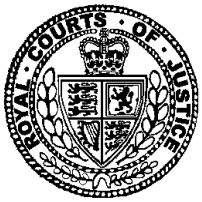

Neutral Citation Number: [2021] EWHC 54 (Admin)

Case No: CO/4794/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th January 2021

Before :

Mr Timothy Corner, QC
Sitting as a Deputy High Court Judge

- -

Between :

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

- -
- -

Gordon Lee (instructed by **Duncan Lewis**) for the **Claimant**
James Fraczyk (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 12th January 2021

- -

Approved Judgment

Timothy Corner, QC:

1. This is an application for interim relief from detention. The Claimant seeks his release on bail.

BACKGROUND

2. The Claimant is a national of Jamaica who first entered the UK on 22nd March 2002 on a visit visa and made a series of successful applications to extend his leave until he was granted indefinite leave to remain as the spouse of a settled person on 9th March 2006.

3. Between 2007 and 2009 the Claimant committed motoring offences and was convicted of possession of Class B drugs in 2013 and 2015. The 2015 offence led to imprisonment for one month.

4. On 18th August 2016 the Claimant was convicted of possession of class A drugs with intent to supply and on 18th November 2016 he was sentenced to a total of 90 months imprisonment. That sentence triggered the Defendant's obligations pursuant to section 32 of the UK Borders Act 2007 ("the 2007 Act") and on 23rd November 2017 she served a notice of decision to deport on the Claimant.

5. The Claimant made human rights representations in response to that decision and on 26th June 2018 the Defendant refused those representations and served a signed deportation decision. The Claimant appealed the decision to refuse his human rights claim but in a determination promulgated on 28th February 2019, that appeal was dismissed. An application to the First-tier tribunal ("FTT") for permission to appeal against that determination was unsuccessful.

6. In August 2019 following the conclusion of his custodial sentence, the Claimant was released from prison and returned to live with his partner and children. In January 2020 the Defendant detained the Claimant and set directions for the Claimant's removal to Jamaica on 11th February 2020. Those removal directions were deferred on 10th February 2020 following an out of time application for permission to appeal to the Upper Tribunal and an order that removal be stayed obtained from the Court of Appeal.

7. On 6th March 2020 the FTT refused bail.

8. On 21st March 2020 Dr Irfan Sayed completed a Rule 35 report which it appears may not have been received by the Defendant, noting the Claimant's account of being kidnapped in Jamaica in 2001 by three men and an account of rape in 2016 in HMP Bullingdon. The doctor concluded;

> "On examination he has scars which may be due to the history given. He is suffering from depression, nightmares, flashbacks and anxiety. Since being detained his condition has worsened and he has started sleeping tablets and medication for depression. My opinion is that continued detention will lead to deterioration in his mental health due to the history given and the nature of being detained with an unknown status."

9. The Claimant was released on 24th April 2020 on conditional bail that required him to report regularly to the Defendant. I understand that it is accepted that the Claimant complied with those reporting requirements.

10. On 18th May 2020 an OASys assessment was completed in respect of the Claimant by the National Offender Management Service. The report states;

> "[The Claimant] is assessed as LOW risk and has been convicted for possession and supply of Class A Drugs. Current evidence does not indicate likelihood of serious harm."

11. The OASys assessment also states that the OGRS 3 probability of proven reoffending is low, the OGP probability of proven non-violent reoffending is medium and the OVP probability of proven violent-type reoffending is low.

12. On 3rd November 2020 the Claimant lodged an EEA application. On 5th November 2020 the Defendant commenced preparation for removal on a charter flight. On 8th November 2020 detention was approved on the basis of the Claimant being a Level 2 AAR and inter alia that "The period of detention will be short….There is no current professional evidence that suggests detention per se would be detrimental to health per se."

