Neutral Citation Number: [2021] EWHC 986 (Admin)

Case No: CO/1008/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2021

Before:

SIR DUNCAN OUSELEY
sitting as a High Court Judge

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Between:

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

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CATHERINE MEREDITH (instructed by **SUTOVIC AND HARTIGAN**) for the **Claimant**
WILLIAM HANSEN (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

Hearing dates: 2 and 3 February 2021

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Approved Judgment

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 29 April 2021.

SIR DUNCAN OUSELEY :

1. These judicial review proceedings were lodged on 29 January 2013. The substantive hearing concluded on 3 February 2021. For the greater part, the challenge concerned events which had not occurred when the proceedings were lodged. This chain of events merits recounting. CPR Part 54 merits its due application, and immigration control its due enforcement.

2. The Claimant arrived in the UK in December 2003, aged 25, it was believed. He claimed asylum on arrival; he was granted temporary admission on 19 December 2003, and served with reporting requirements. The claim was refused, and his appeal was dismissed on 27 July 2004. His appeal rights were exhausted by 27 January 2005. Thereafter he had no right to stay in the country. He first failed to comply with his reporting requirements on 9 February 2005. Mr Hansen for the SSHD suggested that this was not coincidental but an attempt to avoid removal.

3. Mr Emmanuel Carlos (EC) next reported to the SSHD in May 2009, for the purpose of obtaining accommodation, seemingly on the advice of solicitors he consulted because he was now of no fixed abode. A fresh claim appeared to be in the offing. In November 2009, EC was encountered during a search of a factory and found to be working, using a false south African passport; he was arrested and, on 5 November, he was remanded into custody. Mental health problems were mentioned at the police interview. On 10 December 2009, he pleaded guilty to possessing a false identity document; he was sentenced to 8 months imprisonment; the Crown Court recommended his deportation.

4. On 24 December 2009, EC was served with notice of liability to deportation. Five days later, he submitted further representations which were accepted as amounting to a fresh claim for asylum. He also made a further claim for asylum on 3 February 2010. From 6 March 2010, EC was detained under immigration powers, but remained in the prison for a further month before transfer to an Immigration Removal Centre, IRC. There are records of mental problems, a Detention Centre Rule 35 report of signs of torture, concern about fitness for detention, endeavours to arrange Emergency Travel Documentation, ETD, and arrangements for bail being made with a request from the IRC for the release address to be single and not shared accommodation. EC was released on Chief Immigration Officer, CIO, bail on 26 May 2010, with a twice weekly reporting requirement which he complied with.

5. An asylum interview was held on 15 March 2011 in connection with the fresh claim. Evidence for the SSHD's consideration was gathered, including GP and other NHS letters, and a 30 March 2011 report from Dr Tarn, a specialist Registrar in Forensic Psychiatry. The further representations were rejected by the SSHD in a decision dated 9 September 2011, followed shortly after by a decision to make a deportation order served with an in-country right of appeal which EC exercised.

6. On 2 December 2011, the First-tier Tribunal, FtT, dismissed his appeal, taking into account the previous determination of 2004. The 2011 determination contains the only available information about the 2004 determination. An application for permission to appeal was refused by the Upper Tribunal, UT, on 19 December 2011, and on 30 January 2012, EC's appeal rights became exhausted again. The SSHD sought to make arrangements, after the refusal by the UT of permission to appeal, for the issuing by the Angolan authorities of ETD for EC. A Deportation Order was served on 20 April

2012, when EC reported as required. There then followed several months, up to 12 September 2012, when the SSHD tried without success to get EC to attend interviews arranged at the Angolan Embassy for the purposes of arranging for the issue of ETD by Angola.

7. On 12 September 2012, the SSHD decided that EC should be detained because he had refused to co-operate with the removals process; his detention was then authorised, and EC was actually detained on 21 September 2012. This period of detention lasted until 6 February 2013, (139 days). And it was during this period of detention that these judicial review proceedings were lodged, on 29 January 2013, challenging the lawfulness of a now irrelevant certification of the SSHD's refusal of what she took to be representations against his refusal to revoke the Deportation Order, as well as challenging the lawfulness of this period of detention from its outset, and its continuation.

8. I shall have to consider the events relating to that period of detention in some detail as it is one aspect of this judicial review, and it is one which I have to decide substantively. The parties are at odds over the significance of the events recorded, both medically and in the endeavours to obtain ETD for EC, and the part he played, characterised by the SSHD as non-co-operation.

