Neutral Citation Number: [2019] EWHC 1831 (Admin)

Case No: CO/443/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Handed down at Birmingham Crown Court

Date: 12/07/2019

Before :

MRS JUSTICE YIP DBE

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Between :

The Queen (on the application of AS (Somalia))	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Mr R Khubber (instructed by **Turpin & Miller LLP**) for the **Claimant**
Mrs J Gray (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 6th June 2019

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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.

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MRS JUSTICE YIP DBE

Mrs Justice Yip :

1. The claimant is a 24-year-old man of Somalian origin with a significant criminal record. In October 2016, he was served with a deportation order. He was detained under the Immigration Act 1971 for a total period of 14 months between February 2018 and April 2019. By this claim, he challenges the lawfulness of his detention between 10 August 2018 and 25 April 2019, when he was released on bail.

2. The claim was brought while the claimant remained in detention. His grounds for seeking judicial review broadly fell into two parts. The first part challenged the lawfulness of his continued detention following representations being made on 8 August 2018 to revoke the deportation order. The second part related to alleged delay in providing suitable accommodation under s.4 of the Immigration and Asylum Act 1999, following a grant of bail in principle by the First-tier Tribunal in December 2018.

3. After Julian Knowles J refused permission on the papers, the application was renewed. At an oral hearing on 26 March 2019, Cheema-Grubb J granted permission but solely in relation to the first part of the claim.

4. It is the claimant's case that once the representations made on 8 August 2018 were considered, it should have been clear to the defendant that he could not be removed within a reasonable period. Those representations required full consideration and a decision. No such decision has been made to date. In the course of this litigation, it has been made clear that the defendant does not intend to respond to the representations until the Court of Appeal has given judgment in an appeal against a decision of the Upper Tribunal concerning the claimant's brother *MS (Art 1C(5) – Mogadishu) Somalia* [2018] UKUT 196. The claimant's secondary position is that, even if not immediately apparent that removal could not be effected within a reasonable time, that certainly became clear as time went on as appears from the defendant's own records.

5. The claimant contends that his continued detention violated the second, third and fourth principles described in *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704 ("the *Hardial Singh* principles") and/or was unlawful under public law principles (including being contrary to the defendant's published policy on detention) and/or was contrary to Article 5 of the European Convention on Human Rights.

6. The defendant maintains that the claimant's detention remained lawful throughout. The defendant contends that there was no unlawful delay in the consideration of the August 2018 submissions such as to extend the length of detention. Further, that the 'end point' at which release under the second or third *Hardial Singh* principles would be required had not been reached. The defendant also denies any breach of public law principles or Article 5.

Factual background

7. The claimant was born in Somalia in March 1995. He came to this country in 2002 (aged 7) with his mother and six siblings. His mother claimed asylum on arrival. The

family were given leave to remain and were eventually granted refugee status with indefinite leave to remain in 2011.

8. Between 2008 and 2013, the claimant appeared before the courts on 23 occasions and was convicted of 52 offences. On three occasions, he was warned that he could face deportation. In March 2014, he was convicted of aggravated burglary. On 25 April 2014, he was sentenced to 3 years 4 months' imprisonment. The sentencing judge said this:

> "Your record is a truly appalling one … It is a frightening record for somebody of your age, even taking into account the difficulties you have had to deal with in your own personal life."

9. In December 2014, the claimant was served with the first stage notice of deportation. He made no representations. Upon completion of his custodial sentence in September 2015, the claimant was detained under immigration powers. He was released on bail in December 2015. He breached the conditions of his bail and absconded. On 3 January 2016, he was arrested. A status check was made revealing his immigration status. He absconded from the police station. He went on to commit further offending involving the possession of a bladed article and possession of Class A drugs and was recalled to prison.

10. On 26 February 2016, the Home Office sent notification of a decision to cease his refugee status, relying on improvement in the security landscape in Somalia and concluding that the claimant could now return to Mogadishu. In October 2016, the claimant was served with a signed deportation order, decision to refuse a protection / ECHR claim and appeal forms. He did not exercise his right of appeal at the time. He was added to the pool of those considered to be removable to Somalia.

11. On 24 January 2018, the defendant decided to detain the claimant under immigration powers. At that time, it was considered that the only bar to immediate removal was obtaining travel documents. It was estimated that would take one to three months. He was assessed as presenting a high risk of reoffending, a high risk of harm and a high risk of absconding. The assessment made at that time is not challenged, nor could it be. A review of the records plainly demonstrates those risks. His record speaks for itself. He had been described by the police as a constant nuisance. His behaviour in custody was dreadful. He was violent and disruptive, set fire to his cell and made serious threats to staff. The claimant had a clear history of breaching bail and absconding.

12. An OASys assessment in March 2018 found that the claimant expressed no feelings of regret, consideration for his victims or any desire to make amends. The author noted that he had "demonstrated a propensity for violence, and a predilection for weapons." He was found to present a high risk of serious harm to the public and was assessed as presenting a 94% risk of violent reoffending within two years. It was also noted that while in custody, he had said he wished to be deported so he could join Al Shabaab and facilitate terrorism (although it appears this may have been foolish attention seeking, about which he was warned, and he has not otherwise demonstrated any evidence of extremist views).