13. The Joint Head Detention Gatekeeper noted that;

> "I acknowledge both the risk of vulnerability and the length of residence in the UK. Weighed against those factors are the public-protection aspects in play and the prospective imminence of removal.
>
> I find that criminality and risk to the public posed by this individual to outweigh the risk of vulnerability. I can see that his Article 8 family life has been considered through the Courts and no basis has been found to overturn the decision to deport [the Claimant] from the UK.
>
> Given the above, I am satisfied detention is reasonable and proportionate and authorise it as such."

14. On 18th November 2020 the EEA (Zambrano) application was refused. The Defendant re-detained the Claimant on 18th November 2020 and set directions for his removal to Jamaica on a charter flight on 2nd December 2020.

15. On 19th November 2020 a Detention Review ("DR") assessed that he posed a high risk of absconding, a medium risk of harm and a medium risk of reoffending. He underwent a screening process which did not flag up any particular concerns relating to mental health save for a reference to depression.

16. On 22nd November 2020 the Claimant underwent a Rule 34 assessment with Dr Saeed Ahmed. The doctor noted a request to continue with Mirtapazine, that the Claimant was fit and healthy and did not record concerns about the Claimant's ability to cope with being detained or any deterioration in respect of his mental health.

17. On 30th November 2020 the Claimant's representatives wrote to the Defendant setting out a claim for protection on the basis that the Claimant feared ill-treatment on return to Jamaica.

18. On 1st December 2020 the Claimant submitted a psychiatric report from Dr Nuwan Galappathie which set out inter alia the following conclusions;

    i) The Claimant is "suffering from a major depressive disorder and his current depression is severe….[and] in my opinion [the Claimant] meets the criteria for Post Traumatic Stress Disorder (PTSD)" (paras 125, 155). The report suggests (paras 224, 225) that the Claimant's experiences of being attacked in Jamaica and subsequently being raped in HMP Bullingdon would have worsened his mental health problems.

    ii) The Claimant presents with a high risk of self-harm and suicide (para 237).

    iii) The claimant is not medically fit to fly (para 239).

    iv) "..if he is returned to Jamaica this is likely to have a significant adverse impact on his mental health. If he is unable to access the mental health care that he requires this would further worsen his mental health and increase his risk of self-harm and suicide (para 241)."

    v) Dr Galappathie also stated (para 245-248) that the Claimant's mental health had worsened during detention and ongoing detention increased his vulnerability to mental health problems.

19. On 1st December 2020 the Defendant confirmed that in the light of the Claimant's protection claim the removal directions would be deferred and on 4th December 2020 the Claimant had a screening interview in which he described being sexually assaulted in Jamaica and said he was kidnapped and shot in the head by a gang.

20. On 4th December 2020 the Claimant's representatives requested that he be released on bail by the Defendant, giving a number of reasons;

    i) The outstanding protection claim as a bar to removal;

    ii) The intention of the Claimant's representatives to commission a country expert report on the risks that the Claimant faced in Jamaica;

    iii) His substantial ties to the UK and his impeccable reporting record as contra-indications to any absconding risk;

    iv) His significant mental health issues and the evidence that he should be considered at Level 3 on the Defendant's Adults at risk in Immigration Detention ("AAR") policy;

    v) His low risk of reoffending and harm to the public.

21. On 9th December 2020 the Defendant wrote to the Claimant's representatives indicating that she was minded to apply section 72 of the Nationality, Immigration and Asylum Act 2002 ("2002 Act") to the Claimant's protection claim (the presumption of exclusion

from the Refugee Convention as a result of serious criminality) and that the Claimant had until 11th January 2021 to submit representations.

22. On 11th December 2020, in the absence of a response to his application to the Defendant for bail, the Claimant made an application for bail to the FTT. On the same day he was notified that his asylum claim was to be subject to the Detained Asylum Casework ("DAC") procedure and the Claimant's solicitors made representations as to why that was inappropriate. Also, on that date, the Claimant had an appointment with a nurse who said that the Claimant reported having an ongoing headache and bleeding per rectum but said that he sounded settled in his mental state and that he appeared satisfied with the discussion with the nurse.