9. At all events, no progress was made in obtaining any ETD, concern was growing about EC's mental health, more on his behalf than from the IRC; he was moved to single accommodation within the IRC, and sought release on bail, requiring single occupancy accommodation. EC applied for bail on 25 January 2013, shortly before these proceedings were lodged, and was granted bail by the FtT on 31 January 2013. It is not possible at this stage to ascertain whether the accommodation address, provided by the SSHD and to which the FtT granted bail, contained single occupancy accommodation, shared or both. At all events, EC was released on 5 February 2013, but found on arrival at the accommodation that he had arrived too late to be allowed in; entry was refused and he was accommodated that night in a care home. This was shared accommodation; he responded by smashing up the room and threatening the housing manager. He was arrested and remanded into custody. On 7 February, he pleaded guilty to causing criminal damage, and was fined £100. The manager of the care home refused to have him back, with the result that he had nowhere to go. He was then re-detained, under immigration powers. It is unclear what happened to the accommodation which he arrived too late to enter. Not everything about the events of those few days can now be ascertained.

10. At all events, on 7 February 2013, EC was back in immigration detention, and stayed there until released on 4 December 2014, a period of 666 days, the second period of detention, the lawfulness of which it falls to me to determine. EC's application in July 2019 for the detention issues to be transferred to a County Court was successfully resisted by the SSHD. However, the parties agreed before me that any quantum issues should be left in the hope of agreement in the light of this judgment, and any dispute could be transferred.

11. I shall have to go into further detail of why EC was re-detained on 7 February, and what happened thereafter. At present, it is sufficient to say that the problems with obtaining an interview for and then chasing ETD continued, as did medical concerns about EC and his detention. It appears that there were two attempts by or on behalf of EC to

obtain a s4 accommodation address, a necessary precursor to an application to the FtT for bail. But nothing appears to have come of them.

12. On 25 July 2013, Mrs Justice Swift refused permission to apply for judicial review on the papers. She said:

> "The matters advanced on behalf of the claimant in support of his application had been advanced before the FTT which gave a full and detailed judgement in which it found, inter alia, that his evidence was not credible in some important respects, that he had no well-founded fear of persecution, that his PTSD and depression were not caused by torture in Angola as he claimed and that he had family in Angola who could support him. …The mere fact that the same matters are advanced again on the basis that they are true does not mean that the defendant must accept that that is so."

13. The application was renewed to an oral hearing. This was adjourned by consent on 6 November 2013, the day before it was due to be heard. EC had prepared further submissions after being seen by Dr Page for psychiatric assessment, and his medical records were being sought for the purpose of further expert evidence. Amended grounds were first served in respect of this second period of detention on 9 December 2013, and further representations were submitted to the SSHD.

14. At some point, the renewed oral hearing had been fixed for 4 March 2014, and it came on before Haddon-Cave J. Although the decision, refusing these further representations as amounting to a fresh claim, is dated 11 February 2014, it was not served on the Claimant or his solicitors until the morning of this hearing. It was challenged however and was dealt with by the Judge. He refused permission to apply for judicial review on all grounds of claim. There was no formal amendment of the grounds to include that challenge.

15. An application for permission to appeal was lodged at the Court of Appeal, with a very full skeleton argument. Sir Stanley Burnton refused permission to appeal on the papers on 23 July 2014. He observed that the 2011 FtT decision:

> "…was detailed and comprehensive and its rejection of the appellants credibility is not undermined by subsequent evidence. Perhaps more importantly no material has been put forward successfully to impugn the finding of the tribunal but even if his allegations were well founded, he would face no risk on return ….the medical condition is not sufficiently serious to justify the revocation of the deportation order ."

16. On 30 July 2014, the Claimant's then solicitors, Lawrence Lupin, Lupins, appealed to the Court of Appeal for an oral hearing. The fax transmission was signalled to the sender as "OK". The case then went to sleep until some point towards late December 2016, when Lupins' enquiries of the Court of Appeal about the case showed that it had no record of receiving the renewal application. On 12 December 2016, Lupins therefore applied out of time for an oral renewal hearing. The oral renewal hearing came on before Henderson LJ on 22 November 2017.

