Neutral Citation Number: [2021] EWCA Civ 541

Case No: C4/2020/0484

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE SUPPERSTONE
[2019] EWHC 3567 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2021

Before :

LORD JUSTICE DINGEMANS
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

MR (PAKISTAN) **AO (NIGERIA)**	**Appellants**
- and -	
(1) SECRETARY OF STATE FOR JUSTICE **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(3) NATIONAL PROBATION SERVICE**	**Respondents**

Hugh Southey QC and Raza Halim (instructed by **Duncan Lewis**) for the **Appellants**
Robin Tam QC and Julie Anderson (instructed by **GLD**) for the **Respondents**

Hearing dates : 9 and 10 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 on 14 April 2021.

Lord Justice Dingemans:

Introduction

1. This is the hearing of an appeal against the order and judgment of Supperstone J. ("the judge") dated 20 December 2019 dismissing the claims of MR, a national of Pakistan, and AO, a national of Nigeria, for judicial review against the Secretary of State for the Home Department ("the SSHD") and the Secretary of State for Justice ("the SSJ"). MR and AO complain of the failure of the SSHD to put in place for immigration detainees held in Her Majesty's Prisons ("HMP's") under the Prison Rules 1999 a mechanism equivalent to Rules 34 and 35 of the Detention Centre Rules 2001 which govern detention in Immigration Removal Centres ("IRC's"). There were further claims for damages for false imprisonment, for infringement of article 14 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), to which domestic effect was given by the Human Rights Act 1998, and for breach of the Equality Act 2010.

2. There had been a separate claim against the National Probation Service for what were said to be unreasonable delays in finding immigration bail accommodation for AO. That claim was dismissed by the judge, permission to appeal in respect of that claim was refused, and it therefore forms no part of the issues considered on this appeal.

The issues on the appeal

3. The appellants say first that the judge was wrong not to find systemic unfairness or unreasonableness in the failure to put in the Prison Rules a mechanism equivalent to Rules 34 and 35 of the Detention Centre Rules. The appellants contend that healthcare providers in HMP's do not inquire whether a detainee is a victim of torture. Under Rules 34 and 35 of the Detention Centre Rules such a question is mandatory. They say that an assessment in HMP's is to determine the health needs of the detainee, and not to provide the SSHD with details of the vulnerability of the person being detained. The appellants rely on the review now being undertaken by the SSHD following the recommendations made in various reports as evidence that the current system is inadequate and unjustifiable.

4. Secondly, as part of the complaints about unreasonableness, the appellants submit that the judge should have found that it is irrational for the SSHD to adopt a policy which required the provision of information to her about whether immigration detainees were adults at risk because of, among other matters, past torture without putting in place a system such as Rule 35 for obtaining such information at the commencement of and during immigration detention. This was a point which was developed more in oral submissions than it had been in the Skeleton Arguments, although it was confirmed at the hearing that the issue had been sufficiently pleaded before the judge and in the grounds of appeal.

5. Thirdly the appellants submit that the failure to have an equivalent of Rule 35 of the Detention Centre Rules in the Prison Rules amounted to a breach of the policy of the SSHD to obtain information on vulnerable detainees so that the detention of MR and AO was unlawful and therefore the judge should have awarded, at the least, nominal damages for wrongful detention and substantive damages for wrongful detention unless the SSHD could show that MR and AO would continue to have been detained. MR claims damages for the period from 14 December 2017 to 30 April 2018 and AO claims damages for the period from 13 March 2017 until 10 August 2018.

6. Fourthly the appellants submit that the judge should have found that there was unlawful discrimination, both under article 14 of the ECHR and under the Equality Act 2010. Finally the appellants submit that the judge should have found that there was a breach of the public sector equality duty under section 149 of the Equality Act 2010.

7. The respondents submit that the judge was right, for the reasons that he gave, to dismiss these claims. The respondents say that any system, including the system for the management of immigration detention, is capable of improvement but the fact that the SSHD is working to improve the arrangements for immigration detainees in HMP's does not mean that there is any justiciable failing on the part of the respondents. There was no systemic failing in this case because the appellants had not provided sufficient information to show that there was a failure in the system, and there were adequate arrangements to ensure that vulnerabilities of MR and AO were identified.

8. The respondents submit that there was no breach of policy by the SSHD so as to render the detention of MR and AO unlawful. This was because the appellants' complaint was that the policy should have required Rules 34 and 35 of the Detention Centre Rules to be applied to those detained under immigration powers in HMP's, not that it did apply and had been breached. The respondents submit that in any event sufficient information had been obtained by the SSHD about MR and AO and their detention had been properly maintained even after the allegations of torture had become known and was lawful. It was further submitted that if there had been any unlawful imprisonment only nominal damages should be awarded because the SSHD would have lawfully maintained their immigration detention in any event.

9. The respondents submit that the judge was right to find that there was no discrimination, either under article 14 of the ECHR or under the Equality Act 2010, because those in immigration detention in HMP's were in a different position from those in immigration detention in IRC's. This was because those in immigration detention in HMP's were likely to have committed offences, and because information about their medical position would have been obtained in the course of their time of imprisonment. The respondents denied any breach of the public sector equality duty.

10. The issues were refined in the course of oral submissions on both sides and I am very grateful to Mr Southey QC and Mr Tam QC, and their respective legal teams for their helpful written and oral submissions.

11. It is apparent that the following issues arise on the appeal: (1) whether the judge was wrong in finding that there was not a systemic unfairness in the regime in HMP's for immigration detention because there is no equivalent of Rule 35 of the Detention Centre Rules; (2) whether the judge should have found that it was irrational in the case of MR and AO not to have discovered through an equivalent of Rule 35 of the Detention Centre Rules that they were victims of past torture; (3) whether the judge should have found that AO and MR are entitled to damages for false imprisonment; (4) whether the judge was wrong to reject the claim for an infringement of article 14 of the ECHR; (5) whether the judge was wrong to dismiss the claim for indirect discrimination against AO and MR; and (6) whether the judge was wrong to find that there was no breach of the public sector equality duty.

12. In addition there are two procedural matters which arise. The appellants seek permission to rely on a report from the Chief Inspector of Borders and Immigration which was published after judgment had been given by the judge as fresh evidence. The report was titled "*Annual Inspection of `Adults at Risk in Immigration Detention' for 2018-2019"* dated 29 April 2020.

It was common ground that the court should consider this report for the purposes of hearing the argument, before making a decision about whether to admit it as fresh evidence on appeal. The Respondents seek to rely on a Respondents' Notice to affirm their position, which was filed out of time. I will address the procedural issues later in the judgment.

Immigration detention and false imprisonment

13. It is necessary to set out how a person may become the subject of immigration detention. A state has the right to control those who wish to enter or remain in its territory and therefore to set criteria for leave to enter or remain and for the removal of persons who have no right to remain. The SSHD may hold in immigration detention persons who have no right to be in the United Kingdom pursuant to powers conferred by the Immigration Act 1971 and the UK Borders Act 2007. Persons detained pursuant to immigration detention powers may be held in IRC's or HMP's. Persons detained in IRC's are governed by the Detention Centre Rules 2001 (SI No 2001/38), made pursuant to powers conferred by the Immigration and Asylum Act 1999. Persons detained in HMP's are governed by the Prison Rules (SI No 1999/728), made pursuant to powers conferred by the Prison Act 1952.

14. Persons held in any form of imprisonment, including immigration detention, may bring proceedings for false imprisonment. The tort of false imprisonment "has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it", see *R v Deputy Governor of Parkhurst Prison ex p. Hague* [1992] AC 58 at 162D and *R(Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] AC 245 at paragraph 65.

15. The statutory powers to detain which are conferred by the Immigration Act and the UK Borders Act must be exercised for the purposes of the relevant statutes. The first consequence of this is that the Courts have determined that these statutory purposes require that: the Secretary of State must intend to deport or otherwise remove the detained person; the person may be detained only for a reasonable time; if deportation within a reasonable time is not possible detention will become unlawful; and the Secretary of State must act with reasonable diligence to deport or otherwise remove, see *ex parte Hardial Singh* [1984] 11 WLR 704, *R(I) v Secretary of State for the Home Department* [2003] INLR 196, and *R(Lumba)* at paragraph 22.

