Neutral Citation Number: [2019] EWHC 254 (Admin)

Case No: CO/4073/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2019

**Before**:

**MR JUSTICE DINGEMANS**

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**Between:**

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| **R (on the application of W)** | **Claimant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Defendant** |

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**Amanda Weston QC and Leonie Hirst (**instructed by **Public Law Project**) for the **Claimant**
**Robin Tam QC and Julie Anderson** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 28 January 2019

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# Approved Judgment

**Judgment Approved by the court for handing down.**

## Mr Justice Dingemans:

### Introduction

1. This is the hearing of claims for judicial review of two decisions of the Defendant, the Secretary of State for the Home Department ("the Secretary of State") to grant the Claimant, known as W ("the Claimant"), restricted leave to remain. The Claimant is an Algerian national who had been held by the Special Immigration Appeals Commission ("SIAC") to constitute a threat to the national security of the United Kingdom in a decision for which the open judgment is dated 14 May 2007. This holding was made in the light of factual findings in relation to the Claimant's involvement as a secondary party in the "ricin" plot involving Kamel Bourgass and Mohammed Meguerba.

2. SIAC has also decided in an open judgment dated 18 April 2016 that if W were to be returned to Algeria there were substantial grounds for believing that W would face a real risk of being subjected to impermissible treatment contrary to article 3 of the European Convention on Human Rights ("ECHR"). Assurances provided by the Algerian authorities to the United Kingdom government were not sufficient to meet that real risk. While that state of affairs continues W may not be returned to Algeria.

3. Following the delivery of the open judgment on 18 April 2016 the Secretary of State granted W restricted leave to remain for a period of 6 months, subject to conditions. This is the first decision under challenge. The second decision was dated 28 February 2018 to grant W 12 months restricted leave to remain. The Claimant asserts that the restricted leave policy should not have been applied to him and seeks protected status or indefinite leave to remain ("ILR").

4. The main ground of challenge relates to the treatment of further evidence from a psychiatrist, psychologists and a teacher who had assisted W at relevant periods, about W's intellectual functioning and learning difficulties. That evidence shows that W is in the category of those with a moderate learning disability or subnormal range ("the further evidence about intellectual functioning"). This evidence caused one of the Judges who was party to the decision of 14 May 2007 referred to in paragraph 1 to state, in an open judgment dated 25 January 2013, that "if he had known what he now knows about W's intellectual deficits, he would not necessarily have reached the same conclusions". It appears that this was because the further evidence might have engaged issues about "the likelihood that W did not have a full or even significant understanding of what was going on and was used or duped by those who did".

5. The Claimant alleges that the Secretary of State has wrongly failed to consider the further evidence about intellectual functioning when deciding to grant the Claimant restricted leave to remain and impose various conditions. The Secretary of State does not concede that there has been any public law failing, and says that in any event the Claimant has an alternative remedy, which is to present a fresh claim for leave to remain which the Secretary of State can consider, and if the Secretary of State rejects the fresh claim and does not certify the fresh claim under rule 353 of the Immigration Rules, then SIAC would be able to hear an appeal from the decision of the Secretary of State taking all the relevant matters into account.

6. In these circumstances there appeared to be common ground that the Secretary of State should undertake a further consideration of the matter, but the parties were unable to agree the route by which that should be done. I must therefore determine the claim.

7. There were also claims: for discrimination and a breach of the public sector equality duty under the Equality Act 2010 ("the 2010 Act") because it was said that the Secretary of State had failed to have regard to W's disabilities; and for damages for false imprisonment because it was said that the conditions imposed on W when restricted leave was granted amounted to an unlawful restriction of freedom, in reliance on the judgment in *Jollah v Secretary of State for the Home Department* [2018] EWCA Civ 1260.

**Procedural matters**

8. W was granted permission to apply for judicial review on 21 February 2018 on all grounds then before the Court. The decision on permission pre-dated the second decision by the Secretary of State on 28 February 2018. A proposed hearing on 18 June 2018 was stayed pending the judgment of the Court of Appeal in *Jollah*. Following the delivery of judgment in *Jollah* by agreement the parties filed and served amended grounds which dealt with the Secretary of State's further decision on 28 February 2018 and the judgment in *Jollah.* Both parties dealt with all of the claims at one hearing. I will address the outstanding issue of permission for the claim in respect of the further decision on 28 February 2018 in the judgment. There was an application for disclosure of the materials, or the gist of materials, on which the Secretary of State has relied in assessing the threat to national security.

