Neutral Citation Number: [2024] EWHC 31 (KB)

Case No: KB-2022-001090; KB-2021-002596

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 January 2024

Before:

HHJ RICHARD ROBERTS
(Sitting as a Judge of the High Court)

- -

Between:

EBOU JASSEH	**Claimant**
- and -	
THE HOME OFFICE	
	Defendant

- -
- -

Mr Greg Ó Ceallaigh of Counsel (instructed by **Birnberg Peirce Limited**) for the **Claimant**
Mr James Fletcher of Counsel (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 4, 5, 6 December 2023, with hand down on 12 January 2024

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ RICHARD ROBERTS

HIS HONOUR JUDGE RICHARD ROBERTS:

Introduction

1. This is the trial of two claims by the Claimant, who seeks a declaration that he was falsely imprisoned and/or unlawfully detained by the Defendant in breach of the Hardial Singh principles and Article 5 ECHR during two periods of immigration detention:

   i) Between 15 September 2019 and 3 August 2020 (324 days)

   ii) Between 28 June 2021 and 15 September 2021 (80 days).

2. Mr Ó Ceallaigh of Counsel appears on behalf of the Claimant. I am grateful to Mr Ó Ceallaigh for his skeleton argument, dated 30 November 2023, his speaking note, dated 6 December 2023, and his case summary, dated 7 March 2023[1]. Mr Fletcher of Counsel appears on behalf of the Defendant and I am grateful to him for his skeleton argument, dated 28 November 2023, his working chronology and his closing remarks, dated 6 December 2023.

3. The main trial bundle is in two files and totals 933 pages. In addition, there is a supplementary bundle of 613 pages and an authorities bundle of 512 pages. On the first day of trial, the Defendant submitted a further bundle of 25 pages, which I will refer to as bundle Z. References to footnotes below are to the main trial bundle unless otherwise stated.

Contents

4. I have structured this judgment as follows:

[1] Tab 1, 6-7

Second period of detention (28 June 2021 to 15 September 2021) - Hardial Singh principle (i)	186-191
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Breach of Defendant's "Chapter 55 Enforcement Instructions and Guidance" policy	201
Substantial or nominal damages	202-203
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Evidence

5. The Claimant relies upon one witness statement, dated 15 July 2023[2], and gave evidence in person at trial.

6. The Defendant relies upon two witness statements:

   i) Susan Quinn, the Senior Executive Operational Manager of the Foreign National Offender Returns Command of Immigration Enforcement, within the Home Office, dated 1 August 2023[3]. Ms Quinn gave evidence by videolink.

   ii) Joseph Augustine, Assistant Director of the Foreign Nationals Returns Command (FNORC), dated 1 August 2023[4]. Mr Augustine gave evidence in person at trial.

Entry into the United Kingdom and asylum claim

7. On 28 February 1983, the Claimant was born in The Gambia. He is now aged 40.

8. On 19 May 2004, the Claimant was issued with a six-month multi-visit visa to the United Kingdom, expiring on 19 November 2004[5].

[2] Tab 20, 114-122
[3] Tab 21, 140-156
[4] Tab 22, 183-194
[5] Defence, para. 4; tab 6, 34

9. On 28 May 2004, the Claimant entered the United Kingdom with the visit visa.

10. On 19 November 2004, the Claimant's visit visa expired and he became an overstayer.

11. On 3 September 2009, the Claimant claimed asylum in the United Kingdom and was served as an overstayer. His application was put in the Detained Fast Track[6].

12. On 24 September 2009, the Claimant was granted temporary release[7].

13. In 2010, the Claimant was arrested for sexual assault of a female who was intoxicated in Watford town centre[8]. He denied the assault and said he was a witness to an assault by another man. The Claimant was not charged.

14. On 17 June 2010, the Claimant's first asylum claim was refused. On 28 June 2010 he lodged an appeal, which was dismissed on 2 August 2010. On 12 August 2010, the Claimant became appeal rights exhausted.

15. On 19 August 2010, the Claimant advised that he wished to return home voluntarily and would book his own ticket. On 19 October 2010 he said he was still willing to leave the UK voluntarily but could not afford to do so[9]. On 2 November 2010 he said he would not return voluntarily and requested his passport so he could make an application. The Claimant's request for his passport to be returned was refused[10].

EEA Application

16. On 5 November 2010, the Claimant called the Defendant and stated that he intended to make an application for leave to remain as a spouse or on the basis of a relationship with an EEA national[11].

17. On 27 February 2011, a mitigating circumstances interview was conducted, in which he stated he had been in a relationship with an Irish citizen, Natalie O'Connell, since 2006 and that he would not leave the UK voluntarily[12]. On 4 March 2011, the Claimant applied for a certificate of approval of marriage in order to marry Natalie O'Connell[13]. The Claimant discontinued this application on 6 May 2011[14].

18. On 11 May 2011, the Claimant, having been detained, was served with removal directions, to remove him to The Gambia on 18 June 2011[15]. On 18 June 2011, the Claimant refused to leave the detention centre for the deportation flight, resulting in removal directions being cancelled[16].

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[6] CID calendar; tab 94, 826
[7] CID calendar; tab 94, 826
[8] Supplementary bundle, tab 47, 245
[9] Defence, para. 8; tab 6, 34
[10] Defence, para. 8; tab 6, 34
[11] Particulars of Claim, para. 12 and Defence, para. 8; tab 5, 15 and tab 6, 34
[12] Defence, para. 8; tab 6, 34
[13] Particulars of Claim, para. 13; tab 5, 15
[14] Defence, para. 9; tab 6, 34
[15] Particulars of Claim, para. 14; tab 5, 15
[16] Defence, para. 10; tab 6, 35

19. On 20 June 2011, the Claimant stated that he was going to get married on 21 June 2011 and that he had an outstanding judicial review and EEA residence card application[17].

20. On 27 June 2011, the Claimant sought permission to apply for judicial review. The Claimant's removal was deferred[18]. On 16 August 2011, the Claimant was granted bail[19]. On 15 September 2011, the Claimant's judicial review application was closed by the Court[20].

21. On 1 November 2011, the Claimant applied for an "EEA residence card – non-EEA family member" on the basis of his marriage to Ms O'Connell[21]. On 14 November 2011, the Claimant made another application for an EEA residence card – non-EEA family member[22]. On 9 February 2012, the Claimant's application for an EEA residence card was refused due to no marriage certificate being provided[23]. On 14 May 2012, the Claimant's application of 14 November 2011 for an EEA residence card was again refused on the basis that no EEA-identification had been supplied. In particular, the Claimant's wife's passport had not been supplied (although it had been supplied in the earlier application)[24].

22. On 17 July 2012, the Claimant brought an application for judicial review of the refusal of his residence card[25]. On 1 August 2012, upon review, the Claimant was granted a residence card, valid until 1 August 2017[26].

Arrest, conviction and deportation proceedings

23. On 22 July 2015, the Claimant was arrested on suspicion of rape, committed on 21 July 2015[27].

24. On 6 August 2015, the Claimant was released on criminal bail[28].

25. On 30 September 2016, the Claimant was convicted of anal rape at St Albans Crown Court[29]. The Claimant had encountered the victim by chance on a street in the early hours, after nightclubs had ejected her. The victim was drunk. The Claimant took her to his home on the pretext of helping her. While she was vomiting in the toilet, the Claimant anally raped her.

26. On 31 October 2016, the Claimant was sentenced to six years imprisonment and placed on the sex offenders register indefinitely. HHJ Warner said in his sentencing remarks[30],

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[17] Defence, para. 11; tab 6, 35
[18] Particulars of Claim, para. 15; tab 5, 15
[19] Particulars of Claim, para. 16; tab 5, 16
[20] Defence, para. 11; tab 6, 35
[21] Particulars of Claim, para. 17; tab 5, 16
[22] Defence, para. 14; tab 6, 35
[23] Particulars of Claim, para. 18; tab 5, 16; Defence, para. 13; tab 6, 35
[24] Particulars of Claim, para. 19; tab 5, 16; Defence, para. 14; tab 6, 35
[25] Particulars of Claim, para. 20; tab 5, 16; Defence, para. 15; tab 6, 35
[26] Particulars of Claim, para. 21; tab 5, 16; Defence, para. 15; tab 6, 35
[27] Particulars of Claim, para. 22; tab 5, 16
[28] Particulars of Claim, para. 23; tab 5, 16; Defence, para. 16; tab 6, 35
[29] Supplementary bundle. Tab 50, 276
[30] Supplementary bundle, tab 46, 238-242 at 240-241

> "As the jury found, she did not consent to what you'd done. She was, I'm satisfied, in no condition to consent and I'm afraid that she told you that she wouldn't consent when you suggested earlier some sort of encounter, sexual encounter, as she said in her recorded interview.
>
> …
>
> I take into account in your favour the fact that you are 33 years of age with no previous convictions, that this is a single incident of relatively short duration and did not involve violence. And I've also taken account of what I heard and read about you, your background, your circumstances, your relationships and your work record. I do not make a finding of dangerousness in your case, although I can understand the views expressed in the pre-sentence report about why you might represent a danger to females. Given the circumstances of this case I do not consider, looking at your case in its totality, including your background, that I should make such a finding in this case."

27. On 1 November 2016, the Claimant lodged an appeal against his conviction[31].

28. On 8 November 2016, the Defendant decided that the Claimant met the criteria for automatic deportation[32].

29. On 16 May 2017, the Claimant was diagnosed as suffering from a mixed anxiety and depression disorder[33]. He was prescribed mirtazapine. On 26 June 2017, he was diagnosed as suffering from mild depression[34].

30. On 11 December 2017, the Claimant was served with a Stage 1 deportation decision[35].

31. On 15 January 2018, the Claimant claimed asylum for the second time[36].

32. On 31 July 2018, Defendant issued an Emergency Travel Document (ETD) request form[37].

33. On 7 August 2018, the Claimant was seen by immigration officers at HMP Risley in an attempt to complete ETD forms. The GCID notes[38] state,

> "Sub seen in HMP Risley. Attempted to complete ETD forms however, sub refused to comply. Sub stated he will never return to Gambia. Non compliance explained."

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[31] Tab 93, 577
[32] Particulars of Claim, para. 26; tab 5, 16
[33] Supplementary bundle, tab 55, 333
[34] Supplementary bundle, tab 55, 337
[35] Particulars of Claim, para. 29; tab 5, 16
[36] Particulars of Claim, para. 30; tab 5, 17
[37] Supplementary bundle, tab 55, 437-439
[38] Tab 93, 582

34. On 25 September 2018, the Claimant's renewed application for leave to appeal against his conviction was dismissed by the Court of Appeal[39].

35. On 27 September 2018, the GCID notes refer to the Claimant's Stage 1 response, stating that if returned to The Gambia, his life would be at great risk and he will eventually be killed because of his conviction[40].

36. On 2 October 2018, the Claimant confirmed that he wished the claims he had raised in his response to the Stage 1 letter to be treated as an asylum claim[41]. He requested a screening interview[42].

37. On 30 October 2018, the Claimant underwent an asylum screening interview[43].

38. On 6 November 2018, the Claimant had an asylum interview[44].

39. On 31 December 2018 the Claimant was served with a letter informing him of the Defendant's intention to refuse him the protection of the Refugee Convention due to his crime in reliance on s72 of the 2002 Act[45]. On 5 January 2019, the Claimant replied to the Defendant's s72 letter[46]. His asylum interview was completed on 7 February 2019[47]. On 9 August 2019 he made further asylum representations[48].