16. The second consequence of the duty to exercise the power to detain for the statutory purpose is that the Secretary of State may make policies to explain the bases on which those statutory powers will be exercised. If policies are made they must be transparently identified, see paragraph 34 of *R(Lumba)*.

17. If the statutory power to detain is exercised pursuant to an unlawful policy, the detention will not be lawful "if the unlawful policy bore on and was relevant to the decision to detain", see *Kambadzi v Secretary of State for the Home Department* [2011] 1 WLR 1299 at paragraph 42. This means, in the immigration law context, that the unlawful policy has been applied by or taken into account by the decision-maker, see paragraphs 63 and 68 of *R(Lumba)*. If the unlawful policy did not affect the decision to detain, its unlawful nature will not affect the lawfulness of the detention.

18. Although as a matter of history the SSHD was responsible for HMP's, the office of SSJ was created on 9 May 2007 and by the Secretary of State for Justice Order (SI No 2007/2128) the rights and liabilities for HMP's was transferred from the SSHD and Home Office to the SSJ and Ministry of Justice ("MOJ"). HMP's are now administered by Her Majesty's Prison

and Probation Service ("HMPPS") an executive agency sponsored by the MOJ. HMPPS was the successor to the National Offender Management Service ("NOMS") which was originally part of the Home Office.

Immigration detention of the "particularly vulnerable"

19. Section 59(1) of the Immigration Act 2016 imposes a duty on the SSHD to issue guidance regarding the detention of the "particularly vulnerable". The guidance must address (a) whether a person would be particularly vulnerable to harm if detained, and (b) if the person is so vulnerable, whether the person should be detained or remain in detention. By section 59(2) this applies to anyone detained under immigration legislation. The guidance therefore applies to those in immigration detention in HMP's and IRCs.

20. There is guidance which has been issued and titled *"Immigration Act 2016: Guidance on adults at risk in immigration detention (July 2018 version)"*. This creates a presumption that detention will not be appropriate if a person is considered to be "at risk", while making it clear that immigration control considerations might outweigh that presumption. This maintains a balance between the protection of the vulnerable and the maintenance of proper immigration controls.

21. Adults are "at risk" for the purposes of the guidance if, among other matters: they declare that they are suffering from a condition or have experienced a traumatic event such as torture, that would be likely to render them particularly vulnerable to harm if they are placed or remain in detention; or those reviewing detention are aware of medical or other professional or observational evidence which indicates that an individual is suffering from a condition or had experienced torture that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention. The guidance records that a person may be particularly vulnerable to harm in detention if they: are suffering from a mental health condition; have been a victim of torture; are suffering from post-traumatic stress disorder; or are suffering from other serious physical health conditions or illnesses.

22. The guidance provides for three evidence levels which are referred to as leve1 1, 2 or 3, Adult at Risk. Level 1 Adult at Risk is based on self-declaration alone, and such declarations should be afforded "limited weight". Level 2 Adult at Risk is based on professional evidence (for example from a social worker or medical practitioner) or official documentary evidence which indicates that the individual is an adult at risk. This evidence should be "afforded greater weight". Level 3 Adult at Risk is based on professional evidence stating that the individual is at risk and that a period of detention would be likely to cause harm, for example by increasing the severity of symptoms. This evidence should be "afforded significant weight".

23. The guidance records that immigration control factors need to be balanced against levels 1, 2 and 3 Adults at Risk. Relevant factors include whether there is: a realistic prospect of removal within a reasonable period; a criminal history; and a risk of absconding based on the previous compliance record. Immigration control factors can outweigh the presumption that an adult immigrant at risk should not be detained.

Rules 34 and 35 of the Detention Centre Rules and Rule 21 of the Prison Rules

24. In IRC's those who are detained have a regime of health care in accordance with the Detention Centre Rules. Rules 33 to 37 of the Detention Centre Rules are headed "Health care". Rule 33 requires every detention centre to have a medical practitioner trained as a

general practitioner and a health care team responsible for the care of the physical and mental health of the detained persons.

25. Rule 34(1) of the Detention Centre Rules provides, among other matters, that:

> Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner …) within 24 hours of his admission to the detention centre.

26. Rule 34(2) provides that an examination may not take place where the detained person does not consent to it.

27. Rule 35 provides, among other matters, that:

> (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay
>
> (5) …

28. Those who are imprisoned, including those in immigration detention in HMP's, are governed by the Prison Rules. These also provide for a system of healthcare. Rules 20 to 22 of the Prison Rules provide that the governor must work in partnership with local health providers to secure the provision to prisoners "to access to the same quality and range of services as the general public receives from the National Health Service".

29. Rule 21(1) of the Prison Rules provides:

> (1) A registered medical practitioner working within the prison shall report to the governor on the case of any prisoner whose health is likely to be injuriously affected by continued imprisonment or any conditions of imprisonment. The governor shall send the report to the Secretary of State without delay, together with his own recommendations.

Other relevant policies

30. The SSHD has published a separate policy document which is entitled "*Adults at risk in immigration detention*". The relevant version for this appeal is the fifth version. This is similar

to the guidance which has been published under section 59 of the Immigration Act 2016. It notes that "evidence that an individual is a victim of torture may emerge from a Rule 35 [report]". It records that the purpose of Rule 35 "is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention". The policy makes it clear that a Rule 35 report must be brought to the attention of the SSHD's caseworker responsible for detention decisions. The policy records that "a report under Rule 35(1) (a detained person whose health is likely to be injuriously affected by continued detention or conditions of detention) will normally amount to level 3 evidence". The policy states that a report under Rule 35(2), namely that the detained person is suspected of having suicidal intentions, will not always necessitate a review of the appropriateness of detention, but whether it does would depend on the information from the doctor. The policy provides that a report under Rule 35(3), namely that the doctor has concerns that the detained person may have been the victim of torture, would normally amount to at least level 2 evidence. On receipt of a Rule 35 report the caseworker must review the appropriateness of the individual's continued detention in the light of the information in the report and respond within 2 working days of receipt.

31. Another relevant document is the *Detention Services Order 09/2016*. The relevant version for this appeal is the seventh version. This Detention Services Order ("DSO") sets out policy relating to the preparation and submission of Rule 35 reports by medical practitioners. This also provides that the purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The effect of this Order is to ensure that the Rule 35 report comes to the attention of the decision maker and that a prompt decision is made in the light of the report.

32. There is no equivalent policy requiring rule 21 of the Prison Rules reports to be provided to the relevant decision maker.

Some reports on the absence of Rule 35 reports for those held in immigration detention at HMP's

33. Her Majesty's Inspectorate of Prisons published a findings paper in November 2015 titled "*People in prison: Immigration Detainees*". In that paper criticisms were made of some Rule 35 reports and the Home Office responses to the reports noting that "reports often fail to offer meaningful commentary and replies are dismissive". However it was recorded that 5 per cent of the Rule 35 reports on Harmondsworth IRC in 2013 had led to a release and it was noted that "no equivalent safeguard is available in prisons … This could mean that a torture survivor, or detainee who has suicidal intentions, or whose health is being injured by detention, is unnecessarily detained". It was recommended that the prison rules should be amended to accord immigration detainees the same protections of Rule 35 of the Detention Centre Rules.

34. In January 2016 Stephen Shaw CBE presented a report to Parliament entitled "*Review into the welfare in detention of vulnerable persons*". He stated that safeguarding mechanisms should be applied to all persons detained under immigration powers "whatever the place of detention". This meant applying Rule 35 reports on persons in immigration detention in HMP's as well as in IRC's. He appreciated that this would complicate relationships with NOMS, which was then responsible for HMP's but said that was a consequence of the decision to house some immigration detainees in HMP's. It appears that this recommendation was rejected by the SSHD.