**Relevant background**

9. The Claimant is an Algerian national. He has learning difficulties and a reported history of serious mental illness. The Claimant left Algeria during a period of internal strife in the 1990's. He entered the United Kingdom on about 8 September 1999 and he claimed asylum on 15 September 1999.

10. The Claimant has various convictions. On 28 January 2003 the Claimant was charged with conspiracy to cause a public nuisance in relation to an alleged plot to use ricin. He was detained at HMP Belmarsh.

11. On 3 or 5 February 2003 the Claimant's asylum claim was refused but the criminal conspiracy proceedings continued. On 13 April 2005 the Claimant was found not guilty of the conspiracy charge, but pleaded guilty to a charge of possession of a false document and was sentenced to 21 months imprisonment;

12. On 15 September 2005 the Claimant was served with a notice of deportation and was detained under immigration powers. This was the relevant deportation notice which was the subject of the appeal to SIAC. On 7 December 2005 the Claimant was granted bail and he was released on bail on 4 January 2006. It appears that bail was granted because it did not appear that the Claimant's removal was imminent.

13. On 8 May 2006 the Claimant was arrested for shoplifting. On 29 August 2006 the Claimant was served with a certificate dated 24 August to the effect that article 1(F)

or 33(2) of the Refugee Convention applied to the Claimant. The decision letter was dated 29 August 2006 and referred to the finding of the Claimant's fingerprints on various items relating to the ricin plot.

14. The Claimant appealed against his deportation to SIAC. This appeal was heard from 20 to 23 March 2007. The Claimant, and others, had been found by SIAC to constitute a threat to the national security of the United Kingdom in the open judgment dated 14 April 2007. There then followed a number of appeals to the Court of Appeal and further decisions by SIAC. The effect of this litigation was summarised in paragraphs 1 to 3 of the judgment of the Court of Appeal in *BB and others v SSHD* [2015] EWCA Civ 9. Following the open judgment of 14 April 2007 there had been a successful appeal by others to the Court of Appeal which had remitted the matter to SIAC. The House of Lords had dismissed a further appeal by others from part of the judgment of the Court of Appeal.

15. SIAC dismissed remitted appeals in November 2007. The Claimant and others appealed to the Court of Appeal, but these appeals were dismissed in 2010. However the Supreme Court granted permission to appeal on 25 March 2011 and on 12 November 2012 the Supreme Court allowed the appeal in relation to the test to be applied to assess the risk of an infringement of the Claimant's rights under article 3 of the ECHR. The cases were remitted again to SIAC.

16. In an open judgment dated 25 January 2013 SIAC dismissed the appeals including that of the Claimant, apart from one individual whose appeal was allowed on suicide risk and mental health grounds. It was in this judgment at paragraph 46 that reference was made to evidence from Dr Alim, a psychologist who had administered intelligence and social functioning tests to the Claimant, Mrs Newton a psychologist who had reviewed the tests carried out by Dr Alim, and the evidence of Mrs Howells and the statement set out in paragraph 4 above was made. However no finding was made by SIAC on this further evidence because the remitted appeal had dealt only with the assessment of the risk of an infringement of the Claimant's rights under article 3 of the ECHR.

17. The Claimant and others appealed to the Court of Appeal. On 23 January 2015 the Court of Appeal allowed the appeal and remitted the matter again to SIAC. There was a bail hearing for the Claimant on 24 February 2015. SIAC had available evidence from Professor Katona, a consultant psychiatrist, about the Claimant's schizophrenia and significant learning difficulties. Professor Katona identified the need for a carefully thought-through care plan for the Claimant because of issues with his condition.

18. The Claimant brought a claim for judicial review. On 2 October 2015 Irwin J did not determine those proceedings because the Claimant's appeal as remitted to SIAC was shortly to be heard. However at paragraph 5 Irwin J noted that in the light of the background, which included the further medical evidence, the "Secretary of State should give thought to the question of whether there is a real live ongoing national security risk in relation to this appellant". The judicial review application was to be listed as soon as possible following the determination of the appeal by SIAC.