40. The Claimant's criminal release date was 15 September 2019, to be brought forward to 13 September 2019 because of the weekend[49].

First period of detention (15 September 2019 to 3 August 2020)

41. On 10 September 2019 the Defendant's caseworker Dave Ratcliffe referred the Claimant internally for release. Mr Ratcliffe said in an email to the Strategic Director, Gareth Hills[50]:

    i) There were currently no enforced removals to The Gambia, nor had there been for a number of years. A removal could not be arranged within the short to medium term and the Claimant should therefore be released.

    ii) Approved Premises had been obtained by the Claimant's Probation Officer and were available until 6 December 2019[51]. A Schedule 10 accommodation referral was being completed for when the approved premises ended.

    iii) The release would be subject to the following conditions:

[39] Defence, para. 22; tab 6, 36; Bundle Z, 3-9
[40] Tab 93, 583-584
[41] Tab 93, 584
[42] Supplementary bundle, tab16, 79
[43] Supplementary bundle, tab 18, 83-93
[44] Supplementary bundle, tab 19, 94-110
[45] Supplementary bundle, tab 20, 112-113
[46] Supplementary bundle, tab 21, 116
[47] Particulars of Claim, para. 36; tab 5, 17
[48] Particulars of Claim, para. 37; tab 5, 17
[49] Tab 58, 452-453
[50] Tab 58, 452-453
[51] Particulars of Claim, para. 38; tab 5, 17

a) Confinement to approved premises between 19:00 and 07:00 daily, with electronic tagging;

b) Supervision under licence would expire on 14 September 2022;

c) The Claimant was not to enter Watford town centre between 23:00 and 06:00 daily.

d) The Claimant was to report to staff at Luton Approved Premises at 10:00, 13:00 and 16:00 daily, and weekly to a local Police Station.

e) The Claimant was to notify the supervising officer of any developing intimate relationships with women.

42. On 10 September 2019 the Strategic Director, Gareth Hills, rejected the release referral due to the seriousness of the Claimant's offence in two sentences, saying[52]:

> "Given the high harm offending, I would like to maintain detention. We are looking to unblock the ETD issue with the Gambian authorities."

43. On 11 September 2019 the Defendant carried out the first detention and case progression review after the Claimant's custodial sentence[53]. The Defendant noted that there were "no enforced removals to Gambia". Removal was said to be "not imminent – as there is no timescale for enforced removals to Gambia being concluded". Nevertheless, detention was recommended. The Claimant's asylum claim remained outstanding.

44. On 12 September 2019 the Detention Gatekeeper noted "the Gambian ETD process is currently on hold and there are currently no enforced removals to Gambia"[54]. The GCID notes record that the Claimant "stated he was a bit depressed about the situation"[55].

45. On 15 September 2019 the Claimant entered immigration detention[56]. Between 15 September 2019 and 3 August 2020, the Claimant was detained under immigration powers following his sentence of six years in prison for rape and in compliance with s.36(1) of the UK Borders Act 2007 because the Secretary of State thought that s.32(5) applied, pending the making of a deportation order.

46. On 16 September 2019 there was a Detention and Case Progression Review[57]. It was noted that Gareth Hills, the Strategic Director, had refused release for "public safety reasons".

47. On 18 September 2019, the Defendant made a decision to refuse the Claimant protection and to refuse his Human Rights claim[58].

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[52] Tab 93, 588
[53] Tab 23, 205-211
[54] Tab 93, 590
[55] Tab 93, 590
[56] Particulars of Claim, para. 43; tab 5, 17
[57] Tab 24, 212-218
[58] Supplementary bundle, tab 25, 128-148

48. On 25 September 2019 the Claimant was seen by a nurse and noted to have suicidal thoughts. He was referred to Assessment, Care in Custody and Teamwork (ACCT), the care planning process for prisoners identified as being at risk of suicide or self-harm[59]. On 26 September 2019 the Claimant told the nurse that he thought he needed mirtazapine again and had been hearing voices[60]. On 27 September 2019 he was prescribed Mirtazapine[61].

49. On 30 September 2019 the Claimant had a bail application heard by First-tier Tribunal Judge, Mr J P McClure[62]. The Defendant provided the Tribunal with a Bail Summary[63]. This Bail Summary did not mention that there was no ETD process or enforced removals to The Gambia. The Claimant did not appear at the bail hearing due to problems with the video link. First-tier Tribunal Judge, Mr J P McClure refused bail.

50. On 9 October 2019, the Defendant wrote to the Prison Governor at HMP Risley[64], enclosing a decision notice, a deportation order and an appeal form.

51. On 11 October 2019 there was a Detention and Case Progression Review[65]. In the review, it is said under the heading "Case Progression Actions":

> "Barriers to removal are that Mr Jasseh requires an ETD document for his removal, however presently there are no enforced removals to Gambia."

52. In the review under the heading "Authorising officer's comments" it is said[66],

> "The ETD is a barrier, however active discussions are ongoing to resolve the current situation and it is believed an ETD will be available at the conclusion of any deportation appeal.
>
> Detention is therefore authorised".

53. On 8 November 2019, the Claimant's detention was reviewed. Again, his removal was not considered imminent and the Authorising Officer recommended[67]:

> "As removal within a reasonable timeframe appears unlikely, please submit a further release referral highlighting the legal and casework barriers for the Strategic Director's consideration."

54. On 12 November 2019, a medical note says, "mood has improved"[68].

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[59] Supplementary bundle, tab 55, 363
[60] Supplementary bundle, tab 55, 363-364
[61] Supplementary bundle. tab 55, 364
[62] Tab 62, 466
[63] Tab 61, 461-463
[64] Supplementary bundle, tab 27, 157-160
[65] Tab 25, 219-226 at 223
[66] Tab 25, 225
[67] Tab 26, 227-234 at 233
[68] Supplementary bundle, tab 55, 369

55. On 20 November 2019 the Claimant was served with:

    i) A "Stage 2" deportation decision with an out-of-country right of appeal (his asylum claim having been certified as "clearly unfounded")[69].

    ii) A deportation order, dated 20 November 2019, in the wrong name of Peter Yemi Jacobson[70].

56. The Claimant was subsequently served with a deportation order, dated 20 November 2019, in his own name[71].

57. On 27 November 2019, the Defendant had a meeting with The Gambian authorities in respect of the resumption of the ETD process. In a letter dated 28 November 2019, the Director of Returns, Gareth Hills, wrote to the Vice President of The Gambia, setting out what was understood to have been agreed at the meeting[72],

> "I thought it would be helpful to write setting out what we understood had been agreed. This is that the United Kingdom will be able to recommence enforced returns on scheduled, commercial airlines in line with our previous low profile approach.
>
> In accordance with this, the Gambian High Commission in London would recommence documenting enforced cases, starting with the twenty already confirmed as Gambian nationals in 2017. We restated our obligation to ensure that the Gambian High Commission would be able to validate the identity and nationality of any new cases being returned."

58. In the Home Office "Returns Global – Weekly Newsletter, Friday 29 November 2019" it is said[73],

> "I have been in the Gambia this week, engaging with their government on returns issues. For some time it has proved difficult to secure travel documents and a moratorium was put on all returns earlier this year.
>
> We explained that the Gambia was now only one of a few countries to which we couldn't return. ... the meeting was a positive one and we are hopeful now that we can recommence returns and ETDs. I am always wary about whether a constructive outcome will actually deliver the goods. On most occasions it does and we now have forged the personal relations which are so important on these matters."

[69] Supplementary bundle, tab 33, 179-198
[70] Supplementary bundle, tab 31, 172
[71] Supplementary bundle, tab 32, 173
[72] Tab 18, 105
[73] Tab 18, 107

59. On 5 December 2019 there was a Detention and Case Progression Review[74], which concluded that,

> "I have assessed Mr Jasseh as a medium risk of absconding and reoffending due to the serious nature of his offence. …
>
> Due to the seriousness of Mr Jasseh's conviction and being placed on the Sex Offenders Register indefinitely, he has been assessed as a high risk of harm to the public by his Probation Officer.
>
> There are no known medical problems.
>
> The current barriers to Mr Jasseh's removal are there are no enforced removals to Gambia at present and requires an ETD; however, it is known that positive talks have been had with the Gambian authorities, therefore it is expected removals to commence again in the short term.
>
> I therefore request your approval to further detain Mr Jasseh. In assessing this case I have considered the presumption of liberty against the need to protect the public, reduce reoffending and maintain an effective immigration control."

60. On 12 December 2019 the Claimant lodged an appeal against the refusal of his Human Rights claim[75].

61. On 20 December 2019, there was a Detention and Case Progression Review[76]. The Defendant maintained its decision that the Claimant remain in detention for the purpose of progressing his deportation from the United Kingdom.

62. The moratorium on ETDs and enforced removals to The Gambia was not lifted on 1 January 2020, nor on any date prior to the Claimant's release from detention on 15 September 2021.

63. On 7 January 2020, the Claimant became appeal rights exhausted[77].

64. The Claimant says that on 13 January 2020, he submitted further asylum representations[78], although the Defendant does not accept this[79].

65. It is said at paragraph 45(1) of the Defence[80] that,

> "On 14 January 2020, the Deputy Head of Mission wrote to the Strategic Director offering to follow up with the relevant

[74] Tab 28, 243-251 at 249
[75] Particulars of Claim, para. 57; tab 5, 19
[76] Tab 30, 261-269
[77] Particulars of Claim, para. 56; tab 5, 19
[78] Particulars of Claim, para. 58; tab 5, 19
[79] Defence, para. 43; tab 6, 39
[80] Tab 6, 40

> ministries in Banjul regarding the outstanding report from the Documentation Task Force visit in December 2017."

66. On 15 January 2020, the Claimant's case was referred to the Case Progression Panel. On 16 January 2020, the Case Progression Panel recommended the Claimant's continued detention[81].

67. On 16 January 2020, the Defendant's Carolyn Comer sent an email[82] to Gareth Hills, Strategic Director, with a proposal to release the Claimant. She said,

> "It is also noted that an ETD is required, however there are currently no enforced removals to Gambia
>
> As removal is not imminent, release is being proposed.
>
> …
>
> CCD are working with HMPPS to mitigate any risk on release
>
> HMPPS will obtain Approved Premises prior to Mr Jasseh being released whereby he will be required to confine himself between the hours of 19:00 and 07:00 daily unless otherwise authorised by his supervising officer.
>
> Mr Jasseh is not to enter the area of Watford Town Centre between 23:00 and 06:00 daily."

68. The Strategic Director, Gareth Hills, sent an email[83] to Carolyn Comer in reply the same day, saying,

> "Thank you. I'd like to maintain detention given the very high harm offending. We are hopefully about to recommence returns to The Gambia."

69. On 29 January 2020, Gareth Hills wrote to the Deputy Head of Mission saying[84],

> "UK-Gambia Home Affairs Co-operation: Enforced Returns
>
> I am grateful for your offer to follow up with the relevant Ministries in Banjul regarding the outstanding report from the documentation Task Force visit in December 2017. We will again pursue in parallel through our High Commission as the response has now been outstanding for 25 months, so early resolution of this request would be appreciated.
>
> In regard to the moratorium, we had been assured that this would be lifted on the 1st of January 2020."

