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Case No: CO/790/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 January 2019

Before :

NICHOLAS PAINES QC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

THE QUEEN (on the application of) ADEGUN	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Raza Halim (instructed by **Duncan Lewis**) for the **Claimant**
Ms Jennifer Thelen (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 11th September 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

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NICHOLAS PAINES QC:

1. By the time of the substantive hearing of this claim for judicial review, the only live issue was whether the claimant, Mr Michael Adegun, had been unlawfully detained in immigration detention and, if so, whether he was entitled to nominal or substantial damages.

2. The proceedings have a lengthy and slightly complicated procedural history. They were initiated by a claim form filed on 12 February 2016, whilst Mr Adegun was still detained. By an order of 12 February 2016, Lang J placed a stay on Mr Adegun's removal and directed a hearing to be held in March 2016 to determine whether he should be released from detention. In the event, Mr Adegun was released on 8 March and that hearing never took place. A number of interlocutory orders have made since then, which it is not necessary to set out.

3. The result has been that by May of this year the issues had narrowed to that of unlawful detention. Shortly before the hearing, they narrowed further to issues relating to paragraph 55.10 of the Home Secretary's Enforcement Instructions and Guidance (EIG) and rule 34 of the Detention Centre Rules 2001. An argument based on *Hardial Singh* [1984] 1 WLR 704 was dropped prior to the hearing.

The issues

4. There are two bases of challenge to Mr Adegun's detention which, in broad outline, are as follows. Mr Adegun was taken into immigration detention on 28 November 2015 and subsequently released on 8 March 2016. There is first an issue, which I shall call the "rule 34 issue", as to whether Mr Adegun declined a medical examination pursuant to rule 34 of the Detention Centre Rules when he was taken into detention. The rules require such a medical examination to be carried out unless the detainee refuses consent; it was common ground that no examination under rule 34 was carried out at that time. The issue is largely factual; I did not detect any disagreement between counsel as to the legal consequences if rule 34 is not complied with.

5. The second issue I shall call the "paragraph 55.10 issue". It arises because there is evidence, not disputed by the Secretary of State, that Mr Adegun was suffering from a mental health condition which was not recognised by the Home Office until some time after his admission into detention and was not treated with medication until 19 January 2016. Thereafter, his access to medication was interrupted for some ten days before resuming on 1 February. On his behalf Mr Raza Halim relies on paragraph 55.10 of the EIG, which sets out the Secretary of State's policy that those suffering from serious mental illness which cannot be satisfactorily managed within detention should only be kept in detention in very exceptional circumstances. Mr Halim maintains that his client was suffering from serious mental illness and was unfit for detention; moreover, his condition was not satisfactorily managed within detention; the detention was therefore contrary to policy and unlawful.

6. Mr Halim focussed on the periods in which Mr Adegun was not receiving medication for his mental health condition. Those periods are from Mr Adegun being taken into detention on 28 November 2015 until 19 January 2016 when medication was administered, and again from 21 January until 31 January 2016.

7. In his reply, Mr Halim appeared to resile from the position that the paragraph 55.10 claim was limited to those periods. He made a general submission that the detention was unlawful

throughout, in view of the evidence of a Medical Justice psychiatrist, Dr Mounty, that Mr Adegun was not fit to be detained. I return to this later in this judgment.

8. Ms Jennifer Thelen, for the Secretary of State, takes issue with Mr Halim's focus on the failure to provide medication. She points out that this is not a claim for breach of a duty of care or breach of articles 3 or 8 of the European Convention on Human Rights; it is a claim of unlawful imprisonment based on the principles laid down by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; consequently, she says, the correct focus is on the decisions to detain Mr Adegun and subsequently to maintain detention. She maintains that the decisions were not contrary to the policy of paragraph 55.10, broadly because the decision-makers were either unaware of Mr Adegun's mental health condition or were entitled to rely on advice that the condition could be satisfactorily managed in detention.

9. Ms Thelen further submits that any unlawful detention should not be compensated by more than nominal damages since decisions to detain or continue to detain Mr Adegun would have been made in any event.

10. I have concluded, for the reasons given below, that Mr Adegun was detained unlawfully from 30 November 2015 to 25 February 2016 and is entitled to substantial damages in respect of 40 days' detention.

The relevant legislation and policy

11. The Secretary of State has statutory power to detain "overstayers" such as Mr Adegun, and maintains detention centres for this purpose. The Detention Centre Rules 2001 are concerned with the regulation and management of detention centres. Rule 3 provides in part that

> (1) The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression.

12. Rule 5 requires a personal record to be maintained for each detained person. Rule 8 requires the Secretary of State to provide them with written reasons for their detention at the outset and monthly thereafter. Rules 34 and 35 of the 2001 Rules are relevant to this case, and it is convenient to set out rules 33-35 which provide, so far as material:

> 33 **Medical practitioner and health care team**
>
> (1) Every detention centre shall have a medical practitioner, who shall be vocationally trained as a general practitioner and a fully registered person within the meaning of the Medical Act 1983 who holds a licence to practise.
>
> (2) Every detention centre shall have a health care team (of which the medical practitioner will be a member), which shall be responsible for the care of the physical and mental health of the detained persons at that centre.

(3) Each member of the health care team shall (as far as they are qualified to do so) pay special attention to the need to recognise medical conditions which might be found among a diverse population and the cultural sensitivity appropriate when performing his duties.

(4) The health care team shall observe all applicable professional guidelines relating to medical confidentiality.

(5) Every request by a detained person to see the medical practitioner shall be recorded by the officer to whom it is made and forthwith passed to the medical practitioner or nursing staff at the detention centre.

(6) The medical practitioner may consult with other medical practitioners at his discretion.

…..

(8) The medical practitioner shall obtain, so far as reasonably practicable, any previous medical records located in the United Kingdom relating to each detained person in the detention centre.

(9) The health care team shall ensure that all medical records relating to a detained person are forwarded as appropriate following his transfer to another detention centre or a prison or on discharge from the detention centre.

…..

34 **Medical examination upon admission and thereafter**

(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

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

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

…..

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.

The Enforcement Instructions and Guidance

13. The Secretary of State's policy in relation to detention is mainly set out in chapter 55 of the Enforcement Instructions and Guidance (EIG). Chapter 55 states, so far as relevant, as follows:

> 55.1.1. **General**
> The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, whenever possible, alternatives to detention are used…. Detention is most usually appropriate to effect removal … or where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.
>
> …..
>
> To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy.
>
> 55.1.3 **Use of detention**
> **General**
> Detention must be used sparingly, and for the shortest period necessary….

14. Paragraph 55.8 requires detention reviews at 24 hours, 7 and 14 days and then monthly. Rule 55.8A continues:

> 55.8A **Rule 35 - Special Illnesses and Conditions**
> Rule 35 of the Detention Centre Rules 2001 sets out requirements for healthcare staff at removal centres in regards to any detained person:
> • whose health is likely to be injuriously affected by continued detention or any conditions of detention;
> • suspected of having suicidal intentions; and
> • for whom there are concerns that they may have been a victim of torture.
>
> Healthcare staff are required to report such cases to the centre manager and these reports are then passed, via UKBA contact management teams in centres, to the office responsible for managing and/or reviewing the individual's detention.
>
> 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 information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case.

> Upon receipt of a Rule 35 report, caseworkers must review continued detention in light of the information in the report (see 55.8 – Detention Reviews) and respond to the centre, within two working days of receipt, using the appropriate Rule 35 pro forma.
>
> 55.10 **Persons considered unsuitable for detention**
> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
> …..
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
> …..
> • Those suffering from serious mental illness which cannot be satisfactorily managed within detention…. In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
> …..
> If a decision is made to detain a person in any of the above categories, the caseworker must set out the very exceptional circumstances for doing so on the file.

Detention Services Order 17/2012

15. Mr Halim referred me to Detention Services Order 17/2012, which sets out the Home Office policy on the application of rule 35. Paragraph 15 tells medical practitioners to "note when they consider that an individual's health is likely to be injuriously affected by detention or any conditions of detention by briefly stating the basis, with evidence, for that concern and giving an estimate of the timescale for remedial action". Paragraphs 28 to 32 direct Border Agency staff on how to act when a rule 35 report is received. This includes alerting the case owner (officer responsible for the particular detainee's case), forwarding a copy of the report to the case owner within 24 hours (and confirming receipt) along with an instruction to review detention immediately and report the outcome within two days. The report is also to be sent to the detainee's legal representative, if known. The case owner's decision is to be sent to the medical practitioner.

