IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 3130 (Admin)

No. AC-2023-LON-003511

Royal Courts of Justice

Friday, 1 December 2023

Before:

MRS JUSTICE LANG

B E T W E E N :

THE KING
(on the application of)
IS (Bangladesh)

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

MR D HUTCHEON (instructed by Duncan Lewis Solicitors) appeared on behalf of the Claimant.

MR J FLETCHER (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE LANG:

1 On 24 November 2023, the claimant filed a claim applying for permission to apply for judicial review of his ongoing immigration detention. He also made an urgent application for interim relief in the form of an order requiring the defendant to release him from immigration detention and/or grant High Court bail, to a suitable address, on terms to be set by 72 hours after the end of the hearing. This is the application which is now before me.

2 On 24 November 2023, Morris J made an anonymity order and directed that the application for interim relief should be listed to be heard at an *inter partes* hearing on Friday, 1 December 2023. He ordered the defendant to file and serve a statement setting out his position on the application no later than 24 hours before the hearing.

Interim relief

3 The principles governing the grant of interim relief in judicial review proceedings are those contained in *American Cyanamid Company v. Ethicon Limited* (1975) AC 396, modified as appropriate to public law cases. First, the claimant must demonstrate that there is a serious question to be tried. In judicial review claims, this involves considering whether there is a real prospect of the claim succeeding at the substantive hearing (see *R (Medical Justice) v. Secretary of State for the Home Department* [2010] EWHC 1425 (Admin.) *per* Cranston J at [6] and the Administrative Court Judicial Review Guide 2023 [16.6.1]). This is generally thought to be a higher threshold than the arguable test applied when deciding whether to grant permission for judicial review.

4 Secondly, the court should consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. At para.16.6.1 of the Judicial Review Guide it states,

> "This involves balancing the harm to the claimant that would be caused if interim relief is not granted and the claim later succeeds against the harm that would be caused to the defendant, any third party and the public interest if interim relief is granted and the claim subsequently fails".

Bail

5 The statutory power to grant bail is conferred on the defendant in the First-tier Tribunal (FtT) pursuant to Schedule 10 of the Immigration Act 2016. Unlike an application for interim relief in the course of a claim for judicial review, an applicant for bail does not have to establish arguable grounds for judicial review. It is an application on the merits.

6 The appropriate forum for an application for immigration bail is the FtT, not the High Court. The Administrative Court will not generally allow a claim to proceed where, as in this case, there is a suitable alternative remedy provided for by statute. However, I accept that the High Court retains a residual power to grant bail, which is discretionary, and is typically exercised where the court has decided, on an application for judicial review, that the claimant should be released from detention on conditions and a grant of conditional bail is a mechanism for giving effect to that outcome. That is a power which I propose to exercise in this case, if bail is appropriate, principally because of the considerable delay which would result were I to direct that an application for bail be made to the FtT.

Immigration history

7 The claimant was born in Bangladesh on 12 November 1997. He claims that he was kidnapped and tortured in 2009 and 2010. On 1 October 2011, the claimant arrived in the UK with his mother and sister, with leave to remain until November 2013. The claimant's leave was subsequently extended.

8 On 22 September 2015, the claimant, who was then 17, was convicted on a count of sexual assault and sentenced to a detention and training order for 18 months.

9 On 14 April 2016, the claimant's mother and sisters were granted indefinite leave to remain, but the claimant's application was refused.

10 On 29 April 2016, the defendant issued a notice of intention to deport the claimant.

11 On 28 July 2016, the claimant was detained under immigration powers.

12 In May 2106, the claimant made an asylum and human rights claim, which was refused by the defendant in September 2016. The FtT dismissed his appeal in July 2017.

13 On 15 November 2017, following a rule 35(3) report from Dr Chaudhary, the defendant accepted that the claimant's account met the definition of torture and that he should be treated as Level 2 under the *Adults at Risk* policy. The defendant was satisfied that his medical needs could be met at Brook House.

14 On 12 December 2017, the defendant served a deportation order on the claimant. A removal notice was served, but, on 21 December 2017, he was diagnosed by Dr Belda, a consultant psychiatrist, as not fit to fly and a transfer to hospital under section 48 of the Mental Health Act 1983 was recommended.

15 On 18 May 2018, a judicial review claim was filed challenging the notice of removal. On 6 September 2018, the claim was refused and found to be totally without merit.

16 On 2 October 2018, the FtT refused bail on the basis that there was a risk of further offending, and to ensure the claimant's protection in the light of his mental health issues, which required constant watch.

