there is evidence that his mental health is in marked decline. There is also a serious question mark over when (if ever) the Claimant might be removed to India.

41. In considering the balance of convenience, I need to weigh up the various public interest considerations, and need to look closely at the merits of the claim.

42. It seems to me that the merits of the Claimant succeeding on the first ground of challenge – breach of the third *Hardial Singh* principle – are strong. In my judgment the Claimant will most likely succeed at trial on this argument. Furthermore, I consider that the various public interest considerations favour release. The Claimant's right to liberty, and the impact of the ongoing detention on his mental health, outweigh the risk that he will abscond and may commit further offences.

43. In reaching this conclusion, I note that for Holman J the decision was finely balanced. Since that decision, a further 4½ months of detention have elapsed and the prospects of

an ETD being granted to facilitate the Claimant's removal are lower now than they appeared to Holman J. There is no extant ETD application awaiting pre-verification by the British High Commission, let alone under consideration by the Indian authorities.

44. Mr. Ostrowski, for the Secretary of State, contends that the Claimant has only been partially co-operative in providing information as to where he used to live, and that the authorities (cited above at paragraphs 28-30) indicate that this has a bearing on the reasonableness of the period of detention. I am doubtful that the Claimant does have more information to give about his former address(es), but I do not reach a definitive view on this matter. It seems to me that even if the Claimant had further information, this would not lead to him being removed from the country for many more months. The next interview with the Claimant is not due to take place for another 5 weeks. Even if further information is provided by the Claimant this will need to go through the pre-verification process and, if his application is forwarded to the Indian authorities after pre-verification, it will take at least 3 months for the Claimant to gain an ETD and then around 10 working days to arrange for a flight. On the basis that further information is forthcoming, therefore, it would appear as though the Claimant could not be removed for a further period of around 5 months, and for a much longer period if (as is more likely) no such further information is provided by the Claimant at the end of July 2021.

45. In my judgment, it is strongly arguable that it is not reasonable to continue to detain the Claimant, given that we now know that he could not be removed for a further period of around 5 months even if further information is provided at his video interview at the end of July 2021. This is especially so, given the evidence that the ongoing detention is having a detrimental impact on the Claimant's mental health, and this is only likely to worsen. Dr. Galappathie's report paints a vivid picture of the Claimant's mental health difficulties, and makes it plain that these difficulties will only worsen if detention is continued. I accept, as Mr. Ostrowski submitted, that Dr. Galappathie's report should be approached with some caution, given that the Claimant had interactions with medical professionals on numerous occasions over the past several years and yet he never mentioned any mental health issues to them, and none of them appears to have identified any mental health concerns. Nevertheless, there is other evidence to corroborate Dr. Galappathie's opinion: in particular, the evidence from Mr. Hundt, who has had direct dealings with the Claimant, as well as the evidence from one of the prison officers at Wormwood Scrubs who has expressed concern about the Claimant's mental health, saying that the Claimant was in a "downward spiral".

46. On the other side of the scales, I am well aware that there is a clear risk that the Claimant will abscond if he is released from detention. Holman J considered that the absconding risk was "very high" (or at the least "high"). The evidence before me (as before Holman J) was that the Claimant had failed to comply with reporting restrictions in the past, that he had gone to ground for some time, and there were no societal ties (friends or family) which could be relied upon to ensure, or at least encourage, compliance. Mr. Denholm referred at the hearing to the Claimant having an ongoing civil claim which may necessitate staying in touch with his Instructing Solicitors. After the hearing, Mr. Denholm informed me that the civil claim was settling. It did not seem to me, however, that the presence of those ongoing civil proceedings would have necessarily ensured, or encouraged, compliance with the reporting restrictions. It is possible that other restrictions could be applied to the Claimant as part of immigration bail conditions: electronic monitoring, or 'Geo tagging' (which, I am told, allows round the clock-

monitoring). It is possible that these measures would lessen the risk of absconding. However, I cannot be confident that they will, and so I have to say that the risk of absconding remains "high", even with enhanced conditions being applied. In addition, there is a risk that if the Claimant is released from detention he will commit a further offence. The risk of offending has been assessed as "low"; and the risk of harm if the Claimant does offend as "medium". I agree.

47. The fact that there is a high risk that the Claimant will abscond if he is released causes me real concern. Nevertheless, in my judgment, this is outweighed by the fact that the Claimant has a strong case on the *Hardial Singh* principles and would be likely to succeed at trial given that he could not be removed to India for around 5 months (and only then if he provides further information at the video interview at the end of July 2021), that he has already been detained and deprived of his liberty for 18 months, and any further detention is likely to have a negative effect on the Claimant's mental health.

48. I have considered whether it would be appropriate to order an expedited substantive hearing of the judicial review, rather than order interim relief, bearing in mind that if interim relief is granted that is likely to be dispositive of the central issue between the parties. I do not consider that it would be right to take this approach. There was a lengthy oral hearing before me on 9 June 2021, and I consider that there is little more that would be said, or argued, about this issue at a substantive hearing of the Claimant's judicial review.

49. I have carefully considered whether the reasonableness of the Claimant's ongoing detention would be affected if he was to be detained, pending deportation, in an IRC rather than a prison. Given that one of the criteria that the Court should consider – in accordance with the Supreme Court's decision in *Lumba* – is the impact on the detainee of the detention, it seems to me that it would be open to the Court to decide that the impact of detention in prison would be unreasonable, but the impact of detention in an IRC would not. The two regimes are very different, and the impact on the detainee is likely to be different at an IRC.

50. In the instant case, I consider that the impact of detention on the Claimant would be likely to be less severe if he was to be detained in an IRC. That is supported by the opinion of Dr. Galappathie. If there was a serious prospect of removal to India in the next few months, I would have been inclined to order that the Claimant be released from prison, but that he could continue to be detained in an IRC if the Secretary of State was so minded[1]. This would address my concern that the Claimant will probably abscond if he is released, whilst mitigating the impact on his mental health. However, as there is no prospect of removal for a period of around 5 months, and any kind of detention for that length of time is likely to have a negative impact on the Claimant's mental health, it is not in my judgment reasonable for the Claimant to be detained in an IRC for, at the least, the next five months.

51. It is not strictly necessary, therefore, for me to consider the merits of ground 2: that the Secretary of State acted unlawfully in treating the Claimant as an adult at risk at Level

[1] I appreciate that there are a range of factors that the Secretary of State would wish to take into account when transferring a detainee from the prison estate to an IRC, and that the normal presumption operated by the Secretary of State is that those convicted of criminal offences against a minor will remain in prison accommodation and will only be transferred to an IRC in very exceptional circumstances.

2 in accordance with the Statutory Guidance. Nevertheless, for completeness, it seems to me that an arguable case has been made out here: that Dr. Galappathie's evidence puts the Claimant at Level 3 of the Statutory Guidance; and that the Secretary of State could not rationally, and consistently with her guidance, keep the Claimant in detention.

52. I also consider that ground 3 is arguable.

Conclusion

53. In conclusion, therefore, I grant the Claimant interim relief, the terms of which I will discuss with the parties. I also grant permission with respect to all of the grounds.