35. Mr Shaw was asked to conduct a review of his earlier report and this was published in July 2018 titled "*Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons*". He noted that his recommendation that Rule 35 should apply to those in HMP's as well as those in IRC's had been rejected on the basis that a broadly equivalent rule existed in the Prison Rules, being rule 21. Mr Shaw stated that he was less confident that rule 21 of the Prison Rules was an adequate substitute because there were fewer full-time healthcare staff to make assessments, and less regular contact with detainees given the larger prison population numbers. Mr Shaw concluded "prisoners held under immigration powers may well be subject to wider vulnerability issues, and I do not believe the current system is likely to pick this up. This is a worrying gap and needs to be remedied".

Evidence from the SSHD and SSJ about the system governing immigration detainees in HMP's

36. The Respondents relied on the systems which existed in practice in HMP's to show that there was no systemic unfairness or irrationality in the cases of MR and AO. The evidence demonstrated that: there were Home Office criminal casework teams based in HMP's; the detainees were asked to consent to the disclosure of their medical records; and decisions were made by a designated gatekeeper to ensure consistency of decision making. It is necessary to refer to this evidence at some length.

37. Evidence from Daniel Smith showed that a Home Office Detention Gatekeeper team was established as a result of another recommendation (number 25) from Mr Shaw in his 2016 Review. Evidence from Muhammed Riyaz Kaudeer showed that the designated gatekeeper is intended to ensure consistency in the decision making for immigration detainees. This team makes detention decisions for foreign national offenders ("FNO's") and decisions are served by the Home Office immigration criminal casework team which is located in HMP's.

38. The evidence from Mr Smith showed that detention decisions for FNO's in HMP's is referred to the Detention Gatekeeper team before the completion of the sentence. The referral form asks about "any factors which engage the Home Office Adults at Risk in Immigration Detention policy". Any medical information on the referral will be considered together with the contemporaneous data records on the Home Office Case Information Database ("CID").

39. Graham Wilkinson, head of the Foreign National Offender Operational Practice Team at HMPPS said that following Mr Shaw's report HMPPS was devising a new policy to define in a clear way the transition of an individual from serving prisoner to immigration detainee. Mr Wilkinson referred to a service level agreement between the prison service and Home Office relating to the management of FNO's who had completed their sentences. Mr Wilkinson stated that about 11 per cent of prisoners were FNO's (prisoners who did not have British nationality) but not all of those FNO's would be of interest to the Home Office and subject to immigration activity. He said immigration officers present in local prisons might visit daily or several times a week. Arrangements would be made between the prison and the relevant immigration team. Mr Wilkinson identified the hub prisons, which included HMP Pentonville (where MR was detained) and HMP Moorland (where AO was detained). FNO's liable to deportation were issued with forms and letters identifying why the prisoner was to be deported and how a prisoner could appeal. FNO's who were being detained after completion of their sentence of imprisonment had to be informed of their right to apply for bail, and had to be treated as an unconvicted prisoner (so held on remand).

40. Mr Rupert Bailie, an employee of HMPPS who worked in national roles in the Health, Wellbeing and Substance Misuse teams recorded that prison health services were a part of the National Health Service provided to all citizens, and that clinical guidelines which govern health services provided to the general population apply. Mr Bailie stated that all men and women were screened by healthcare services upon reception. This required a medical examination of all incoming prisoners to determine, among other matters, whether they had any short or long term physical or mental health needs. This requirement was set out in PSI 07/2015. Mr Bailie recorded that NHS contracted healthcare providers had an independent system of management for the medical professionals, to ensure the independence of clinical decision making. Patient confidentiality was maintained, but there were limited exceptions for the immediate protection of life. Prisoners could consent for their medical records to be seen by others.

41. Richard Bell, Acting Assistant Director of the Criminal Casework Prison Operations and Prosecutions Team in the Immigration department of the Home Office referred to Assessment, Care in Custody Teamwork ("ACCT") reviews. He had oversight of a team of immigration officers who carried out operational duties on behalf of the Home Office Criminal Casework team in HMP's. An ACCT review is a multi-agency review organised by the prison to review an individual's current risk and vulnerabilities of prisoners, including those in immigration detention in HMP's. He produced the forms which were provided to FNO's, including a form notifying of intention to deport, asking for reasons why such a decision should not be made, and also a form requesting consent from the detainee to disclose their medical history to the Home Office. Decisions about immigration detention would be referred to the Detention Gatekeeper, and if detention is approved a form authorising detention would be served. Immigration detention is reviewed every 28 days.

42. Aaron Beeney, a prison officer in HMPPS, was the Equalities and FNO at HMP Pentonville where MR was held. Mr Beeney was also an assessor for the ACCT process for nine years. HMP Pentonville housed many FNO's. MR was detained at HMP Pentonville and Mr Beeney had been involved in an ACCT for MR. Mr Beeney said that Home Office immigration staff conduct their own immigration induction at the prison induction stage. There is an immigration team based at the HMP Pentonville, which also covered other north London HMP's where there are FNO's. FNO's are asked to give consent for the release of their medical records to the immigration team.

43. Mr Beeney gave evidence about the ACCT process. This was described as the "prison's principal non-medical intervention for dealing with concerns about a prisoner's safety or wellbeing, including psychological or psychiatric issues". The ACCT process can be opened during the induction stage or at any time during the prisoner's stay in HMP. It can be initiated by any member of prison staff. Mr Beeney said that "the immigration team is notified and involved in the ACCT process where appropriate, for example where the prisoner's immigration situation is a factor affecting their state of mind, and/or where the prisoner's condition may affect their deportation". Mr Beeney referred to monthly workshops for FNO's with external charities and support groups including Detention Act and Bail for Immigration Detainees.

44. Christopher Barnett-Page of HMPPS worked on a programme to prevent self-inflicted deaths and to reduce self-harm in HMP's. He stated that it was possible for Home Office Immigration staff to be involved as part of the team managing the ACCT process. He referred to the UK Border Agency staff embedded at hub prisons, who cover FNO's in what he termed the hub and spoke prisons. He referred also to mobile teams who can be contacted by prisons.

45. Christopher Jackson was the safer custody manager at HMP Moorland where AO was held. Mr Jackson stated that the first interaction a prisoner will have with healthcare is when they are met by a nurse to discuss individual medical needs. The need for other services will be identified. Mr Jackson referred to the work of mental health teams and the ACCT process. Mr Jackson stated that as a hub prison there was an immigration team based at HMP Moorland.

46. Paul Gasson, of the Home Office, identified some of the risks of housing FNO's in IRC's. He also gave evidence about the regime in IRC's. He identified that reports under Rule 35 of the Detention Centre Rules provide a means by which the vulnerability or risks associated with a detainee are brought to the attention of those managing the IRC. It also provides a means by which the SSHD's officials can decide whether the continued detention of the person concerned is appropriate. Mr Gasson stated that individuals should be held in immigration detention in HMP's only where they posed a risk to the safety of the public or the good order of an IRC. A risk assessment will be carried out to determine the suitability of the transfer of a FNO from HMP to an IRC.

Evidence adduced on behalf of MR and AO showing that there was systemic unfairness or irrationality in the cases of MR and AO

47. In addition to the reports on the absence of an equivalent to Rule 35 for those held in immigration detention in HMP's referred to in paragraphs 33 to 35 above, the appellants relied on evidence to show that there was systemic unfairness or irrationality in the cases of MR and AO in not providing immigration detainees in HMP's the benefits of Rule 35 reports. There was evidence from Dr Annie Bartlett, Professor of Offender Healthcare at St George's Hospital, University of London, that the primary function of health care screening in prisons was not to consider whether a person is suitable for detention in the particular prison. Dr Bartlett doubted that there was routine use of Rule 21 of the Prison Rules in routine health work. She had not come across screening questions on torture, whereas it was mandatory in Rule 35 reports. Dr Bartlett did not have experience of immigration officers routinely attending ACCT's.

48. Toufique Hossain, the solicitor for the appellants, gave examples of other cases involving vulnerable clients held under immigration detention powers in HMP's. This was relevant to the appellants' case that there was a systemic unfairness because Rule 35 reports were not produced on persons in immigration detention in HMP's.