23. The Claimant's DAC interview that had been arranged for 14th December 2020 was suspended because the Claimant was unwell.

24. On 16th December 2020 the Defendant wrote to the Claimant's representatives confirming that the Claimant's health would be assessed and his fitness to be interviewed would be considered.

25. On 17th December 2020 the Claimant's FTT bail hearing took place in the FTT before Judge Moon, who refused bail. In her written reasons she said;

> "1. I accept he has recently had a good reporting history but balanced against that is the risk of harm to the public, he has been convicted of a very serious drugs related offence and received a long custodial sentence.
>
> 2. In terms of whether removal is imminent, it is not going to take place within 14 days but based on what I have heard today, the respondent does intend to remove within 7 weeks which I consider to be a reasonable timeframe given the seriousness of the offence.
>
> 3. I take into account the summary of the medical evidence. There is no suggestion that his medical needs cannot be cared for in the detention centre where he will be able to access the anti-depressants that the medical report states he needs. He has been in detention for one month, in my view the respondent ought to be given the opportunity to expedite the decision on his asylum claim which we are told they will and if they do not progress this decision then the time will come when continued detention may not be justified."

26. On 22nd December 2020 the Claimant commenced proceedings seeking judicial review of his detention, seeking a declaration to that effect and damages, and also seeking as interim relief bail effecting his immediate release from detention.

27. On 22nd December 2020 Mr Justice Saini directed that the Defendant file and serve an Acknowledgement of Service and grounds opposing the interim relief application by 4pm on 30th December 2020, with the Claimant to respond by 10am on 4th January 2021, and thereafter the application for interim relief to be considered by a judge on the papers in the week commencing 4th January 2021, subject to any direction for an oral hearing. A short extension was granted to the Defendant on 31st December 2020 for service of Acknowledgement of Service.

28. Mr Justice Saini said;

> "2. The recent decision of 17 December 2020 of Judge Moon is highly relevant and must be given appropriate weight.
>
> 3. The Judge refused the Claimant bail for a number of reasons including the risk of harm to the public (the Claimant has been convicted of a very serious drugs related offence and received a long custodial sentence) and his potential removal within 7 weeks.
>
> 4. The Judge also took into account the medical evidence and was right in my view to observe that there is no suggestion that the Claimant's medical needs cannot be cared for in the detention centre, where he will be able to access the anti-depressants that the medical report states he needs.
>
> 5. I also do not consider his continued detention for a further short period before the matter returns to court will place the Claimant at risk by reason of his other vulnerabilities.
>
> 6. I emphasise that the Defendant will need to satisfy the Court that detention can be justified in the present circumstances which are likely to inhibit removals.
>
> 7. Unless there is a realistic prospect of removal very soon I would expect her to agree that the Claimant should be given bail with conditions (given his previous history of compliance in reporting). That is however only a provisional view…"

29. On 23rd December 2020 a Rule 35 report was produced stating that the Claimant had "significant mental distress", but was not received by the Defendant until 29th December.

30. On 24th December 2020 the Claimant was seen by Dr Patel, a psychiatrist, who diagnosed him as suffering from Adjustment Disorder with Depressive Features and Suicidal ideation. On the same day, the IRC's Mental Health Nurse, Cecilia Goodness-Amao noted that diagnosis and said;

> "In my own view, continue[d] staying in detention environment will definitely increase risk behaviour and have further negative impact on his psychological and mental wellbeing."

31. Further DRs were conducted on 30th and 31st December 2020.

32. In the 31st December DR it was said that the Claimant posed a high risk of absconding;

> "as he will be fully aware of the intention to remove him following his re-detention on 18 November 2020. I acknowledge his prior recent compliance with reporting however he has been previously been found to use drugs whilst on bail and has declined voluntary departure…."