17 In October 2018, a removal notice was served, but the claimant was assessed as not fit to fly. On 9 October 2018, Dr Hillier, a consultant psychiatrist, received a Part 3 request stating that the claimant was on ACDT (Assessment Care in Detention and Teamwork system) and on constant watch, he had increased suicidal thoughts, he could not be treated optimally in a detention setting and detention was having a deleterious effect on both his mental health and suicide risk, and his ongoing detention should be considered under rule 35.

18 On 15 October 2019, the High Court (Jeremy Johnson QC, siting as a deputy judge of the High Court) held that the claimant had been lawfully detained between 28 July 2016 and 29 June 2018. He was unlawfully detained for five months from 29 June to 30 November 2018. The judge found that, in the light of his history of mental illness, the defendant should have released him within a short time of receipt of the report of Dr Burman-Roy, a consultant psychiatrist, dated 5 July 2018, who diagnosed PTSD, a severe depressive episode and emotional unstable personality disorder, which was deteriorating in detention with an escalating risk of self-harm. Also, the judge found that subjecting him to constant observation for 75 days had violated his Article 8 ECHR rights.

19 On 30 November 2018, the claimant was released from immigration detention, having been detained for 28 months.

20 On 23 November 2020, the defendant refused the claimant's further submissions. The claim for asylum was refused, on the basis that he had a genuine well-founded fear of persecution in Bangladesh was rejected. The defendant rejected the claim that he would be subject to ill treatment in breach of Articles 2 and 3 of the ECHR in Bangladesh. Furthermore, the defendant concluded that, because of his conviction, he was excluded from a grant of humanitarian protection under para.339D of the Immigration Rules. The defendant was satisfied that his deportation would not breach the UK's obligations under Article 8 of the ECHR. The claim that deportation would be in breach of Article 3 and Article 8 because of the claimant's mental illness was rejected on the basis that medical facilities, medication and treatment would be available to him in Bangladesh. It was considered that he would be able to access support in the UK whilst travelling, and on arrival in Bangladesh, which would minimise any risk of self-harm or suicide.

21 The application to revoke the deportation was refused. The defendant concluded that the claimant's further submissions amounted to a fresh asylum and human rights claim within para.353 of the Immigration Rules. He was granted a right of appeal.

22 On 9 December 2000, the claimant lodged an appeal against this decision. The case management review hearing took place on 21 January 2022 and the appeal hearing was listed for 21 March 2022. It was adjourned, presumably because by then the claimant had been arrested and was remanded in custody.

23 On 26 January 2022, the claimant was charged with conspiracy to supply and possession with intent of Class A drugs (heroin and crack cocaine) in a commercial enterprise. He was remanded in custody.

24 On 19 June 2023, the claimant was convicted and sentenced to three years' imprisonment. The judge sentenced him on the basis that he had a significant role, occasionally operating a supply line, but he was mainly concerned with packing and delivering the drugs. He only worked intermittently. His mental illness was taken into account as mitigation, together with his guilty plea.

25 Whilst in prison, he was placed on the ACCT system (Assessment Care in Custody and Teamwork) and was treated with one-to-one psychology sessions.

26 On 28 July 2023, which was his conditional release date, he was placed in immigration detention. He remains on licence with conditions until 26 January 2025.

27 His appeal before the FtT was relisted for 19 July 2023, but it was then converted into a case management review hearing and that case management review hearing was then adjourned to 22 August 2023. On that occasion, the following directions were made:

> (1) by 12 September 2023, the appellant is to file the updated psychiatrist report of Dr Galappathie;
>
> (2) by 17 October 2023, the respondent is to provide the appellant with the sentencing remarks, OASys report and an updated PNC for the claimant;
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> (3) by 7 November 2023, the applicant is to confirm in writing to the respondent and the FtT whether or not the NRM referral has been made and set out his position on the further conduct of the appeal;

(4) a further case management review hearing to be listed "not before 14 November 2023".

28 On 17 October 2023, a rule 35 report was completed by Dr Farooq recommending release on the grounds of his mental illness. I consider this further below. On 25 October 2023, the claimant's solicitor sent an NRM referral request to the defendant with a pre-action protocol letter. On 15 and 21 November 2023, the defendant advised the claimant's solicitors to contact one of the first responder organisations to make a referral into the NRM.

Medical issues

29 The claimant has a long history of mental illness. He is currently diagnosed as suffering from post-traumatic stress disorder (PTSD), a recurrent depressive disorder, which is currently severe with psychotic symptoms, and attention deficit hyperactivity disorder (ADHD). He is treated with medication.