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[81] Tab 93, 598-599
[82] Tab 64, 470
[83] Tab 65, 477
[84] Tab 19, 112-113

70. On 14 February 2020 there was a Detention and Case Progression Review [85].

71. On 25 February 2020 the Claimant had a bail application heard by First-tier Tribunal Judge, Mr J P McClure[86]. The Defendant provided the Tribunal with a Bail Summary[87]. This Bail Summary again did not mention that there was no ETD process or enforced removals to The Gambia. The Claimant was refused immigration bail. The reasons for refusal state[88],

> "The applicant is required to reside at an approved probation hostel by reasons of nature of his conviction. The letter submitted to show that a hostel place is available is dated 15 September 2019. There is no evidence that a place is currently available. As there is no suitable approved accommodation bail is refused.
>
> In the circumstances I cannot be satisfied that the appellant has an address to go in accordance with his criminal licence. I cannot be satisfied that he would abide by the conditions of bail and surrender himself as required. Bail is refused."

72. Also on 25 February 2020, a Case Progression Panel (CPP) approved continued detention[89]. The CPP had not been informed that The Gambia had not lifted the moratorium as it had said it would on 1 January 2020[90]. The CPP said[91],

> "The panel have recommended to maintain detention as a valid document is soon to be obtained and there are no outstanding barriers to removal. Therefore it is considered that continued detention should be maintained."

73. On 13 March 2020, the Claimant's continued detention was approved at a detention and case progression review[92].

74. On 23 March 2020, The Gambia closed its borders due to the COVID pandemic[93].

75. On 31 March 2020, the Case Progression Panel approved continued detention[94].

76. On 9 April 2020, the Claimant's detention was confirmed at a detention and case progression review[95].

77. On 23 April 2020, the Claimant was informed by a letter from the Defendant that his detention had been exceptionally reviewed on 1 April 2020 as a result of the COVID

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[85] Tab 30, 261-269
[86] Tab 68, 492
[87] Tab 66, 483-487
[88] Tab 62, 492
[89] Tab 93, 604
[90] Tab 19, 112
[91] Tab 93, 599
[92] Tab 31, 270-279
[93] Particulars of Claim, para. 63; tab 5, 19
[94] Tab 93, 605
[95] Tab 32, 280-289

pandemic and it was considered that detention remained appropriate[96]. I comment that no consideration was given on the face of the letter to the fact that there was no ETD and there had been no enforced removals to The Gambia for a number of years.

78. On 7 May 2020, there was a Detention and Case Progression Review[97].

79. On 21 May 2020, the Claimant's caseworker noted that there was no update to the Claimant's case and advised him to apply again for bail[98].

80. On 3 June 2020, there was a Detention and Case Progression Review[99], which granted the Defendant's request to detain the Claimant further.

81. Also on 3 June 2020, the Claimant had a bail application heard by First-tier Tribunal Judge, Mr Hollings-Tennant[100]. The Defendant provided the Tribunal with a Bail Summary, dated 1 June 2020[101]. As with the earlier Bail Summaries, this Bail Summary did not mention that there was no ETD process or enforced removals to The Gambia. The Claimant was granted bail in principle, subject to a suitable address being obtained.

82. On 16 June 2020 the CCP approved continued detention pending an address being sought[102].

83. On 2 July 2020, there was a detention and case progression review[103]. It was said[104],

> "Pending accommodation being made available, I agree that detention is appropriate for a further 28 days. Please continue to chase the relevant parties in order to secure accommodation."

84. On 3 July 2020 the CCP recommended that the Claimant be released, subject to appropriate measures being in place, on the basis that there was "no prospect of removal"[105].

85. On 30 July 2020, there was a detention and case progression review[106].

86. On 3 August 2020, the Claimant was released from prison and immigration detention on licence[107]. On the same day, he was granted immigration bail, with conditions to include a curfew and tagging to approved accommodation[108].

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[96] Tab 67, 488-489
[97] Tab 33, 290-299
[98] Tab 93, 608
[99] Tab 34, 300-309
[100] Tab 71, 506-508
[101] Tab 69, 493-497
[102] Particulars of Claim, para. 67; tab 5, 20
[103] Tab 35, 310-319
[104] Tab 35, 318
[105] Tab 93, 617-618
[106] Tab 36, 320-329
[107] Tab 99, 844-847
[108] Tab 72, 509-511

87. On 30 October 2020, the Claimant was recalled to HMP Leeds because of breaching the terms of his tagging and licence[109]. The recall report, dated 30 October 2020, says[110],

> "Mr Jasseh is a Foreign National Offender who is managed by the Home Office. The Home Office placed Mr Jasseh in accommodation in Huddersfield, but this address has subsequently been assessed as unsuitable by both police and Probation. Alternative accommodation has been sought and Mr Jasseh has been informed of this. However, he is currently refusing Probation's instruction to move into an alternative address provided by the Home Office. He has been spoken to by his Offender Manager and a Senior Probation Officer. He has been rude and obstructive and has stated that he will not move and believes that he is being discriminated against. It is my assessment that Mr Jasseh is currently demonstrating a complete disregard for his Licence and this indicates that he is not willing to comply with Probation and his conditions. Further, he is currently displaying a concerning change in behaviour, including an increased sense of entitlement, portraying self as a victim, ruminating and increasing negative attitudes to professionals. Therefore, a recall is necessary to manage the risk posed."

88. On 28 June 2021, the Parole Board decided that the Claimant should be released, conditional upon the finding of suitable available approved accommodation.

89. On 16 July 2021, First-tier Tribunal Judge Curtis granted the Claimant immigration bail subject to the condition that the grant of bail would not commence until his release address had been approved by his offender manager[111].

90. On 20 July 2021 the Claimant's application for accommodation under s.4 of the Immigration and Asylum Act 1999 was refused[112].

91. The Defendant says at paragraph 80 of the Defence[113],

> "By 21 July 2021 it had become apparent that the Claimant could not be removed within a reasonable further period."

92. The Claimant's detention was approved in the detention and case progression review, dated 26 July 2021[114]. It was said[115],

> "2. Travel Documentation

[109] Supplementary bundle, tab 48, 262
[110] Supplementary bundle, tab 49, 264-273
[111] Tab 90, 568-569
[112] Tab100, 848-850
[113] Tab 6, 46
[114] Tab 39, 350-360
[115] Tab 39, 353

> An ETD is required for Mr Jasseh's removal; however, the Gambian ETD process is currently paused for enforced removals.
>
> What is the timescale for issue according to the Returns Logistics country guidance: a few months
>
> …
>
> Estimated timescale for removal based on current circumstances: at least six months."

93. On 27 July 2021, the Claimant applied for accommodation pursuant to Schedule 10 of the Immigration Act 2016[116].

94. Also on 27 July 2021, the Claimant's solicitors wrote to the Defendant requesting that the Claimant be seen by a member of the prison's Mental Health team as a matter of urgency. The Claimant had expressed concerns that he could not cope with being detained and he was considering harming himself[117].

95. On 28 July 2021, the Claimant's solicitors sent a further pre-action letter saying that the Claimant's detention was unlawful, and giving a final opportunity of a further nine days to source accommodation and release him[118].

96. On 30 July 2021, the Claimant's solicitors sent an email to the prison healthcare confirming that the Claimant had not yet been assessed[119]. On 1 August 2021, the Claimant was seen by a nurse and reported poor sleep, being stressed out and withdrawing socially from peers[120]. The nurse discussed referral to the psychology service.

97. On 6 August 2021, the Claimant's appeal against the refusal of his s.4 Immigration and Asylum Act 1999 accommodation claim was dismissed[121].

98. On 11 August 2021, the Claimant issued a judicial review claim challenging his detention[122].

99. On 13 August 2021, First-tier Tribunal Judge Curtis granted bail in principle to allow the High Court to consider issues as raised in the judicial review. The order states[123],

> "I hereby extend my grant of immigration bail in principle, of 16 July 2021, until 10 September 2021 with a review hearing to be fixed on, or before, that date which means that the Applicant is hereby granted immigration bail in principle, subject to the following conditions, but, by virtue of Paragraph 3(8) of

[116] Para. 95 of Particulars of Claim - Tab 5, 23
[117] Para. 96 of Particulars of Claim - Tab 5, 23
[118] Para. 97 of Particulars of Claim - Tab 5, 24
[119] Supplementary bundle, tab 57, 572
[120] Supplementary bundle, tab 55, 563
[121] Tab 105, 862 and tab 106, 863-868
[122] Particulars of claim, para. 102 tab 5, 24
[123] Tab 91, 571

> Schedule 10 to the Immigration Act 2016, this grant of bail will not commence until he has either been released by (or following) order of the High Court in relation his application for interim relief or a release address has been approved by his offender manager."

100. On 16 August 2021, the Claimant was granted Schedule 10 accommodation, pursuant to the Immigration Act 2016. The Defendant started to source accommodation[124].

101. On 18 August 2021, a Case Progression Panel[125] said,

> "After considering the evidence from all the information presented on the day, the Panel consider that there are factors which suggest that removal within a reasonable time frame, in the particular circumstance of this case, may not be possible."

102. At paragraph 89 of the Defence, the Defendant admits that it requested accommodation from the provider on 20 August 2021, following a grant of support under Schedule 10[126].

103. On 25 August 2021, Upper Tribunal Judge Allen ordered the Defendant to provide accommodation pursuant to Schedule 10 to the Immigration Act 2016 within 14 working days[127].

104. On 10 September 2021, the Defendant applied to vary Upper Tribunal Judge Allen's order, seeking a further five days[128].

105. On 15 September 2021, Johnson J ordered[129],

> "1. The time by which the Defendant must comply with paragraph 1 of the Order is extended until 4pm on 22 September 2021.
>
> 2. Any person affected by this Order may apply on notice to have this Order set aside or varied on 2 days' notice.
>
> **Reasons**
>
> 3. I am not satisfied that the Defendant has demonstrated that sufficient efforts have been taken to comply with the Order. The email of 9 September 2021 at 13.38 is a reasonable summary of what is to be expected – but it is only at that point that this degree of urgency seems to have been expressed by the Secretary of State, and there has been no update as to the position since then,

[124] Particulars of claim, para. 104; tab 5, 24
[125] Tab 93, 736
[126] Tab 6, 47
[127] Tab 108, 889
[128] Particulars of Claim,
[129] Supplementary bundle, tab 42, 225

> particularly as to whether a further property has in fact been sourced.
>
> 4. The Claimant has, in effect, consented to a 7-day extension. I am willing to vary the Order accordingly, but I am not willing to give any further extension on the papers and without an update as to the position in relation to 23 Waterloo Promenade."

106. On 15 September 2021 the Claimant was released from detention[130]. On 17 September 2021, probation considered the accommodation unsuitable and the Claimant was moved to approved premises[131]. On 25 October 2021, the Claimant was provided with accommodation under Schedule 10 to the Immigration Act 2016[132].

The statutory context

107. Schedule 3, paragraph 2 to the Immigration Act 1971 provides, inter alia[133],

> "(2) Where notice has been given to a person in accordance with regulations under [section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision)] of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on immigration bail under Schedule 10 to the Immigration Act 2016."