33. The assessment stated the Claimant posed a medium risk of "Harm A." It stated that he had been assessed as posing a low risk of serious harm, but a medium risk of harm "given the escalation in the seriousness of offending and the impacts that this has on the wider community…."

34. The assessment gives an overall low risk of offending, but goes on to refer to the OASys assessment that the risk of non-violent reoffending was medium, "suggesting that the risk of further drugs offences is prevalent."

35. In his comments in the 31st December DR, the authorising officer said that the Claimant should be placed in Level 3 under the Defendant's AAR policy.

36. He also referred to the OASys risk assessment, stating;

> "I also note the OASys report risk assessment which noted a medium risk of nonviolent re-offending and low risk of harm. This does not however fit with the length of his custodial sentence and an escalation in the seriousness of his offending, as such I'm minded agreeing that he would present a medium risk of harm."

37. With regard to removal directions the authorising officer said;

> "Removal directions are not in place due to a very late asylum claim given the period of which he has been in the UK, as such it could be perceived that this is an attempt to frustrate detention, given his lack of compliance with the interview, that healthcare noted he is fit to attend. This will however be tested on 7 January 2021 with a further interview. The claim will be considered and I acknowledge that there is a presumption that the appeal will be afforded, however it could still be certified on a case-by-case basis (unclear as he failed to provide the full asylum interview). Once he has immediate review should be given to determine whether certification is appropriate. This will be expedited under the DAC process.
>
> If it can be certified, then removal could be achieved within 7 weeks as I am advised that there is potential removal prospect in February and an agreed ETD remains valid until 23 February 2021. It is also noted that the JR is not a bar to the progression of the case or removal."

38. He concluded;

> "… having considered all factors in this case, the presumption of liberty is outweighed by the risks in this case and the vulnerabilities can be managed on a short-term basis with appropriate medical support within the IRC. The public protection concerns relating to serious drug offences is prevalent and the length of sentence also meets the guidance for ongoing detention to be considered under the AAR policy.
>
> This is a very finely balanced case but I do find in favour of detention at this time."

39. On 31st December 2020 A McCallum wrote to the Claimant on behalf of the Defendant acknowledging receipt of a Rule 35(3) report from the medical practitioner at Harmondsworth IRC. I set out below extracts from the letter;

".. The Doctor does not state that a further period of detention would be harmful pending the Mental Health Team referral. As such the Rule 35(3) report on its own merits would continue to engage level 2 of the policy, however other vulnerabilities/factors have also been considered of which would suggest that you do engage level 3 of the policy.

We note that a Medical Legal Report, dated 29 November 2020 was received by the responsible casework team on 1 December 2020 for which Dr Nuwan Galappathie raised concerns…'In my opinion detention appears to be having an adverse impact on his mental state.'

A Healthcare update was sought following receipt of the above and on 24 December 2020, a response was received in which they noted that.. 'In my own view, continue staying in detention environment will increase risk behaviour and have further negative impact on his psychological and mental well-being.'

It is therefore considered that the additional medical evidence would engage **level 3** of the Adults at Risk in Immigration Detention Policy…

Your probation officer has completed an OASys Report which was approved on 18 May 2020, a copy of which was provided on 18 December 2020 to the responsible casework team…

The responsible casework team have assessed you as posing a medium risk of harm given the escalation in the seriousness of your offending and the impacts that this has on the wider community…

Although you have previously complied with reporting conditions in the UK and weight has been given to your most recent compliance for a sustained period, you will now be fully aware that removal will be enforced should your claim be refused and having not agreed to return voluntarily, there are also concerns that you may not maintain regular contact for any subsequent removal.

You have also been assessed as posing a medium risk of harm and reconviction which has taken into account the prior OASys assessment but also concerns raised by the Judge at your recent bail refusal that noted that your recent good reporting history but balanced against that was 'the risk of harm to the public, he has been convicted of a very serious drugs related offence and received a long custodial sentence.'