30 The medical evidence from December 2018 onwards is helpfully summarised in the report of Dr Galappathie, consultant forensic psychiatrist, dated 19 October 2023. This is an addendum to his initial report dated 7 January 2022. Dr Galappathie's opinion is that the claimant is not fit to be detained because he suffers from significant mental health problems and has a significant history of self-harm and suicide ideation, both in the past and on numerous recent occasions since being in detention. In his opinion, detention is having a negative impact on the claimant's mental health. He states,

> "In my opinion, detention has led to him experiencing worsening depression leading to psychotic symptoms, thoughts about self-harm and suicide, worsening anxiety related symptoms, worsening of his PTSD, distress as a result of having ADHD whilst in detention and feeling frustrated and has led to frequent incidents of self-harm and attempted suicide".

Dr Galappathie also stated that, in his opinion, the claimant was not suitable to be detained at Brook House IRC, given his negative experiences there, and also being placed on constant watch was having an adverse impact on his mental health.

31 I refer to the claimant's chronology for a summary of recent medical issues.

> "**4 August 2023**. IRC medical records state that C put a razor in his mouth and threatened self-harm. Code Red call made and force used to prevent self-harm. C very frustrated that he has not yet been able to see mental health team. ACDT opened for C: request sent to mental health nurse to see C that day. C placed on hourly observations.
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> **5 August 2023**. ACDT review … C to remain on ACDT with at least one observation every three hours. Later medical help called after C self-harmed in room (cuts to wrists and calf). C placed on constant watch.
>
> **6 August 2023**. C reports he is hearing voices telling him to self-harm and that he has harmed himself multiple times since arriving at Brook House; refers to torture in Bangladesh. Medical records record that C is experiencing symptoms of psychosis, suicidal ideations, flashbacks, panic attacks, depression and feelings of hopelessness. Plan made to refer C to psychiatrist, take him 'onto the mental health caseload' and complete a 'MH [mental health] care plan'. Records note diagnosis of PTSD and of other mental health conditions. C participates in food fluid refusal assessment.

8 August 2023. C self-harms by way of multiple superficial lacerations to left side of chest; treatment received; states his mental health was declining.

9 August 2023. ACDT review: C mentions history of torture and asks for rule 35 report but is told that 'one had already been done in the past…'. C says prison told him he needed EMDR treatment and is told 'to follow the [advice] given to him by psychologists when in prison". C does not report active suicidal thoughts or self-harm ideation when asked: placed on observations every three hours; C reports having no appetite.

11 August 2023. C sees psychiatrist, Dr Jegede; denies current plans to self-harm. ACDT review: C reports still feeling the same; remains on three hour observations.

16 August 2023. ACDT review: C reports having 'high' levels of thoughts of self-harm and says he is not receiving treatment he needs; remains on observations every three hours.

21 August 2023. ACDT review: C is subdued in mood and anxious; reports sleep problems, night nurse, flashbacks and voices telling him not to talk; kept on obs every three hours.

22 August 2023. Dr Galappathie writes to the Healthcare Manager at Brook House informing that his conclusions are that C's mental state appears to have deteriorated in detention, that he has suicidal thoughts and that in his view "further detention will worsen his mental health and increase his risk of self-harm and suicide". Dr Galappathie communicated that C was "at risk of death" and that the ACDT was causing C distress. He also noted that C required specialist trauma-focused psychological therapy.

28 August 2023. ACDT review ... C placed on AM, PM, evening and two night-time observations.

1 September 2023. ACDT review: C reluctant to answer questions but refers to flashbacks, feeling 'there is little or no point in living' and being very depressed: obs set at AM, PM, evening and one night-time.

5 September 2023. ACDT review: (C did not attend on basis he did not wish to repeat himself). C expressed a view that the IRC healthcare could not provide him with the treatment he needed for his trauma.

6 September 2023. ACDT review (C declined to attend) decision to close his ACDT but with mental health team to continue to support.

23 September 2023. C meets with nurse, complained of feeling tired, stressed and anxious, says he has no thoughts of deliberate self-harm.

29 September 2023. C meets with psychiatrist, Dr Jegede. C reports that medication not benefiting him, that he is going backwards, because he no longer has support from a psychologist and that he is getting self-harm thoughts again; reports flashbacks and severe distress. Dr Jegede tells C that "ideally, Psychology would be the best intervention" but "there is no psychology service available" at Brook House.

> **7 October 2023.** Mental health in-reach team review with C. C's mood is low, not feeling good, still feels health needs cannot be met without psychological input. Nurse books rule 35(3) appointment, recorded that C has reported 'symptoms of psychosis'.
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> **17 October 2023**. Rule 35(3) report completed by Dr Farooq, the Brook House GP. Report records C's account of torture experiences in 2009 and 2010 and states,
>
> > 'He gives a detailed consistent account of his experiences. The above incident appears to fall within the definition of torture. … He does have significant scarring. The mechanism of injury and his scars do seem consistent. … His mental health is NOT stable in this environment. He has previously tried to commit suicide. He has previously self-harmed. I DO have concerns in terms of acute deterioration or severity in relation to his mental and physical health on the basis of his available records and current presentation of PTSD and ADHD, depression and EUPD."