Procedural issues - fresh evidence

49. As noted above the appellants also seek permission to rely on the report dated 29 April 2020 from David Bolt, the Chief Inspector of Borders and Immigration, as fresh evidence. The report was headed "*Annual Inspection of `Adults at Risk in Immigration Detention' for 2018-2019"* dated 29 April 2020. The appellants say that they could not have obtained the report for the hearing, because it was published only after the hearing had concluded and judgment had been given. The appellants submit that the report is material, because it supports their arguments that the SSHD should have applied an equivalent rule to Rule 35 in the Prison Rules for immigration detainees. The appellants also complain that the report had been submitted to the SSHD before the hearing in front of Supperstone J. had concluded, because the report was sent to the SSHD on 29 July 2019 (as appears from page 3 of the report) and the hearings took place before the judge on 16 to 19 July 2019 and continued on 22 November 2019.

50. It was originally submitted on behalf of the SSHD that as the report was a report to Parliament it was not admissible evidence because reliance on the report in court proceedings would infringe Parliamentary privilege under article 9 of the Bill of Rights. This submission was not in the event pursued in oral submissions and it was not sustainable. This is because a Court's reference to a report placed before Parliament does not involve impermissible questioning of proceedings in Parliament contrary to the Bill of Rights. In addition the SSHD submitted that the report, as a report to Parliament, had first to be provided to Parliament, and therefore no reference could be made to it until it had been published. The appellants pointed out that such a requirement would not have prevented disclosure of the underlying material on which the report was based. Finally it was submitted by the SSHD that the report added nothing to what was already fully and fairly disclosed.

51. In the new report the Chief Inspector recorded that "while there are serious shortcomings with the Rule 35 process, there is no equivalent, broad or otherwise, as Rule 21 is seldom if ever used." The Chief Inspector stated that prison staff were largely unaware of the adults at risk guidance and that the SSHD's rejection of the recommendation that Rule 35 be applied to immigration detainees at HMP's was based on a false premise about rule 21 of the Prison Rules. The Chief Inspector specifically warned that if a detainee informed a prison officer about a vulnerability it would not necessarily get back to the Home Office. The Chief Inspector said that the new key workers "were not briefed to probe [foreign national offenders] about possible vulnerabilities that might require them to be flagged as an adult at risk". The Chief Inspector recommended at 22 that: "Rule 35 should apply to detainees held in prisons". This supports a clear consensus that an equivalent of Rule 35 of the Detention Centre Rules should be applied to persons in immigration detention in HMP's.

52. There was no dispute before us that, in accordance with the well-established "*Ladd v Marshall* principles" (as glossed in *Terluk v Berezovsky* [2011] EWCA Civ 1534), further evidence should only be admitted for the purpose of an appeal (a) if it could not have been obtained with reasonable diligence for use at the trial; (b) if it would probably have had an important influence on the result of the case; and (c) if it is credible.

53. In my judgment the report should be admitted as fresh evidence. It is plain that the appellants could not have obtained the report before the proceedings, because it had not been published. It was common ground that the report contained credible evidence. In my judgment the report was further evidence on the importance of having some system equivalent to Rule 35 of the Detention Centre Rules for immigration detainees in HMP's. As such it was capable of having an important influence on the result of the trial and appeal.

Procedural issues – the Respondents' Notice

54. There is another procedural matter to address. The respondents served a Respondents' Notice out of time. It was common ground both that the matters sought to be raised were set out in earlier submissions made on behalf of the respondents, and that the matters could be fairly determined at the hearing. In the circumstances I grant permission for the Respondents' Notice to be served out of time.

The relevant factual background for MR

55. The evidence summarised above mainly relates to the grounds of appeal of systemic unfairness or irrationality in the cases of MR and AO. However all of the grounds of appeal

raise issues relating to the individual claims and it is therefore necessary to set out the evidence relating to both MR and AO below.

56. MR, who is now 39 years old, claims to have been the victim of ill treatment and torture by the MQM group in Karachi, Pakistan in 2016 when he was the subject of a violent attack with sharp-edged instruments, whips with beads, branded irons and blunt heated rods. He has 13 scars on his body which have been described by Dr Alick Munro in a report dated 17 June 2019 as "highly consistent" with, "consistent" with, or "typical" of his description of torture.

57. MR had first come to the UK as a student on 10 September 2003. At some time after complaints from his partner, he was made the subject of a non-molestation order. On 2 December 2015 he was sentenced for breach of that order to one week's imprisonment. On 29 February 2016 he was convicted of two counts of breach of the order and on 22 April 2016 he was sentenced to 12 months imprisonment and a restraining order was imposed. On 9 July 2016 the SSHD decided that he was liable for deportation and on 20 July 2016 he was served with notice of liability for deportation. On 29 July 2016 he made representations to the effect that if returned he would be killed by his family because of his lifestyle and his convictions in the UK. On 9 September 2016 he was served with a deportation decision. On 19 September 2016 the Detention Gatekeeper noted that MR was taking medication for depression and there was "a harm aspect". His sentence of imprisonment came to an end on 27 September 2016 at HMP Thameside. He was then detained under immigration detention powers at HMP Thameside, which meant that he was held under remand conditions. At that stage MR was assessed as a Level 2 Adult at Risk because of his depression. However MR was kept in immigration detention because of his past offending so that immigration controls could be maintained. On 27 October 2016 MR signed a disclaimer stating that he wanted to return to Pakistan. On 10 November 2016 he was transferred to Colnbrook IRC and he was deported to Pakistan on 11 November 2016.

58. It was on his return to Pakistan in 2016 that MR claims to have been the victim of torture by the gang in Pakistan. MR returned to the UK without leave and in breach of his deportation order, having travelled through the Republic of Ireland. MR contacted his former partner who complained to the police about MR's further breach of the restraining order and an assault by MR.

59. On 14 October 2017 MR was arrested and remanded in custody. On 15 October 2017 he was transferred to HMP Thameside. On 14 October 2017 his Case Information Database notes showed that he reported that he had depression and was stressed about being in custody. A conversation on 14 October 2017 was recorded in which MR had reported being scared of everything, with loss of appetite, memory and a feeling of depression. He was however able to hold a decent and appropriate conversation and his reports were believed to be attention seeking behaviour. He had been placed on an ACCT review when previously in custody and an ACCT review was opened on 24 October 2017. On 27 November 2017 he was transferred to HMP Pentonville. Mr Beeney had various conversations with MR in his general capacity as FN Officer.

60. On 14 December 2017 MR was convicted of battery and two counts of breach of a restraining order. He was sentenced to a total of eight weeks imprisonment and the restraining order was extended. As MR had already served the equivalent of eight weeks' imprisonment following his remand in custody this meant that he was eligible for release. MR was detained again under immigration detention powers at HMP Thameside on 14 December 2017. He remained a Level 2 Adult at Risk because of his depression but he continued to be detained

because of his offending and the fact that he had not complied with immigration laws. MR contends that his period of imprisonment from 14 December 2017 until his release on 30 April 2018 was unlawful.

61. On 19 December 2017 MR's legal representatives stated that he wished to make an asylum claim. On 20 December 2017 the detention manager recorded that MR suffered from depression and was taking mirtazapine. The associated risks of public harm, re-offending and absconding outweighed the presumption of liberty in his case. The Detention Gatekeeper approved his detention, recording a high risk of absconding, re-offending and harm. The records show that his depression was noted, that he was assessed as at level 2 Adult at Risk, but there was no Rule 35 report. It appears that at this stage MR was refusing consent for his medical records to be provided to the Home Office, and refused to co-operate with the process of obtaining travel documentation. On the Detention and Case Review form there was a standard question asking: "Known or claimed medical condition (including mental health and/or self harm issues and any reference to Rule 35 report)". The answer referred to the mental health issues suffered by MR.