13. The claimant's detention under immigration powers commenced on 2 February 2018, when his latest custodial sentence came to an end. On 4 May 2018, the prison healthcare service confirmed that the claimant was on medication for depression, but that his condition could be satisfactorily managed in detention. Thereafter, he was assessed at level 2 within the defendant's adults at risk policy ("AAR"). Detention was reviewed periodically, and removal directions were set for 14 August 2018. It is conceded on the claimant's behalf that his detention was lawful from 2 February to 10 August 2018, so I need say no more about this period. The claimant had not sought legal representation up to that point.

14. On 8 August 2018, submissions were made by solicitors acting for the claimant seeking revocation of the deportation order and cancellation of the removal directions. The application alleged that deportation would breach the Refugee Convention and/or Articles 3 and 8 of the European Convention on Human Rights. Reference was made to *MS* (above), in which the Upper Tribunal determined that the defendant was not entitled to cease refugee status solely on the basis of a change in circumstances in one part of the country of proposed return. The claimant's family are from Kismayo rather than Mogadishu. The Upper Tribunal upheld the First-tier Tribunal's decision that the claimant's brother could not be deported, despite his own significant criminal record.

15. The defendant recognised that the new submissions would require a response. Accordingly, on 9 August 2018, the removal directions were cancelled. The following day, the authorising officer authorised continued detention for a further 28 days noting:

> "We need to try and obtain a timescale for completion of further reps so RD's can be set again or a possible RR completed."

16. It is the claimant's case that his detention became unlawful from 10 August 2018. He had then been in immigration detention for six months. The defendant had recognised that he could not be removed until a decision was made on the submissions. If an adverse decision was made, the claimant was likely to have a right of appeal which he would pursue. The appeal would take time and might succeed given the Upper Tribunal's decision in relation to his brother. Therefore, says Mr Khubber, it was apparent from this time that there was no realistic prospect of the claimant's removal within a reasonable time.

17. The defendant maintains that the decision in *MS* is wrong in law and that there are material differences between the claimant and MS that mean he can be deported, even if his brother cannot. The defendant has been granted permission to appeal in *MS*. Permission was granted in December 2018 and the case is listed for hearing in the Court of Appeal during July 2019.

18. As I have indicated, no decision has yet been made on the claimant's submissions and it is now apparent, as confirmed by Miss Gray during the hearing, that the defendant has deferred consideration of those submissions until after the Court of Appeal's judgment in *MS*. Although the defendant's position is that the claimant can be removed even if the appeal in his brother's case fails, I do not consider it unreasonable for the decision to be deferred pending the outcome of the appeal in *MS*.

The case is plainly of relevance to the claimant's. It is not unreasonable for the defendant to take the pragmatic view that the claimant's removal should not be progressed further pending the decision in *MS*. Miss Gray submits that a successful appeal in *MS* would be decisive of the claimant's case, although the hearing of this claim was not the time to explore whether that is correct. The defendant has been given encouragement as to the merits of the appeal in *MS* by the observations of Haddon-Cave LJ when granting permission. An objective reading of the order suggests that the defendant has good prospects of success.

19. I note that the monthly detention reviews for August, September and October 2018, do not specifically list the outstanding submissions and/or the Upper Tribunal decision in relation to the brother as a barrier to removal. The only barrier listed is the obtaining of travel documents. No estimate is made of the likely timescale for removal. However, references to the submissions and *MS* appear elsewhere within the detention reviews so that it is clear that the authorising officers were aware that the claimant could not be removed until the representations had been dealt with.

20. On 12 September 2018, the authorising officer noted that removal directions had been deferred due to the representations but concluded:

> "I am satisfied that there remains a clear intention to deport and that removal can be effected within a reasonable timescale. The risks associated with Mr [S]'s release outweigh the presumption to liberty."

21. On 9 October 2018, the authorising officer first noted that the further representations were awaiting the outcome of the defendant's challenge to the Upper Tribunal decision in *MS* and then stated:

> "Once the representations are concluded removal directions can be put into place, making his removal still reasonable. Given his behaviour in detention and that he had previously absconded, I am content that it remains proportionate to maintain detention."

22. The claimant's case was considered by a Home Office internal case progression panel on 22 October 2018. The claimant had then been in detention for over eight months. The note indicates:

> "…the panel consider that there are factors which suggest that removal within a reasonable time frame, in the particular circumstances of this case, may not be possible."

The panel recorded that the outstanding application was a barrier to removal. Having set out factors for and against detention, the panel concluded:

> "Until the brother case is resolved. There is no timescale on removal. Therefore the panel have recommended a release with appropriate restrictions in place to mitigate any risks upon release."

By way of mandated action, the panel recorded:

> "The case should be re-referred by casework on the next available panel review if additional case progression is to be undertaken which will minimise the barriers therefore to allow a realistic prospect of removal within a reasonable timeframe."

23. The next detention review was on 8 November 2018, at which the authorising officer noted:

> "Mr [S]'s brother case … still remains un-concluded and no timeframe can be given. Little progress has been made since the last review and following the suggestion of the case review panel, release should be considered."

A release referral was to be submitted. In the meantime, the authorising officer authorised detention for a further 28 days.

24. The claimant had made a number of unsuccessful applications for bail to the First-tier Tribunal. On 31 October 2018, the First-tier Tribunal refused bail, the judge stating:

> "I recognise that removal is not imminent and that the time will come when release on bail is appropriate notwithstanding the risks identified above. However, that time has not yet arrived. There presently is no reasonable alternative to continued detention."

It is to be noted that the decision records that the claimant had been in detention since 12 June 2018, as set out in the grounds for seeking bail submitted by the claimant's solicitors. In fact, his detention had commenced four months earlier.