17. Between times, on 4 December 2014, EC had been released from immigration detention, reporting as required thereafter. The absence of an ETD remained a barrier to removal. In 2016-2017, the SSHD received further information about EC's medical circumstances. On 1 June and 22 September 2017, Lupins made further representations to the SSHD with medical and other supportive material. The documentation process had continued inconclusively. There was no decision on these representations.

18. Henderson LJ gave permission only that the application for permission to appeal could be re-opened, that is, made out of time, and that permission to appeal be granted. The question of permission to apply for judicial review was to be determined by two LJs. The issues for them to consider were limited to those raised in Ms Meredith's "Advocates Statement": (1) whether the decisions of 24 December 2012 and 11 February 2014 erred in finding that there were no reasonable prospects of the FtT finding that there was such a risk of suicide that removal would breach Article 3 ECHR; (2) whether EC's detention had been unlawful. Henderson LJ also ordered that Lupins provide a witness statement setting out what had been happening over the previous three years.

19. On 5 April 2018, Master Meacher made an order by consent in the Court of Appeal, granting permission to apply for judicial review, remitting the claim to the High Court, setting a timetable for the submission of further submissions to the SSHD, (3 months), a further decision by the SSHD (3 months from submissions), and amended grounds to be served within 28 days thereafter, followed by detailed grounds of defence; trial directions were set out.

20. EC then instructed his present solicitors, who submitted further representations on 15 August 2018, the day before the expiry of an agreed extension of time. The representations included a witness statement from EC, and a psychiatric report from Dr Wootton. On 25 October 2018, EC attended an asylum interview with the SSHD. On 15 November 2018, a Mental State Assessment Report from Dr McQuillan, of the Stockton Access Team, within the local NHS Foundation Trust, EC's treating clinician, was submitted to the SSHD. Time for her decision was extended three times and the decision emerged on 17 January 2019.

21. That decision is the decision now challenged in these proceedings, although it refers back to the SSHD's earlier decisions, and the FtT/Adjudicator decisions. It rejected the further information, with the earlier information, as justifying a different decision on the various claims, and as yielding a realistic prospect of the FtT finding that they succeeded. This applied to the asylum or humanitarian protection claims based on fear of Unita rebels or the Angolan government, or based on his bisexuality or homosexuality, his claim under Article 8, his claim that removal would breach Article 3 because of his medical conditions, applying *Paposhvili* ECtHR, and his application to revoke the deportation order. The amended grounds of challenge were not served until 5 August 2019, on the deadline of agreed extensions of time. Pandemic problems account for the postponement of the hearing fixed for 24 -25 March 2020.

22. And so the hearing came before me more than three years after Henderson LJ granted permission to apply for permission out of time. No judge has considered the merits of granting permission for a challenge to the decision now challenged. Permission was granted by consent before the decision challenged was taken, indeed before the representations on which the decision was based had even been made. Had the

amended grounds of 5 August 2019 required permission on the grounds of arguability, as would have been the case if they had been brought in separate judicial review proceedings, there would also have been a significant delay issue. Both parties may have adopted a pragmatic approach, perhaps justified by the particular circumstances in the progress of the litigation, but it is hard to find compliance with CPR54 and the overriding objective, in various parts of this history, or an effective decision and removal system, in this rolling process of decisions, appeals, further submissions, fresh decision, challenge, further submissions, further decision, amended challenge and appeal, remittal, further representations and decision, and amended challenge.

23. At no stage, in the near 18 years of EC's residence in the UK has he had any leave to be here. At no stage, has the Adjudicator or FtT found in his favour on the substantive merits of his appeals, nor has any High Court or Court of Appeal Judge accepted the arguability of his challenges to those decisions of the SSHD which were not appealable. The decision of 24 October 2012 was found not to be arguably in error by Mrs Justice Swift, that of 11 February 2014, was found not to be arguably in error by Haddon-Cave J and Sir Stanley Burnton. Henderson LJ did not rule on that point. And the grant of permission to challenge the later decision of 17 January 2019 did not touch upon its arguability.

24. So, I am not trammelled in my consideration of whether there are realistic prospects of the FtT allowing an appeal against the SSHD's decision by any judicial decision that it is reasonably arguable that it has realistic prospects. I shall deal with the decision first, followed by the unlawful detention claim.