16. Paragraph 32 deals with cases where the report "contains insufficient content to understand the medical concern and meaningful consideration of the report is not possible". The case owner should immediately telephone the contact management team, who should obtain the missing information from the medical practitioner within 24 hours and forward it to the case owner within a further 24 hours.

The facts

17. Mr Adegun, who is a citizen of Nigeria, entered the United Kingdom on a one year visa in November 2013. His leave may have been curtailed in February 2014, but the evidence is inconclusive. At all events he remained in the United Kingdom without further leave.

18. In October 2014 both Mr Adegun's parents were murdered in Nigeria. At around that time or shortly after, Mr Adegun developed a mental health condition and was compulsorily detained ("sectioned") under section 2 of the Mental Health Act 1983 during February and March 2015, after which he was released into treatment in the community. On 28 November 2015 he was arrested in Essex, where he then lived, following an altercation involving his partner and another person. His passport contained a false stamp indicating that he had leave to remain. He was identified as an overstayer and detained under the Immigration Act 1971. A minute sheet relating to this records Mr Adegun as saying he had no medical conditions.

19. Mr Adegun was taken in custody to Campsfield IRC in Oxfordshire, where he arrived at 12.17 am on Sunday 29 November. The referral sheet indicated that no medical conditions or medication were known of.

20. Mr Adegun's first night in custody report records that he had given the reception staff no cause for concern, but that the healthcare team had concerns. It is not clear when that record was made, but this appears to have been done by 8.23 am on Monday 30 November. (It also records that Mr Adegun was checked at 5.00 am on the Sunday, when he appeared to be asleep, and at 1.00 am on the Monday, when he was lying awake.) The subsequent discharge report records that Mr Adegun was seen by Healthcare on arrival.

21. The Secretary of State has been unable to produce any healthcare records relating to Mr Adegun's stay at Campsfield; it seems (see paragraph 34 below) that no record was set up on the computerised system; any handwritten notes have been lost. However, the Secretary of State has produced a photocopy of a page from a desk diary relating to 28 and 29 November 2015. It contains for each date lists of names headed "new" and "routine"; Mr Adegun's name appears in the "new" list for 29 November. Beside each name in the list is marked a tick or (more frequently) the word "declined" or "DNA"; Mr Adegun's name is marked "declined". An accompanying witness statement from an administrative support officer at the IRC says that he understands that the photocopy was provided by the healthcare manager at the IRC and is a page from the IRC doctor's diary; he has been informed that the entry indicates that Mr Adegun was "offered access to the doctor" but declined.

22. Mr Adegun's evidence is that on arrival at Campsfield he saw a nurse for about five minutes, and that he told her that he had bipolar disorder and was on daily medication, which he did not have with him. I accept this evidence, which is consistent with the entry on the first night in custody report. He disputes that he declined to see a doctor, saying that during the Sunday he was moved to a different block and did not receive any message informing him of a doctor's appointment. If he had known he would have attended because he was keen to have his medication.

23. I accept that evidence, which is consistent with those records that do survive. The hearsay account provided by the Secretary of State does not enable me to decide how "declined" came to be written in the doctor's diary. I agree with Mr Halim that what is most likely is that Mr Adegun was looked for unsuccessfully in the room in which he had spent the first night.

24. I therefore find that rule 34 of the Detention Centre Rules was infringed because Mr Adegun did not withhold consent to a medical examination but was not given one.

25. Mr Adegun also says that he became really distressed at Campsfield and could not sleep; on Monday 30 November in the afternoon he attended Healthcare and told the nurse that he was

having difficulties sleeping; he was told to come back before bedtime for a sleeping tablet; he did this for the next three nights. I accept that evidence also.

26. Mr Adegun saw his solicitors at Campsfield on 1 December. He subsequently made a written application for asylum dated 2 December, in which he said that he could not return to Nigeria for fear that his parents' killers would kill him too, and also referred to his admission to hospital for depression and mental health problems and his having been on medication ever since. He added that he should not be in detention because of his mental state.

27. The first review of Mr Adegun's detention was carried out on 2 December. The review stated that he appeared to be fit and well with no medical conditions and did not fall in any of the categories in paragraph 55.10 of the EIG. It also recorded that he had claimed asylum on that date. After weighing various factors it recommended that detention be continued, and Mr Adegun be referred to detained asylum casework (DAC). The authorising officer accepted this recommendation on 3 December.

28. On 4 December Mr Adegun made a request for temporary admission to the United Kingdom under the Immigration Act and to be released to his partner's address. He wrote that he had been suffering from clinical depression since 27 February and his depression had worsened since his admission to Campsfield; his detention was making him mentally unstable and unwell. He attached photocopies of a letter to him from the Newham Centre for Mental Health saying that he had been detained under section 2 of the Mental Health Act 1983 on 27 February 2015 and also of the packaging of two types of medication prescribed to him in March 2015, Olanzapine and Sodium Valproate, with instructions to take one of each at night.

29. The request was forwarded by the contact manager at Campsfield to the duty caseowner at National Removals Command (NRC) in Croydon on 6 December. NRC replied to the application on 9 December, saying that temporary admission would not be granted. The letter said "With regards to your complaints of ill health, the staff at the detention centre should be able to provide you with further assistance or advice." Ms Thelen observed that the Secretary of State could not force Mr Adegun to receive treatment and suggested that the most that NRC could do was to remind him that it was available. Mr Adegun's evidence is that after receiving this letter he went again to Healthcare and complained about his sleeping difficulties and his mental health; he was merely told to come back at bedtime to get a sleeping tablet. I accept this evidence.

30. A further detention review was carried out on 9 December. It again found Mr Adegun to be fit and well with no medical conditions and not to fall under paragraph 55.10. It recommended that detention be maintained pending acceptance of Mr Adegun by DAC. The authorising officer confirmed this on the same day.

31. Mr Adegun's history sheet at Campsfield contains a final entry dated 14 December. It says

> I spoke to Michael [Mr Adegun] this afternoon at length and in in private. SBO Godfrey received a phone call from Michael's partner claiming that Michael was in a terrible state of mind and that she was terrified for his safety. I found Michael attending a church mass with fellow Christians. We talked about his mental health and he claims that he is coping at the moment and is aware of the support available to him. No current thoughts of suicide or self harm. He claims that he has a history of depression but he is not currently in that mind set.

32. Ms Thelen drew my attention to the note that Mr Adegun was aware that mental health support was available.

33. Mr Adegun was accepted into DAC on 14 December. He was transferred from Campsfield IRC to Harmondsworth IRC, the physical move taking place on 15 December. A detention review was performed on 14 December. It noted that Mr Adegun had been accepted into DAC. It said "Applicant is fit and well. There have been no reports raised from Healthcare to deem the Applicant unfit or unsuitable for detention" and added that he did not fall under paragraph 55.10. It recommended continued detention in order to process his asylum application; the recommendation was accepted the same day.

34. Mr Adegun's patient record at Harmondsworth begins on 15 December with a note of his consent to sharing of records and of an interview with a staff nurse at 4.02 pm. This begins with a note of Mr Adegun saying he was stressed/depressed and was taking stress medication at Campsfield "but nil noted on medical notes which was manually and hand written"; I observe that the only medication that Mr Adegun seems to have received at Campsfield was sleeping tablets. The record also noted "requires GP appt for review"; and "is not receiving prescribed medication". On 16 December it is noted "did not attend for GP appointment".

35. Mr Adegun had a screening interview, and an initial contact and asylum registration form was completed by a member of the DAC Harmondsworth team, on 16 December. Mr Adegun's recorded answer to a question about medical conditions and medication was "Depressed. Admitted to Newham Hospital for 2 months for depression. On medication: Olanzapine". He also answered a question about reasons why he should not be detained while his asylum claim was considered; his recorded reply was "Because of mental state. When I am in detention it really gets to my head and it is hard for me. Hard for me to sleep sometimes". He said that he had medical documents.