25. On 5 December 2018 the claimant was granted bail in principle at a contested hearing. The Home Office had been liaising with the Probation Service to find an approved address for the claimant, who was still on licence. No suitable address had been identified by December 2018. The Probation Service had identified that the claimant presented a very high risk of absconding and committing further offences and therefore strongly recommended that he should not be released into the community unless accommodated in a Probation hostel.

26. On 12 December 2018, the authorising officer noted:

> "Whilst there would be sound reasons for continuing detention; namely protection of the public and prevention of absconding, I understand that this individual has been granted bail, in principle, by the IAC, subject to probation address. Please work to put release into effect once such an address becomes available."

27. The claimant's solicitors sent a letter before action on 19 December 2018. There was some delay in the letter being received by the relevant department over the Christmas period and it was not responded to until 18 January 2019. The challenge to the

claimant's continued detention was dealt with separately on 28 January 2019. By then, the January review had taken place, at which it was noted that a response to the claimant's representations was pending the outcome of *MS*. Detention was maintained while accommodation was sought, "pending the putting in place the necessary mitigation to manage his case from within the community".

28. The claimant's case was reviewed by a case progression panel on 17 January 2019. Again, the panel noted that there were factors that may mean removal was not possible within a reasonable time. The note contains the following:

> "The panel have recommended release as there is no prospect of imminent removal. There are barriers in place which frustrate imminent removal. The barriers are Subject has been granted IJ bail, due to the timescales of this the panel have recommended release. The panel have noted the subs risks being as HIGH, and to mitigate any risk upon release the panel have recommended appropriate measures be in place to restrict the risk factors, such as reporting, curfews, approved accommodation or tagging. As at current time there is no prospect of removal the panel have recommended release."

29. In the response to the letter of claim dated 28 January 2019, the defendant maintained that:

> "Given the significant risk of harm, absconding and risk of reoffending your client poses if released it is considered that these factors outweigh the presumption of liberty and his continued detention remains appropriate until an approved address has been secured."

30. This claim was issued on 1 February 2019. The Acknowledgment of Service was served on 14 February 2019. Permission was refused on the papers on 26 February 2019.

31. Detention was maintained at the February review. On 6 February 2019, the authorising officer identified that the claimant had been detained for over a year. He noted:

> "I am mindful that this review is concerned with progression of the case to removal"

He authorised detention for a further 28 days but recorded that it was imperative that the Probation Service assess the suggested bail address (sourced on 31 January 2019) during that period.

32. In March 2019, that address having been assessed as unsuitable, the Probation Service was being chased in relation to accommodation. The claimant's detention was maintained pending appropriate accommodation being found. Permission was granted in this judicial review on 26 March 2019. The case progression panel again recommended release on 27 March 2019, noting that the judicial review presented an additional bar to removal.

33. The claimant's licence period expired on 10 April 2019. The April review recommended that detention should be maintained until an approved release address was available. The authorising officer for the April review was A Cockell, Acting Assistant Director, who noted (on 12 April 2019):

> "It appears to me that absent the grant of bail in principle detention would be appropriate pending removal due to the high harm risk. However, for now we should proceed to release in line with the bail grant …"

34. The claimant was released on conditional bail on 25 April 2019.

Legal principles

35. The legal framework is uncontroversial. The power to detain a person who is subject to a deportation order is provided by Schedule 3 of the Immigration Act 1971. Lawful exercise of that power requires adherence to the four *Hardial Singh* principles, as considered and refined in subsequent cases. Those principles are:

(1) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.
(2) The deportee may only be detained for a period that is reasonable in all the circumstances.
(3) 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.
(4) The Secretary of State should act with reasonable diligence and expedition to effect removal.

36. The defendant bears the burden of proving that the detention was lawful. In assessing the lawfulness of the detention, the court objectively reviews the evidence known to the defendant at the time.

37. When considering the third *Hardial Singh* principle, detention will only continue to be justified if there is "a sufficient prospect" of the Secretary of State being able to achieve removal within a reasonable period. What amounts to "a sufficient prospect" and what is a "reasonable period" in any particular case is heavily fact sensitive. It necessarily depends on the weight of other factors and involves a balancing exercise (see *R (MH) v Secretary of State for the Home Department*) [2010] EWCA Civ 1112).

38. The risks of absconding and reoffending are always of "paramount importance" (see Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [121]). However, as Lord Dyson made clear at [144]:

> "There must come a time when, however grave the risk of absconding and however grave the risk of serious offending, it ceases to be lawful to detain a person pending deportation."

39. Further, the balance may shift over time. As Richards LJ said in *MH* (above, at [68]):

> "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."

40. In considering whether there has been a breach of the fourth *Hardial Singh* principle, it is not enough that some part of the process is shown to take longer than it should have done. The dividing line between mere administrative failing and illegality will be crossed only where, as a result of the failure, the claimant has been detained longer than he would otherwise have been (see *R (Krasniqi) v Secretary of State for the Home Department* [2011] EWCA Civ 1549 at [12]).

41. In addition to the *Hardial Singh* principles, the defendant must, of course, exercise the power to detain in accordance with the usual principles of public law.