19. By a judgment dated 18 April 2016 SIAC allowed the appeals of the Claimant and others against deportation. The open judgment showed that this was because it was

common ground that there were substantial grounds for believing that there was a real risk that the Claimant and others would be subjected to torture and inhuman and degrading treatment if returned to Algeria contrary to article 3 of the European Convention on Human Rights ("ECHR"). Assurances had been provided by relevant authorities in Algeria. SIAC found that "viewing the evidence as a whole we are not convinced that the improvements in conditions in Algeria are so marked or so entrenched as to obviate the need for effective verification that the authorities will adhere to the assurances given" finding that there was no robust system of verification in place. SIAC did not address individual issues arising from the medical evidence before it.

20. Following the SIAC judgment dated 18 April 2016 the Secretary of State was required to determine what form of leave ought to be granted to the Claimant who could not, at that time, be deported.

**The first decision dated 28 April 2016**

21. By a decision dated 28 April 2016 the Secretary of State granted the Claimant restricted limited leave to remain for a period of 6 months subject to conditions pursuant to section 3(1)(c) of the Immigration Act 1971 ("the 1971 Act").

22. The conditions were: a residence condition at a specified address; a restriction on obtaining employment without written consent from the Secretary of State; a reporting condition; a restriction on enrolling on any course of study without consent from the Secretary of State; and a prohibition on a recourse to public funds ("NRPF"). It is the residence condition which is relevant to the claim for false imprisonment. This required the Claimant to live at a specified address and to seek the permission of the Secretary of State to change any address. It was provided that the Claimant could not spend more than 3 consecutive nights away from the address without prior written consent from the Secretary of State and could not spend more than 10 nights away from the address in any rolling 6 month period without prior written consent of the Secretary of State.

23. The letter dated 28 April 2016 set out relevant background. That recorded the fact that the Claimant's appeal against deportation was dismissed following a hearing from 20-23 March 2007. It noted the history of the appellate proceedings and remitted SIAC hearings and recorded that on 18 April 2016 SIAC allowed the Claimant's appeal on article 3 ECHR grounds. The letter recorded that the Claimant's deportation would be conducive to the public good but that the 2005 deportation order had been withdrawn in the light of SIAC's judgment. At paragraph 63 of the letter it was recorded "on 24 August 2006 your client was served a certificate under the Anti-Terrorism, Crime and Security Act 2001 stating that he is "not entitled to the protection of the Refugee Convention because article 1(F)(c) or 33(2) applies to him". Reference was then made to the open judgment of SIAC dated 14 May 2007 and it was said at paragraph 64 "consequently, given that there is a current article 3 barrier to his deportation, your client falls within the scope of the published policy on Restricted Leave". It was recorded in paragraph 68 that the conditions were imposed "having carefully considered your client's individual circumstances and the terms of the restricted leave policy …". At paragraph 100 it was noted in summary that the restricted leave policy applied "because of his exclusion from the Refugee convention".

24. There was pre-action protocol correspondence about the imposition of the restricted leave policy and the conditions on the Claimant. One of the points noted on behalf of the Claimant was that he was destitute. On 16 September 2016 the Secretary of State decided to amend the conditions to delete the NRPF condition so as to permit the Claimant to have recourse to public funds.

25. The Claimant brought a claim for permission to apply for judicial review on 27 July 2016. By letters dated 19 and 26 October 2016 the Claimant sought further leave to remain in the United Kingdom.

26. Following the judgment of the Court of Appeal in *R(Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409; [2016] 4 WLR 97 which related to the right of the Secretary of State to impose certain conditions on those released from immigration detention, on 18 January 2017 the Secretary of State amended the conditions imposed on the Claimant to delete the conditions relating to spending more than 3 consecutive nights away from the address without prior written consent and spending more than 10 nights away from the address in any rolling 6 month period. A letter dated 18 January 2017 was sent to the Claimant but it seems that this letter was not delivered because there was no one present to receive it. On 20 January 2017 the Claimant's solicitors noted that the conditions about spending time away from the property were unlawful, and asked for their removal. A request for indefinite leave to remain was made. By letter dated 6 February 2017 the Home Office noted that the Claimant had not received the letter dated 18 January 2017 and refused to deal with the request for ILR because the application had not been made on the appropriate form.