The Hardial Singh Principles

108. The four principles to be applied in determining the length of time for which a person may be detained pending deportation under the 1971 Act were established by Woolf J in *R v Secretary of State for the Home Department, ex parte Hardial Singh* [1984] 1 WLR 704. These well-known principles were re-stated by Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at paragraph 22[134] as follows:

    i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

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[130] Particulars of claim, para. 109; tab 5, 25
[131] Tab 93, 761-763
[132] Particulars of claim, para. 110; tab 5, 25
[133] Authorities bundle, 3
[134] Authorities bundle, tab 6, 142-257 at 161-162

ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;

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

109. In *R(I) v SSHD* [2003] INLR 196, Dyson LJ provided a list of circumstances relevant to the reasonableness of the period of detention, as follows:

> "48. 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… 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."

110. In *R (A and others) v Secretary of State for the Home Department* [2008] EWHC 142 (Admin) Mitting J said that the Secretary of State had to have a basis for saying that the detainee could be expected to be deported within the near future:

> "16. In those circumstances, for continued detention to be lawful two questions have to be capable of being answered. First, by when does the Secretary of State expect to be able to deport A? Secondly, what is the basis for that expectation? Mr Patel, on instructions, is understandably unable to answer either of those questions, other than by the generality that the Secretary of State expects to be able to deport him within a reasonable time. Mr Patel realises that that begs the question. In my view, against the history that I have recited, there is simply no basis for concluding that A can be expected to be deported within the near future, nor can anybody, let alone the Secretary of State, give an answer to the first of those questions. An impasse has been reached in A's case. It has been reached after the lapse of many months of detention. His detention has now become unlawful.
>
> 17. I reach that conclusion notwithstanding that he has committed a serious criminal offence and that there is in his case the risk of absconding. Those are factors which have to be weighed in the balance. Were there grounds for believing that his application for emergency travel documents would soon be resolved favourably, then those factors would have led me to uphold the lawfulness of his detention. But absent any basis for concluding that he can soon be deported, those factors do not outweigh the claim that he has to conditional release …."

111. In *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112 Richards LJ said[135],

> "65. I do not read the judgment of Mitting J in *R (A and Others) v Secretary of State for the Home Department* as laying down a legal requirement that in order to maintain detention the Secretary of State must be able to identify a finite time by which, or period within which, removal can reasonably be expected to be effected. That would be to add an unwarranted gloss to established principles …. Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a *sufficient* prospect of removal to warrant continued detention when account is taken of all other relevant factors
>
> ….
>
> 68(v) As the period of detention gets longer, the greater the degree of certainty and proximity of removal I would expect to be required in order to justify continued detention."

112. Mostyn J highlighted in *Mahboubian, R (On the Application Of) v The Secretary of State for the Home Department* [2020] EWHC 3289 (Admin) (03 December 2020) that,

> "23. What amounts to a reasonable period is, needless to say, highly fact specific. Its length will take account of the obstacles which might prevent a deportation. Some countries simply will not accept a return of their nationals who have committed crimes in this country. If that is proved then continued detention cannot be justified."

Grace period

113. Once what is considered a reasonable period in accordance with the Hardial Singh guidelines has ended, the Defendant is entitled to a reasonable grace period in which to release the individual. In *R (on the application of AC (Algeria) v SSHD* [2020] EWCA Civ 36[136] the Court of Appeal said,

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[135] Authorities bundle, tab 5, 118-141 at 138-139
[136] Authorities bundle, tab 14, 429-441 at 441

> "39. The duration of such a "period of grace" must be judged on the facts of the case. The relevant facts include the history, as well as the risks to the public. I fully accept that the risk to the public is a highly important factor, but it cannot justify indefinite further immigration detention. No risk can justify preventive detention: - that is clearly out-with the statutory power of the Respondent.
>
> …
>
> 44. ... In future, when the question of a period of grace arises or might arise, the Secretary of State should be expected to advance some evidence and to make considered submissions as to what period would be appropriate and why."

Article 5 ECHR

114. Article 5 ECHR provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> …
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Defendant's policy document "Enforcement Instructions and Guidance"

115. The Hardial Singh principles and the effect of Article 5 ECHR are codified in the Defendant's document "Enforcement Instructions and Guidance", version 26. In relation to Foreign National Offenders it is said at paragraph 55.1.3[137]:

> "… due to the clear imperative to protect the public from harm, the risk of re-offending or absconding should be weighed against the presumption in favour of immigration bail in cases where the deportation criteria are met. In criminal casework cases concerning foreign national offenders (FNOs), if detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate

[137] Authorities bundle, tab 2, 9-10

> to detain as long as there is still a realistic prospect of removal within a reasonable timescale.
>
> If detention is appropriate, an FNO will be detained until either deportation occurs, the FNO wins their appeal against deportation …, bail is granted by the Immigration and Asylum Chamber, or it is considered that Secretary of State immigration bail is appropriate because there are relevant factors which mean further detention would be unlawful…
>
> In looking at the types of factors which might make further detention unlawful …..Substantial weight must be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does re-offend, must be considered. Where the offence which has triggered deportation is more serious, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of granting immigration bail.
>
> In cases involving these serious offences, therefore, a decision to grant immigration bail is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, immigration bail is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences."

116. At Chapter 55.3.A "Decision to detain – criminal casework cases" it is said[138],

> "As has been set out above, public protection is a key consideration underpinning our detention policy. Where a foreign national offender meets the criteria for consideration of deportation, the presumption in favour of granting immigration bail may well be outweighed by the risk to the public of harm from re-offending or the risk of absconding, evidenced by a past history of lack of respect for the law. However, detention will not be lawful where it would exceed the period reasonably necessary for the purpose of removal or where the interference with family life could be shown to be disproportionate.
>
> …
>
> More serious offences
>
> A conviction for one of the more serious offences is strongly indicative of the greatest risk of harm to the public and a high risk of absconding. As a result, the high risk of public harm carries particularly substantial weight when assessing if

[138] Authorities bundle, 14-15

> continuing detention is reasonably necessary and proportionate. So, in practice, it is likely that a conclusion that such a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean detention is not appropriate."

Court is primary decision maker

117. It is clear law that it is for the Court to determine for itself, as opposed to carrying out a Wednesbury review of the Secretary of State's decision, whether detention is justified. In *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804[139], Keene LJ said,

> "71. … Classically the courts of this country have intervened by means of habeas corpus and other remedies to ensure that the detention of a person is lawful, and where such detention is only lawful when it endures for a reasonable period, it must be for the court itself to determine whether such a reasonable period has been exceeded. That has been the approach adopted in practice in the domestic cases to which we have been referred: Hardial Singh, R (I) v. Secretary of State for the Home Department and, to my mind, Khadir. In addition, this issue fell to be considered explicitly in the case of Youssef v. The Home Office [2004] EWHC 1884, where Field J held that the court was the primary decision-maker as to the reasonableness of the length of detention: see paragraph 62."

Hardial Singh principle (i) - Claimant's detention on 15 September 2019

118. In his skeleton argument, Mr Ó Ceallaigh says at paragraph 38, "The Claimant accepts that the Defendant had a power to detain him." I find that on 15 September 2019, the Claimant was lawfully detained pursuant to Schedule 3 of the Immigration Act 1971 (see paragraph 107 above) and therefore there has been compliance with Hardial Singh principle (i).

The Hardial Singh principles (ii) and (iii) - Reasonable period

119. The issues are whether the Claimant was detained from 15 September 2019 for a period that was reasonable and whether before the expiry of the reasonable period, it became apparent that the Defendant would not be able to effect the Claimant's deportation to The Gambia within a reasonable period and should have released him.

120. The burden of proof is upon the Defendant to show that there was a legal justification for administratively detaining the Claimant from 15 September 2019 to 3 August 2020.

121. The Defendant's witness Susan Quinn, a Senior Executive Operational Manager of Immigration Enforcement, gave oral evidence. Ms Quinn said in cross-examination that:

[139] Authorities bundle, tab 4, 100-117 at 113-114

i) She had no knowledge of the case beyond what was in the papers;

ii) The Defendant's employees who did know about the case, particularly Gareth Hills (the Strategic Director), Clare Whorall and Nina Pritchard, continued to work for the Defendant.

122. Mr Hills, Ms Whorall and Ms Pritchard did not make witness statements or give evidence at trial.

123. Ms Quinn's evidence revealed that she has a very limited grasp of the key facts in this case and as a consequence, her evidence was of limited value:

i) She accepted that she did not know what factors the caseworkers had taken into account in recommending the continued detention of the Claimant;

ii) She was unable to assist with the difficulties in the removals process to The Gambia. She was unaware of the letter from Gareth Hills to the Vice-President of The Gambia, dated 28 November 2019[140], and the letter from the Strategic Director to the Deputy Head of Mission, dated 29 November 2019[141];

iii) She was unaware that the first deportation order served upon the Claimant was in the wrong name (see paragraph 55 ii) above);

iv) She suggested that the asylum interview had been expedited because of the Claimant's detention when in fact it had finished long before his detention.

124. The considerations relevant to whether the Claimant's removal to The Gambia was going to be possible within a reasonable time included:

i) The likelihood or otherwise of the Claimant absconding.

ii) The likelihood that upon release the Claimant would commit an offence.

iii) Whether there was a sufficient prospect for the Defendant being able to effect the removal of the Claimant having regard to all the circumstances, including the risk of absconding and the risk of danger to the public if he was at liberty.

iv) The fact that the Claimant could have voluntarily agreed to return to The Gambia.

v) The effect of the administrative detention upon the Claimant's health.

Risk of absconding

125. The risk of absconding was underlined in *Fardous v SSHD* [2015] EWCA 931 Civ[142] where the Court of Appeal made the following points:

> "44 It is self-evident that the risk of absconding is of critical and paramount importance in the assessment of the lawfulness of the

[140] Tab 18, 104-106
[141] Tab 19, 112-113
[142] Authorities bundle, tab 9, 301-312 at 309-310

> detention. That is because if a person absconds it will defeat the primary purpose for which Parliament conferred the power to detain and for which the detention order was made in the particular case. This has been made clear in a number of cases: see for example paragraph 54 of the judgment of Keene LJ in R (A) v Secretary of State for the Home Department [2007] EWCA Civ 804 and the judgment of Lord Dyson in Lumba at paragraph 121.
>
> 45 Although the risk of absconding will therefore always be of paramount importance, a very careful assessment of that risk must be made in each case, as the magnitude of that risk will vary according to the circumstances. It may be very great, for example, where the person has, as in this case, a clear track record of dishonesty and a knowledge of how to "work" the controls imposed to regulate immigration in the European Union. Another example where the risk may be high is where the person refuses voluntary repatriation that is immediately available to him. It is important to emphasise that the risk of absconding is distinct from the risk of committing further offences and not dependent on that further risk. The risk of re-offending requires its own distinct assessment.
>
> 46 However, as is accepted on behalf of the Secretary of State, the risk of absconding cannot justify detention of any length, as that would sanction indefinite detention. It is therefore not a factor that invariably "trumps" other factors, particularly the length of detention. It is nonetheless a factor that can, depending on the circumstances, be a factor of the highest or paramount importance that may justify a very long period of detention."

126. The Defendant says that the risk of absconding is evidenced by:

    i) The Claimant's refusal to leave his cell for a removal flight on 18 June 2011[143].

    ii) The Claimant's refusal to complete ETD forms and his statement that he would never return to The Gambia on 7 August 2018[144].

127. Mr Fletcher says in his skeleton argument, dated 28 November 2023, at paragraph 27 i that the Claimant had no close family ties. However, I find that this is not correct. The Claimant had a brother, Kabir Jasseh, who made a statement dated 16 September 2021[145] offering the Claimant accommodation with him and his family in his property, in Mansfield. The Claimant also has four cousins in the United Kingdom.