42. The Secretary of State must give effect to his own published policy, to be found in Chapter 55 of the Enforcement Instructions and Guidance ("EIG"). The policy makes it clear that cases involving foreign national offenders remain subject to the general policy, which includes a presumption in favour of release on bail. However, in any case in which the criteria for considering deportation are met, the risk of re-offending and the particular risk of absconding is to be weighed against the presumption in favour of bail and, in many cases this is likely to lead to the result that the person should be detained, provided detention is, and continues to be, lawful. The policy provides that detention must be used sparingly but indicates that in criminal casework cases "it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable time". The *Hardial Singh* principles are specifically incorporated into the defendant's policy. The guidance notes that a person who has an appeal or representations outstanding may have relatively more incentive to comply with restrictions if released.

43. The defendant's "Adults at risk in immigration detention" policy provides for a case-by-case evidence-based assessment of the appropriateness of detention of a person considered to be at particular risk of harm. The policy notes that the clear presumption is that detention will not be appropriate for an adult at risk but that immigration control considerations can outweigh that presumption.

44. A public law error bearing directly on the decision to detain will render that detention unlawful, even where the *Hardial Singh* principles have been met throughout: see *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299. In that case, Lord Kerr of Tonaghmore JSC said at [86] that it could not be lawful to hold someone in detention without examining whether good grounds for doing so continue to exist. He continued:

> "… where the review does not partake of the quality or character required to justify the continuance of detention, it becomes unlawful and gives rise to a right to claim false imprisonment."

This echoes what Lord Dyson said in *Lumba* at [71]:

> "I can see that at first sight it might seem counter-intuitive to hold that the tort of false imprisonment is committed by the

> unlawful exercise of the power to detain in circumstances where it is certain that the claimant could and would have been detained if the power had been exercised lawfully. But the ingredients of the tort are clear. There must be a detention and the absence of lawful authority to justify it. Where the detainer is a public authority, it must have the power to detain and the power must be lawfully exercised. 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. But that is not a reason for holding that the tort has not been committed."

45. The claimant claims additionally or in the alternative that his detention was in breach of Article 5 of the ECHR, relying upon the same matters as relied upon as breaches of the *Hardial Singh* principles and/or public law. To that extent, the Article 5 claim adds little in considering the lawfulness of his detention (see *Kambadzi* at [58-59] for consideration of the interaction between Article 5 and *Hardial Singh*).

***Hardial Singh* 4**

46. Turning to the claimant's grounds, I shall deal first with his claim that the defendant breached the fourth *Hardial Singh* principle. I take this out of turn for two reasons. First, consideration of this ground bears upon consideration of the complaint in relation to *Hardial Singh* 2 and 3. Second, clarification of the defendant's position led to less emphasis being placed upon this ground.

47. The claimant's pleaded case was that the defendant had failed to act with reasonable diligence and expedition because no decision had been made on the representations made on 8 August 2018 and no explanation had been provided for the delay. It is acknowledged that the claimant's deportation cannot take place until a decision is made. In his grounds, the claimant contended that a decision should have been made within 7 days of receipt of the submissions.

48. It was only in the course of these proceedings that it became clear to the claimant's representatives that the defendant intended to defer making a decision on the claimant's representations until after his brother's appeal had been determined. That had not previously been communicated to them, even in response to the letter of claim. The claimant's solicitors wrote further on 29 January 2019 highlighting that he relied upon his brother's case to suggest that his own claim had merit and noting that the response to the letter of claim had failed to engage with the issue of removability. That was a fair observation.

49. In my view, it is appropriate for the defendant to defer a decision on the claimant's representations pending the outcome of the appeal in his brother's case. As the defendant contends that the claimant can be deported even if the appeal in *MS* is dismissed, it could be argued that the decision can be made, albeit any appeal might then be stayed pending the decision in *MS*. However, on a practical basis, awaiting the outcome of *MS* before making any decision is sensible. The reality is that any attempt to decide the claimant's asylum claim and to remove him before then would

inevitably be challenged through the tribunals or this court, relying heavily on the Upper Tribunal's decision in *MS*. The reasoning for any decision made before the Court of Appeal have decided *MS* would then need to be reviewed. In the circumstances, it makes sense to postpone substantive consideration of the claimant's representations until *MS* has been decided. I did not understand the claimant to contend otherwise.

50. Mr Khubber does, however, argue that the defendant was required to make a decision on the representations (which could have included a decision to defer) and to communicate that to the claimant's solicitors expeditiously. He suggests that could and should have been done within 48 hours to 7 days. Mr Khubber argues that had the defendant taken that course, it would have led to an early appreciation that removal was uncertain and could not be achieved within a reasonable time so that the claimant would have to be released. He says, therefore, that this amounted to the sort of serious delay causing the detention to be longer than it would otherwise have been, as to cross the line into illegality.

51. In my view, there was some unreasonable delay in the defendant communicating his position in relation to the representations. The claimant and his solicitors were entitled to know what was happening. However, I do not consider that failure has led to any practical delay in the progression of the claimant's case. By early October 2018, the defendant's officers had noted that the representations were awaiting the outcome of the appeal in *MS* (then only at the permission stage). I accept that the defendant required time to seek advice on the impact of *MS* on the claimant's case. Taking the decision to defer substantive consideration of the representations earlier and/or communicating that promptly would not have produced a shorter period of detention.

52. The claimant's real complaint is that the defendant did not sufficiently engage with consideration of the prospect of removing him within a reasonable time. In as much as any delay in responding meaningfully to the representations reflects a failure to understand the significance for the claimant's detention, that can properly be considered under the second and third *Hardial Singh* principles.

53. It follows that I do not consider that the fourth *Hardial Singh* principle gives rise to a separate ground which could succeed independently of the challenge under the second and third principles.