62. Consent for release of the medical records was provided on 6 February 2018. There was a further review on 14 February 2018 which agreed that detention was appropriate. This was because MR had shown a blatant disregard for both the criminal law (breaching non-molestation orders) and immigration law (returning after having been deported) and it was assessed that he was highly unlikely to comply with any conditions imposed. On 16 February 2018 it was recorded that from a psychiatric perspective he was fit to fly but the note continued "however he has been clear he does not want to return to Pakistan and has alleged he was tortured there before he made his way to Ireland". Dr Katherine Bartlett, a psychiatrist who had seen MR when detained at HMP Pentonville produced a letter dated 21 February 2018 reporting on her consultations with MR about his PTSD and potential morbid jealousy.

63. A bail hearing was scheduled for 23 February 2018. It appears from the notes that there were concerns about an outstanding criminal allegation against MR which was not, in the event, pursued.

64. There were various delays in arranging for MR's asylum interview. On 27 April 2018 MR was granted bail on conditions, and on 30 April 2018 he was released on bail.

65. On 15 June 2018 MR's asylum screening interview was completed. He reported the torture that he said he had suffered in Pakistan. The asylum claim had not been resolved by the time of the hearings before the judge. This claim was issued on 27 June 2018.

66. After commencement of these proceedings MR was imprisoned for further offences concerning his former partner.

The relevant factual background for AO

67. AO, who is now 31 years old, claims to have been the victim of ill treatment and torture by members of Boko Haram in Nigeria when he was about 13-14 years old. AO said that he was assaulted with various weapons, tied to a tree and escaped in a gutter. He has 80 scars on his body which have been assessed to be highly consistent with his description of torture. There was also evidence of scarring around the knee which he said was when he had been shot in the knee.

68. AO entered the UK and was issued with a visitor visa from 27 April 2006 until 27 October 2006. It appears that he remained in the UK without leave. On 10 January 2012 he was convicted of possessing false identity documents with an improper intention. He was sentenced to six months imprisonment. On 27 July 2012 AO was again convicted of possessing false identity documents with an improper intention and was sentenced to a further six months imprisonment.

69. After his release AO committed a further offence, and on 5 August 2014 AO was convicted of sexual activity with a child aged under 16 years, and was sentenced to six years imprisonment. He was placed on the sexual offences register. AO was imprisoned at HMP Northumberland. His sentence of imprisonment was scheduled to be completed on 13 March 2017.

70. AO was transferred to HMP Moorland on 28 January 2015. On 30 January 2015 AO was visited by an immigration officer and served with a notice of liability to deportation. On 17 March 2015 a deportation order was signed in respect of AO. It provided for an out of country appeal. On 2 October 2015 AO referred to "things that I don't want to talk about" which were "quite traumatic in terms of violence, death and torture". He was prescribed Olanzapine. He was recorded as hearing voices and his prescription of Olanzapine was increased and the ACCT was closed. He was recorded on 21 October 2015 as having "traumatic experiences in Nigeria after being radicalised". On 4 December 2015 AO referred to being shot in the knee in Nigeria.

71. On 2 December 2015 AO was visited by an immigration officer so that travel documentation could be obtained. AO refused to co-operate and stated that he intended to make a claim for asylum, but he did not take any steps to progress that. On 8 March 2016 AO was still refusing to co-operate with making arrangements for his travel documentation.

72. On 1 October 2016 AO was visited by an immigration officer who explained the duties to co-operate in relation to travel documentation. AO informed the immigration officer that he wished to return to Nigeria but there was a problem because he was Christian but some of his family were Muslims. He had at one time become interested in the Muslim faith and had talked to members of Boko Haram. AO was advised that what he had said would be treated as an asylum claim. On 5 October 2016 an immigration officer served a section 72 notice on AO. A screening interview took place on 2 November 2016. AO said he had been found with gunshot wounds and scars and that medical records would show the scars and gunshot wounds. AO provided the SSHD with a consent form for the release of medical records. On 1 December 2016 AO said he feared disclosing his injuries to anyone and had avoided talking about what had happened to him for many years. There was also discussion about the results of an MRI scan on his knee which showed water on the knee.

73. The full asylum interview took place on 26 January 2017 and AO disclosed his account of torture. On 17 February 2017 a probation officer assessment suggested AO would offend again if released with a high risk of failing to comply with licence conditions, immigration bail conditions and sex offender registration. AO was assessed to be at high risk of causing further serious harm to children. On 22 February 2017 the Detention Gatekeeper authorised further detention noting that no risk indicators, as set out in the Adults at Risk policy, had been raised by AO or healthcare

74. On 13 March 2017 AO completed his sentence of imprisonment and he was detained in HMP's under immigration detention powers, save for two brief periods when he was at

Colnbrook IRC. On 10 April 2017 and 8 May 2017 monthly detention reviews were undertaken. Nothing had been noted about risk indicators.

75. In one of the detention reviews which post-dated the 10 April 2017 review and pre-dated the 4 June 2017 review, there was a standard question "Known or claimed medical conditions (including mental health and/or self-harm issues, PTSD, Risks of suicide)" which was answered AO "has not raised any medical issues and received any Rule 35 report".

76. On 12 May 2017 AO's asylum claim was refused. This was explained to AO by an immigration officer on 15 May 2017. On 19 May 2017 AO made further submissions. A letter from Nottingham NHS Trust was provided saying that AO suffered from a psychotic illness. In disclosures in May 2017 AO referred to his experiences when joining and then attempting to leave Boko Haram.

77. On 2 June 2017 a further monthly detention review was undertaken. The decision to detain was maintained because of the high risk of reoffending. On 14 June 2017 the SSHD withdrew the certification of AO's appeal, but AO did not appeal. A further detention review took place on 29 June 2017. On 11 July 2017 the letter dated 19 May 2017 was forwarded to the SSHD. This referred to medication being provided to AO. A detention review took place on 31 July 2017 and it was noted that AO's condition was being managed by the prison. Detention was maintained. A detention review panel considered AO's position on 31 August 2017. He was assessed as being a Level 2 Adult at Risk, but the risk factors weighed in favour of continued detention.

78. Detention reviews took place on 25 September and 23 October 2017. On 19 October 2017 a fresh asylum decision was made with an in country right of appeal but AO did not appeal.

79. On 7 November 2017 AO applied for a bail accommodation address. In November and December 2017 detention reviews were in favour of maintaining detention. On 8 January 2018 AO was aggressive to an immigration officer, contending that he should be transferred to an IRC. He later apologised for being aggressive and it was explained to him that he had been assessed as being unsuitable for transfer because of his risk factors. On 18 January 2018 detention was reviewed, his mental illness noted, but detention was maintained. On 7 February 2018 a case progression panel also decided to maintain detention. His status at Level 2 Adult at risk was specifically noted.

80. On the same day AO was transferred to IRC Colnbrook so that a face to face interview with an official from the Nigerian High Commission could take place. AO was transferred back to HMP Moorland on 12 February 2018.

81. On 14 February 2018 the Health Care Team at HMP Moorland said that it was believed that AO would benefit from further psychological interventions but that it was not appropriate to undertake trauma processing in the light of the uncertain time left in custody.

82. Emergency travel documentation was agreed by the Nigerian High Commission on 15 February 2018. On 16 February 2018 AO's detention was maintained and removal directions were set on 20 February 2018 for removal on 27 February 2018.

83. On 26 February 2018 AO was transferred to Colnbrook IRC to be removed by charter flight on 27 February 2018. However AO lodged an out of time appeal to the FTT and deportation was deferred.

84. On 28 February 2018 a Rule 35 report was completed on AO. AO informed the health care team that he had experienced torture in Nigeria and it was recorded that the injuries were consistent with his account of having been tortured. The report recorded that AO was experiencing significant mental distress. The report noted that he was distressed when showing the scars.

85. On 2 March 2018 the SSHD responded to AO's Rule 35 report. The SSHD accepted that in the light of the evidence AO was a "level 2 Adult at risk". Detention was maintained.

86. On 6 March 2018 the health care team at Colnbrook IRC stated that there were episodes of "frank psychosis" when AO had been detained at HMP Moorland.

87. AO was transferred back to HMP Moorland. On 21 March 2018 an application for bail was dismissed. On 13 April 2018 the FTT permitted AO's out of time appeal to proceed. On 20 April 2018 detention was maintained because of the risk factors.