**The second decision dated 28 February 2018**

27. The Secretary of State responded by letter dated 28 February 2018 to the letters dated 19 and 26 October 2016. In the decision letter it was noted that "you maintain that the certificate excluding you from the Refugee Convention on the basis of a risk to national security was fatally flawed. You raise the SIAC judgment of 25 January 2013 where it was stated that the national security case may have been unfairly decided against you because it was unaware of your intellectual impairment and that fairness required your national security case to be reconsidered". In the letter at paragraph 9 it was recorded "consideration has been given to the matters raised in your letters of 19 and 26 October 2016 … it is acknowledged that you maintain that the certificate excluding you from the Refugee Convention on the basis of a risk to national security was fatally flawed and a full reconsideration is required. The position has been reconsidered in the light of all your submission and the relevant judicial comments. Having had due regard to all the circumstances, it is considered that the findings in the open judgment on 14 May 2007 provide a sound basis for your exclusion from the Refugee Convention. The judicial finding is that you were not candid and open but used deception in relation to your association with the relevant terrorists. Further, there is a judicial finding that you were present at the scene of the relevant activities. In light of this, it has been decided to maintain our decision to exclude you from the Refugee Convention …" At paragraph 10 of the letter it was recorded "you are excluded from the Refugee Convention under article 1F(c)" at paragraph 10 of the letter. At paragraph 16 it was noted that "having carefully considered your individual circumstances and your representations dated 19 and 26 October 2016 and JR grounds in accordance with the published policy you have been

granted 12 months restricted leave to remain subject to conditions pursuant to section 3(1)(c) of the 1971 Act." The conditions were a residence condition at a specified address and requiring prior consent before changing address, a restriction on obtaining employment without written consent from the Secretary of State, a reporting condition, and a restriction on enrolling on any course of study without consent from the Secretary of State.

**The issues arising from the grounds of challenge and summary grounds of defence**

28. It is common ground that the Secretary of State applied the Home Office "Asylum Policy Instruction Restricted leave" policy ("the restricted leave policy") to the Claimant.

29. The Claimant challenges the Secretary of State's decisions on 5 grounds set out in the amended statement of facts and grounds. These are: (1) a failure to undertake a particularised assessment of the Claimant to see whether there are exceptional or compelling reasons that he should not be granted restricted leave but some other form of leave; (2) it was irrational to grant the Claimant restricted leave and not some other form of leave; and (3) the Secretary of State had failed to consider relevant information in deciding to grant restricted leave. The first 3 grounds relate to the application of the restricted leave policy in the first and second decision letters and it was common ground that they overlapped. The other grounds are (4) there has been a failure to make reasonable adjustments and there has been a breach of the public sector equality duty in respect of the Claimant who has a protected characteristic, namely disability by reason of mental illness or learning disability; and (5) there was false imprisonment by reason of the imposition of the residence condition as worded on him.

30. The Secretary of State defends the claim on the basis that the Claimant has an alternative remedy of making a fresh claim for asylum, which fresh claim would be reconsidered by the Secretary of State and which, if rejected and not certified as not amounting to a fresh claim under the Immigration Rules, would give rise to an appeal before SIAC. In any event it is said that the Claimant was excluded from the Refugee Convention and that the judgment of SIAC dated 14 May 2007 "remains extant" and that there were no public law failings in respect of the first 3 grounds. The fourth and fifth grounds were denied. In respect of the fourth ground the amendment to remove the condition about NRPF and to extend the restricted leave period was relied on as showing that proper account had been taken of the Claimant's disability. As to the fifth ground it was said that the conditions as to residence did not amount to false imprisonment.

31. I should note that there was a point raised about the scope of the exemption in paragraph 16 of schedule 3 of the 2010 Act in respect of certain immigration decisions in the summary grounds of defence and reply to summary grounds but it was not pursued before me and it is not necessary to say anything further in relation to that.