Given that removal directions were deferred and there is an outstanding asylum claim, the length of your custodial sentence and the risk of harm which was also a concern for the Judge during your bail hearing would suggest there is a current public protection risk, despite the compliance on reporting recently. As such consideration of detention can be given in-line with the policy.

…with the current Healthcare response also noting that you are receiving appropriate psychiatric support and observations, along with your compliance with medication and with no reason to believe that you cannot attend a further interview; short-term detention pending your interview under consideration as to whether an appeal would be afforded, along with quite swift removal prospects if the barriers are concluded, would appear to be proportionate."

40. On 6th January 2021 Mr Justice Baker ordered that the DAC interview scheduled to take place on 7th January 2021 should not take place. On 8th January 2021 Mr Justice Pepperall ordered that the interim relief application be listed for a remote hearing at 2pm on Tuesday 12th January 2021. I conducted that hearing.

CLAIMANT'S GROUNDS FOR APPLYING FOR JUDICIAL REVIEW

41. The Claimant's grounds for applying for judicial review are in summary as follows.

42. First, the Claimant contends that during his detention the Defendant has breached her published AAR policy in the following respects;

    i) First, the Defendant failed to follow her published policy by continuing to detain the Claimant after it became clear that he could not be removed within a reasonable time.

    ii) Secondly, what is reasonable in all the circumstances will be informed by the likely impact of continued detention on the individual, and from 1st December 2020 the Defendant had sight of the psychiatric report from Dr Galappathie which was clear evidence that the Claimant was presenting a Level 3 risk. Under Level 3 detention can only be justified where there is either a set date for removal or significant public protection concern or if the individual has been subject to a 4 year plus custodial sentence. In the Claimant's case, although he had been subject to a custodial sentence of over 4 years, his OASys assessment is that he was at a low risk of reoffending and a low risk of harm. Further, the AAR policy directs the Defendant to consider as part of the determination of whether an individual should be detained his particular vulnerabilities and "whether there are alternative measures, such as residence or reporting restrictions, which could be taken to ensure an individual's compliance."

43. The Claimant says the policy was not followed in that

    i) There was professional evidence that he met the Level 3 criteria;

    ii) The policy made it impermissible to detain the Claimant when he could not be removed within a reasonable period and that period had to be assessed in the light of his vulnerabilities;

    iii) In the light of the fact that he did not pose a significant public protection concern and his history of compliance with bail conditions, there were alternative measures that could be taken.

44. The Claimant's second ground is that the detention contravenes the principles set out in the case of R v Governor of Durham Prison, ex p Hardial Singh [1984] 1 WLR 704 at 706, as approved by the Supreme Court in R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12 [2012] 1 AC 245, as modified in the context of section 36(1) of the 2007 Act in R (Rashid Hussein) v Secretary of State for the Home Department [2009] EWHC 2492 (Admin), by Nicol J.

45. The Claimant's third ground is based on the Defendant's conduct at the FTT. The Claimant draws attention to Judge Moon stating;

> "In terms of whether removal is imminent, it is not going to take place within 14 days but based on what I have heard today, the respondent does intend to remove within 7 weeks which I consider to be a reasonable timeframe given the seriousness of the offence."

46. The Claimant says that on the basis of the information before the Defendant on 17th December 2020, the date of the hearing before Judge Moon, "it is very difficult to understand how an estimate that removal would take place within 7 weeks was possible." The Claimant says the Defendant acted unlawfully in saying to the FTT that it was her intention to remove within that period.

47. The Claimant's fourth ground is that it was unlawful for the Defendant to detain the Claimant pursuant to the DAC policy.

48. As a fifth ground the Claimant says that even if his detention was not unlawful by reason of the first four grounds, the detention was in breach of Article 5 of the ECHR.