***Hardial Singh* 2 and 3**

54. In *R(I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, Dyson LJ (as he then was) described the second and third principles as "conceptually distinct" whereas in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, Toulson LJ suggested the third principle was "a facet or consequence" of the first two. As Richards LJ said in *MH* (above) there is really no material difference between the approach in those two cases. There is a significant overlap between the second and third *Hardial Singh* principles and I therefore consider them together. In doing so, it is important to remember that the second principle involves looking back at the period the detainee has already been detained whereas the third principle involves looking ahead. This was neatly summarised by Dyson LJ in *I* at [47]:

> "Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."

55. As Lord Dyson JSC in *Lumba*, he continued this theme and said at [103]:

> "A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place."

56. Regrettably, the defendant's records do not demonstrate clear and consistent engagement with this starting point.

57. I consider that the August review, conducted shortly after receipt of the representations, did include proper regard to the question of removability within a reasonable period. The claimant had then been in detention for six months. The defendant had been progressing towards removal and had set removal directions, which were stayed upon receipt of the representations. The authorising officer acknowledged the need to obtain a timescale for responding to the representations.

58. In considering the period of detention which was reasonable in all the circumstances of this case, I accept the evidence from the OASys report that the claimant presented a very high risk of violent reoffending. There was also a proven history of absconding. As is acknowledged by the defendant's policy, outstanding representations may afford an incentive to maintain contact, reducing the risk of absconding. However, the claimant's conduct in custody provided little cause for optimism that he would abide by rules and further evidenced the risks he presented to others. Further, it is of note that the claimant persisted in his offending even after repeated warnings that he was risking deportation. The risks of violent re-offending and absconding were important considerations, which carried significant weight in the required balancing exercise. The claimant had been assessed according to the Adults at Risk Policy at level 2, but his condition was being managed in detention and he had been assessed as fit to fly and fit to be detained. The defendant still firmly intended to deport him. However, the need to deal with his representations first had been acknowledged. That necessarily involved seeking advice and giving consideration to the claimant's brother's case. At that stage, there was inevitably uncertainty as to how long it would take to make a decision on the representations as the authorising officer acknowledged. However, I have no hesitation in saying that a reasonable period, having regard to all the circumstances including the risks the claimant posed, had not then expired. Further, it was not apparent that removal could not be effected within a period that remained reasonable.

59. In my judgment, the August review was appropriately conducted, giving proper consideration to all relevant matters and reaching a decision to continue to detain, with which I agree.

60. At the September 2018 review, the authorising officer addressed the question of whether the claimant could be removed within a reasonable period, concluding that he was satisfied he could be.

61. The appeal in *MS* was pending. It can be inferred that the defendant had received advice that the appeal had at least reasonable prospects of success, but permission had not then been granted. It is not clear that the defendant had decided to defer consideration of the claimant's representations until *MS* had been decided. There is no record of the defendant having considered the timescale for the claimant's representations to be dealt with between the August and September reviews. It is of note that, at a bail hearing on 24 September 2018, the First-tier Tribunal judge noted that the Home Office should be in a position to say when a decision was likely to be made on the further submissions.

62. By October 2018, the defendant had decided that the claimant's representations should await the outcome of the appeal in *MS,* although had not communicated that to the claimant or his solicitors.

63. It seems to me that from the September 2018 review onwards there was a lack of proper focus in the monthly reviews on the question of whether there was a realistic prospect of removal within a reasonable time. Answering that question involved consideration of what a reasonable time would be having regard to all the circumstances. Those circumstances included the risks of re-offending and absconding. However, as the authorities make clear, such risks, however grave they may be, cannot eclipse the need to consider the prospect of removal within a reasonable time.

64. I agree with the submissions made on behalf of the claimant that as time went on the lack of proper focus on the question of removability within a reasonable time became more apparent within the detention reviews. Consideration of the risks of reoffending and absconding and the need for an approved release address appears to have eclipsed giving proper attention to the second and third *Hardial Singh* principles.

65. By contrast, the case progression panels appeared to recognise from October 2018 onwards that it may not be possible to remove the claimant within a reasonable time. That led to their recommendations that the claimant be released. However, I do not consider that the case progression panel approached their consideration of the case by reference to the correct legal principles either. Their error may be seen as the converse to that seen in the detention reviews, in that they do not appear to have given consideration to the impact of the serious risks of re-offending and absconding in the balancing exercise required to decide what period would be considered reasonable to detain the claimant pending removal. Essentially, they did not apply the correct test in approaching the second and third *Hardial Singh* principles.

66. Contrary to what the panels' observations suggest, it is not necessary for removal to be "imminent" or possible at the "current time" nor does there need to be a fixed

timescale in order to say that removal within a reasonable time remains a realistic prospect.

67. Mr Khubber suggested during submissions that the views of the case progression panel were those of an expert authority to which due deference should be given by the Court. While I would accept that the panel has expertise which the Court does not in relation to some matters relevant to removability, the legal principles and the likely time for an appeal to be determined in the Court of Appeal do not fall into that category.

68. Adopting the correct principles, it is my view that there has been a realistic prospect that the claimant will be removed at all relevant times. It does not seem to me that there is any basis to suggest that the claimant is likely to be in a better position than his brother. I accept that if the Upper Tribunal's decision in *MS* stands that the prospect of removing the claimant would have to be considered uncertain at best. However, at all times since the claimant's representations have been received, the defendant has been actively challenging that decision. An appeal had been lodged. Permission to appeal was granted by the Court of Appeal in December 2018, in terms which encouraged the defendant's belief that *MS* was wrongly decided. If the appeal in *MS* succeeds, it seems very likely that the claimant's removal will proceed.