32 On 14 November 2023, Dr Galappathie carried out a further assessment of the claimant in person at Brook House.

33 On 16 November 2023, Dr Galappathie wrote to the IRC healthcare manager indicating his opinion that the claimant's mental state had deteriorated still further. He had suicidal thoughts following the suicide of another detainee. He assessed the claimant "at high risk of impulsively attempting to commit suicide" and noting that the lack of specialist one-to-one psychological therapy was a risk factor for suicide.

The defendant's rule 35 report dated 3 November 2023

34 The defendant responded to the rule 35 report dated 19 October 2023 on 3 November 2023. He accepted that the claimant's account of his kidnapping and abuse in Bangladesh met the definition of "torture". The evidence met Level 2 of the *Adults at Risk* policy. The mental health concerns and deterioration identified by the GP raised him to Level 3 of the *Adults at Risk* policy.

35 The defendant then went on to balance the risk factors against the immigration control factors as follows,

> "You have been detained since 28 July 2023 and a primary consideration when detaining any individual under immigration powers is the imminence of removal. The current barriers to your removal are your outstanding appeal and Emergency Travel document (ETD). Your appeal has been listed for 14 November 2023 and should it be dismissed; an ETD can be immediately re-validated for your removal within ten working days. As such, dependent on the outcome of your claim, your removal to Bangladesh can proceed within 4-6 weeks.
>
> Whilst we acknowledge that you have an outstanding claim which may provide an incentive to remain in contact with the Home Office, there is reason to believe that if released at this stage you would be unlikely to surrender for departure. You are now fully aware of the Home Office's intention to deport you, and you declined the offer of voluntary departure on 3 July 2023. Therefore, there are concerns that you will not report or attend

for any subsequent removal directions should you received a negative outcome on your outstanding claim.

At the time of completing your Rule 35 assessment, the GP raised a Rule 35 (3) as they are concerned with your mental health in detention and as such you are assessed at level 3 of the Adults at Risk in Immigration Detention Policy. This is a factor which would weigh in favour of your release.

You are a Foreign National Offender who has amassed 2 convictions between 22 September 2015 and 19 June 2023 for 3 offences, one being sexual assault. Most notably, you were convicted on 19 June 2023 at Kingston Upon Thames Crown Court for conspire/supply of controlled drugs – Heroin and Cocaine for which you were sentenced to 3 years imprisonment. As such, you have been assessed as posing a high risk of harm which would suggest that you are currently a public protection concern.

As such, although assessed at level 3 of the Adult at Risk policy following your rule 35(3) assessment, detention can be considered if removal directions are set within the immediate future or there are significant or current public protection concerns. In this instance there are public protection concerns and with compliance concerns and potential to remove shortly if your appeal is dismissed, it is considered that appropriate close monitoring and support could commence during this period to safeguard your vulnerabilities within detention pending the conclusion of your case and your potential removal from the UK.

If following this review your cases do not progress along the timescale trajectories outlined above based on any delays, casework will review your detention due to the additional timescales required to resolve such matters in-line with the principles of Hardial Singh.

It is considered that the immigration factors outweigh the vulnerabilities in your circumstances. This means that, following consideration of the vulnerability factors which have been made in your case, the risks associated with your release are enough to justify your ongoing detention. As a result of this, the Rule 35 Team have decided to maintain your detention at this time, but this will be regularly reviewed in line with the Detention General Guidance and the Adults at Risk Policy in Immigration Detention Policy."

36 The defendant's pre-action response dated 8 November 2023 resisted the proposed claim, relying solely on the rule 35 response of 3 November 2023.

37 On 13 November 2023, the claimant's solicitors notified the defendant that the assertion in the rule 35 response that the appeal was listed for hearing on 14 November 2023 was incorrect and asked for a reconsideration.

38 This was a mistake on the part of the defendant. No hearing of any kind was listed on 14 November 2023 and no dates for forthcoming hearings had been given to the parties.

Legal and policy framework

39 The claimant is subject to a deportation order served on 12 December 2017. Once the custodial element of the claimant's prison sentence was completed, his immigration detention was authorised, pursuant to para.2 of Schedule 3 to the Immigration Act 1971, pending his deportation.