THE LAW

49. It is relevant to begin by referring to the principles applied in detention cases. In the Lumba case (cited above) Lord Dyson said at [22]

> "It is convenient to introduce the Hardial Singh principles at this stage, since they infuse much of the debate on the issues that arise on this appeal. It is common ground that my statement in R (I) v Secretary of State for the Home Department [2003] INLR 196 para 46, correctly encapsulates the principles as follows:
>
> (i) the Secretary of state must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) if before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
>
> (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal."

50. In Hussein Mr Justice Nicol applied the Hardial Singh principles in the context of automatic deportation under section 32 of the 2007 Act and concluded at [44]

> "Mr Husain submitted that some adaptation of these principles was necessary to reflect the nature of the power to detain under s. 36 (1) (a) of the 2007 Act. Mr Eadie

> accepted that a degree of modification was necessary. In the end I am not sure that there was any significant difference between the positions canvassed by the parties. In any case I would express the implied limitations in this context in this way:
>
> …
>
> (ii) The detainee may only be detained for a period that is reasonable in all the circumstances.
>
> No change is needed to this principle.
>
> (iii) If, before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period he should not seek to exercise the power of detention.
>
> No change is necessary to the formulation here, but this principle infringed if detention continues even though it is apparent that either resolution of the question of whether any of the exceptions in s.33 is applicable, or any subsequent deportation, or both together, will take more than a reasonable time.
>
> (iv) The Secretary of State should act with reasonable diligence and expedition to determine whether any of the exceptions in s. 33 is applicable.
>
> An analogous limitation to Dyson LJ's fourth principle is clearly to be read into the s.36(1) (a) power, but some adaptation is necessary to reflect the exercise on which the Secretary of Stage is engaged. Of course, if none of the exceptions in s.33 apply and the automatic deportation obligation in s.32(5) arises and detention is continued under s.36(1) (b), that power will be subject to the implied limitations as formulated by Dyson LJ. The Secretary of State will then have to act with reasonable diligence and expedition to effect deportation. What is reasonable will no doubt take account of the totality of the period the person concerned spent in detention after the conclusion of his criminal sentence pursuant to immigration powers."

51. Mr Justice Nicol's application of the Hardial Singh principles to this context was approved by the Court of Appeal in JS (Sudan) [2013] EWCA Civ 1378.

52. So far as the approach to an interim relief application is concerned, in R (Adams) v Secretary of State for the Home Department [2014] EWHC 3506, Mr Justice Singh said [6-7] that there were two issues to be determined at the interim relief stage of a claim such as this; first whether there is prima facie a serious issue to be tried and secondly the application of a modified balance of convenience test sometimes characterised as the balance of justice, having regard to the "special nature of public law litigation." At [12] Mr Justice Singh identified the risk of further deterioration in a Claimant's mental health as an important factor in favour of release when the balance of convenience test was applied.

53. In Sanger Sabir Mohammed v Secretary of State for the Home Department [2020] EWHC 1337 (Admin) Mr Justice Fordham considered the Claimant's mental health difficulties to be relevant to the balance of convenience test ([22]) and also took into

account ([12]) the likelihood of a challenge to an adverse decision on the protection claim that had been made by the Claimant in that case.

THE AAR POLICY

54. The AAR policy gives guidance for balancing identified risk issues against immigration considerations in relation to detention. In relation to Level 3 the policy states

> "Where on the basis of professional and/or official documentary evidence, detention is likely to lead to a risk of harm to the individual detained for period identified as necessary to effect removal, they should be considered for detention only if one of the following applies
>
> -removal has been set for a date in the immediate future, there are no barriers to removal, and escorts and any other appropriate arrangements are (or will be) in place to ensure the safe management of the individuals return and individual has not complied with voluntary or ensured return
>
> -the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or if the individual presents a current public protection concern
>
> It is very unlikely that compliance issues, on their own, would warrant detention of individuals falling into this category. Non-compliance should be taken into account if there are also public protection issues or if the individual can be removed quickly.
>
> The above is intended as a guide rather than a prescriptive template for dealing with cases. Each case must be decided on its own merits, taking into account the full range of factors, on the basis of the available evidence."