69. Until the hearing of the appeal in *MS* was fixed it was difficult to estimate the likely timescale for the conclusion of those proceedings and therefore for consideration of the claimant's representations. Before permission was given, it would have been reasonable to expect a decision on the application fairly shortly (as happened) and to anticipate reviewing the likelihood of being able to remove the claimant once it was known whether the appeal would proceed. When permission was given in December 2018, it would have been reasonable to expect the appeal to proceed during this legal year. While there can be no certainty as to when the judgment will be handed down, I think it is reasonable to anticipate being in a position to effect the claimant's removal by the end of the year, or perhaps early next year.

70. If the defendant had adopted the correct approach, the question then was whether that was a reasonable period to detain the claimant pending his removal. That involved looking at the period for which he had already been detained and adding to this the likely period before he could be removed. The claimant contends that any adverse decision in his case would give rise to a right of appeal, which would take "weeks if not months". I do not say that is necessarily the case if the defendant's appeal in *MS* succeeds. However, realistically, the total period from the date of the claimant's detention in February 2018 to removal is likely to approach two years. The defendant ought to have addressed this properly during the claimant's detention. Having done so, he then had to weigh in the balance all the other circumstances, including the risk of re-offending and absconding.

71. Making the assessment by applying the correct legal principles to the facts as known to the defendant at each stage from August 2018, I conclude that a reasonable period had not expired, nor do I think that a period of two years' detention would have been unreasonable, so long as the defendant reasonably concluded that the risks could not be managed within the community. I recognise, of course, that such would be a lengthy period of immigration detention. However, the context included the need to pursue the appeal in *MS*, which was being progressed; the real risk of absconding

(even allowing for some reduction in that risk while the representations remained outstanding) and the very high risk of violent re-offending.

72. Undoubtedly, where the period until removal could be effected was likely to be lengthy, there was a need to anxiously scrutinise whether it was the case that the risks could only be managed by continuing to detain the claimant. As time went on, the need to consider bail as an alternative became increasingly pressing. This was recognised by the defendant, following the case progression panel's recommendations in October 2018 and the grant of bail in principle in December 2018. The defendant was bound to take account of the strong views of the Probation Service that the claimant should not be released into the community unless he could be accommodated in approved premises. Of course, that always had to be considered in the context that the power to detain was for immigration control and therefore the defendant's focus was different from that of the Probation Service, but it was a highly relevant factor in considering bail as an alternative to detention. It is not open to the claimant to argue that there was a delay in sourcing appropriate accommodation given the terms of the grant of permission in this case.

73. I am fortified in my view that the *Hardial Singh* 'end point' had not been reached by the decisions of the First-tier Tribunal refusing bail on 24 September 2018 and 31 October 2018 and by the refusal of permission in this claim by Julian Knowles J on 26 February 2019. The grant of bail in principle on 5 December 2018 does not detract from that. As Edis J made clear in *R* (*Sathanantham & others) v Secretary of State for the Home Department* [2016] EWHC 1781, the grant of immigration bail subject to restrictions including accommodation in approved premises is an alternative to continuing detention before the *Hardial Singh* end point has been reached, providing an important safeguard against unnecessary detention. It arises in circumstances where the person is no longer required to be detained for the protection of the public by any order of a criminal court but where detention under immigration powers on public safety grounds may otherwise be required. The decision that the claimant should have bail but subject to approved accommodation being available is therefore entirely consistent with my view that the *Hardial Singh* end point had not then been reached.

Conclusion on *Hardial Singh* principles

74. I have concluded that it was reasonable for the defendant to defer his decision on the claimant's representations pending the appeal in *MS*. The defendant was actively challenging the decision in *MS* and can be taken to have received positive advice on the prospects of doing so, which was supported by the grant of permission by the Court of Appeal in December 2018. In those circumstances, there is a realistic prospect of removal, albeit not imminently. Once permission was granted, it became apparent that it would take some time for the claimant's case to be resolved.

75. The balanced assessment required in considering whether the claimant's detention breached the *Hardial Singh* principles involves looking at all the circumstances, including:

    i) The period for which the claimant had already been in detention;

    ii) The likely timescale for removal;

iii) Recognition that, while there is a realistic prospect of removal, uncertainty remains given the Upper Tribunal decision in *MS*;

iv) The claimant's history of absconding;

v) The possible incentive against absconding afforded by his outstanding representations;

vi) The history of persistent offending even in the face of warnings that such might give rise to deportation;

vii) The very high risk of violent re-offending as set out in the OASys report;

viii) The claimant's behaviour in custody and lack of cooperation with the prison authorities;

ix) The assessment of the claimant according to the Adults at Risk policy and his revelation at the bail hearing in December that he had self-harmed but set against the assessment that he was fit to be detained and fit to fly and that his condition was being managed;

x) The views of the Probation Service that the risks he posed could not be appropriately managed in the community other than by accommodating him in approved premises.

76. Taking all those factors into account, I conclude that there was sufficient prospect of removal within what would be a reasonable period in all the circumstances such as to warrant continued detention until approved premises were available. I have also found that any delay in reaching the decision to defer a response to the representations, or in communicating that, did not impact on the length of the detention. Accordingly, I find no breach of the *Hardial Singh* principles.