40 In order to be lawful, immigration detention must accord with the limitations implied by the common law and by Article 5 of the ECHR. At common law, the party detained is subject to the limitations set out in *R (Hardial Singh) v. Governor of Durham Prison* [1983] EWHC 1QB [1984] 1 WLR 704. In *R* (I*) v. Secretary of State for the Home Department* [2002] EWCA (Civ.) 888, Dyson LJ described the *Hardial Singh* principles in the following terms, which the Supreme Court approved in *R (Lumba) v. Secretary of State for the Home Department* [2011] UK SC 12; [2011] 2 WLR 671:

> "46.There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:
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> > 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 the reasonable diligence and expedition to effect removal.
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> 47.Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, 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.
>
> 48.It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps

> taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences".

41 Whilst according deference to the defendant's expertise and knowledge, the court has held that it is the judge of reasonableness when applying the *Hardial Singh* principles and the usual *Wednesbury* principles do not apply (see *R (A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804).

42 However, the law has changed upon the coming into force of section 12 of the Illegal Migration Act 2023, on 28 September 2023, which amends the statutory detention provisions. The changes are not retrospective and so they only apply to periods of detention from 28 September 2023 onwards. I do not agree with the claimant's interpretation that they only apply to persons whose period of detention commenced after 28 September 2023.

43 In a deportation case, where detention is authorised under paragraph 2 of Schedule 3 to the Immigration Act 1971, it provides:

> "(2) In paragraph 2 of Schedule 3 to the Immigration Act 1971 (detention or control pending deportation)—"
>
> (a) after sub-paragraph (3) insert—
>
> "(3A) A person liable to be detained under sub-paragraph (1), (2) or (3) may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the deportation order to be made, or the removal to be carried out.
>
> (3B) Sub-paragraphs (1) to (3) apply regardless of whether there is anything that for the time being prevents the deportation order from being made or the removal from being carried out.
>
> (3C) [is not relevant here]
>
> (3D) Sub-paragraph (3E) applies if, while a person is detained under sub-paragraph (1), (2) or (3), the Secretary of State no longer considers that the deportation order will be made or the removal will be carried out within a reasonable period of time.
>
> (3E) The person may be detained under that sub-paragraph for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person's release as the Secretary of State considers to be appropriate."

44 The explanatory notes to the Illegal Migration Act 2023 state at para.101 that section 12 replaces, in part, the *Hardial Singh* principles with a codified statutory version of the second and third principles. The notes also state at para.102 that section 12 overturns the common law principle established in *R (A)* and later authorities that it is for the court to decide for itself whether there is a reasonable or sufficient prospect of removal within a reasonable time. This is further explained at paras.104 and 105 of the notes.

45 The burden of proof is on the defendant to justify the legality of the detention (see *Lumba per* Lord Dyson at [44]). This is a long established principle at common law which is also reflected in the ECHR case law.

46 In *R(A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804, Toulson LJ considered the relevance of a risk of reoffending and absconding, and said:

> "45. ….. a pertinent question in this case is whether, and to what extent, a risk of the individual absconding and a risk of him re-offending may be taken into account in considering what may be a reasonable time for attempting to bring about his removal or departure. The way I would put it is that there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty. Counsel for both parties agreed with that approach as a matter of principle.
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> …
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> 55.A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

47 In *Lumba* at paras.122 to 128, Lord Dyson rejected the submission that a refusal to return voluntarily rendered the detention reasonable and then indicated an intention to abscond if released. The Secretary of State had to satisfy the court that, in the circumstances of the particular case, it was right to infer from a detainee's refusal to return voluntarily that he was likely to abscond. If he wished to challenge his deportation on ECHR or Refugee Convention grounds, it was reasonable for him to refuse the offer of repatriation pending the determination of those proceedings.

48 The statutory power to detain has to be exercised in accordance with the defendant's published policies on detention in chapter 55 of the *Enforcement Instructions and Guidance* ("EIG"). Unless there is good reason to depart from them, the defendant's policy in the EIG with regard to detention and temporary release is set out at para.55.1.2:

> "Cases concerning foreign national offenders – dealt with by criminal casework – are subject to the general policy set out above in 55.1.1, including the presumption in favour of temporary admission or release and the special consideration in cases involving children. Thus, the starting point in these cases remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attention

> must be paid to their individual circumstances. In any case in which the criteria for considering deportation action (the "deportation criteria") are met, the risk of re-offending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of temporary admission or release is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding. Paragraph 55.1.1 sets out a general presumption in favour of temporary admission or release rather than detention. 55.1.2 provides that cases concerning foreign national prisoners are subject to the general policy in 55.1.1 and that the starting point in such cases "remains that the person should be released on temporary admission or released unless the circumstances of the case require the use of detention".