36. An entry dated 16 December on Mr Adegun's case record sheet notes this information; it adds that Mr Adegun had said he had seen the doctor at Healthcare for an appointment, and that he was advised (it seems, by the detention centre staff member) to see the doctor for further advice and support.

37. A further detention review was conducted on 16 December. It recorded what Mr Adegun had said in his screening interview about his depression and hospitalisation, adding that he "has" a healthcare appointment on the morning of his screening interview (that same morning). It continued "There have been no reports raised from Healthcare to deem the Applicant unfit or unsuitable for detention" and that he did not fall under paragraph 55.10. It recommended further detention in order to process his asylum application. This was accepted.

38. A further induction interview was carried out on 17 December. There is a handwritten note on the record saying "claims to be suffering from depression and Mental Health had made appointment at Healthcare for 16/12 but was missed due to legal appointment. Has contacted Healthcare for another appointment". Ms Thelen noted that Mr Adegun had missed the appointment that was offered to him; she submitted that the obligation under rule 34 had been discharged. She points out that the information that Mr Adegun gave on 17 December was that he was due to have another appointment.

39. Mr Adegun's evidence is that he arrived ten minutes late for the medical appointment on 16 December because the screening interview had over-run. He was told to rebook. I accept

that account. I have not found any evidence that Mr Adegun had any form of legal appointment other than the screening interview.

40. A further detention review was carried out on 21 December. The record noted that Mr Adegun had his asylum interview scheduled for 5 January. It repeated that Mr Adegun "claims he suffers with depression and Olanzapine daily" and stated that he had been a patient of Newham for two years. It then repeated that Mr Adegun "has" a healthcare appointment on the morning of his screening interview and added that "there have been no reports raised from Healthcare to deem the Applicant unfit or unsuitable for detention". Mr Adegun was said not to fall under paragraph 55.10. The review recommended continued detention in order to process the asylum application. Ms Thelen accepted that the reference to the appointment was out of date but maintained that the officials understood from the 17 December interview that Mr Adegun was in contact with Healthcare. She said that it was his decision whether to take up the medical services on offer.

41. The next review was on 24 December. The record contains the same notes about Mr Adegun's claim of depression and having been a patient at Newham. It omits the out of date reference to the appointment on the morning of the screening interview but says again that no reports had been raised from Healthcare. Mr Adegun did not fall under paragraph 55.10 and continued detention was appropriate in order to process the asylum application.

42. On 24 December Mr Adegun attended the surgery and was seen by a staff nurse. The notes record him complaining of depression and referring to his admission to Newham Hospital. They say that he did not know what medication was prescribed and that he requested to see the GP. He was placed on the GP waiting list.

43. Mr Adegun first saw a doctor in the afternoon of 5 January 2016 – nearly a fortnight later and more than a month after being taken into detention. The notes record Mr Adegun recounting his history of depression and admission to Newham Hospital. They record him as saying that the medication was Olanzapine and Sodium Valproate, but that he had not taken any since his discharge; he was feeling low and depressed and finding it difficult to sleep. At that stage he said he was not hearing voices or seeing visions and had no thoughts of self-harm or suicide. There was also a finding of "normal speech, good eye contact, well kempt, no obvious psychomotor retardation". The diagnosis was of a new episode of depressive disorder and the treatment plan was to refer him to the mental health team.

44. Mr Adegun's asylum interview also took place on 5 January. Mr Adegun was mainly questioned about events in Nigeria. In response to a standard question he said that he was feeling well enough to be interviewed. The only reference that was made to his mental state was that, in response to the question why he did not claim asylum earlier, he said that his state of mind and mental health prevented it. At the end of the interview his solicitor said that medical documents would be submitted.

45. The next day, 6 January, the solicitors sent further representations in an emailed letter. These included a statement that Mr Adegun had made to them on 4 January. This repeated that Mr Adegun had been sectioned under the Mental Health Act and admitted to Newham and was still under medication, adding that "I take" daily Sodium Valproate and Olanzapine.

46. The representations included a section based on Mr Adegun's mental health. It said that Mr Adegun was suffering from depression and suspected bipolar disorder and proceeded to make

representations on the basis that this would not be adequately treated in Nigeria, such that removal would infringe article 3 of the ECHR.

47. On 8 January Mr Adegun's solicitors wrote again expressing concern at his continued detention and the DAC process and requesting his release on temporary admission, or alternatively a rule 35 report. The letter referred to Mr Adegun's previous detention under the Mental Health Act and his medication for psychotic and bipolar disorder. The letter said that Mr Adegun had been provided with medication at Campsfield. It went on to say that Mr Adegun had not seen a medical professional or been provided with medication at Harmondsworth. This was said to be because he had either missed appointments because of immigration interviews or had been told there were no appointments available.

48. While the letter of 6 January may have given the false impression that Mr Adegun was receiving medication, the letter of 8 January stated clearly that he was not receiving it at Harmondsworth (and seems to have been wrong in saying that he had received it at Campsfield).

49. The letter went on to refer to paragraph 55.10 of the EIG. It said that Mr Adegun suffered from bipolar disorder and had been at Harmondsworth for three weeks without an assessment of his suitability for detention, a healthcare appointment or medication. He was experiencing healthcare issues as a result and his condition was not being adequately managed in detention. The letter asked that he be seen by a medical practitioner immediately, and also for his temporary release to his partner's address.

50. Also on 8 January Mr Adegun was seen again by a doctor, who recorded that Mr Adegun wanted to have a rule 35 examination. The treatment plan was that Healthcare would book Mr Adegun in with the mental health team who would see him that day to clarify his medication and conduct a rule 35 examination. In the afternoon a mental health nurse saw Mr Adegun and booked an urgent rule 35 examination.

51. A detention centre doctor made a rule 35 report on 9 January. The doctor ticked the box indicating that Mr Adegun's health was likely to be injuriously affected by continued detention. The reasons given were as follows:

> "Michael has been admitted to hospital 27 February 2015 due to his severe mental health symptoms – bipolar in nature…. Since then he has been on medication and has found his symptoms have been controlled until he was taken into detention. Since being detained he has not had any of his medication as we do not have any correspondence from Newham Mental Health Team or his GP.
>
> I have no correspondence from Newham Mental Health Trust to submit the exact details due to the short time requirement for this report to be submitted. If further information is required please contact the Harmondsworth Detention Centre Medical Health Team."

52. This report was received by Detention Asylum Casework (DAC) on 11 January.

53. A further detention review was conducted on 12 January. This referred to the rule 35 report, saying that it would be responded to shortly, and noted that the decision on Mr Adegun's asylum claim was due to be completed by 13 January. The review reported Mr Adegun's

statement that he suffered from depression and had been a patient at Newham. It nevertheless said again that Mr Adegun did not fall under rule 55.10, adding that he was fit and well, and no reports had been received from Healthcare to deem him unfit or unsuitable. Detention was authorised for one night pending review of the rule 35 report. There is no evidence of a further detention review until 21 January.

54. On 12 January Mr Adegun's solicitors wrote asking for a copy of the rule 35 report and again requesting Mr Adegun's release on temporary admission. They wrote again on 13 January referring to the terms of the report and asking for his immediate release.

55. On 13 January DAC emailed Healthcare attaching Mr Adegun's rule 35 report and pointing out that it did not explain what Mr Adegun's condition was or why it could not be managed in detention. On 15 January an IRC mental health nurse saw Mr Adegun to inform him that his medical records had been received from Newham Hospital; the nurse would discuss his case with the psychiatrist.

56. It had taken a month from Mr Adegun first signing the relevant consent form for his records to arrive from Newham. I do not know when they were first asked for, but Mr Adegun signed a fresh consent form on 8 January and I consider it most probable that the request was not made until then.

57. On the morning of 18 January Mr Adegun came to the mental health office saying that there were men in his room who wanted to take him away; the nurse noted that he was exhibiting paranoid ideations. The nurse spoke to the wing officer who spoke to Mr Adegun's roommate. The roommate said that Mr Adegun's behaviour had changed; he used to pray a lot but had recently started talking to himself a lot. When the nurse returned to speak with Mr Adegun, he had gone away; calls to his mobile phone were at first unanswered and then went into voicemail. The nurse informed the wing staff.

58. At approximately 3.30 pm on 18 January Mr Adegun's solicitors called Healthcare saying they had had a concerning telephone call from Mr Adegun who sounded incoherent. The solicitor mentioned that claimant had not had medication since arriving at Harmondsworth.