88. On 8 May 2018 AO applied for bail but withdrew the application. Detention was maintained.

89. On 23 May 2018 AO was granted conditional bail by a FTT judge. The condition was that he reside at an address provided by the National Offender Management Service ("NOMS"). There were delays in identifying a suitable address by NOMS and on 10 August 2018 AO was released from detention after approved premises were identified for AO on 8 August 2018.

90. On 18 October 2018 a further decision was made refusing AO's asylum and human rights claims. An appeal against that decision was dismissed by the FTT on 18 March 2019. He was refused permission to appeal by the FTT and Upper Tribunal.

91. On 24 October 2018 AO had commenced proceedings for judicial review against the respondents. After commencement of these proceedings on 3 May 2019 AO was convicted of breaching his sexual offending order and he was sentenced to 4 months imprisonment. On 5 November 2020, the SSHD made a positive 'Reasonable Grounds' decision in respect of his claim to have been a victim of trafficking as a child.

The judgment below

92. The judge set out relevant facts in his judgment, now reported at [2020] 4 WLR 39. The judge set out the statutory framework and guidance before turning to set out the facts relating to both MR and AO and summarising the submissions of the parties. The judge did not accept that there was a lacuna in the scheme governing the immigration detention of vulnerable persons, including victims of torture or those suffering from mental health problems, in HMP's. The judge specifically noted the equivalence of health care systems in HMP's and the NHS and relied on the fact that the SSHD received information about the healthcare circumstances of immigration detainees from a range of sources in paragraph 93 of the judgment.

93. The judge agreed in paragraph 94 of the judgment that the claim failed to have regard to a critical distinction between individuals who were entering immigration detention in IRC's

and those entering immigration detention in HMP's. This was that "in the main, detainees who enter IRC's enter detention from liberty". That meant that there would not be up to date medical information about detainees coming to IRC's and so there was a need for Rules 34 and 35 of the DCR. The judge contrasted that situation with immigration detainees in HMP's who were likely to have been serving a custodial sentence. Such a detainee would have had NHS health screening on entry to prison on which medical information would be recorded, and medical evidence would have been considered prior to the expiration of the custodial sentence in order for a decision to be taken about whether a person should be detained under immigration powers at the end of their sentence.

94. The judge set out the relevant legal principles for making a finding of systemic unfairness and held in paragraph 99 that the relevant criteria for such a finding had not been satisfied. There was insufficient evidence about the full run of cases, notwithstanding evidence from the appellants' solicitor about other cases. The judge also accepted the respondents' submission that Rule 35 was concerned with the flow of information and not fairness. The judge rejected the contention that the absence of equivalent rules to Rules 34 and 35 led to inherent unfairness and unreasonableness, resulting in the scheme for detention of immigration detainees in HMP's being unlawful.

95. The judge rejected the claims for breach of article 14 of the ECHR and for breaches of the Equality Act 2010 because the two regimes and two cohorts were so different that either they are not properly comparable or the differential treatment was justified by the difference between the two cohorts.

No systemic unfairness – issue one

96. It is apparent that Rule 35 of the Detention Centre Rules obliges medical practitioners to report to the manager of the IRC on the case of a detained person in three main circumstances. These are if: (1) the health of the detained person is likely to be injuriously affected by continued detention; (2) the detained person is suspected of suicidal intentions; (3) the medical practitioner is concerned that the detained person may have been the victim of torture. The manager is then obliged to report these findings to the SSHD without delay. The reason for the immediate report to the SSHD is because any of those three circumstances may impact on the decision to continue to detain the detained person who will then be at least a level 2 Adult at Risk in the second and third circumstances set out above. The evidence showed that a Rule 35 report may be particularly important if a detainee lacks capacity and is unable to bring relevant matters to the attention of the caseworker.

97. Although, as the respondents submit, there is a superficial similarity in the wording of Rules 34 and 35 of the Detention Centre Rules governing IRC's and Rule 21 of the Prison Rules governing HMP's, there is nothing which requires medical practitioners in HMP's to report to the SSHD a concern that the detained person may have been the victim of torture. In these appeals this has had the following consequences. First it is now known in this case that there are concerns that both MR and AO have been the victims of torture but that, certainly at the start of their immigration detention, medical practitioners in HMP's did not identify this fact. Assuming that MR and AO had consented to such an examination, an examination under Rules 34 and 35 of the Detention Centre Rules should have exposed the concern that they had been victims of torture. This is important in circumstances where the evidence in these claims shows that the majority of Rule 35 reports referred to the SSHD refer to concerns about torture.

98. Secondly there is no similar provision to Rules 34 and 35 of the Detention Centre Rules in the Prison Rules which requires medical practitioners to report these concerns to the SSHD in a structured way. Although the Prison Rules contain obligations on medical practitioners to report to the Governor of HMP concerns about those detained in the prisons, those matters are addressed by the Governor and the SSJ is responsible for HMP and not the SSHD. This means that relevant information might not end up with the SSHD. This matter is partly balanced by the fact that the Home Office criminal casework teams do ask FNO's to consent to release their medical records to them, and that relevant matters are then referred to the Detention Gatekeeper.

99. It is, however, fair to the respondents to state that both MR and AO were dealt with as a Level 2 Adult at Risk at material times before medical concerns about past torture had been raised in each case. This was because the existing medical information in their cases about mental health issues was considered by the criminal casework team and was made available to the Detention Gatekeeper. This was so even though for a period of time MR did not consent to the release of medical records to the SSHD. The SSHD suggested that MR's failure to provide consent for his prison medical records to be disclosed meant that he would not have agreed to a rule 34 medical examination so that no Rule 35 report would have been obtained, but it is not necessary to determine this point to resolve these claims. It is also right to state that when AO reported that he had been a victim of torture the evidence was captured in the Case Information Database.

100. It was common ground that the applicable test to make a finding of systemic unfairness is set out in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341, where Lord Dyson MR said:

> ". … (i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts."

101. In that case Lord Dyson made a finding of systemic unfairness because the effect of the detained fast track process where a party needed more time to obtain relevant evidence was to put an advocate into an unfair dilemma, namely whether to seek an adjournment and highlight difficulties with a case or instead to do the best on the material available.

102. The approach to finding systemic unfairness in *R(Detention Action)* has been followed in *R(Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92, where the Court held that the removal of legal aid for certain parole and prison hearings would result in systemic unfairness. A more recent example was *R(BF (Eritrea)) v Secretary of State for the Home Department* [2019] EWCA Civ 872; [2020] 4 WLR 38 where

it was held that policy and guidance contained in a sub-paragraph of Enforcement Instructions and Guidance relating to age assessments of asylum seekers was unlawful because it created a real risk of more than a minimal number of children being wrongly detained.

103. Where there is systemic unfairness it is not an answer to say that judicial review is available to correct unfairness in any single case. It is also important to remember that judges must respect the line between adjudicating in cases, which is for the courts as the judicial branch of government, and determining policy, which is for the legislative and executive branches of government, compare *R(S) v Director of Legal Aid Casework* [2016] EWCA Civ 464; [2016] 1 WLR 4733 at paragraph 18.

104. It was common ground that in order to show systemic unfairness, namely where it is claimed that a rule, administrative system or a policy is unlawful because it gives rise to an unacceptable risk of unfairness "the threshold is a high one, and requires showing unfairness which is inherent in the system itself and not just the possibility of aberrant decisions and unfairness in individual circumstances", see *R(Howard League for Penal Reform) v Lord Chancellor* at paragraphs 4 and 48. Lord Dyson in *R(Detention Action)* emphasised that the fact that the threshold of showing unfairness was a high one did not dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals. The importance of the highest standards of fairness in asylum appeals is well-established and explains the principle of anxious scrutiny engaged in reviews of decision making in this area. It is apparent that if a system is not systemically unfair, it might still be possible to succeed in individual challenges.