49 The *Adults at Risk in Immigration Detention* policy (April 2023) strengthens the presumption against detention of those who are particularly vulnerable to harm in detention. However, detention may still be appropriate in an individual case where public interest considerations outweigh the presumption of release, even for a person considered to be at risk. Once an individual has been identified as being at risk, the likely risk of harm, if detained, is assessed at one of three levels. The higher the level of risk to the individual the shorter the length of detention that should be maintained. The claimant has been recently assessed at the highest level, Level 3, which indicates that there is professional evidence that the individual is or may be at risk and detention would be likely to cause harm. Such evidence should normally be accepted and any detention reviewed in light of the accepted evidence.

50 However, risk factors to the individual have to be balanced against immigration control factors and public protection issues, where a foreign national offender is being deported for serious offences. The section headed "Balancing risk factors against immigration control factors" (internal page 22) states:

> "…..An individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained….
>
> As in any case of potential detention, in order to detain there must be a realistic prospect of removal within a reasonable period. In cases of adults at risk in which this condition is met, the following is a guide to balancing any identified risk issues relating to the individual concerned against the immigration considerations. In all cases, the primary consideration should be based on the length of time for which detention is expected to be required and the likely impact of the length of detention on the individual given the evidence of risk.

51 Specific guidance for each Level is then set out. The policy guidance for individuals at Level 3 is as follows (internal page 23):

"Where on the basis of professional and/or official documentary evidence, detention is 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.

…….

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."

52 I was also referred to the following policy guidance: *Immigration Act 2016: Guidance on adults at risk in immigration detention* (May 2021), *Management of adults at risk in immigration detention* (August 2022), *Assessment Care in Detention and Teamwork (ACDT)* (October 2022).

53 The Detention Centre Rules 2001 ("the 2001 Rules") govern the treatment of detained persons in immigration removal centres. Rules 33(1) and (2) of the 2001 Rules provide that every detention centre shall have a healthcare team, including a medical practitioner who must be trained as a GP, which shall be responsible for the care and mental health of the detained persons at that centre.

54 Rule 35 of the 2001 Rules provide as follows:

"**Special illnesses and conditions (including torture claims)**

(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.

(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the

> detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
>
> (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care".

55 Where a rule 35 report is received, a Home Office responsible officer is required to carry out a review of whether the person should remain in detention within two working days after receiving the report (see p.17 of the rule 35 policy). The responsible officer must review the detainee's detention in light of the rule 35 report, and must take prompt action to release the detainee if appropriate. This reflects, among other things, the likelihood that detained persons whose circumstances are sufficiently grave to require a rule 35 report are not fit for detention and should be released.

Grounds of challenge

Submissions

56 The claimant contends that his detention is unlawful on the basis that,

> (1) it falls foul of the *Hardial Singh* principles;
>
> (2) it is in breach of the *Adults at Risk* policy;
>
> (3) the defendant has breached rule 35 of the 2001 Rules; and
>
> (4) his detention is contrary to his rights under Article 5(1) and Article 8 of the ECHR.

57 The claimant also contends that the defendant is responsible for systemic failures in relation to the protection of mentally-ill detained persons at Brook House, placing the defendant in violation of his systemic duties under Articles 2 and 3 of the ECHR and also renders his detention unlawful. There has been insufficient time for me to deal with that issue today.

58 The defendant resists the claim, and the application for interim relief, and submits that it is without merit. The defendant's decision to detain the claimant was lawful and in line with *Hardial Singh* principles. The claimant is a serious offender, having been convicted of sexual assault and conspiracy to supply and possession with intent of Class A drugs.

59 The defendant has assessed the claimant as posing a high risk of serious harm to the public and of reoffending. His risks of absconding have also been assessed as high by the defendant. At the time of his most recent offence, the claimant was subject to immigration

bail conditions, including electronic tagging and monitoring, and there is a greater risk that he will not comply with conditions if released this time.

60 The claimant is a failed asylum seeker, having had his human rights claim previously dismissed by the First-tier Tribunal on 20 July 2017. Since then the defendant has always intended to deport the claimant and detention was for that purpose. The only current barriers to the claimant's removal are his outstanding protection and human rights appeal and emergency travel documentation (ETD). The defendant considers that, in the event that the appeal hearing takes place after 14 November 2023 and it is dismissed, deportation could be achieved within a reasonable timescale.

61 The defendant accepts the evidence concerning the claimant's mental health meets Level 3 under the *Adults at Risk Policy*. However, he has concerns that, if released, the claimant will fail to report for removal and there is a current public protection concern. Considering all the circumstances, the risks outweigh the presumption in favour of release.