59. An appointment was made for Mr Adegun to see the psychiatrist the next morning (19 January). The medical notes record as follows:

> Known to Newham services. First presentation in 2015, with psychosis. Detained under s 2 MHA after a s 136. Thought disorder and delusional, hearing voices and had become socially withdrawn. Had been discharged to [Community Mental Health Trust] on olanzapine.
>
> Increasing levels of distress since arrival at IRC, though has not had antipsychotic for some time.. Now expressing some delusional ideas causing him significant distress.
>
> Examination: Thin, young Nigerian man. Some psychomotor agitation. Looking round fearfully. Becomes v tearful. Describes his parents being murdered in 2014 because his father was royalty and targeted by envious political rivals. He is now the heir and under threats. Believes he is being visited at night by armed men of the same group, with guns, who wish to kill him and have threatened he keeps silent – unchallengeable, and he cannot consider alternative explanations. Hears threats ? hallucinations.

> Thinks he's "near the end" – having some suicidal thoughts – doesn't acknowledge a clear plan. Has some support through his girlfriend.
>
> Diagnosis: ?Psychosis
>
> Plan: 1. ACDT [care in detention] opened – discussed with Dove House.
>
> 2. Reinstate olanzapine.
>
> 3. MH caseload – support, sx [symptoms] and compliance monitoring.
>
> 4. Part C

60. The psychiatrist completed Part C of form IS.91RA (supplementary information). This said:

> Mr Adegun has a psychotic history of relatively recent onset. He has been successfully treated in the community with antipsychotic medication.
>
> He is currently demonstrating a relapse of his illness, characterised by delusional thinking, and he is concerned an armed gang affiliated to the murderers of his parents visit him at night. He is experiencing a constant sense of threat and distress that is making him feel suicidal.
>
> At present this relapse is amenable to treatment in the centre, with medication, support by the Mental Health Team, and management of risk through the ACDT process which I have opened.
>
> He is currently unfit to travel, though fitness is likely to be restored following a period of successful treatment.
>
> Should he not comply with treatment due to a failure of insight it is possible that treatment under the protection of the Mental Health Act will be required.

61. Mr Halim commented that it had taken a delusional episode for Mr Adegun's medication to be reinstated.

62. On 20 January Mr Adegun attended Healthcare with bruising to his face following a fight. He had been punched by another detainee. On 21 January Mr Adegun attended at healthcare for what the medical notes describe as a review; he was seen by a mental health nurse. He explained the circumstances of the fight, in which he had been struck but had not struck back; he said he was taking his medication. The treatment plan that was formulated was to continue the medication.

63. An email sent within DAC on 21 January said that the rule 35 report had been discussed at the Healthcare meeting that day and that Healthcare had restarted Mr Adegun's medication and would review the case the next week. Mr Adegun was demonstrating a relapse of his psychiatric illness characterised by the delusion that an armed gang affiliated to his parents' murderers visited him at night; it was at present amenable to treatment in the IRC. It was noted that the rule 35 report required a response.

64. Also on 21 January DAC wrote to Mr Adegun, with a copy to his solicitors, saying that following the rule 35 report a decision had been made to continue Mr Adegun's detention and adding that "The reasons for this are that the Harmondsworth Healthcare Team have confirmed that your condition can be suitably managed within the Detention Centre. Please

be assured that your detention will be kept under review and you will be notified of the outcome of these reviews".

65. Ms Thelen observed, justifiably, that the rule 35 report did not explain why Mr Adegun's condition could not be satisfactorily managed in detention. It is clear to me that, by marking the report form to that effect, the examining doctor was strongly signalling the need for serious consideration to be given to his suitability for detention. She also correctly observed that in seeking clarification DAC were acting in accordance with the prescribed procedure. I note, however, that action was not taken within the timescales set out in Detention Services Order 17/2012: this required the missing information to be received within 24 hours, whereas it took 24 hours for it be asked for and a further 6 days for a psychiatrist to provide a definitive opinion. It took a further 2 days (not 24 hours as prescribed) for Mr Adegun to be notified of the outcome.

66. The detention review of 21 January recited "On the 11/01/2016 DAC received a Rule 35 Report. 21/01/2016 Rule 35 Report responded to, detention maintained." The review continued to recommend detention. The authorising officer referred to the rule 35 report and noted that the IRC doctors' confirmation "that although the applicant suffers from a medical condition, it can be satisfactorily managed within the IRC". The officer added that "The asylum application has been refused and […] certified as clearly unfounded. There is no other legal basis to remain and removal is therefore imminent. Given his immigration history there is nothing to show that he will comply with any conditions, especially those relating to his removal. Continued detention is therefore authorised." The Home Office's monthly progress report of 22 January said much the same.

67. Mr Adegun's medical notes do not contain any record of a further review in the week from 21 January, as referred to in the 21 January email.

68. On 22 January 2016 Mr Adegun's solicitors sent a letter before claim to the Border Agency Judicial Review Unit, challenging the decision to detain him and the policy of detaining applicants with significant mental health problems and processing their asylum claims in detention. The letter asked for Mr Adegun to be taken out of detention, for time to be allowed for his mental health condition to stabilise and for him to be re-interviewed and a new asylum decision made. These proposals were rejected by letter of 28 January on the grounds that there was no evidence that Mr Adegun's condition could not be satisfactorily managed within detention or that it had affected his asylum interview.

69. The next entry on Mr Adegun's patient record is that on 1 February he attended Healthcare in a subdued mood, complaining of auditory hallucination ("hearing voices") all the time and saying that he had only had medication for two days because IRC officers were not taking him to the pharmacy. A treatment plan was formulated to the effect that the officers would take Mr Adegun to the pharmacy and that he would remind them. Mr Adegun also agreed to seek support when not coping with distress. A dose of lorazepam was administered that day. This is corroborated by a detention centre record of administration of medication covering the period from 19 January to 7 March 2016 (the day before Mr Adegun's eventual release). Medication was administered on all dates except from 21 to 31 January. Mr Adegun's evidence is that he had to be taken to a different block to receive the medication; he complained to security that he was not being taken, but nothing came of it.

70. On 8 February Mr Adegun attended a further review at Healthcare. He was still complaining of his parents' murderers visiting him at night, disrupting his sleep and making him scared

and anxious. He also still complained of auditory hallucinations. He tried to distract himself by reading or listening to music. It was recorded that he was compliant with his prescribed treatment. It was noted that Mr Adegun was still on an ACDT observation plan. The decision was made to book a psychiatrist review.

71. On 11 February Mr Adegun's case was discussed at a complex case meeting. It was noted that he had started to take medication consistently since 2 February. On 12 February a review of medication charts showed that Mr Adegun did "not appear to be fully compliant" with his medication; the mental health team was aware of this.

72. My finding is that the reason why Mr Adegun did not take medication was the reason he gave on 1 February: the IRC officers were not taking him to the pharmacy; that reason seems to been accepted at the time. In view of the symptoms he was complaining of, I do not believe that he would have declined an opportunity to receive medication.

73. On 15 February Mr Adegun's solicitors wrote to the IRC reporting that they had issued judicial review proceedings in respect of the decision to process Mr Adegun's asylum claim in detention; the court had ordered an interim remedies hearing in the week commencing 7 March and time for serving the Secretary of State's grounds of defence had been abridged to 29 February. The letter complained that Mr Adegun's condition had not been managed at all between 3 December 2015 and 19 January 2016 or between 21 January and 1 February, as he had not received any medication in those periods. The letter also enclosed a report from a psychiatrist at Medical Justice, Dr Mounty, who considered that Mr Adegun was not fit to be detained. His immediate release was requested.

74. Dr Mounty's report was based on an interview in January 2016, a 40 minute telephone call on 4 February, Mr Adegun's medical records from Harmondsworth between 15 December and 21 January, the rule 35 report, his asylum interview and his statement of evidence. She diagnosed him as being in a depressive phase of bipolar disorder with moderately severe depression. He had deteriorated between the January interview and the February telephone call, sounding in low mood and despair, speaking in a monotone and crying frequently. In her opinion he was not fit to be detained. His condition had deteriorated in detention. He was at risk of a deterioration of his depressed phase of bipolar disorder or a relapse into a manic phase.