105. In my judgment there is a weakness in the system for obtaining medical information, equivalent to that obtained from Rule 35 reports in IRC's, about immigration detainees in HMP's. This appears from the reports from Mr Shaw, the recent report from the Chief Inspector of Borders and Immigration, and from the fact that the SSHD has agreed to set up some system for capturing evidence about vulnerabilities of immigration detainees in HMP's in a manner in which it is captured by Rule 35 reports. The weakness is apparent from the fact that immigration detainees are not asked specifically about mental health or torture issues in the structured way in which immigration detainees in IRC's are asked about those matters under Rules 34 and 35 of the Detention Centre Rules. The question is whether this is sufficient to make a finding of systemic unfairness.

106. In my judgment there was not such systemic unfairness in the scheme governing immigration detention in HMP's as to render it unlawful. This is for the reasons set out below. First I agree with the judge that there is not sufficient evidence to show that unfairness is caused to immigration detainees in HMP's in the general run of cases. This is because there is a system, involving the Home Office criminal casework teams based in HMP's, which does obtain relevant information about persons detained in immigration detention in HMP's. In these cases the SSHD had managed to obtain sufficient medical information about both MR and AO to assess them correctly as level 2 Adults at Risk, albeit the information about AO was only obtained part way through the period of immigration detention, and in both cases the information did not at first include medical concerns about past torture. The helpful evidence about other individuals in immigration detention in HMP's set out in the statement of Mr Hossain does not (for understandable reasons) enable this court to say whether introducing Rules 34 and 35 of the Detention Centre Rules into HMP's would have affected the relevant levels of Adults at risk for those individuals. In this respect I have seen from Mr Hossain's statement that the individual identified as CZ was said to have reported to prison staff that he had been a victim of torture, suggesting that relevant information was obtained by the system

operated by the SSHD. It is also right to record that Mr Hossain's statement suggests that the relevant evidence was not then acted on by the SSHD.

107. Secondly it is clear that even if a Rule 35 report had been obtained for both MR and AO which highlighted concerns about past torture, the decision to maintain immigration detention would have been made. This appears from the fact that both MR and AO had been assessed as level 2 Adults at Risk even before there was medical evidence of concerns about past torture. The decision to detain MR and AO was maintained notwithstanding that they were assessed at level 2 Adults at Risk. Obtaining a Rule 35 report about torture would not have elevated either MR or AO into a level 3 Adult at Risk. This reality of the situation for MR and AO is proved by the fact that once the allegations of torture became known in their cases, the decision to detain was continued. It is therefore difficult to make a finding of systemic unfairness when it is apparent that there was no individual unfairness in the case of MR and AO for the reasons set out above.

108. Thirdly as appears from the facts of these particular cases concerning MR and AO, persons in immigration detention in HMP's are very likely to have been the subject of custodial sentences or, at the least, to have been remanded in custody pending trial because there are in their cases exceptions to the right to bail. That suggests that, even if higher levels of Adults at Risk are found to exist, detention is very likely to be continued even though the individual is an adult at risk. This means that the absence of the information in the particular case will very often not lead to unfairness in the individual cases.

Irrational not to obtain medical concerns about past torture of MR and AO – issue two

109. Although, for the reasons set out above, it is not possible to make a finding of systemic unfairness because Rule 35 of the Detention Centre Rules does not apply to immigration detainees in HMP's, this still leaves the distinct issue about whether the operation of the system of immigration detention in the cases of both MR and AO was rational. The appellants submitted that to be rational a decision needs to be informed, and this was effectively common ground. The appellants complain that the SSHD has produced a policy requiring information to be known about vulnerabilities of immigration detainees, which includes detainees in HMP's. One such vulnerability would have been if there were medical concerns that MR or AO had been the subject of torture. As is now known there would have been such medical concerns that MR or AO had been tortured. However the SSHD did not find this out until part way through the period of immigration detention for both MR and AO. The appellants submit that it is irrational to have a policy requiring information to be known, but not to ensure that information was obtained in the particular cases.

110. The SSHD submits that the system of asking for release of medical information from immigration detainees in HMP's, and the regular interaction between the Home Office criminal casework team and immigration detainees in HMP's meant that the system was sufficient. Although the system did not in fact identify until later the medical concerns about torture for both MR and AO, there was no irrationality in the system.

111. In my judgment, in the cases of both MR and AO, it was irrational, and was therefore unlawful, not to have ensured by means of a Rule 35 report or equivalent, that medical information showing concerns about past torture for both AO and MR was obtained at the commencement of or at any later time during their immigration detention. The reason for making the finding of irrationality in these individual cases is because Parliament has required the SSHD to issue guidance about the immigration detention of the particularly vulnerable, see

section 59(1) of the Immigration Act 2016. The SSHD has adopted a policy which limits the detention of vulnerable immigrants. It is known that some immigration detainees may have suffered past torture. It is known that past torture makes immigration detainees vulnerable. It is known that many victims of torture will not volunteer the fact of torture for many good and varied reasons. In these claims evidence showed that MR and AO found it very difficult to talk about the circumstances which had caused their respective scarring.

112. The failure in the system in HMP's, so far as it affected both MR and AO, was that although the criminal casework team did pick up other mental health issues from: past and current medical records; case information database records; and discussions with MR and AO; no one was required to find out whether there were such medical concerns about torture, there was no attempt to find out whether there was such information, and the concerns were not discovered. Further, as appears from the detailed review of the factual background for both MR and AO, there was express reference to the absence of a Rule 35 report in detention reviews for both MR and AO. If Detention Review teams are going to refer to the absence of a Rule 35 report, it is only rational to have provided MR and AO with the opportunity of obtaining such a report or its equivalent.

113. The SSHD relied on MR and AO to volunteer their history of past torture but there was no attempt to create any space, such as that created by obtaining a Rule 35 report, to enable them to report that they had been tortured. Further so far as AO was concerned, when he raised his complaints about torture in his asylum interview there was no effort then made to obtain evidence of any medical concerns about torture, and the absence of a Rule 35 report was then specifically recorded in detention reviews. In my judgment it was not rational in the case of both MR and AO for the SSHD to have a policy which required information to be known about their vulnerability because of, among other matters, past torture, but not to obtain medical concerns about past torture.

114. I have stepped back to consider whether this finding about irrationality so far as it concerned MR and AO in these particular cases, should lead me to change my conclusion that the judge was wrong not to make a finding of systemic unfairness. A finding of irrationality in the arrangements for MR and AO does not necessarily result in either systemic unfairness or justiciable unfairness in any individual case. The difficulties in the way of such a finding of systemic unfairness remain, including in particular the fact that there was not enough information about other immigration detainees in HMP's to make this finding, in circumstances where it is apparent that much information about immigration detainees in HMP's was obtained from prison medical records and the Home Office criminal casework teams. Although the information about past torture, including medical concerns about past torture, was not obtained by the systems employed by the SSHD in MR and AO's cases, relevant medical information about past torture might have been obtained in other detention cases. I should note that the underlying factual position in relation to other immigration detainees in HMP's is unlikely to become known one way or the other. This is because claims for judicial review in respect of any public law failings relating to other immigration detainees held in HMP's, where the facts would become known, will be out of time. I also take account of the fact that when further information, including medical concerns about past torture, was obtained in the cases of MR and AO it did not lead to their release from immigration detention. This suggests that there was no systemic unfairness affecting immigration detention, regardless of whether the operation of the system in their individual cases was rational.

115. So far as the public law remedy for this irrational failure to obtain medical concerns about past torture in the case of MR and AO is concerned, I have already recorded that the SSHD is

devising a system for providing immigration detainees in HMP's with the benefits of Rule 35 of the Detention Centre Rules. It is noteworthy that different complaints have been made about the operation of Rule 35 in IRC's because medical practitioners in IRC's are not independent of the IRC (whereas they are independent in HMP's), showing that simply cross applying Rule 35 from IRC's to HMP's may solve one problem but create another. As is well-known the Courts are not in a position to devise systems to give effect to the SSHD's policies, and it is not the function of the court to attempt to do so. The Court's function is to declare whether it is irrational and unlawful for the SSHD to have a policy which required information about vulnerability of both MR and AO because of medical concerns about their past torture, but not to have obtained that medical information. In my judgment in these circumstances it will therefore be sufficient to declare that in the case of MR and AO there was an irrational failure to obtain medical concerns about past torture which was needed for the SSHD to operate her policy relating to the immigration detention of the vulnerable. It will then be for the SSHD to devise a remedy that would avoid this problem in the future.