[143] Tab 94, 822
[144] Tab 93, 582
[145] Tab 110, 914

128. In the 14 Detention and Case Progression Reviews between 11 September 2019 and 30 July 2020[146], the Claimant was assessed as being a medium risk of absconding, and the Claimant accepts this.

129. I must take into account factors which materially reduce the likelihood of the Claimant absconding:

    i) That he had been on bail for the offence of rape between 6 August 2015 and 30 September 2016 (almost 14 months) and did not abscond.

    ii) The Claimant was lawfully resident in the UK when he was arrested for rape.

    iii) The Claimant has a history of engaging with the Defendant and making immigration and human rights applications.

130. It is common ground that the Claimant was a medium risk of absconding. I find that having regard to all the circumstances, the risk of the Claimant absconding could have been mitigated and reduced to an acceptable level, as the Defendant's case workers, Dave Ratcliffe[147] and Carolyn Comer[148], suggested in their release referrals, dated 10 September 2019 and 16 January 2020 respectively. In his email to the Strategic Director, Gareth Hills, dated 10 September 2019[149], Dave Ratcliffe said that the release would be subject to the following conditions:

    i) Confinement to approved premises between 19:00 and 07:00 daily, with electronic tagging;

    ii) Supervision under licence until 14 September 2022;

    iii) A prohibition on entering Watford town centre between 23:00 and 06:00 daily.

    iv) Reporting condition: to report to staff at Luton Approved Premises at 10:00, 13:00 and 16:00 daily, and weekly to a local Police Station.

    v) A requirement that the Claimant notify the supervising officer of any developing intimate relationships with women.

Risk of re-offending

131. The Claimant accepts that he was properly assessed as a risk of re-offending. In all the Detention and Case Progression Reviews, the Claimant was assessed as:

    i) A high risk of harm to members of the public, namely adult females. The Defendant said the Claimant had shown a blatant disregard for the UK's immigration and criminal laws.

[146] Tabs 23 (205) – 36 (329)
[147] Tab 58, 452-453
[148] Tab 64, 470-471
[149] Tab 58, 452-453

ii) A medium risk of re-offending[150] because although he had only committed one offence, that offence was of a serious nature. However, this is contradicted in all the Detention and Case Progression Reviews, where it is also said that the Claimant is a high risk of re-offending[151]:

> "With no legal right to work in the United Kingdom or access to benefits, it may only be a matter of time that he chooses to re-offend in order to support himself and therefore it is considered that he represents a high risk of re-offending."

132. I accept Mr Ó Ceallaigh's submission that the Claimant's risk of re-offending was overstated by the Defendant for the following reasons:

i) The Probation Service assessed the Claimant as at low risk of re-offending[152];

ii) The Defendant assessed the Claimant as at medium risk of re-offending in part on the basis that he would commit a Theft Act offence to support himself when:

a) He had no history of acquisitive offending. I find that there was no objective basis for the contention that the Claimant would choose to re-offend to support himself. I further find that when released, the Claimant would have received financial support from either the Home Office or the Probation Service;

b) The Defendant's witness Ms Quinn accepted that the risk of acquisitive offending was an immaterial factor that should not have been considered.

iii) The Claimant had been on criminal bail for rape from 6 August 2015 to 30 September 2016 without incident.

133. The Claimant's licence was revoked on 31 October 2020 and he was recalled to prison. The recall report[153] states that the Claimant refused to move to an alternative address provided by the Defendant and that he displayed an increased sense of entitlement. However, the recall report also says,

> "To his credit, Mr Jasseh has responded well to supervision up until this point … he has not missed any Probation appointments."

The Claimant says in his witness statement at paragraph 29[154] that he did not want to leave his accommodation because he was suffering from Coronavirus symptoms and was self-isolating, and so asked for more time before moving.

134. I accept the evidence of Mr Augustine in cross-examination that apart from the Claimant's refusal to move and intransigence, the Claimant was doing well on parole.

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[150] By way of example, see Detention and Case Progression Review dated 3 June 2020 (tab 34, p. 300-308 at 303)
[151] Tab 34, p. 303
[152] Supplementary bundle, 256
[153] Supplementary bundle, tab 49, 264-273
[154] Tab 20, 118

He said that the breach of the Claimant's licence did not indicate that the Claimant was at risk of absconding or further offending.

Bail application on 25 February 2020

135. On 25 February 2020, the Claimant was refused bail by First-tier Tribunal Judge McClure[155].

136. Mr Augustine says in his witness statement at paragraph 29[156] that the likelihood of the Claimant being granted bail is a factor when deciding whether to maintain detention. In cross-examination, he contradicted this by saying that the refusal to grant the Claimant bail was not relevant to whether detention should be continued.

137. Prior to the Claimant's bail hearing on 25 February 2020, the Defendant's representative provided the First-tier Tribunal Judge with a four-page bail summary[157]. Mr Augustine accepted in cross-examination that:

    i) The bail summary did not include the fact that for a number of years:

        a) The Gambian authorities had not been providing emergency travel documents;

        b) There had been no enforced returns to The Gambia.

        and there was no prospect of this changing in the foreseeable future.

    ii) The information in (i) above was relevant to whether bail should be granted.

    iii) Bail was not granted by First-tier Tribunal Judge Mr McClure because there was no suitable approved accommodation currently available.

138. I find that refusal of bail is not relevant to the question of whether the Claimant should be administratively detained. However, even if the bail refusal of 25 February 2020 was relevant, I find that by reason of the matters in paragraph 137 above, very little if any weight could be placed on the refusal.

Case Progression Panel decisions

139. In my judgment the Case Progression Panel (CPP) decisions are not relevant to the decisions that I must make. However, even if the CPP decisions on 15 January 2020[158] and 2 March 2020[159] were relevant, their significance would in any event be very limited. In respect of the 15 January 2020 decision, the CPP believed that "a valid [travel to The Gambia] document was soon to be obtained", which was not the case, and so the basis of the Panel's decision is undermined. In respect of the 2 March 2020 decision, the CPP appeared to believe that an ETD could be sent to the IRC for

[155] Tab 68, 492
[156] Tab 22, 190
[157] Tab 66, p. 483-486
[158] Tab 93, 599
[159] Tab 93, 604

completion and submission to The Gambian authorities[160], whereas in fact there had been no ETD process to The Gambia for years.

Obstacles preventing deportation

140. As at 15 September 2019, when the Claimant was administratively detained:

i) There had been no enforced returns to The Gambia for years and there was a moratorium. In a letter from the Defendant to The Gambia High Commissioner, dated 29 January 2020[161], it is said,

> "UK-Gambia Home Affairs Co-operation: Enforced Returns
>
> I am grateful for your offer to follow up with the relevant Ministries in Banjul regarding the outstanding report from the documentation Task Force visit in December 2017. We will again pursue in parallel through our High Commission as the response has now been outstanding for 25 months, so early resolution of this request would be appreciated.
>
> In regard to the moratorium, we had been assured that this would be lifted on the 1st of January 2020."

ii) There was no Emergency Travel Document (ETD) process at all and had not been for years.

141. On 10 September 2019, the Defendant's case worker Dave Ratcliffe sent an email to Mr Gareth Hills, Strategic Director, requesting the release of the Claimant, saying[162],

> "As removal cannot be arranged within the short to medium term, release is requested.
>
> HMPSS have obtained Approved Premises for Mr Jasseh at Luton Approved Premises, where he is to confine himself to this address between the hours of 19:00 and 07:00 daily unless otherwise authorised by his supervising officer. These premises are available until 6 December 2019, therefore a Schedule 10 accommodation referral is currently being completed for when the Approved Premises ends."

142. Mr Hills replied on 10 September 2019 saying[163]:

> "Given the high harm offending, I would like to maintain detention. We are looking to unblock the ETD issue with the Gambian authorities."

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[160] Tab 93, 604: "The panel suggested case owner ensure contact IRC/POP Team regarding ETD application completion and forwarded to RL Gambian officials before Mr J's released finalised."
[161] Tab 19, 112
[162] Tab 59, 452
[163] Tab 93, 588

143. I find Mr Hills' two-sentence reply inadequate, bearing in mind that, as was said by Lord Brown in *R v Lumba* (supra) at paragraph 341[164], "Freedom from executive detention is arguably the most fundamental right of all". Mr Hills does not deal with all the factors which must be taken into account, which are summarised in *R(I) v SSHD* (supra)(see paragraph 109 above), and the Defendant's policy documents (see paragraphs 115-116 above). His statement "we are looking to unblock the ETD issue" does not give sufficient weight to the fact that there had been no enforced returns to The Gambia for years. He does not deal with the fact that the risk of the Claimant absconding or re-offending could be mitigated and controlled by stringent conditions, as particularised by Mr Ratcliffe.

144. The Defendant's employees dealing with the Claimant's detention all confirm Mr Ratcliffe's position that the Claimant cannot be forcibly removed to The Gambia:

i) On 12 September 2019, the Defendant's Detention Gatekeeper, Lisa Gilligan, noted[165],

> "ETD required, the Gambian ETD process is currently on hold and there are currently no enforced removals to Gambia."

ii) The 24-hour detention review conducted on 16 September 2019[166] notes,

> "Mr Jasseh's removal is not imminent as he has an outstanding asylum claim and the Gambian ETD process is currently paused."

iii) In the Detention and Case Progression Review of 8 November 2019 the Authorising Officer stated[167],

> "As removal within a reasonable timeframe appears unlikely, please submit a further release referral highlighting the legal and casework barriers for the Strategic Director's consideration."

145. There was a meeting between Home Office representatives and the Gambian Vice-President in The Gambia in late November 2019. There is a letter from Mr Hills, Strategic Director, to the Vice-President of The Gambia, dated 28 November 2019[168], which states,

> "I thought it would be helpful to write setting out what we understood had been agreed. This is that the United Kingdom will be able to recommence enforced returns on scheduled, commercial airlines in line with our previous low-profile approach.
>
> In accordance with this, the Gambian High Commission in London would recommence documenting enforced cases,

[164] Authorities bundle, tab 6, 142-257 at 249
[165] Tab 93, 590
[166] Tab 93, 591
[167] Tab 26, 233
[168] Tab 18, 105

> starting with the twenty already confirmed as Gambian nationals in 2017. We restated our obligation to ensure that the Gambian High Commission would be able to validate the identity and nationality of any new cases being returned."

146. Whist I bear in mind that the Defendant does not have to identify a finite time by which removal can reasonably be expected to be effected, I note that this letter does not provide any timeframe for when enforced removals would begin. Further, the letter confirms that any enforced returns would start with twenty Gambian nationals from 2017. I further note that the Defendant has not disclosed any letter or response from The Gambia saying that any agreement as to enforced returns and ETDs had been reached.

147. The very day after the letter of 28 November 2019, the Defendant adopts a very different tone, expressing doubt as to whether The Gambia will permit enforced returns. In the Defendant's 'Returns Global – Weekly Newsletter, Friday 29 November 2019' it is said[169],

> "I have been in The Gambia this week, engaging with their government on returns issues. For some time it has proved difficult to secure travel documents and a moratorium was put on all returns earlier this year. …
>
> …
>
> The meeting was a positive one and we are hopeful now that we can recommence returns and ETDs. I am always wary about whether a constructive outcome will actually deliver the goods. On most occasions it does and we now have forged the personal relations which are so important on these matters"

148. The Defendant says that it expected the moratorium to be lifted on 1 January 2020. In a letter from the Defendant to the Deputy Head of Mission at The Gambia High Commission, dated 29 January 2020[170], it is said,

> "In regard to the moratorium, we had been assured that this would be lifted on 1 January 2020."