75. It appears from Mr Adegun's case record sheet that a decision in principle to release him was taken on 17 February. Initially he was to be released the next day, but release was put on hold and a complex case meeting held on 18 February. At that meeting it was noted, according to the medical notes, that a new mental health report had been received from DAC with a diagnosis of bipolar disorder, and that DAC were considering release. The reports were to be discussed at an assessment meeting. The decision reached on 18 February, as recorded in the case record, was "maintain detention at present".

76. The detention review on 19 February said nothing about these developments. It recorded that Mr Adegun's mental health condition was being managed and that he did not fall under paragraph 55.10. Continued detention was recommended and authorised.

77. On 22 February Mr Adegun again attended Healthcare for a review. He was recorded as saying that he saw his parents' murderers everywhere and that he "did not trust anything" because the staff all knew "them". He said that the staff on his wing were not supervising him because they were also involved with the murderers. The mental health nurse described

him as continuing "to express some delusional ideas which appear to be causing some distress". The nurse booked Mr Adegun in for a psychiatrist's review and advised him to seek if he was failing to cope.

78. On 23 February Mr Adegun saw a psychiatrist, who did not find clear evidence of a major depressive disorder; the diagnosis (so far as I can understand it) was of previous bipolar disorder. The psychiatrist referred to Mr Adegun's "ambivalence" towards taking medication (though the evidence is that he was consistently receiving medication during this period). The treatment plan was for physical health checks, psychoeducation on the importance of taking medication and cognitive behavioural therapy. This was, however, followed by a "new referrals meeting" the same day at which a psychiatrist concluded that Mr Adegun "likely needs to be in hospital". Anonymisation of medical staff in the notes prevents me knowing whether this was the same psychiatrist. The plan then was to refer Mr Adegun to hospital, but this was overtaken by the Secretary of State's decision to release him from detention.

79. On 26 February the Home Office notified Mr Adegun's solicitors that they intended to release Mr Adegun as soon as practicable. There was correspondence over a release to his partner's address, which did not prove possible. Various matters relating to Mr Adegun's release were discussed within the Home Office. Accommodation was found, a care plan was put in place and he was released on 8 March.

The rule 34 issue

80. Rule 34 of the Detention Centre Rules makes a medical examination within 24 hours of admission mandatory unless the detainee declines to consent to it. It is common ground that no rule 34 examination of Mr Adegun was carried out at Campsfield. I have concluded above that Mr Adegun did not decline the examination that was booked for 29 November 2015.

81. Ms Thelen accepts that the lack of a medical examination made Mr Adegun's detention at Campsfield unlawful. She referred me to *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236, where Burnett J held that rule 34 encapsulated a Home Office policy that detainees should be medically examined and that

> the conclusion dictated by *Lumba* is that if an immigration detainee, in the absence of good reason, is not medically examined within 24 hours of his arrival at a detention centre, his detention thereafter will be unlawful…. Because the legality of detention is concerned with the Secretary of State's policy (and not with a direct breach of the Rule) a good reason for non-compliance would save the legality of detention. (paragraph 53)

82. The only reason for non-compliance that was advanced was that Mr Adegun declined the examination. I have found that that was not the case.

83. Ms Thelen also submitted, in reliance on the conclusion in paragraph 52 of the judgment, that damages for the unlawful detention should be nominal if I conclude that Mr Adegun would have been detained in any event. I accept the submission and return to that issue below.

The paragraph 55.10 issue

84. As I have mentioned, counsel are divided as to the correct approach in law. In essence, Mr Halim straightforwardly submits as follows: paragraph 55.10 of the EIG encapsulates a policy of the Secretary of State that, except in very exceptional circumstances, people should not be detained if they are suffering from serious medical conditions which cannot be satisfactorily managed within detention. There is no suggestion that very exceptional circumstances applied in this case. It is therefore implicit in the policy that a person with a serious medical condition should not be in detention unless their condition can be satisfactorily managed there.

85. Mr Halim did not accept that Mr Adegun's condition could be satisfactorily managed in detention; he relied on the rule 35 report and Dr Mounty's report as showing that it could not. He accepted that the Secretary of State would have a defence to the claim of false imprisonment if Mr Adegun's condition had been satisfactorily managed in detention, but submitted that it had plainly not been. In opening he was explicit that the unlawful detention claim was in respect of the periods I have referred to at paragraph 6 above. In reply he was more equivocal, saying that he had not accepted that Mr Adegun's detention was lawful so long as he was receiving medication; he invoked what Dr Mounty had said about Mr Adegun being unfit for detention and Beatson LJ's observation in *R (VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57 at [82] that "under the policy, satisfactory management of a condition at least requires the prevention of deterioration".

86. He said that the critical question was why the Secretary of State had not given Mr Adegun his medication. He also described the Home Secretary as "washing his hands" of Mr Adegun's case; detention reviews repeatedly said that paragraph 55.10 was not engaged, in the teeth of all the evidence to the contrary. He disputed the relevance of *Lumba*, saying it was a case about failure to review detention; the relevant cases in his submission were *R (Das) v Secretary of State* [2014] EWCA Civ 45, *R (O) v Secretary of State* [2016] UKSC 19 and *VC*.

87. The policy enshrined in paragraph 55.10, Mr Halim submitted, required the Secretary of State to manage the mental health of detainees. The Secretary of State should ask himself at the outset "can this detainee's mental health condition be managed in detention?" If the Secretary of State failed to manage the condition he could maintain detention under the "very exceptional circumstances" part of the policy, but that was not this case. (I add that Ms Thelen did not rely on that part of the policy). He also submitted that, once a detainee tells the Secretary of State how to manage his mental condition – as Mr Adegun did in this case by asking for particular medication – that puts the Secretary of State on notice of the detainee's need for the medication. If the Secretary of State fails to provide it, the detention is unlawful, because the policy requires the Secretary of State, for so long as he detains such a detainee, to provide satisfactory management of the mental health condition.

88. In consequence of this approach, Mr Halim's submissions did not focus on the decisions to detain, nor on the application to this case of the caselaw that I have referred to. Ms Thelen submitted that the unlawfulness of detention in a case such as this flowed from the failure (if any, which she disputed) to follow policy in making the decisions to detain or continue detention. Paragraph 55.10 posed what she described as a "forward-looking" question for detention decisionmakers: can the condition be satisfactorily managed in detention? She very properly took me through those decisions and, again entirely properly, made points on them in support of the Secretary of State's case. The absence of a similar critique from Mr

Adegun's point of view has required me to look carefully at all the evidence to see what findings can fairly be made about compliance with the Secretary of State's policy.

89. I agree with Ms Thelen as to the approach in principle. As Lord Dyson said in *Lumba*, a claimant claiming false imprisonment needs first to establish that he was intentionally imprisoned by the Secretary of State; the burden then shifts to the Secretary of State to show that there was a lawful justification for the detention (paragraph 65 of the judgment). In that regard, there is no difference in principle between a detention that is unlawful because there is no statutory power to detain and one and one that is "unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law" (paragraph 66). Lord Dyson added that the public law error "must bear on and be relevant to the decision to detain" (paragraph 68).

90. At paragraph 88 Lord Dyson concluded

> "To summarise, therefore, in cases such as these, all that the claimant has to do is to prove that he was detained. The Secretary of State must prove that the detention was justified in law. she cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made."

91. He went on to hold that if it was established that a decision that correctly applied policy would inevitably have been a decision to detain, the false imprisonment should sound in nominal damages only (paragraph 95). It has subsequently been made clear that for this purpose the Secretary of State is required to establish not merely that he could rationally have decided to detain the claimant, but that he would have so decided (*VC* at paragraph 62). I deal with the substantial or nominal damages issue later in this judgment.

92. In accordance with the approach of Lord Dyson in *Lumba*, I consider that the focus on this case should be on the compatibility with the policy underlying paragraph 55.10 of the various decisions to detain and continue the detention of Mr Adegun. This issue revolves around the part of the policy that concerns whether an illness can be satisfactorily managed in detention; Ms Thelen did not dispute that the claimant had a serious illness, nor rely on any exceptional circumstances that justified his detention even if his condition were not capable of being satisfactorily manged in detention. Nor did Mr Halim challenge the decisions to detain Mr Adegun on any grounds other than rule 34 and paragraph 55.10.