No unlawful detention – issue three

116. The appellants put their claim for false imprisonment on the basis that the SSHD had "failed to (timeously) discover AO and MR's experiences of torture and mental ill health" because there was no equivalent to Rule 35 in the Prison Rules. This meant that their suitability for detention was not adequately reviewed by either the SSHD or SSJ and therefore AO and MR were unlawfully detained. The respondents submit that even if the court found that it was irrational, and therefore unlawful, not to obtain medical concerns about the past torture of MR and AO, this did not make their detention unlawful. This was because the failure to obtain the information was not relevant to and did not bear upon the decision to detain in circumstances where the SSHD had noted that both MR and AO were level 2 Adults at Risk, the further information would not have affected this level of Adult at Risk, and the SSHD had reasonably decided to detain MR and AO in the light of immigration control factors notwithstanding their vulnerabilities.

117. For the reasons set out above under issue two there was an irrationality, and therefore illegality, in the operation of the system so far as it affected both MR and AO. It is apparent from the principles summarised in paragraphs 13 to 17 of this judgment above that if there is illegality in the exercise of the statutory power to detain, the detention may be unlawful. However it will not be unlawful unless the illegality "bore on and was relevant to the decision to detain", see *Kambadzi v Secretary of State for the Home Department* at paragraph 42.

118. In this case it was irrational not to have a mechanism for obtaining a Rule 35 report or equivalent setting out medical concerns about the past torture of MR and AO for the reasons set out above under issue two. It can be said that the absence of such a mechanism and a Rule 35 report was "relevant", in the broadest sense of the word, to the decision to detain, because the absence of a Rule 35 report was noted in detention reviews. This, however, did not in my judgment "bear upon" the decision to detain. This appears from the fact that both AO and MR were or became level 2 Adults at Risk for the purposes of the policy before medical concerns about past torture became known, and that if a Rule 35 report setting out medical concerns about past torture had been obtained, it would not have elevated their level from level 2 Adult at Risk. In each case there were significant factors relating to immigration control which were capable of outweighing, and did outweigh, the presumption that a person at risk should not be detained. In this sense the absence of a Rule 35 report "did not bear upon and was not relevant to" the decision to detain so as to render unlawful the immigration detention of MR and AO. I would therefore dismiss the claims for false imprisonment made by MR and AO.

119. I can confirm that if I had found the immigration detention of MR and AO to be unlawful, any damages for false imprisonment would have been nominal only. This is because the evidence about concerns about torture did not, when it was obtained, alter either the level of Adult at Risk or the decision to detain.

No unlawful discrimination under article 14 of the ECHR – issue four

120. There was no material dispute about the applicable principles relating to claims for infringement of article 14 of the ECHR. The five relevant matters to be considered on such a claim were common ground. The issue before us was whether the judge was wrong to find that there was no infringement of article 14.

121. It was common ground that the detention of MR and AO in HMP's came within the ambit of rights protected by articles 3 and 5 of the ECHR. It was also common ground that being detained is another "status", for the purposes of article 14 of the ECHR. The dividing point between the parties was whether there was any differential treatment of MR and AO on a ground prohibited by article 14 of the ECHR. This involved consideration of whether MR and AO, when detained in HMP's, were in an analogous situation with those detained in IRC's. It also required identifying whether they were in a relevantly similar situation, see *Clift v United Kingdom* at paragraph 66. It also involves identifying whether any difference in treatment could be justified. It was common ground that these issues, although jurisprudentially distinct, overlapped in practice, see *R(Stott) v Secretary of State for Justice* [2018] UKSC 59; [2020] AC 51 at paragraph 148.

122. In my judgment the judge was right to reject this claim for the reason that he gave, namely that those in immigration detention in HMP's and IRC's were not in a relevantly similar situation. It is true that both those in immigration detention in HMP's and IRC's are being detained by the SSHD pursuant to statutory powers in relation to immigration. There are, however, important differences. Those detained for immigration detention in IRC's very frequently arrive without any relevant background or history. Those detained in HMP's will have been inducted into a prison with a functioning medical system, there will have been contact with the criminal casework team and those in immigration detention in HMP's will have been asked to consent to the disclosure of their medical records. Although, in the individual cases of MR and AO there was an irrational failure to obtain information showing medical concerns about their past torture, this was because the systems in place for HMP's had not picked up or acted on those concerns about past torture. This did not mean that they were in a similar position to those being inducted into IRC's and therefore the subject of Rule 35 reports.

123. Although there is an argument that once detained, those detained in IRC's and in HMP's are in a similar position so far as subsequent reviews of detention are concerned, in the individual cases of MR and AO, the irrational failure to obtain medical concerns about past torture did not, on the facts of their cases, result in any differential treatment between those in HMP's and those in IRC's having an effect on their continued detention. This was because those who maintained the detention had treated MR and AO at times as level 2 Adults at Risk. This level would not have been affected by medical concerns about past torture, and when medical concerns about past torture were obtained it did not affect their continued detention. MR and AO were therefore not affected by any differential treatment. In these circumstances it is not appropriate to find any violation of article 14 of the ECHR in their cases, nor would any such breach have required the grant of any remedy, still less any award of damages.

No indirect discrimination – issue five

124. Again there was no material dispute about the applicable principles. The issue was whether the judge was wrong to find that there was no indirect discrimination. Disability is a protected characteristic. Section 6 of the Equality Act defines disability and includes a physical or mental impairment as one that has a substantial and long-term adverse effect on a person's ability to carry out normal activities.

125. Indirect discrimination is prohibited by section 19 of the Equality Act. In order to prove indirect discrimination it is, among other matters, necessary to show a provision, criterion or practice applied by the Respondents to prisoners who have disabilities and to prisoners who do not have disabilities that puts prisoners with disabilities at a particular disadvantage when compared with prisoners without disabilities.

126. The judge dealt with this claim in the judgment very shortly and in my judgment the appellants have not been able to identify why the judge was wrong. In particular there was no clear articulation of the provision, criterion or practice which the judge was said to have failed to analyse, or any clear analysis of the particular disadvantage suffered by the appellants. In this case it is apparent that there was a failure to discover the medical concerns about past torture of both MR and AO but, because they were level 2 Adults at Risk, this failure did not cause them any particular disadvantage. In these circumstances the question of any unlawful indirect discrimination does not arise. In my judgment this ground of appeal fails.

No breach of the public sector equality duty – issue six

127. The appellants also relied on the public sector equality duty set out in section 149 of the Equality Act 2010. As is well-known section 149 requires a public authority, in the exercise of its functions, to have due regard to the need to eliminate discrimination, advance equality of opportunity between persons who share a protected characteristic and those who do not, and foster good relations between persons sharing a protected characteristic and those who do not share that characteristic. In particular, section 149 requires a public authority to have due regard to the relevant equality matters "in the exercise of its functions". The appellant did not identify at any stage what "functions" the respondent was exercising when it allegedly failed to have regard to the relevant equality matters. The appellants' case on this ground was faintly argued, and not clearly articulated in the statement of facts and grounds or in any other document, including the grounds of appeal. I could discern no basis on which to conclude that the judge's rejection of this claim was wrong.

Conclusion

128. For the detailed reasons set out above I would dismiss the appeal against the judge's finding that there was no systemic unfairness in the system for imprisonment of immigration detainees in HMP's. I would, however, allow the appeal to the extent of declaring that in the case of MR and AO there was an irrational failure to obtain medical concerns about past torture which was needed for the SSHD to operate her policy relating to the immigration detention of the vulnerable. I would dismiss the appeals against the rejection of the claims for false imprisonment, infringement of article 14 of the ECHR, for indirect discrimination and for breach of the public sector equality duty.

Lord Justice Lewis:

129. I agree.

Lady Justice Elisabeth Laing

130. I also agree.