149. However, the moratorium was not lifted on 1 January 2020.

150. On 16 January 2020, another release referral was made by a case worker, Carolyn Comer, to the Strategic Director. Ms Comer wrote[171],

> "It is also noted that an ETD is required, however there are currently no enforced removals to Gambia
>
> As removal is not imminent, release is being proposed

[169] Tab 18, 107-108
[170] Tab 19, 112
[171] Tab 64, 470-471

> Mr Jasseh is considered to pose a high risk of harm to members of the public, namely adult females.
>
> CCD are working with HMPPS to mitigate any risk on release
>
> HMPSS will obtain Approved Premises prior to Mr Jasseh being released whereby he will be required to confine himself between the hours of 19:00 and 07:00 daily unless otherwise authorised by his supervising officer.
>
> Mr Jasseh is not to enter the area of Watford Town Centre between 23:00 and 06:00 daily.
>
> He is to notify his supervising officer of any developing intimate relationships with women.
>
> Mr Jasseh's supervision under licence expires on 14 September 2022.
>
> To mitigate risk CCD will be requesting Mr Jasseh be subjected to electronic monitoring with a curfew of between 19:00pm – 07:00am daily.
>
> He will also be required to report weekly to immigration.
>
> Immediately prior to release, communication will take place with both the police and HMPPS"

151. Mr Hills sent an email[172] to Carolyn Comer in reply the same day, saying,

> "Thank you. I'd like to maintain detention given the very high harm offending. We are hopefully about to recommence returns to The Gambia."

152. I find that Mr Hills' three-line response does not begin to address the serious concerns raised by Ms Comer and expresses no more than a hope of being about to be able to remove the Claimant to The Gambia. The moratorium on enforced returns and ETDs was not lifted on 1 January 2020, nor at any time during the Claimant's detention.

153. In the Defendant's disclosure before the Court, there are no letters or communications between the Home Office and The Gambia relating to enforced returns to The Gambia or ETDs for The Gambia after the letter of 29 January 2020.

154. The witness statements of Joseph Augustine, dated 1 August 2023[173], and Susan Quinn, dated 1 August 2023[174], do not refer to the Defendant taking any steps to seek to persuade The Gambia to issue an ETD for the Claimant or accept an enforced return of the Claimant at any stage. Mr Augustine said in cross-examination that he did not know what factors the case worker had taken into account when deciding to maintain

[172] Tab 65, 477
[173] Tab 22, 183-193
[174] Tab 21, 140-182

detention. In his witness statement he displayed a complete misunderstanding of the fact that there had been no enforced returns to The Gambia for a number of years and no ETD process, attributing this at paragraph 33 of his witness statement to the Covid-19 pandemic[175],

> "The process for enforced removal had been paused and it was likely that it would remain so for the coming months due to the pandemic."

155. In his skeleton argument, Mr Fletcher submits at paragraph 18,

> "In matters related to dealings with foreign states, the Defendant has considerable expertise and the assessment of the Strategic Director therefore carries significant weight."

156. If the Defendant had provided a witness statement from the Strategic Director (Mr Hills), this submission would have had some weight but as the Defendant has not done so, I find this submission to be empty of any substance.

157. Mr Ó Ceallaigh submitted that the Court should draw an adverse inference from the Defendant's failure to adduce evidence from the Strategic Direction or anyone else as to the likelihood of enforced returns to The Gambia being reinstated. He referred the Court to *AO v Home Office* [2021] EWHC 1043 (QB), in which Morris J held[176],

> "49. From Ms Louden's evidence, it seems clear that there are individuals working within the Home Office (very possibly including Mr Walker) who were directly involved at the time. They have not been called to give evidence. In this regard, the judgment of Beatson LJ in VC supra, at §68, citing Sales J in Das at §21, is of particular relevance... The Court was simply referred to the contemporaneous records on the Secretary of State's file (detention reviews, raw medical data and other documents) and was left to try to piece together what had happened in relation to complex issues. That is effectively the position in this case too. In such a case, as Sales J pointed out, the Secretary of State takes a substantial risk that the Court will draw adverse inferences of fact from the failure to call available witnesses... In assessing the facts in the present case, I bear this well in mind, in particular on, but not limited to, issues where the burden of proof is on the Secretary of State.
>
> …
>
> 270. In the present case, in my judgment it is highly significant that there is no evidence from any individual within the Home Office who was involved in the Claimant's detention. Ms Louden fairly accepted that she was not involved at the time and that her knowledge of the facts surrounding the Claimant's

[175] Tab 22, 191
[176] Authorities bundle, 442-511 at 456 and 508

> detention is taken from consideration of the document file on the case. In my judgment, Ms Louden's evidence as to what would have happened at the time was opinion based on that consideration alone and does not carry much weight. Further, in light of the absence of evidence from those at the time, I am entitled to draw the adverse inference that the Claimant would not, or might well not, have been detained."

158. Mr Ó Ceallaigh also referred the Court to *R (VC) v SSHD* [2018] EWCA 1 WLR 4781, in which Beatson LJ said at paragraph 68[177],

> "In *Das*, a case similarly concerned with an immigration detainee suffering from mental illness who alleged that her detention was unlawful, the Secretary of State also chose to submit no evidence to explain her decision making in respect of the decisions to detain. In my judgment in that case at [80] I agreed with the following statement of Sales J, the judge at first instance in that case:
>
> "Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk. In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party …. The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, [in the words of Lord Walker of Gestingthorpe in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2009] UKPC 6 at [86])] 'to co-operate and to make candid disclosure by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. …'"
>
> I remain of the view that this is the right approach. It follows that the approach of the judge below in this case was over generous to the Secretary of State. I now turn to the questions set out at [62] above."

159. I accept Mr Ó Ceallaigh's submission and draw an adverse inference from the Defendant's failure to adduce any evidence from the Strategic Director, Mr Hills, or any other witness as to the reinstatement of enforced returns and ETDs to The Gambia.

[177] Authorities bundle, tab 12, 389

160. The Defendant placed in evidence on the first day of the trial a document entitled "Timeline for resolving Gambian returns"[178]. This document is not dated and does not state its provenance or identify an author. It is unknown whether the document is a draft, a record or a note. No witness has given evidence about this document apart from Mr Augustine, who said in evidence-in-chief that he had never seen this document before and did not know its provenance, authorship or date. Having regard to the absence of evidence about this timeline, I find that I can place very little, if any weight upon it.

Conclusion as to detention from 15 September 2019 to 3 August 2020

161. I reject the Claimant's contention that there was not a reasonable prospect of his enforced return to The Gambia within a reasonable period from 15 September 2019 because I find that there was a sufficient prospect that enforced returns to The Gambia would be possible from 1 January 2020. It appears that on 12 September 2019 The Gambian authorities had said that the moratorium would be lifted on 1 January 2020: in a letter from Mr Hills to The Gambian Deputy Head of Mission, dated 29 January 2020, he says, "In regard to the moratorium, we had been assured that this would be lifted on 1 January 2020. I refer you to the enclosed Note Verbale (MEA/C/306 (45-PMN)) from your Ministry of Foreign Affairs dated 12 September 2019[179].

162. On 16 January 2020, the Claimant was again referred to Mr Hills for release, on this occasion by Carolyn Comer, and I find that from that date there was no sufficient prospect of removing the Claimant to The Gambia to warrant his continued detention. I reach this conclusion taking account of the following factors:

    i) The Claimant had committed a serious criminal offence, for which he has expressed no remorse or contrition.

    ii) The Claimant had shown disregard for the immigration system by failing to regularise his immigration status for five years after his visa expired in 2004.

    iii) There was a medium risk of the Claimant absconding. On the one hand, the risk was heightened by the fact that the Claimant had refused to leave his cell for a removal flight on 18 June 2011[180]. Further on 7 August 2018 he refused to complete forms and indicated he would never return to The Gambia. On the other hand, the Claimant had been on bail for rape from 6 August 2015 to 30 September 2016 (almost 14 months) and did not abscond. I have found that contrary to Mr Fletcher's submission, the Claimant had close family ties (see paragraph 127 above). I find, as did the Defendant's Dave Ratcliffe and Carolyn Comer, that the risk of absconding could have been, and subsequently was, mitigated by strict conditions.

    iv) There was a risk of the Claimant re-offending, which I have found could be mitigated and controlled by strict conditions.

    v) The Claimant could voluntarily return to The Gambia.

[178] Bundle Z, p. 1
[179] Tab 19, 112
[180] Tab 94, 822

vi) I accept that the Claimant's mental health deteriorated while he was in detention. The medical notes show that on 26 September 2019 the Claimant stated he was experiencing auditory hallucinations and would like to be assessed. On 27 September 2019 the medical notes show that the Claimant started mirtazapine[181]. I find that the Claimant's mental health was adequately treated while he was in detention and so this factor is of limited weight. I accept that from March 2020, when Covid-19 led to lockdown, the Claimant was detained in his cell for 23.5 hours a day. However, this was common to all persons in detention and prison during the Covid pandemic and therefore I find it is of limited significance.

163. The factors in paragraph 162 above have to be weighed in the balance. I have drawn an adverse inference against the Defendant for failing to call its Strategic Director, Mr Hills, or any other person to give evidence as to the reinstatement of enforced removals and ETDs to The Gambia. I conclude that looked at objectively and weighing all the above factors, as at 16 January 2020 the Defendant had no more than a hope of being able to remove the Claimant to The Gambia within a reasonable time, and the risk of absconding and re-offending was not at a sufficient level to justify detention. The Defendant has not provided any evidence, and the burden of proof is upon it, to show that after 1 January 2020 the Claimant could have been deported within the near future or within a reasonable time. Indeed, two of the Defendant's case workers dealing with the Claimant's case, Dave Ratcliffe on 10 September 2019 and Carolyn Comer on 16 January 2020, had proposed the Claimant's release from detention.

Grace period

164. I find that the Hardial Singh endpoint was reached by 16 January 2020, when Carolyn Comer sent her email[182] to Mr Hills proposing the Claimant's release. Mr Fletcher submitted that once the Hardial Singh endpoint is reached, the Defendant is entitled to a reasonable grace period in which to release the individual. What is reasonable depends on the circumstances of the individual case. The relevant facts include the history, as well as the risks to the public.

165. The parties referred me to the following case law:

i) In *R (Muqtaar) v SSHD* [2012] EWCA Civ 1720[183] Lloyd LJ said[184],

> "88. I see force in the view of Elias LJ that it was incumbent upon the Secretary of State first to give urgent consideration to the appellant's position, he having already spent 41 months in detention, and, secondly, to put in evidence as to why (if it was her case) it was necessary to take more than a week to reach a conclusion as to the appellant's position."

[181] Supplementary bundle, tab 55, 364
[182] Tab 64, 470
[183] Authorities bundle, tab 7, 258-281
[184] Supra, 281

ii) In *AC(Algeria) v Secretary of State for the Home Department* (supra), Irwin LJ (with whom Baker and King LLJ agreed) considered the case law on grace periods and held as follows[185],

> "38. Once any of the second, third or fourth principles are breached, then the question arises whether any further detention is lawful. Such further detention can be lawful, in my judgment, only for a reasonable period to put in place appropriate conditions for release.
>
> …
>
> 44. In future, when the question of a period of grace arises or might arise, the Secretary of State should be expected to advance some evidence and to make considered submissions as to what period would be appropriate and why."