93. I was referred to passages in the four decisions I have mentioned. *Das* confirms that the interpretation of a policy such that in paragraph 55.10 is a matter for the court, but that the fact-sensitivity of the question whether paragraph 55.10 applies is such as to preclude the giving of detailed judicial guidance. The purpose of the policy is to balance the objectives of ensuring firm and fair application of immigration controls and the humane treatment of individuals facing removal. It provides broad guidance as to how the discretion to detain is to be exercised. It is not helpful to dissect the individual components of the paragraph. But the Secretary of State must consider whether the policy applies to a person whose detention is being considered; in the *Das* case, the failure of the Secretary of State to consider or review the claimant's psychiatric condition in the face of awareness of a psychiatric report on the claimant, her frequent attendances at the health centre and the prescription of anti-psychotic medication was described as a 'stark example' of failure in this respect.

94. As regards satisfactory management of a condition in detention, the court indicated that officials should consider matters such as the medication the detainee is taking and whether his or her demonstrated needs are such that they can or cannot be provided for in detention, taking account of the facilities available and the expected period of detention. Ms Thelen placed reliance on paragraph 70, where Beatson LJ said

> "The Secretary of State is not entitled to abdicate her statutory and public law responsibilities to the relevant health authorities or clinicians in the way deprecated by Singh J in *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) at [155] and [181]. However, where (unlike the present case) the Secretary of State through the UKBA officials has conscientiously made reasonable inquiries as to the physical and mental health of the person who is being considered for detention, has obtained such reports of clinicians who had previously treated the person as have been made available, and considered the implications of the policy in paragraph 55.10 for the detention of that person, leaving aside cases in which there has been negligence by the clinicians at the detention centre, she should generally be entitled to rely on the responsible clinician: see, albeit in the context of the European Convention of Human Rights, *R (P) v Secretary of State for Justice* [2009] EWCA Civ 701 at [49] – [50]."

95. In the *O* case the period of the claimant's detention that was in issue followed the Secretary of State's receipt of an external medical report recommending the claimant's release from detention on mental health grounds. The Supreme Court made the following observations about the concept in paragraph 55.10 of "satisfactory management":

> "30 In formulating policy that, save very exceptionally, management of serious mental illness in an IRC, if not "satisfactory", should precipitate release, the Home Secretary has adopted a word of extreme and appropriate elasticity. It catches a host of different factors to which the circumstances of the individual case may require her to have regard. In *R (Das) v Secretary of State for the Home Department (Mind and another intervening)* [2014] EWCA Civ 45, [2014] 1 WLR 3538, in a judgment with which Moses and Underhill LJJ agreed, Beatson LJ, at paras 45 to 47 and 65 to 70, offered a valuable discussion of the phrase "satisfactory management". I respectfully disagree with him only in relation to an aside in para 71 of his judgment. Beatson LJ there expressed an inclination to accept the Home Secretary's contention that, if the management of the illness in an IRC was likely to prevent its deterioration, it would be satisfactory even if treatment was available in the community which was likely to secure its improvement. I would not exclude the relevance of treatment, available to the detainee only if released, which would be likely to effect a positive improvement in her (or his) condition. If it was likely that such treatment would actually be made available to the detainee (rather than be no more than on offer in principle to all members of the community in NHS publications), its availability should go into the melting-pot; and the burden would be upon the

> Home Secretary to inquire into its availability. If, contrary to the Partnership Agreement quoted in para 29 above, the standard of care (expressly aimed at improving health as well, of course, as preventing it from deteriorating) provided to a detainee in an IRC were for some reason not equal to that which would be made available to her if released, it would in my view be questionable, subject to the strength of other relevant factors, whether the management of her illness in the IRC was satisfactory. While satisfactory management does not mean optimal management, a narrow construction of the word "management" as meaning no more than "control" of the illness would lack principled foundation, particularly when in very exceptional circumstances the detainee may continue to be detained in the IRC pursuant to the policy notwithstanding the unsatisfactory management of her illness there."
>
> 31. Above all the policy in para 55.10 of the manual mandates a practical inquiry. As Beatson LJ stressed in the *Das* case, the phrase "satisfactory management" should be interpreted with regard to its context and purpose (para 45); should not be subjected to the fine analysis appropriate to a statute (para 47); nor invested with a spurious degree of precision (para 65). An important part of its context is that the management of the illness takes place in detention pending likely deportation. Treatment of a patient who finds herself in the doubly stressful circumstances both of detention and of likely deportation has its own considerable, extra challenges; treatment in those circumstances might be satisfactory even if it would not otherwise be satisfactory.

96. The Court found that the Secretary of State had not dealt satisfactorily with the medical report. At paragraph 30 Lord Wilson listed some of the questions to which the Secretary of State should have sought to obtain answers. These included whether the report's diagnosis was correct, whether the detention centre clinicians agreed with it, how satisfactory they regarded the current treatment as being and what accommodation and treatment would be available to the claimant if released. In the result the court found that the claimant would not have been released any earlier than she in fact was.

97. Both counsel drew my attention to passages in *VC* (a case which, coincidentally, concerned a national of Nigeria suffering from bipolar disorder). A rule 35 report in June 2014 had advised that the claimant would become unfit for detention if his condition deteriorated further; a second rule 35 report in March 2015 had advised that he needed to be transferred to a secure mental health facility. Beatson LJ (with whose judgment the other members of the court agreed) held that the policy underlying paragraph 55.10 – and the duty to consider whether the policy requires the detainee's release – is engaged wherever the Secretary of State is deciding whether to detain a person suffering from more than a mild mental health condition, and not merely after it becomes apparent that the condition is not being satisfactorily managed (paragraphs 51-53). The Secretary of State's failure to make enquiries following the first rule 35 report rendered the detention unlawful (paragraph 56). This was subject to the theoretical qualification that

> "on receipt of the report, the Secretary of State was entitled to take further advice on the appellant's case from the relevant mental health

> authorities…. Had she done so, a reasonable time for the relevant mental health authorities to assess the appellant would have been allowed. There was no discussion at the hearing of what would have been a reasonable time, but doing the best that I can, I consider that at that early stage an assessment might have taken longer than the week the judge allowed after the second Rule 35 report. There was, however, no evidence that the Secretary of State's caseworker in fact contacted the relevant mental health authorities for such advice so the question does not arise."

98. At paragraph 62 the judgment identifies the issues relating to damages where detention has been unlawful in accordance with *Lumba* as being

> (a) Could the Secretary of State have lawfully detained the appellant, i.e.
>
> (i) Was it rationally open to the Secretary of State to conclude that the appellant's mental illness could be satisfactorily managed in detention?
>
> (ii) If not, was it rationally open to the Secretary of State to conclude that "very exceptional circumstances" applied so as to justify the appellant's detention in any event?
>
> (b) Can the Secretary of State demonstrate, on the balance of probabilities, that she would have detained the appellant in any event?

99. In connection with the fact that Mr Adegun had told the detention centre staff what his mental health condition was and how it had been being treated, Mr Halim drew my attention to paragraphs 78-83 of the judgment in *VC*. The issue there was somewhat different from the issue that arises in Mr Adegun's case. It was the extent to which the Secretary of State was at fault for not considering the possible advantages of VC being treated outside a detention centre. Counsel for the Secretary of State had argued that this had not been put to the detention centre officials. Beatson LJ accepted that the fact that a condition could be better treated outside a detention centre did not of itself mean that it could not be satisfactorily managed within a detention centre. He also accepted that the Supreme Court in *O* had not required the Secretary of State to search out every possible treatment; he nevertheless rejected the notion that the Secretary of State did not need to consider a treatment because a detainee has not suggested it. He considered that the Secretary of State was required to take into account the fact that the claimant (who was refusing treatment) could be compulsorily treated under the Mental Health Act, but not in a detention centre.

100. A related issue was the extent to which the Secretary of State could rely on treatment recommended by detention centre clinicians as being adequate. Beatson LJ referred to paragraph 70 of his judgment in *Das* (see paragraph 94 above); it still remained his view of the law but, as the Secretary of State had not made conscientious enquiries or obtained reports from VC's previous clinicians, it was not sufficient in the instant case for him to rely on the detention centre clinicians.