## The restricted leave policy

32. On 23 January 2015 the Home Office published the restricted leave policy. The restricted leave policy applied to individuals who could not be removed because that would infringe their rights under the ECHR and who are: "excluded from the Refugee Convention for article 1F reasons … or have been refused asylum under article 33(2) of the Refugee Convention." The restricted leave policy provided that "there may be circumstances in which asylum seekers have committed war crimes, crimes against humanity, serious non-political crimes outside the country of refuge … or who are a danger to national security or are otherwise non-conducive to the public good". The restricted leave policy noted that those who fall within the scope of the policy have committed serious international crimes or represent a danger to the security of the UK and therefore only article 3 ECHR consideration would normally outweigh the public interest in removing them. The intention of the restricted leave policy is to ensure that the individual can be removed at the earliest opportunity. Paragraph 3.1.1 of the restricted leave policy provided that "the purpose of article 1F is to deny the benefits of refugee status to those who do not deserve international protection …". Paragraph 3.3.1 of the restricted leave policy provided that "article 33(2) provides for the refusal of asylum to individuals who would otherwise be refugees where there are reasonable grounds for regarding them as a danger to the security of the UK. This includes those convicted of particularly serious crimes or those who espouse extremist views and behaviours". Paragraph 4.10 of the restricted leave policy provided for active reviews to re-assess any protection needs and the prospects of removal.

33. General challenges to the legality of the restricted leave policy have been refused by the Courts, see *MS & MBT v SSHD* [2017] EWCA Civ 1190; [2018] 1 WLR 389.

## The Refugee convention, the Qualifying Directive and their interpretation

34. The 1951 Geneva Convention and Protocol relating to the status of refugees ("the Refugee convention") provides at article 1F: "the provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes ….". Article 33 is headed "Prohibition of expulsion or return ("refoulement") (1) No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2) The benefit of the present provision may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is …".

35. Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or as persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive") provides minimum standards for the protection of persons granted asylum. Article 2(e) provides: "persons eligible for subsidiary protection means a third country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his … country of origin … would face a real risk of suffering serious harm

as defined in article 15, and to whom article 17(1) and (2) do not apply …". Article 15 provides: "serious harm consists of … (b) torture or inhuman or degrading treatment or punishment of an application in the country of origin …". Article 17 is headed "Exclusion" and provides "(1) a third country national … is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: (a) he … has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes …. (d) he or she constitutes a danger to the community or to the security of the member state in which he … is present. (2) Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or actions mentioned therein". Article 18 provides that "Member states shall grant subsidiary protection status to a third country national … eligible for subsidiary protection in accordance with chapters II and V.

36. The Qualification Directive has been implemented by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and it was common ground that parts of the Qualification Directive were directly effective as part appears from *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630; [2010] QB 633 at paragraph 62.

37. The separate purposes performed by article 1F and article 33(2) of the Refugee Convention were explained by the Supreme Court of Canada in *Pushpanathan v Canada* [1999] INLR 36. As was noted article 1F excludes a person from the Refugee Convention whereas article 33(2) allows for the refoulement of a bona fide refugee where he poses a danger to the security of the country of refuge, which is dealing with the current position, see paragraph 58.

38. It is common ground that the approach to the construction of article 1F is that it must be interpreted narrowly and applied restrictively, because of the consequences of excluding someone from the Refugee Convention, see *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745 at paragraphs 12 to 16. There is to be a high threshold "defined in terms of the gravity of the action in question, the manner in which the act is organised, its international impact and long-term objectives, and implications for international peace and security". There should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.

**Relevant statutory provisions**

39. Section 3 of the Immigration Act 1971 ("the 1971 Act") provides at 3(1)(b) a power to grant leave to remain for a limited or indefinite period, and at 3(1)(c) a power to impose conditions relating to work, accommodation, registration with the police, reporting and residence.

40. Section 82 of the 1971 Act provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a protection claim or a human rights claim. Appeals raising national security issues may be heard by SIAC.

## The Immigration Rules

41. Rule 353 of the Immigration Rules provides: "When a human rights or protection claim has been refused or withdrawn … and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered …".