77. However, I have found an absence of proper engagement with the principles, and in particular a lack of proper focus on the question of removability within a reasonable time within the defendant's decision making. That falls to be considered under the claimant's next ground: that detention was unlawful under public law principles.

Detention unlawful on public law grounds

78. The claimant's grounds contend that his detention was unlawful under public law grounds for "similar reasons as set out … in relation to the *HS* principles." The claimant relies upon the policy set out in Chapter 55 of the Enforcement Instructions and Guidance. It is the claimant's case that detention was not being used sparingly (55.1.13) or in a way that gives proper respect to the strong presumption against detention (55.1.1). I reject these general complaints for the reasons I have given in dealing with the *Hardial Singh* principles.

79. However, although I have concluded that proper application of the *Hardial Singh* principles leads to the conclusion that detention was justified, I have also concluded that the defendant did not engage properly with the key question of removability within a reasonable time. The theme that runs through the detention reviews is a focus upon the risks of offending and absconding without adequate consideration of

the likely length of time before removal. This was so from September 2018 and continued even when the case progression panels specifically identified that removal within a reasonable time may not be possible. I have found that the decision makers did not properly direct themselves in accordance with the legal principles. The approach in the detention reviews from September 2018 can also be seen as a failure to have regard to paragraph 55.14 of the EIG, which highlights the need to consider the need for outstanding legal proceedings to be resolved before removal in deciding whether continued detention is appropriate. To that extent, I conclude that the decision making was flawed on public law grounds. In the words of Lord Kerr in *Kambadzi* at [86], the reviews from September onwards did not "partake of the quality or character required to justify the continuance of detention."

80. The claimant also complains that the detention reviews do not demonstrate a proper evaluation of the impact of the assessment of his vulnerability under the Adults at Risk Policy. In reality, I regard this as an additional aspect of the same complaint rather than something wholly separate. The defendant's reviews from May 2018 noted the claimant's vulnerability (as evidenced by the medication he was taking). There is nothing to counter the assessment that he was fit to be detained and that his condition was being appropriately managed. There is no evidence of any deterioration in the claimant's mental health.

81. The Adults at Risk Policy contains a clear presumption that detention will not be appropriate for a person considered to be "at risk". However, it also makes it plain that any risk factors will have to be balanced against immigration factors. Such immigration factors are set out at paragraph 14 as the length of time in detention; public protection issues and compliance issues. Paragraph 15 states that an individual should only be detained if the immigration factors outweigh the risk factors and notes that this will be a highly case specific consideration. Within the guidance in paragraph 14, the policy highlights the need for removal within a reasonable period and states:

> "What is a "reasonable period" will vary according to the type of case but, in all cases, every effort should be made to ensure that the length of time for which an individual is detained is as short as possible. In any given case it should be possible to estimate the likely duration of detention required to effect removal. This will assist in determining the risk of harm to the individual."

82. The failure within the detention reviews to grapple with the question of the likely period before removal could be effected therefore amounted to a breach of the defendant's Adults at Risk Policy, which specifically required consideration of the likely length of detention and the impact of that on the risk of harm to the claimant.

83. However, for the reasons I have already given, I find that a proper application of the policy leads to the conclusion that the immigration factors outweighed the risk factors in this case. Therefore, I view this as another aspect of the failure of the reviews to partake of the quality or character required. I do not find that proper application of the policy would have led to a different outcome in this case.

84. In granting permission, Cheema-Grubb J said that it was arguable that the claimant's detention was unlawful "because of the apparent failure of the Defendant when considering whether the Claimant's removal is still possible within a reasonable time to take account of the Defendant's own assessment of the delay necessitated by the Claimant's bother's immigration case." Despite this indication, Ms Gray did not address this aspect of the claim in any detail. During the hearing, she did not demur from Mr Khubber's contention that, as a matter of law, the claimant's detention would be rendered unlawful notwithstanding that the *Hardial Singh* principles had not be breached if the defendant had not given proper consideration in the detention reviews to the views of the case progression panels that it may not be possible to remove the claimant within a reasonable time. However, the defendant's case was that the case progression panel recommendations were consistent with the *Hardial Singh* end point not having been reached and with release being conditional on suitable accommodation being available.

85. In *Lumba* at [62] Lord Dyson (with whom the majority agreed) said:

> "The introduction of a causation test in the tort of false imprisonment is contrary to principle both as a matter of the law of trespass to the person and as a matter of administrative law."

He went on at [66-68] to make it clear that a decision to detain made in breach of a rule of public law will be unlawful and will give rise to an action in false imprisonment notwithstanding that the defendant could and would have detained if properly exercising the power to detain. However, not every breach of public law is sufficient to give rise to an action in false imprisonment. The breach must "bear on and be relevant to the decision to detain."

86. At [207] Baroness Hale put the test as follows:

> "… the breach of public law must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result – which is not the same as saying that the result would not have been different had there been no breach."

87. That test was considered and followed by Beatson J (as he then was) in *R (Abdollahi) v Secretary of State for the Home Department* [2012] EWHC 878 (Admin). He found that a failure to consider the position of the detainee's children at the time of detention and to consult the Office of the Children's Champion could not be said to be a technical error or an error of the sort that is not capable of affecting the decision to detain. Therefore, he found that the defendant had not shown a lawful justification for the detention, although he found that the claimant could have been detained in any event in the lawful exercise of the power of detention and he would have been so detained. In those circumstances, he found the defendant liable in the tort of false imprisonment but awarded only nominal damages.