ASSESSMENT

55. The approach I take is, as per the Adams and Mohammed cases cited above, to consider first whether there is a serious issue to be tried, and secondly to address the balance of convenience or justice, including the public interest considerations that apply to this as a public law case.

56. For the purposes of this application for interim relief, although there are other grounds (set out above) I begin by considering whether there is a serious issue to be tried by reference to the principles in Hardial Singh. Particularly relevant are the second and third Hardial Singh principles, that the deportee may only be detained for a period that is reasonable in all the circumstances and that if before the expiry of the reasonable period of detention it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, she should not seek to exercise the power of detention.

57. It was made clear in Lumba (see [121]) that the risks of absconding and reoffending are "always of paramount importance" and highly relevant to the application of the Hardial Singh third principle.

58. The Defendant relies on the assessment that the Claimant's risk of non-violent reoffending is medium, the risk of harm is medium and the risk of absconding is high.

59. Despite the Defendant's assessment of the risk of harm and non-violent offending as medium, the Claimant says there is no public protection concern in this case that justifies his detention. The OASys assessment of 18th May 2020 states that "current evidence does not indicate likelihood of serious harm". Further, says the Claimant, he has already had immigration bail on two separate occasions, from his release from prison in August 2019 until his detention by the Defendant on 29th January 2020 and then from 24th April 2020 until his re-detention on 18th November 2020. During those periods the Claimant says that there has been no suggestion that he posed a significant danger to anyone.

60. The Claimant challenges the Defendant's assessment of the risk of absconding. The Claimant says that assessment does not acknowledge the fact that he complied with weekly reporting requirements during his previous periods of immigration bail. In answer to the argument that he is now aware of the Defendant's intention to remove him and that this acts as a powerful incentive for him to abscond, the Claimant submits that there were no barriers to removal during his previous period of immigration bail. In particular, he was released from detention on 24th April 2020 in circumstances where there were no barriers to removal but continued to report during the intervening period until his detention on 18th November 2020.

61. I do not think it necessary for me to decide, particularly for the purposes of interim relief, whether the risks of non-violent reoffending, harm and absconding are indeed medium, medium and high respectively. The assessments carried out on behalf of the Defendant are in any case worthy of respect, as Mr Justice Fordham said in Mohammed at [9]. However, I do think it relevant to take account of the fact that during his previous immigration bail, with no barriers to removal, it is not suggested that he posed any serious danger to the public or sought to abscond. Further, the Claimant complied with his bail conditions, save that he accessed drugs in January 2020, when he tested positive for cannabis and amphetamines. However, the fact that he was only given a verbal warning and not prosecuted suggests that these matters were not regarded as grave.

62. I turn to prospects for removal. To begin with, his protection claim has still not been decided. He has not yet been interviewed. I should add that I was told that he had recently raised a trafficking claim but I was given no details and therefore that matter has not formed a significant part of my assessment. I was told by counsel that there is no presumption that the protection claim will be certified if rejected, thus preventing an in-country appeal. If he is allowed an in-country right of appeal, that appeal is likely to mean (as Mr Justice Fordham said in Mohammed at [12]) a barrier to removal lasting several months. Even if the claim is certified, he could still challenge the decision by judicial review, which as Mr Justice Fordham pointed out could also take months to resolve.

63. I was invited by the Defendant to make an assessment of the strength of the protection claim. The Defendant said that the fact the claim had only been made very recently showed it was likely to be bogus. However, I cannot assess the strength of the claim, because I lack sufficient information to do so.

64. The Defendant also contended that the possibility of further challenge to a certification decision "proves far too much", because the logic of this point would render most immigration detention unlawful on the basis of a never-ending series of prospective challenges. I recognise the force of this contention, but it seems to me that I have to assess the application of the Hardial Singh principles in the light of the facts as they are. If the Claimant is able to postpone his removal by legal action, that must be relevant.