166. In the present case, Mr Ó Ceallaigh submits that there should be no period of grace because the Defendant has advanced no evidence as to what that period should be.

167. In light of the fact that the Defendant has adduced no evidence as to what the grace period should be and bearing in mind that the Defendant's caseworker Dave Ratcliffe had already recommended the release of the Claimant on 10 September 2019 and the authorising officer had recommended on 8 November 2019 that a further release referral should be submitted to the Strategic Director, I find that the grace period should be no longer than 14 days from 16 January 2020, namely 30 January 2020.

168. I conclude that the Claimant was unlawfully detained from 30 January 2020 to 3 August 2020, a period of 187 days.

Hardial Singh – principle (iv)

169. I have found that as at January 2020 there was no realistic possibility of an enforced removal to The Gambia and it therefore follows that Hardial Singh principle (iv) does not fall to be considered.

Article 5 ECHR

170. I find that the Claimant's detention from 30 January 2020 amounted to a breach of Article 5 ECHR and the Defendant thereby acted in breach of s.6 and Schedule 1 to the Human Rights Act 1998, for which the Claimant is entitled to compensation pursuant to s.7 and s.8.

Breach of Defendant's "Chapter 55 Enforcement Instructions and Guidance" policy

171. The relevant policy for this case is contained within the "Chapter 55 Enforcement Instructions and Guidance" (see paragraphs 115-116 above). The policy confirms that:

i) Detention must be used "sparingly, and for the shortest period necessary";

[185] Authorities bundle, tab 14, 440-441

ii) There is a presumption in favour of release;

iii) Reasonable alternatives to detention must be considered.

172. In *Lumba* (supra), Lord Dyson said:

i) At paragraph 26[186],

> "A decision maker must follow his published policy … unless there are good reasons for not doing so."

ii) At paragraph 68[187],

> "The breach of public law must bear on and be relevant to the decision to detain".

173. I find that the Defendant is in breach of its policy for the same reasons as stated in relation to the breach of the Hardial Singh (ii) and (iii) principles.

Breach of Defendant's 'Detention Case Progression Panels' Policy

174. The Defendant's policy "Detention Case Progression Panels", published for Home Office staff on 20 May 2020[188], provides inter alia,

> "CID Action
>
> …
>
> The casework team must give significant weight and consideration to any CPP recommendations, which must not be rejected without careful consideration. If recommendations are rejected there must be clear reasoning for this decision, which must be recorded on CID and in the next Detention and Case Progression Review (DCPR) form.
>
> …
>
> Rejecting a recommendation
>
> …
>
> CID
>
> When a CPP recommendation is disagreed with or rejected, this must be recorded clearly and fully reasoned. All reasoning for the disagreement or rejection must be entered within a note on CID and within the next DCPR. There needs to be a clear and auditable account on CID and within DCPRs setting out the reasons why the recommendation or case progression actions

[186] Authorities bundle, tab 6, 162
[187] Authorities bundle, tab 6, 172
[188] Authorities bundle, tab 3, 73-99 at 93-94

> have not been followed (for example, there has been a change in circumstances/new information). This will not only help when the next DCPR is conducted, or when cases return to the CPP, but will also assist in the event that a claim for unlawful detention is made."

175. Applying the law to the present facts, the GCID case record sheet dated 3 July 2020 records that the Case Progression Panel recommended the release of the Claimant[189].

176. The next Detention and Case Progression Review on 30 July 2020[190] authorized continuing detention for a further 28 days and did not consider the fact that the CPP had recommended the Claimant's release.

177. The Defendant's witness Ms Quinn accepted in terms that there was no consideration of the CPP recommendation to release the Claimant, in breach of the Detention Case Progression Panels policy. Ms Quinn suggested that this breach of policy was because the Claimant was granted bail in principle on 3 June 2020[191].

178. I accept Mr Ó Ceallaigh's submissions that:

i) Ms Quinn's suggestion was pure speculation as she accepted in cross-examination that she did not know what the decision maker took into account;

ii) In any event, it was still a clear breach of the Defendant's Detention Case Progression Panels policy;

iii) It is no answer to say that bail in principle had been granted because such bail could lapse and then the CPP's views would be of importance.

179. I find that the Defendant breached its Detention Case Progression Panels policy in failing to consider the CPP recommendation to release the Claimant at the next Detention and Case Progression Review on 30 July 2020.

180. In *R (VC)* (supra), it was said by Beatson LJ at paragraph 62[192] that where detention has been vitiated by a public law error, a Claimant will only be entitled to nominal damages if they could and would have been detained in any event. This requires the Court to consider that had the public law error not been present: (i) could the Defendant have lawfully detained the Claimant?; and, if so, (ii) can the Defendant demonstrate that it in fact would have detained the Claimant, on the balance of probabilities?

181. I find that the Defendant has failed to show on the evidence that the Claimant could and would have been detained in any event.

Substantial or nominal damages

182. In *R (Lumba) v SSHD* (2012) 1 AC it was said at paragraph 71[193],

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[189] Tab 93, 617
[190] Tab 36, 320-329
[191] Tab 71, 506-508
[192] Authorities bundle, tab 12, 388
[193] Authorities bundle, tab 6, 173

> "Where the power has not been lawfully exercised, it is nothing to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages."

183. I find that the Defendant has not shown that the power to detain could and would have been lawfully exercised. As a consequence, I find that the Claimant is entitled to receive substantial damages for his unlawful detention between 30 January 2020 and 3 August 2020.

184. I find that the compensatory damages will reflect the fact that from 26 March 2020, when the UK went into lockdown due to the Covid-19 pandemic, the Claimant was restricted to his cell for 23.5 hours each day. There is no evidence before the Court as to how long this restriction was in place for. I note that restrictions were relaxed on 23 June 2020, when the 2m social distancing rule was introduced.

185. I find that the Claimant is not entitled to any greater damages by reason of the Defendant's breaches of Article 5 ECHR and its policies, as these only duplicate the breach of the Hardial Singh principles.

Second period of detention (28 June 2021 to 15 September 2021) - Hardial Singh principle (i)

Defendant's submissions

186. The Defendant says that the Claimant was detained from 28 June 2021 pursuant to Schedule 3 of the Immigration Act 1971 (see paragraph 107 above).

187. The Defendant relies upon the evidence of Mr Augustine, who says in his witness statement at paragraph 39[194] that the Claimant was detained for the purpose of removal to effect deportation.

Claimant's submissions

188. At a Parole Board hearing on 28 May 2021 it was decided that the Claimant should be released on 28 June 2021, pending the finding of suitable approved accommodation[195].

189. The Claimant says that the evidence shows that from 28 June 2021 he remained in detention solely because release arrangements were still being made:

    i) Ellen Budgen, of the Detention Gatekeeper Team, sent an email to Detention Gatekeeper Criminal Casework Referrals on 29 June 2021, saying[196],

    > "Detention agreed solely for release arrangements."

[194] Tab 22, 192
[195] Particulars of Claim at paragraph 76; tab 5, 21
[196] Tab 93, 694

ii) The GCID case record sheet, dated 1 July 2021[197], records Marie Gridley as saying,

> "ETDs for Gambia are currently paused therefore there is no realistic timescale for removal
>
> Detention agreed solely for release arrangements."

iii) The Defendant's witness in the judicial review claim, Nina Pritchard, Senior Executive Officer in the Foreign National Offenders Returns Command Accommodation Team (FNO RC AT), says in her witness statement, dated 8 September 2021 at paragraph 31[198],

> "31. The Claimant was detained under Immigration powers on 28 June 2021. The purpose of his detention was in order to source accommodation. A completed form was sent to FNO RC AT on 14 June 2021 so that it could be processed. The caseworker chased a response from FNO RC AT on 26 June 2021 and 1 July 2021 but was informed that there was a large backlog of applications."

190. I have no hesitation in preferring the evidence of Ms Budgen, Ms Gridley and Ms Pritchard to that of Mr Augustine because they had direct personal involvement in making decisions about the Claimant at the material time, whereas Mr Augustine:

i) Says in his witness statement at paragraph 6[199], "I did not have personal involvement in the detention of the Claimant, but from the available records ….".

ii) Accepted in cross-examination that he had no knowledge of the case beyond what was in the papers.

iii) Had no knowledge of what factors the caseworkers took into account when deciding to maintain detention.

iv) Misunderstood the reason that there were no removals to The Gambia, thinking this was due to the Covid-19 pandemic.

v) Was unaware of the facts and did not know that the Claimant was present in the United Kingdom lawfully when he committed the relevant offence.

191. I find that the Defendant detained the Claimant for an unlawful purpose, namely for release arrangements, and breached Hardial Singh principle (i). As a consequence the Claimant is entitled to receive substantial compensatory damages for the period of his detention between 28 June 2021 and 15 September 2021.

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[197] Tab 93, 708
[198] Supplementary bundle, tab 58, 594
[199] Tab 22, 184

Hardial Singh principle (iii)

192. The Defendant has not produced any witness evidence from employees who made decisions relating to the Claimant during his second period of detention. Mr Augustine admitted in cross-examination that he had no knowledge of the case beyond what was in the papers.

193. There is no evidence (except for the timeline, which I have found at paragraph 160 above that I can place very little weight upon) of any contact between the Defendant and The Gambia after January 2020. Looking at the matter objectively, as at June 2021, there is no evidence that there was a realistic possibility of any change in the position that there could be no enforced removals to The Gambia. Mr Augustine admitted in cross-examination that between 28 June 2021 and 15 September 2021 there was no material change in the inability to remove the Claimant to The Gambia.

194. I find that the evidence shows that the Defendant has failed to show, and the burden of proof is upon it, that as at 28 June 2021, the Claimant could be removed to The Gambia within a reasonable time:

i) The Defendant's Michelle Coe, HEO Team Leader, said as early as 5 February 2021[200],

> "Given the travel doc situation with Gambia I imagine release on immigration bail again is likely, but this would need signing off at a higher level than me."

ii) The detention and case progression reviews dated 25 June 2021[201], 29 June 2021[202], 26 July 2021[203] and 23 August 2021[204] all contained the following in the section "2. Case History"

> "2. Travel Documentation
>
> Do we hold a valid travel document No
>
> An ETD is required for Mr Jasseh's removal; however, the Gambian ETD process is currently paused for enforced removals.
>
> …
>
> 3. Assessment of removability
>
> There are no legal or case work barriers to Mr Jasseh's removal.
>
> It is also noted that there are no enforced removals to Gambia at present.

[200] Tab 93, 672-673
[201] Tab 37, 330-339
[202] Tab 38, 340-349
[203] Tab 39, 350-360
[204] Tab 40, 361-371

> Estimated timescale for removal based on current circumstances:
> At least six months."

195. I conclude that there was a breach of Hardial Singh principle (iii) because objectively as at June 2021 the Defendant knew or ought to have known it could not enforce returns to The Gambia within a reasonable time.

196. For completeness' sake, I set out my findings as to the Defendant's position.

197. The Defendant admits in the Defence at paragraph 80 that[205],

> "By 21 July 2021 it had become apparent that the Claimant could not be removed within a reasonable further period."

198. The Defendant contends that it was entitled to a grace period from 21 July 2021, which did not expire until 15 September 2021.