## A failure to consider the further evidence about intellectual functioning and no adequate alternative remedy – grounds 1 to 3

42. The decision letters as a whole show that the Secretary of State did not consider the further evidence about intellectual functioning before deciding to impose the restricted leave policy on the Claimant. Although there were some parts of the decision letters which referred to taking account of all the relevant circumstances and representations, it was plain from the fact that the decision letters relied on the findings in the SIAC open judgment dated 14 May 2007 without engaging in an analysis of what might have caused the further statement in the open judgment dated 25 January 2013 to the effect that the judge would "not necessarily have reached the same conclusion" that the Secretary of State had not reflected on the further evidence about intellectual functioning. The Secretary of State relied on the open judgment dated 14 May 2007 to find that the Claimant was excluded from the protection of the Refugee convention but did not give any form of explanation as to why the further evidence about intellectual functioning did not affect the Secretary of State's reliance on the open judgment dated 14 May 2007.

43. It is plain that in order to make decisions about the application of the restricted leave policy to the Claimant the Secretary of State was entitled to rely on the open judgment dated 14 May 2007. However in my judgment the Secretary of State was not entitled to leave out of account the further evidence about intellectual functioning because it might have had an important effect on the Secretary of State's decision about whether the Claimant was excluded from the benefit of the Refugee Convention or could not take advantage of certain of its provisions. This is particularly so where it had been noted that the further evidence about intellectual functioning, if it had been adduced at the hearing before the open judgment dated 14 May 2007, might have affected the conclusion about whether the Claimant was a risk to national security because it raised issues about whether the Claimant was an innocent dupe and the interpretation of what the Claimant had said about various matters.

44. It was suggested that the first decision was no longer relevant because it had been replaced by the second decision. In my judgment both decisions remain relevant because they were the decision under which the Secretary of State decided to impose the restricted leave policy on the Claimant, which policy continues to apply to the Claimant. The Claimant is entitled to a decision from the Secretary of State, on the basis of the relevant information which includes the further evidence about intellectual functioning, about whether the restricted leave policy should be applied to him.

45. In circumstances where the Secretary of State has failed to consider relevant material before making the first and second decisions the usual remedy would be to quash the

decisions on that basis and remit the matter to be decided by the Secretary of State who is the relevant decision maker, because it is not for the courts to become the decision maker. However it is necessary to consider whether there is an adequate alternative remedy available meaning that I should refuse relief to the Claimant because it is common ground that judicial review is a remedy of last resort.

46. The Secretary of State submitted in the grounds of defence that the Claimant should make a new protection or human rights claim. The Claimant said that the target of his complaint is the decision to grant him only restricted leave and he is entitled to quash an unlawful decision in that respect. The Claimant also relies on the fact that the issue about an adequate alternative remedy was only raised in November 2018 suggesting that this was not a real point.

47. I accept that judicial review is a remedy of last resort in respect of challenges to decision making by public authorities. That is because if there are other adequate remedies those should be used to avoid the intervention of courts to audit the legality of decision making where it is not required. However in my judgment a new protection or human rights claim will not provide an adequate remedy for two main reasons. First the Secretary of State has reserved the right to certify any new claim as not a fresh claim for the purposes of rule 353 of the Immigration Rules. That is a perfectly proper approach to take, but it means that if the Claimant does make a new protection or human rights claim the Secretary of State may certify the claim as not being a fresh claim. That might give rise to a claim for judicial review to challenge that certification and lead to further proceedings.

48. Secondly the Claimant is entitled to a decision of the Secretary of State on the further evidence about intellectual functioning when the Secretary of State makes a decision about whether to apply the restricted leave policy to the claimant. The Secretary of State may decide that, notwithstanding the terms of the open judgment dated 14 May 2007, the effect of the further evidence about intellectual functioning means that the claimant is not removed from the protection of the whole or part of the Refugee Convention. In such a case there would be no need for further hearings in SIAC to obtain the benefit of the Secretary of State's considered view. If the Secretary of State considers that all the material taken together means that the Claimant should remain subject to the restricted leave policy then the Claimant will know the Secretary of State's considered position. If the Claimant seeks to challenge that decision then other issues may arise. I note that SIAC suggested that the Secretary of State had power to take a further decision in relation to deportation, see paragraph 48 of the open judgment of SIAC dated 25 January 2013, but it is not necessary to decide whether that approach is open. I also note that the Claimant had applied for ILR by letter dated 20 January 2017 but it had been refused by letter dated 6 February 2017 because it had not been made on the appropriate form. The Court would expect the parties to co-operate if further decisions are challenged so that the issues could be fairly addressed.