65. In any event, even if I left out of account the outstanding protection claim or took the view that it was weak and therefore gave it little weight, the timescale for removal of the Claimant would still be highly uncertain. In his comments in the 31st December 2020 DR, the authorising officer said he had been advised that there was a potential removal prospect in February. I was told by counsel for the Defendant that removal in February would no longer be possible, and the charter flight which would take the Claimant back to Jamaica, if booked, would be in March.

66. I entirely accept that as the Defendant submitted it is not necessary to give an exact date for removal and that all that is necessary is a realistic prospect. But I am very concerned that there was no actual evidence before me from the Secretary of State as to whether a charter flight even in March is a realistic prospect. Certainly, I do not think there is a realistic prospect of removal "very soon", to borrow the words of Mr Justice Saini.

67. It is also appropriate to consider the Claimant's mental health. As Mr Justice Fordham said in Mohammed (at [19]) this is relevant both to the strength of the claim and to the balance of convenience. The seriousness of his condition has been accepted by the Defendant. He clearly suffers from serious depression with a risk of suicide. This has been identified not only by Dr Galappathie but also by Dr Patel. Further, by placing him in Level 3 under the AAR policy, the Defendant has accepted that "detention is likely to lead to a risk of harm to the individual if detained for the period identified as necessary to effect removal." The likely consequences of detention were identified at least as far back as March 2020 by Dr Sayed, who said that "continued detention will lead to deterioration in his mental health."

68. This does not, of course, mean that it is necessarily unreasonable to continue to detain the Claimant. However, the fact that he suffers from a serious mental health condition which is exacerbated by continued detention is relevant to the assessment of the reasonableness of the detention.

69. In the circumstances set out above I am driven to the conclusion that there is indeed a serious issue to be tried in relation to the Hardial Singh principles. I would consider there to be a strong prima facie case even setting aside the Claimant's mental health, but that matter makes the case stronger still.

70. I have in mind that it is always for the state to justify detention of the individual and that I must apply anxious scrutiny to executive detention. I have taken into account the fact the Claimant has only been detained for a relatively short period of less than two months, considerably shorter than in, for example, Mohammed. This is an important factor under the Hardial Singh principles. However, it is necessary to look forward also, and to take into account the timescale for removal and the effect on the Claimant of detention continuing into the future, as well as the risk of reoffending, causing harm and absconding.

71. Having regard to the uncertain timescale for the Claimant's removal, his substantial compliance with his bail conditions for several months in 2020 which is relevant to the risk of reoffending, harm and absconding, and his serious mental health issues and the effect on him of continuing detention, I think there is a strong prima facie case that his continued detention is unlawful.

72. I do not need to deal with the Claimant's other grounds because I have found a serious issue to be tried in relation to the Hardial Singh principles. However, I would observe that as the Defendant submitted, the AAR Level 3 policy is not breached just because (if it be the case) a detainee does not pose a public protection concern. A previous substantial custodial sentence is enough of itself to allow consideration of an individual for detention, pursuant to the policy.

73. I turn finally to the overall balance of convenience, or balance of justice. Plainly, the Claimant was convicted in 2016 of a very serious criminal offence, which led to the imposition of a long custodial sentence. I accept also that the risks of him absconding and/or reoffending and/or causing harm are factors of paramount importance. However, I think his record while on bail, while not spotless, suggests some limit on the extent of those risks. Further, his mental health is very seriously impaired and detention is making it worse. In those circumstances, despite the fact that his period of custody so far has been limited, I think that the lack of a clear timescale for his deportation means that he should be released.

74. Given my findings above, it was agreed that I should direct his release by way of interim relief. It will then be for the Defendant to release him using the bail powers given her by statute, and in those circumstances the Defendant will be able to identify appropriate conditions.