62 Furthermore, whilst the medical evidence obtained for the claimant suggests that his mental health has deteriorated whilst in detention, the evidence also suggests that he was not engaging in any form of therapy whilst in the community and stopped his medication. On the other hand, in detention the claimant has received support from the mental health team and ACDT and was under regular observations. Therefore, the claimant remains safe in detention.

Conclusions

63 In my judgment, the initial decision to detain the claimant upon his release from prison on licence was not, arguably, unlawful. The claimant was subject to a deportation order served on 12 December 2017 and so his immigration detention was authorised pursuant to para.2(2) of Schedule 3 to the Immigration Act 1971, pending his deportation.

64 At the initial detention review, which was completed on 11 July 2023, his history was properly considered, including his mental illness, his claim to be a victim of torture and his previous assessment as an adult at risk Level 3. The barriers to his removal were correctly identified as his outstanding appeal to the FtT, which was at that time listed in less than two weeks' time on 19 July 2023. There was no suggestion of any difficulty in renewing his ETD which had previously been approved by the Bangladeshi authorities but had expired. The timescale to removal was assessed at three months.

65 The reviewing officer assessed the risk of absconding as high, as it was anticipated that he would seek to avoid deportation. The risk of reoffending was high in the light of his convictions and other suspected sexual offending. The risk of harm to the public was high, especially to women, citing the reasons for the refusal of bail in February 2017, his MAPPA assessment and the harm matrix rating of A. The reviewing officer stated,

> "This case has been considered on its merits, the presumption in favour of liberty has been weighed against the risk of harm to the public, risk of reoffending and risk of absconding. Taking into account all of the information, his AAR status risks, it is considered that detention is justified for a short period for his appeal to be concluded to bring this case to a successful conclusion."

66 The authorising officer noted the AAR assessment but was satisfied that his medical concerns were well supported within the detention setting. Detention was believed to be

necessary and proportionate to progress this case towards removal. If removal became protracted, release was to be considered.

67 Form IS91 dated 10 July 2023 assessed the claimant as adult at risk Level 2 and this assessment was noted in the detention reviews that followed. The 24-hour review reached essentially the same conclusions as 11 July review. The review on 25 August is not in the papers before me, but the authorising officer's comments on 24 August 2023 were that the appeal had been heard and that he had been given until 12 September to provide additional evidence and so removal was deemed likely within a reasonable timescale. However, the appeal had not been heard and so this view was based on mistaken information.

68 By the time of the review on 22 September 2023, officers were aware that the appeal had not been heard on 19 July. The assessment of removability stated,

> "Appeal judge has directed appeal not to be listed until 14 November to allow more time to gather information after a request from reps".

69 The reviewing officer used slightly different wording in his recommendation,

> "His appeal was heard on 19 July and the judge has directed the appeal not be listed until 14 November to allow time to gather information".

70 The report gave the impression that officers thought that the appeal was going to be heard on or soon after 14 November 2023, which was only a few months away. The reviewing officer observed that detention would be for "a short period". This was inaccurate as the FtT had directed that there would be another case management hearing, not the hearing of the full appeal, and it would be listed "not before 14 November", which, in the terminology of listing officers means it could be listed at any time after 14 November. It was not directed to be listed on 14 November.

71 The authorising officer anticipated that his appeal would be "listed after 14 November" and that, taking all factors into account and balancing the risks associated with release, she believed continued detention to be necessary and proportionate. She was still satisfied that his medical concerns were well supported within the detention setting. She stated that he was a Level 2, under the *Adults at Risk* policy. His previous Level 3 status was referred to in the case history, but there was no mention of the fact that he had been placed in the ADCT in August nor that he was self-harming and needed close monitoring. It appears that, in assessing the appropriateness of a continuing detention under the *Adults at Risk* policy, officers were not aware that Dr Galappathie had written to the healthcare manager on 22 August 2023 advising that the claimant's mental state was deteriorating in detention and that he had suicidal thoughts.

72 In the October 2023 review, the reviewing officer said his appeal was heard on 19 July and the judge directed that the appeal should not be listed until 14 November. The authorising officer interpreted this as meaning that it was to be "scheduled for November 2023" and was content to approve detention for a further 28 days while they awaited a hearing date. Again, there was no indication that the reviewing officers were assessing his detention under the *Adults at Risk* policy with the benefit of up-to-date medical information about the claimant.

73 The review on 3 November 2023 assessed his removability on the basis that "the judge has directed that the appeal should not be listed until 14 November 2023". The officer's mistaken belief that the appeal hearing will be listed at or soon after 14 November led the authorising officer to find that "detention is justified for a short period, estimated four to six weeks, for the claimant's appeal to be determined".