101. At paragraphs 82-83 Beatson LJ recorded it as common ground that satisfactory management of a condition at least requires the prevention of deterioration. He noted the indications available to the Secretary of State that VC's condition was deteriorating. (*VC* was a different

case from Mr Adegun's in that VC was not complying with his medication; hence the relevance of the fact that VC could be compulsorily treated in an outside mental health facility.) At paragraph 85 Beatson LJ overturned the trial judge's conclusion that it had been open to the Secretary of State to conclude, following the first rule 35 report, that VC's condition could be satisfactorily managed in detention.

Assessment of the detention in this case

The decision to detain Mr Adegun

102. Mr Halim did not explicitly challenge the decision to place Mr Adegun in detention. I do not consider that that decision was contrary to the Secretary of State's policy. There was no evidence available at the time of his arrest that engaged the policy.

Detention at Campsfield

103. I have already found that Mr Adegun's detention at Campsfield was unlawful because of the lack of a rule 34 examination. I still need to consider whether the Secretary of State has discharged the burden (see paragraph 98 above) of showing that he could rationally and would in fact have decided to detain Mr Adegun if a rule 34 examination had been carried out.

104. In my judgment a doctor examining Mr Adegun in late November would have accepted (as the rule 35 doctor later did) that he had a history of bipolar disorder including admission to hospital, but that his symptoms had since been controlled by medication. That doctor would have set in train the process of obtaining Mr Adegun's medical records, in compliance with rule 33(8), and would have made a report under rule 35. The doctor might have referred him to a psychiatrist; in any event I consider that the medical advice at that stage would have been that Mr Adegun's condition was capable of being satisfactorily managed with medication in detention; I so find both because of the evidence that medication had worked while Mr Adegun was at large and because that was the view subsequently taken by the Harmondsworth psychiatrist on 19 January.

105. If that information had been available when Mr Adegun's detention in Campsfield was reviewed on 2 and 9 December, I consider that the decisionmaker could rationally have concluded that his mental condition could be satisfactorily managed in detention. I consider it very likely that the decision on both occasions would have been to continue his detention. Mr Halim did not challenge any of the other reasons why decisionmakers found detention to be appropriate in Mr Adegun's case.

106. In fact, the decisions were taken on the false basis that Mr Adegun had no medical conditions, despite Mr Adegun having referred to his mental health condition in his asylum application of 2 January. That fell well short of what *Das* requires. In addition to the absence of a medical examination, those decisions are in my judgment flawed by a failure to do what the policy of paragraph 55.10, as explained in *Das*, requires. But, for the reasons I have given, I consider that decisions to detain Mr Adegun could and would have been reached if the policy of paragraph 55.10 had been followed.

Detention at Harmondsworth

107. Mr Halim did not submit that rule 34 was infringed at Harmondsworth. In the face of evidence that Mr Adegun was late for the examination because of his screening interview, I

am not persuaded by Ms Thelen's submission that the Secretary of State's duty under rule 34 was, as she put it, "discharged" by the fact that it had been set up.

108. Rule 34 requires an examination within 24 hours of arrival and makes it clear that, even if a detainee declines it (not this case), they are entitled to it "at any time" upon request. Even if Mr Adegun's first attempt to get a fresh medical appointment was not until 24 December (he disputes this), and even taking account of this being the Christmas period, I do not consider that merely putting him on a waiting list, with the result that he was not seen by a doctor for another ten days, amounted to compliance with rule 34. Given that the duty is to perform the examination with 24 hours of arrival, I tend towards the view that, where a detainee who for whatever reason is not examined within 24 hours seeks an examination, it should in principle be provided within 24 hours of the request.

109. I do not need to base my decision on this because I consider that, in any event, a number of the decisions to continue Mr Adegun's detention at Harmondsworth were vitiated by a failure to follow the policy of paragraph 55.10 as explained in the authorities that I have cited.

110. By the time the Secretary of State decided to accept Mr Adegun into DAC (on 14 December), the Secretary of State was on notice that Mr Adegun claimed to be suffering from a serious mental health condition; the claim was backed by credible evidence that he had been "sectioned" under the Mental Health Act earlier that year and had been on medication. In my judgment this raised a need for the "practical enquiry" discussed in *Das* and *O*. I appreciate that cases of this sort are fact-sensitive, and that (unlike in the cases I have discussed) the Secretary of State had not at this stage received any formal medical evidence calling in question Mr Adegun's suitability for detention, though he did know of the concerns of the healthcare team at Campsfield on the first night.

111. In my judgment the Secretary of State ought not to have continued Mr Adegun's detention without, as a first step, seeking to obtain the views of the IRC healthcare staff on the manageability of his condition in detention. I do not need to decide whether more than that was required in the first instance, given that not even that was done at this stage.

112. The reasoning behind the decision of 14 December was therefore not satisfactory: while it was literally true that there were no reports from Healthcare, the statement that Mr Adegun was fit and well was in my judgment inaccurate. I find that he did have a serious medical condition and that the Secretary of State had been put on notice of it when his application for temporary admission was received. This was by at latest 6 December. I consider that the decision to maintain detention without engaging with this evidence was contrary to the Secretary of State's policy, albeit that continuation of detention pending the outcome of enquiries would not have been. I go on to hold that only nominal damages are due in respect of detention pursuant to this decision; the Secretary of State could rationally have concluded that Mr Adegun was in other respects suitable for DAC and decided to accept him into DAC at Harmondsworth pending further enquiries into his mental condition.

113. In the event, the rule 34 medical examination did not take place on the morning of 16 December, the day on which the next detention review was carried out. Those involved in the review do not seem to have been aware of that, but again took the decision to continue detention on the purely negative basis that no adverse report had been received from Healthcare.

114. I accept that on 16 December a member of the detention centre staff did encourage Mr Adegun to see the doctor, and that Mr Adegun said on 17 December that he was due to have another appointment, but nothing appears to have been done to ascertain whether Mr Adegun had an appointment, when it was, or what had resulted from it.

115. That error of approach permeated the subsequent decisions. The decision of 21 December was still based on the out of date reference to a pending medical appointment "on the morning of his screening interview". Ms Thelen accepted that this was out of date, but pointed out that the information available from the 17 December interview was that Mr Adegun was due to have another appointment. As I have indicated, I do not consider that that was sufficient to discharge the investigative duty referred to in the case-law.

116. The reference in the decision to the day of the screening interview was irrational; moreover, the decision was not based on Mr Adegun having an imminent medical appointment, even though the 17 December interview suggested that that was the case. It was in my judgment based on no more than the absence of a report of unsuitability for detention. This was not a case where the detention would inevitably be brief: the decisionmaker knew that Mr Adegun's asylum interview would not be until 5 January.

117. The same goes in my judgment for the decision of 24 December. The out of date reference to the appointment on 16 December is omitted, but again the decision is based solely on the absence of a negative report from Healthcare, despite it setting out the evidence that suggested that Mr Adegun had a serious mental health condition. The decisionmaker does not appear to have given any consideration to whether Mr Adegun had been seen or was about to be seen by Healthcare.

118. I therefore conclude that Mr Adegun's detention at Harmondsworth was initially unlawful.

119. The next detention review was on 12 January. By then the Secretary of State had received the rule 35 report. The decision was to authorise further detention for one night, pending consideration of the report. It is in the same formulaic terms as the earlier decisions, including the assertion that Mr Adegun was fit and well and the reference (despite the terms of the rule 35 report) to "no reports from Healthcare"; the decision did not comment at all on the terms of the rule 35 report, merely authorising a further 24 hours' detention pending consideration of it. The Detention Services Order requires case owners to consider a rule 35 report immediately and, if it contains insufficient content, to raise that issue immediately. I do not consider that a mere "holding" decision to continue detention for 24 hours was in accordance with policy or that detention pursuant to it was lawful.

120. Thereafter, there is no evidence of a further decision in relation to continued detention until 21 January, when there was a detention review and Mr Adegun was notified of the Secretary of State's response both to the rule 35 report and to the pre-action protocol letter. That response refers to the receipt of a rule 35 report on 9 January and a decision to maintain detention on 21 January (oddly, the letter itself is dated 20 January; it also omits reference to the "holding" decision of 12 January). I can only conclude that no formal decision about detention was taken between the 24-hour holding decision of 12 January and the decision of 21 January. This means that the Secretary of State cannot show lawful authority for detention in the period between the holding decision and 21 January, with the consequence that detention remained unlawful.