88. In the same way, I find that the defendant's failure within the detention reviews to properly consider the question of removability within a reasonable period having regard to the correct legal principles and the defendant's published policies (including

the AAR policy) was capable of affecting the decision to detain and was a material breach. In the circumstances, I find that the claimant's detention became unlawful from 12 September 2018, being the date on which further detention was authorised following the September review. However, for the reasons I have given, I find that the claimant could and would have been lawfully detained throughout the period until his release on bail.

Detention contrary to Article 5 ECHR

89. The claimant's grounds contended that his detention was contrary to Article 5 "for the same/similar reasons as set out in relation to breach of the HS principles and breach of public law principles." This ground was therefore not advanced as providing a separate basis for finding the claimant's detention unlawful. That is consistent with the approach in *Kambadzi* where it was agreed on both sides that the alternative claim under Article 5 added nothing to the claim at common law if that claim succeeded (see paragraph 45 above).

90. In his skeleton argument, Mr Khubber made reference to the recent decision of the First Section of the European Court of Human Rights in *VM v United Kingdom (No. 2)* (Application No. 62824/16). However, he did not develop this argument in any detail. On the face of it, the particular passage from *VM* which is cited appears to relate to delay in releasing a detainee in view of practical considerations and therefore to be linked to delay in providing bail accommodation. However, I fully accept that the claimant, through Mr Khubber, was not seeking to resurrect that part of the claim for which permission had been refused. Rather, he sought to rely on *VM* as being relevant to any grace period which the defendant may be entitled to for the purpose of securing suitable accommodation once the *Hardial Singh* end point had been reached. In light of my findings, it has become unnecessary to consider issues relating to any grace period.

91. No application was made to amend the grounds so as to contend that the Article 5 claim added anything of substance to the claim at common law. In the circumstances, I do not consider that the claimant is entitled to advance a separate claim based upon breach of Article 5 going beyond that which I have already dealt with in relation to the *Hardial Singh* and public law principles.

Conclusion

92. I have found that there was no breach of the *Hardial Singh* principles in this case. However, I have concluded that the detention reviews from September 2018 did not properly address the key question of removability within a reasonable time. I have found this to be a material breach of public law bearing on the decision to detain. On that basis I find that the claimant's detention was unlawful from 12 September 2018. However, I am satisfied that the claimant could and would have been lawfully detained had the defendant correctly directed himself on the applicable legal principles and applied his published policies.

93. I have not yet received any submissions on damages, the parties having agreed that the court should deal at this stage only with the lawfulness of the claimant's detention and that the assessment of any damages flowing from my findings should be assessed

at a later date. Therefore, the issue of whether the claimant is entitled to more than nominal damages remains to be determined, together with quantum.

94. Having circulated my judgment in draft to the parties, I have received further written submissions and the parties have ultimately agreed the terms of a consequential order to reflect my findings and provide directions for the assessment of damages. I therefore make an order in those terms.

IN THE HIGH COURT OF JUSTICE **CO REF NO:443/2019**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Before MRS JUSTICE YIP DBE

BETWEEN

R (On the application of

AS (Somalia))

Claimant

V

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

ORDER

Upon hearing Counsel for the Claimant (Mr R. Khubber) instructed by Turpin & Miller LLP and Counsel for the Defendant (Ms J. Gray) instructed by the Government Legal Department

It is ordered that

1. This claim for judicial review is allowed to the extent that the Claimant is entitled to a declaration that his detention was unlawful from 12 September 2018 to 25 April 2019 on public law grounds (and for the same reasons in breach of Article 5 ECHR) for the reasons set out in paragraphs 78 to 88 of the judgment.

2. The Claimant's claim that his detention was unlawful under *Hardial Singh* principles (and for the same reasons in breach of Article 5 ECHR) is dismissed for the reasons given at paragraphs 46 to 76 of the judgment.

3. The Claimant's application for permission to appeal is refused.

4. Time for the Appellant to file his Appellant's Notice with the Court of Appeal (if so advised) be extended to 35 days after the date of the decision of this Court pursuant to CPR para 52.12(2)(a).

5. The Court's consideration of damages for unlawful detention is subject to the following case management directions:

   i). Consideration by the Court of damages arising from its judgment is adjourned pending the outcome of any application for permission to appeal made directly to the Court of Appeal.

   ii). The Claimant is to inform the Court if permission to appeal is granted or refused within 48 hours of receipt of any Order from the Court of Appeal.

6. If permission to appeal is refused by the Court of Appeal:

   i). The parties are to liaise with each other in order to see if agreement can be reached on issue of damages.

   ii). If agreement can or cannot be reached the parties are to inform the Court within 28 days of the notification of the refusal of permission to appeal.

   iii). If agreement cannot be reached the following further directions are made for the Court to resolve outstanding matters:

      a). The Court's assessment of damages in the light of its judgment on the lawfulness of detention is to be listed for an oral hearing with a time estimate of 1 day (excluding judgment).

      b). The Claimant is to file and serve an agreed bundle 21 days before the hearing date.

      c). The Claimant is file and serve his skeleton argument on damages 21 days before the hearing date.

      d). The Defendant is to file and serve his skeleton argument on damages 14 days before the hearing date.

      e). The Claimant is to file and serve an agreed authorities bundle 7 days before the hearing date.

7. The costs of this claim are adjourned to be considered after resolution of damages arising from illegality of detention by the Court, with further direction as necessary.