49. For the reasons set out above in my judgment the first decision should be quashed, and I grant permission to bring the claim for judicial review in respect of the second decision and I quash the second decision.

**No need to address the claim for unlawful discrimination – ground 4**

50. In circumstances where I have quashed the first and second decisions it is not necessary to address the claims for unlawful discrimination and infringement of the public sector equality duty. This is because it was apparent that the issue was whether the policy should be applied to the Claimant given the further evidence as to intellectual functioning and as a result of my decision above, the Secretary of State will reconsider whether the restricted leave policy should be applied to the Claimant in the light of the further evidence as to intellectual functioning. Other issues arose in the course of submissions as to whether the restricted leave policy could ever be applied to the Claimant in the light of the further evidence about intellectual functioning and whether there had been a breach of the public sector equality duty or proper attention to the Claimant's circumstances evidenced by the adjustment of the conditions of the restricted leave policy applying to the Claimant. As it is apparent that the further evidence as to intellectual functioning has not yet been considered by the Secretary of State in the context of the restricted leave policy, and this will be for the Secretary of State to consider in the first instance, it is not necessary or desirable for me to say anything more about it and I do not do so.

**No claim for false imprisonment – ground 5**

51. This claim is made on the basis that the condition as to restricting periods away from the residence is unlawful because it is beyond the terms of section 3(1) of the 1971 Act and that the restriction on movement amounted to the tort of false imprisonment.

52. The tort of false imprisonment is the unlawful imposition of restraint on another's freedom of movement, see Clerk & Lindsell on Torts 21st Edition at 15-23. Difficult questions about whether a person has been unlawfully detained can arise where persons attend courts or offices because of the existence of unlawful summonses which have not been executed, and it is possible for a person to be restrained without being aware of it. In *Jollah* the impermissible restriction was the curfew, and there was evidence about the direct interference with that claimant's activities including attending family court hearings and his attendance at the mosque.

53. In this case the condition of residence had been imposed and the Claimant was required to spend his nights at the specified premises. However this restriction did not remove the Claimant's freedom to sleep away from the premises because the Claimant was at liberty to spend up to 3 consecutive nights away and up to 10 nights away in a 6 month period. Further there was a provision to increase the number of nights spent away from the premises with the written consent of the Secretary of State. In this case there is no evidence from the Claimant, who has made 2 witness statements, about whether he spent any nights away from the premises, or that he wanted to spend more nights away from the premises, or indeed that these provisions had any effect on him whatsoever. Therefore in my judgment the relevant conditions did not falsely imprison the Claimant.

54. This conclusion is supported by the decisions in *G v Secretary of State for the Home Department* [2016] EWHC 3232 (Admin) at paragraph 12 where it was noted that the policy requiring prior consent to stay away from the residence was unlawful, but did not amount to false imprisonment, for reasons given in *MS v Secretary of State for the*

*Home Department* [2016] EWHC 3162 (Admin) at paragraphs 30-37, and the decision in *MS* itself. There was no actual detention as to amount to imprisonment.

55. In my judgment this claim for damages for false imprisonment should therefore be dismissed. This is because there was no imposition of restrictions on the Claimant which amounted to actual detention. I can confirm that if I had found that there had been any false imprisonment I would, on the evidence, have only awarded nominal damages of £1 because the Claimant had not proved that the detention had had any effect on him.

**No order for disclosure**

56. The Claimant applied for disclosure of material, or the gist of material, relied on in the past by the Secretary of State to make determinations about the risk to national security posed by the Claimant. I have not made an order for disclosure because disclosure is not necessary to do so to dispose fairly of this claim for judicial review. Issues of disclosure may arise in future claims but those issues will be for the future.

**Conclusion**

57. For the detailed reasons given above: (1) I grant permission to challenge the second decision relating to restricted leave and I quash the first and second decisions and remit the matter to the Secretary of State to make further decisions, taking into account the further evidence as to intellectual functioning; (2) I do not need to address separately the discrimination claims and do not do so; (3) I dismiss the claim for damages for false imprisonment.