121. By the time of the detention review of 21 January, Mr Adegun had at last been seen by the psychiatrist, who reported that Mr Adegun's condition was amenable to treatment in the IRC. It is clear from the terms of the detention review that the decision to maintain detention was based on that report; indeed, it relied entirely on the view from Healthcare.

122. Ms Thelen's case, based on paragraph 70 of *Das*, was that the Secretary of State was entitled to rely on the view of Healthcare. Paragraph 70 of the judgment accepts that the Secretary of State should "generally be entitled to rely on the responsible clinician", but that was subject (on the facts of that case) to the proviso that the Secretary of State had consciously made reasonable enquiries as to the detainee's mental health, obtained the reports of previous clinicians and considered the implications of the policy in paragraph 55.10 for the detention of the person. I accept that in the present case there was still no formal medical evidence, apart from the rule 35 report, contesting Mr Adegun's suitability for continued detention, and that that report could be regarded as overtaken by the psychiatrist's report. However, the part C completed by the psychiatrist had only said that the condition was amenable to treatment "at present". DAC were aware of the proposal for a review the next week. The Secretary of State's letter to Mr Adegun in response to the rule 35 report had promised that detention would be kept under review.

123. Nevertheless, the review decision of 21 January barely touched on these matters. It merely stated that the rule 35 report had been responded to and "detention maintained". The authorising officer's comment was, without qualification, that it had been "confirmed" that Mr Adegun's medical condition could be managed within the IRC.

124. I accept that the Secretary of State was entitled to rely in the psychiatrist's report, but in my judgment that report only justified continued detention in the first instance for one week, pending the promised Healthcare review. The Secretary of State's duty of investigation required him at least to obtain a fresh view from Healthcare after that expected review. In these circumstances an unqualified decision to maintain detention, not reviewed for nearly a month, was not in accordance with the policy underlying paragraph 55.10.

125. The next detention review was some four weeks later, on 19 February, preceded by a complex case meeting on 18 February. By then Mr Adegun's solicitors had brought judicial review proceedings and supplied the report of Dr Mounty. The history shows that in the meantime Mr Adegun had ceased to receive medication for a fortnight, for reasons which I find were the fault of the detention centre staff, and he had been back to Healthcare on 1 and 8 February complaining of further disturbing symptoms. It seems that the detention decision-makers had been aware of some of these developments, given the note on the medical record sheet of an earlier proposal to release Mr Adegun on 17 February. Nevertheless the 19 February review said nothing about any of this. The decision, subsequently reversed on 26 February, was to maintain detention. Though the case record mentions a decision to maintain it "at present", the formal decision was to maintain it indefinitely. I do not consider that the 19 February decision was in accordance with the policy, which at least required the Secretary of State to base his decision on up to date facts.

126. The position changed with the decision recorded in the letter of 26 February. Thereafter it took until 8 March for the arrangements for Mr Adegun's release to be finalised, but I do not regard this as an excessive period. There was correspondence with Mr Adegun's solicitors about the arrangements and I do not consider that the Secretary of State was in any way dragging his feet. The case-law accepts that the Secretary of State can reasonably keep a detainee in detention while arrangements of this sort are being made.

127. I therefore conclude that Mr Adegun's detention ceased to be unlawful on 26 February, but had remained unlawful up to that point. I propose to declare that the Secretary of State unlawfully detained Mr Adegun from 30 November 2015, when a rule 34 examination was not carried out, until 25 February 2016. This was a period of 88 days.

Nominal or substantial damages

128. I now need to consider whether the Secretary of State could rationally and would in fact have detained Mr Adegun for any number of days if policy had been followed. The burden of persuasion on this lies on the Secretary of State.

129. I have already given the reasons why I consider that the Secretary of State could and would have accepted Mr Adegun into DAC on 14 December, pending enquiries into his mental condition. I also consider that if on 16 December the Secretary of State had reviewed Mr Adegun's detention in accordance with his policy, he could rationally have maintained detention pending the result of a rule 34 examination. He could not rationally have maintained detention indefinitely in the absence of a rule 35 report, because its absence could mean either that the examination had not disclosed a problem or that (as was the case throughout December) no examination had in fact been carried out. It was open to the Secretary of State, through Mr Adegun's case owner, to check whether an examination had been carried out and, if not, to take steps to bring it about. I do not believe that Mr Adegun would have declined an examination.

130. If one had been carried out in mid-December, I expect that it would have reached the same result as was belatedly reached in February: Mr Adegun had a serious mental health condition necessitating in the first instance referral to the psychiatrist. I expect that the psychiatrist would have reached the same conclusion as was reached in February, namely that "at present" the condition was amenable to treatment in the IRC; I consider it likely, given the seriousness of Mr Adegun's condition, that the psychiatrist would have recommended monitoring of Mr Adegun's symptoms and a review after seven days (as was intended following the actual psychiatric examination of 19 January).

131. It in fact took 10 days from the rule 35 report to the assessment by the psychiatrist. This was largely due to the terms of the rule 35 report that was in fact issued. Had Mr Adegun received the attention of a doctor earlier in his stay at Harmondsworth, I think it likely that the rule 34 examiner would simply have referred Mr Adegun to the psychiatrist and that in normal circumstances this could reasonably have taken one week.

132. I consider that on 16 December the Secretary of State could and would have maintained the detention of Mr Adegun, who was otherwise suitable for it, pending these steps. In my estimation a rule 34 examination would have taken place by 20 December and the examination by a psychiatrist around 27 December. I therefore conclude that the Secretary of State could and would have maintained Mr Adegun's detention at least until one week after the psychiatric assessment, that is until around 3 January.

133. It is more difficult to establish what would have happened after that. The evidence I have is that (a) Mr Adegun did not have delusions as at 5 January, (b) he had a delusional episode on 18 January (though this was after about seven weeks without medication) (c) he was still having hallucinations about the murderers on 8 February, a week after the resumption of medication, (d) he was exhibiting paranoid delusions that the IRC staff were in league with the murderers by 22 February (three weeks after the resumption of medication), (e) by around

17 February the Secretary of State had decided in principle to release him and (f) that by 23 February at least one psychiatrist was tending to the view that he needed to be moved to hospital.

134. I bear in mind that the burden is on the Secretary of State to satisfy me as to the period for which Mr Adegun would have been detained. With this in mind, and making the best assessment I can of the available evidence, I think it unlikely that a decision to proceed to Mr Adegun's release on medical grounds would have been reached as early as 3 January.

135. The Secretary of State cannot, however, persuade me that no deterioration in Mr Adegun's condition would have occurred. I accept that there is no evidence in fact of a recorded delusional episode until 18 January – occurring in the absence of medication, whereas in the "counter-factual scenario", Mr Adegun would have been on medication. I am not qualified to judge whether the earlier seven weeks without medication contributed to the episode on 18 January, and there is no medical evidence on the point. But a second delusional episode in fact occurred a week after the resumption of medication. Again I am not qualified to judge, and have no evidence as to, whether the seven weeks without medication contributed to that. I cannot dismiss it as improbable that, such an episode would have occurred around mid-January even if Mr Adegun had been receiving treatemnt.

136. If it had, I consider that Healthcare's response would have been the same as it was on 8 February – to refer Mr Adegun back to the psychiatrist. That could reasonably have taken a week. What might have happened thereafter is a matter of speculation. I do not derive much assistance from the medical notes for 23 February given the apparently conflicting psychiatric views. I cannot conclude in the Secretary of State's favour that it is more likely than not that Mr Adegun would have continued to be regarded as fit for detention beyond mid-January.

137. Thereafter, I estimate that the arrangements for his release would have taken the same amount of time as they in fact took, leading to his release on about 28 January. That would have been 40 days earlier than the actual release date. I am therefore not satisfied, in respect of 40 days of the actual period of detention, that Mr Adegun could and would have been detained in any event.

138. I therefore propose to award nominal damages in respect of the early period of Mr Adegun's detention and substantial damages in respect of 40 days' detention. Subject to counsel's submissions, I propose to remit the assessment of damages. I invite counsel to agree a form of order or, failing agreement, to make submissions in writing.