199. If I had accepted that the Hardial Singh endpoint was 21 July 2021, I would have found that the grace period expired on 3 August 2021. I reject the period of time sought by the Defendant as a grace period, 56 days. I find that the Defendant did not take reasonable steps to obtain accommodation for the Claimant for the reasons set out at paragraphs 206 – 232 below. I note that Johnson J gave as one of his reasons in his order of 15 September 2021[206] that he was not satisfied that the Defendant had demonstrated sufficient efforts to comply with the order of Upper Tribunal Judge Allen, sitting as a Deputy High Court Judge, that the Defendant release the Claimant to accommodation by 15 September 2021.

Hardial Singh – principles (ii) and (iv)

200. As at June 2021 there was no realistic possibility of an enforced removal to The Gambia because The Gambia had not been accepting enforced removals for a number of years. It therefore follows that Hardial Singh principles (ii) and (iv) do not fall to be considered. I comment that Mr Augustine accepted in cross-examination that during the entire second period of detention, no steps were taken to remove the Claimant.

Breach of Defendant's "Chapter 55 Enforcement Instructions and Guidance" policy

201. I repeat paragraphs 171-173 above.

Substantial or nominal damages

202. I repeat paragraphs 182-183 above.

203. I find that the Claimant is entitled to substantial compensatory damages for his wrongful detention by reason of the Defendant's breach of the Hardial Singh principles between 28 June 2021 and 15 September 2021. I find that the Claimant is not entitled to additional damages by reason of the breach of Article 5 ECHR and the Defendant's policy "Chapter 55 Enforcement Instructions and Guidance".

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[205] Tab 6, 46
[206] Supplementary bundle, tab 42, 225

Aggravated damages

204. In *Thompson v Commissioner of the Police for the Metropolis* [1998] QB 498 at 516C it was said:

> "Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted."

205. Mr Ó Ceallaigh says that the Claimant is entitled to aggravated damages for the matters set out in paragraph 59 of his speaking note, dated 6 December 2023. Mr Fletcher says that there is no high-handed conduct that could merit aggravated damages.

206. I find that the evidence shows that from January 2021 to 20 August 2021 the Defendant acted in a high-handed and oppressive manner, and frustrated the securing of accommodation for the Claimant.

207. Firstly, the Defendant knew from January 2021 that the Claimant was going to be released and that all that stood between the Claimant and release was the sourcing of accommodation for him. On 20 January 2021, the Probation Service informed the Defendant[207],

> "I am looking at releasing him if I can find him suitable accommodation, I cannot really justify him remaining in prison until 14/09/22.
>
> Will his previous immigration bail still be active or will he have to apply again for this?
>
> Can you also confirm he will get Schedule 4 accommodation too?"

208. On 3 February 2021 the Probation Service again wrote to the Defendant saying[208],

> "Please can you confirm that you will be providing accommodation upon Mr Jasseh's proposed release."

209. At first Michelle Coe advised on 5 February 2021[209] that the Claimant should make an application under Section 4 of the Immigration and Asylum Act 1999. The application was refused on 1 March 2021 on the grounds that the Claimant was serving a custodial sentence and in the absence of a grant of bail, his essential living needs were being met and as such he had no recourse to support[210].

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[207] Tab 93, 671
[208] Tab 93, 672
[209] Tab 93, 672-673
[210] Tab 93, 685

210. The Probation Service wrote to the Defendant on 25 March 2021 saying[211],

> "Mr Jasseh has his Parole Hearing on 27/May. Currently, he finds himself in a Catch 22 situation. Whilst Probation may wish to see him released, we can't recommend release without a release address. He put an address forward but this was not approved.
>
> I expect the Parole Board may well face a similar dilemma. However, they may direct release and expect that that the S.4 application be granted and you guys then source accommodation following the Hearing. There's usually a few weeks' notice.
>
> How much notice do you need in such an scenario?"

211. On 4 May 2021 Michelle Coe wrote[212],

> "This person had a Section 4 application refused in march 2021 as it appeared his CRD was not 'til 2022.
>
> The OM has clarified below that he in fact has a parole review on 27 May 2021 at which he could be granted parole and released (see below). <u>If so he will need accommodation quickly. As such he is applying for Section 4 accommodation for potential release at this point. Please can his application be reconsidered now this has been clarified?</u>" (my emphasis)

212. It would appear that the Defendant then refused the s.4 application wrongly on the basis that the Claimant's release date was September 2021, whereas in fact it was May 2021. On 7 May 2021 there is an email from the Defendant's case worker Lindsay saying[213],

> "This S4 application was refused by Bry in March 21 as the release date was recorded as September 21. Information below states that release date is in fact 27 May 2021 and he requires support.
>
> Diane/Hayley
>
> Can we reconsider the application. I know the previous application was March 21 but if nothing has changed as he has been detained we should be able to assign to decision maker (Nic) and reconsider decision on Atlas?"

213. The Defendant's Bryan Mylotte replied on 10 May 2021 saying[214],

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[211] Tab 93, 675
[212] Tab 93, 675
[213] Tab 93, 676
[214] Tab 93, 676-677

> "Unfortunately I will not reconsider my decision from 1 March 2021. At the moment Mr Jasseh only has a parole review hearing on 27 May 2021. He has not been granted parole yet so my decision to refuse support would remain the same if I was to reconsider my decision now.
>
> If granted parole Mr Jasseh will need to submit a new application which will be considered once received."

214. On 12 May 2021 an email from Michelle Coe says[215],

> "I have already supplied the required report in January - I have re-sent this to Katherine Duffy.
>
> I have queried this accom case further with FNORCAT HEO Diane Murphy as a bit stuck on this issue."

215. The Parole Board decided at a hearing on 27 May 2021 that the Claimant should be released on 28 June 2021, pending suitable approved accommodation.

216. As the Detention Gatekeeper said on 29 June 2021[216],

> "I note FNORC are requesting a short period of detention whilst suitable release arrangements are sought for Mr Jasseh … release has been agreed and these arrangements should not be protracted. Can you flag this case to the CPP for 2 weeks' time please for monitoring. Detention agreed solely for release arrangements." (my emphasis)

217. As the Detention Gatekeeper said, the Claimant was only being detained while accommodation arrangements were being made and these should not have been protracted. I find that the Defendant both could and should have considered sourcing accommodation for the Claimant under Schedule 10 from 27 May 2021, when the Parole Board met and said that the Claimant was to be released on 28 June 2021. The Defendant's witness Nina Pritchard says at paragraph 42 of her witness statement[217],

> "There is no difference between accommodation provided under s.4 IAA 1999 and accommodation under paragraph 9 of Schedule 10 to the Immigration Act 2016."

218. On 7 June 2021 the Claimant's case worker Alice Rumley sent an email saying[218],

> "I note Mr Jasseh has made an application for S4 accommodation on 25th May 2021.

[215] Tab 93, 677-678
[216] Tab 93, 694
[217] Supplementary bundle, tab 58, 590-598 at 596
[218] Tab 93, 681

> Is anyone able to confirm if this was received? If so has his application been accepted? And how long roughly will it take for accommodation to be sourced?"

219. Mr Williams replied on 15 June 2021, saying that the application needed to be made through Migrant Help[219]. I find that Mr Williams should have said that the application needed to be made under Schedule 10. The Claimant followed Mr Williams' advice and made a new application for accommodation on 16 June 2021[220].

220. In an email dated 8 July 2021 from Alice Rumley it is said[221],

> "We are making arrangements for his release however as he has proposed no address for release we now need to await our CCAT team to approve his application and source him accommodation.
>
> …
>
> I have chased this however due to the current pandemic accommodation is very difficult to source.
>
> Once an address is provided release will be requested."

221. On 20 July 2021 the Claimant's s.4 application was refused[222]. The Claimant appealed.

222. On 28 July 2021 the Claimant applied for support under Schedule 10 to the 2016 Act[223]. The Defendant held the application 'in abeyance' pending the outcome of the s.4 appeal. I find that the Defendant could and should have considered the Schedule 10 application at the same time as the appeal under s.4.

223. The delay in sourcing accommodation for the Claimant had a serious adverse effect on his mental health. On 3 August 2021 a note from Marte Lund says[224],

> "Mr Jasseh is having a very difficult time and has expressed concerns that he cannot cope, and says that he requires mental health support urgently. We would therefore be grateful if you could please ensure that Mr Jasseh is seen by a psychologist as a matter of urgency and priority. Further, Mr Jasseh told me today that he feels that he needs to be placed on an ACCT due to his mental health. I would be grateful if you could please pass these concerns on to your mental health team and safer custody as a matter of urgency."

224. On 12 August 2021 the Accommodation Team sent an email saying[225],

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[219] Tab 93, 685
[220] Tab 93, 685
[221] Tab 93, 710
[222] Tab 93, 716
[223] Tab 93, 717
[224] Tab 93, 724
[225] Tab 93, 728

> "We refused his application for support on 20 July 2021. He has appealed but we will not grant or look for accommodation unless a judge overturns our decision." (my emphasis)

225. Bearing in mind that, as the Defendant's Detention Gatekeeper had said on 29 June 2021, sourcing accommodation should not be protracted, this response was in my judgment high-handed and obstructive.

226. On 13 August 2021 the Defendant's Arwyn Williams accepted belatedly[226],

> "It would appear that we need to grant Schedule 10 support due to exceptional circumstances as no ETD can be sourced irrespective of the dismissed Section 4 appeal
>
> Therefore the reply to the Reps to say that we are ordered to release to Schedule 10 accommodation and as such we will be granting and requesting an urgent address."

227. I find that Arwyn Williams' approach of granting Schedule 10 accommodation should have been the approach from 27 May 2021, when the Parole Board said that the Claimant would be released on 28 June 2021.

228. However, the same day the Defendant adopted a contradictory approach. Alice Rumley sent an email saying[227],

> "Mr Jasseh is not eligible for S.10 OR S.95
>
> He will need to appeal or re-apply for S.4"

229. On 16 August 2021 the Defendant finally granted accommodation under Schedule 10. The case notes say[228],

> "The subject is not eligible for s4 accommodation as per the refusal decision dated 20 July 2021 and the appeal which was dismissed on 6 August 2021. However, as part of his release the Order states 'or under any other statutory provision through which the Applicant is eligible for assistance in this regard' for example paragraph 9 schedule 10."

230. On 20 August 2021 a request for accommodation under Schedule 10 was finally made[229].

231. I find it of significance that the request for accommodation under Schedule 10 was made on 20 August 2021 and accommodation was found for the Claimant on 3 September 2021, 14 days later. This was seven months after the Defendant was placed

[226] Tab 93, 729
[227] Tab 93, 730
[228] Tab 93, 732
[229] Tab 93, 737

on notice of the need for accommodation, three months after the grant of parole and two months after detention had begun.

232. I conclude that the Claimant is entitled to aggravated damages for his unlawful detention between 28 June 2021 and 15 September 2021 because of the Defendant's highhanded and obstructive attitude to sourcing accommodation, which was required for his release.

Exemplary damages

233. The Claimant does not pursue a claim for exemplary damages.

Summary of findings

234. I find that applying the Hardial Singh principles:

i) The Claimant was unlawfully detained between 30 January 2020 and 3 August 2020 (187 days).

ii) The Claimant was wrongly detained between 28 June 2021 and 15 September 2021 (80 days).

iii) The Claimant is entitled to substantial compensatory damages in respect of i) and ii) above.

235. I find that the Claimant is entitled to aggravated damages for the period between 28 June 2021 and 15 September 2021.