74 The report of the reviewing officer indicates that an update on the claimant's medical condition had been provided by then as there was reference to a referral to the mental health team, his medication and regular reviews. It was noted that he was not mentally stable in this environment and he had previously tried to commit suicide and self-harm. Further, that his GP was of the opinion that he should be released because of concerns about his acute deterioration. It was noted that he had been assessed as *Adults at Risk* policy Level 3.

75 Despite this medical evidence and the reassessment to Level 3, both the reviewing officer and the authorising officer were of the view that detention was justified for a short period, estimated as four to six weeks, for his appeal to be determined and his ETD to be revalidated.

76 As I have already found, the same error infected the defendant's rule 35 letter dated 3 November 2023, which stated "Your appeal has been listed for 14 November 2023" and went on to assume that he could be removed in four to six weeks.

77 The balancing exercise between, on the one hand, the risk to the claimant and, on the other hand, the immigration, control and public protection factors was conducted on a false premise.

78 Furthermore, in breach of the rule 35 policy, the defendant took two weeks not two days to reply to the rule 35(3) report. The report was dated 19 October 2023 and the reply was dated 3 November 2023. If at a later stage in these proceedings it is found that he was detained unlawfully at that time, the delay is likely to be significant.

79 In my judgment, the claimant has a real prospect of success in establishing at a substantive hearing that the detention is and was unlawful, both before and after the coming into force of the amended para.2 of Schedule 3 to the Immigration Act 1971, and that there is, and has been, an arguable breach of Article 5 of the ECHR.

80 The first reason for my conclusion is that arguably, there was a failure to apply the *Adults at Risk* policy, in particular the guidance for adults at Level 3 which I have set out earlier in my judgment, and to release the claimant in the light of:

> (a) the claimant's history of mental illness, including the previous assessment at Level 3 and the finding of unlawful detention by the High Court in 2019;
>
> (b) his current mental illness;
>
> (c) his deteriorating condition;
>
> (d) his acts of self-harm;
>
> (e) the risk of suicide; and
>
> (f) the advice of medical professionals that he ought to be released from detention.

81 The second reason for my conclusion is that, arguably, there were repeated flawed assessments of the factors for and against detention, because of the failure to make an accurate, informed assessment of the likely hearing date of the claimant's appeal hearing and the persistent mistaken assertions that the appeal would be concluded in November 2023.

82 I do not have sufficient information from the defendant to enable me to reach a preliminary conclusion on the allegation that a rule 35 report should have been sent at an earlier date.

83 In considering the balance of convenience, I accept that there is convincing evidence that the claimant is not fit for detention, because of his significant health problems and his history of self-harm and suicidal ideation, confirmed by a number of doctors, whose opinions I have already referred to.

84 Most recently, Dr Farooq, the Brook House GP, completed a Rule 35(3) report advising "His mental health is NOT stable in this environment. He has previously tried to commit suicide. He has previously self-harmed. I DO have concerns in terms of acute deterioration or severity in relation to his mental and physical health on the basis of his available records and current presentation of PTSD, ADHD, depression and EUPD".

85 The opinion of Dr Galappathie, consultant forensic psychiatrist, dated 19 October 2023 was that the claimant is not fit to be detained because he suffers from significant mental health problems and has a significant history of self-harm and suicide ideation, both in the past and on numerous recent occasions since being in detention. In his opinion, detention is having a negative impact on the claimant's mental health. He states,

> "In my opinion, detention has led to him experiencing worsening depression leading to psychotic symptoms, thoughts about self-harm and suicide, worsening anxiety related symptoms, worsening of his PTSD, distress as a result of having ADHD whilst in detention and feeling frustrated and has led to frequent incidents of self-harm and attempted suicide".

86 The claimant has now been in immigration detention for five months and, on the evidence, his appeal is not going to be finally determined in the near future. However, the balance of convenience also has to take into account and weigh in the balance the possible risks of reoffending, the possible risks of absconding and the risks of harm to the public.

87 The question that I have to address is whether those risks and the public interest can be adequately addressed by bail conditions, in addition to the conditions of his licence and supervision by his probation officer. The matters really fall into two categories: his accommodation, which will have to be approved by the probation service, and the nature of the accommodation which was suitable for a person subject to the high harm assessment, as in this case, and, secondly, the importance of access to medical treatment, in particular, his medication, and, if possible, a referral for ongoing psychological treatment, which was available in prison but not at Brook House, and is likely to be beneficial, according to the medical evidence. Of course, that will be subject to limitations on NHS resources.

88 Perhaps, because of the speed in which this case has come to court, neither of the parties before me today were in a position to put forward proposed bail conditions and to address the areas of concern that I have just identified. In those circumstances, I am minded to adjourn this hearing for a suitable period, then hear representations on these matters, and then reach a conclusion on the balance of convenience.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.