The earlier Tribunal decisions

25. I have to start here, because the later decision refers back to them, and they are relevant to how a future FtT would judge the fresh claim. In 2004, the Adjudicator dismissed EC's asylum appeal. What information there is about that is to be found in the FtT appeal decision in December 2011. EC at all events was found not to be a credible witness in 2004; his mental health was not considered.

26. The FtT in 2011 considered EC's appeal against the decision to make a deportation order, in which he claimed that removal would breach the Refugee Convention and his rights under Articles 2, 3 and 8 ECHR. The appeal was dismissed on asylum and human rights grounds and under the Immigration Rules.

27. In it, EC's credibility was considered in part by comparing what he said in his 2011 asylum interview with what he had said in 2003-2004. This included contradictory statements in 2004 about what had happened to his family, and when they had all died, as noted by the first Adjudicator. The FtT commented at [8(7)]:

> "Having regard to the above, as the respondent states, there is a substantial inconsistency between the Appellant's evidence in 2003 /2004 when he said that his family members were killed in September 2001 but in his current asylum application the Appellant states that they were killed when he was 16 to 18 years of age which would be between November 1994 and November 1996 and this must go to his credibility."

28. The differing versions of what happened to EC in Angola, and of how he came to leave it, were considered in detail, including the version summarised in the first Adjudicator's determination. This was contrasted with what he had said in his asylum interview in 2011. His more recent claim was that he had been forced to join UNITA and had been tortured by them, and had seen them torture and murder other boys of his age, between 16-18. Eventually, and even though he had not joined them, one of them released him and allowed him to escape into the jungle. He found medical treatment. And "just found himself here." The Angolan Government would see him as a UNITA rebel as he had been held by them; UNITA rebels would kill him if he returned. The earlier version was that he and his family were members of the rebel group UNITA, and that he was detained and beaten by government supporters, but had been released and then helped to leave Angola by UNITA friends "to come to the UK to claim political asylum", leaving on a military plane, and changing planes to a French airline which landed at Heathrow. The FtT found that these accounts were completely different: in the one, he was a member of UNITA detained and ill-treated by the government; in the other, he was abducted and tortured by UNITA. At [8(11)], the FtT recorded EC's explanation:

> "The Appellant in interview on 15th March 2011 in answer to question 33 ("In 2001 you changed your claim and said that MPLA forces had killed your family. Can you explain this?") said that "No because of the torture by UNITA I lost a lot of memory and what I was saying was just asking for help and do not know what I was saying. I am so sorry for what I have said but it was a result of memory loss". The Appellant however at the interview on 22nd January 2004 stated in reply to question 79 ("So you knew nothing about your journey?") "I don't know anything my brain was messed up because I don't have family. I was sick as well when I got here that is why they asked me the questions at the airport my head was spinning and I didn't know what was happening. It was only when I was at the solicitors I had time to think about what had happened".

29. The FtT then referred to the evidence before the SSHD from Dr Wardek, a Chartered Psychologist at the local Primary Care Trust, who thought in 2010 that EC was suffering from complex PTSD. A psychiatric report was obtained from Dr Tarn, after the refusal letter: he concluded that the Appellant fulfilled the criteria for a diagnosis of severe PTSD, and moderate depressive symptoms. From EC's account, the symptoms of PTSD stemmed from what UNITA rebels did to him. EC had also given him a lifelong account of hearing voices, which created some diagnostic uncertainty, but which did not additionally compromise EC's daily functioning; it was consistent with exposure to severe psychological trauma. Dr Tarn could not exclude some embellishment to further his immigration application, but nothing about EC's demeanour gave significant reason to doubt his account; Dr Tarn had considered whether EC was malingering, but, as an evaluator rather than as a treatment provider, and with relevant experience of working with refugees, he did not believe that EC was malingering. Dr Tarn also noted EC's description of his being victimised by his village community in Angola because he was sick.

30. The FtT noted that EC was seeking medical help from a GP for mental health problems in January 2004, but they had not been raised before the first Adjudicator. He had

represented himself at that hearing. He had been prescribed an anti-depressant in 2004, but after he stopped reporting in 2005, there were no GP records and so none of any medication being prescribed, but it appears that the FtT found that he had received some form of mental health treatment; 2011 FtT [8(20) last sentence], seemingly in 2008. He had, he told Dr Tarn, been of no fixed abode and begging on the street, until he reported again to the police in 2009. When he was in prison in 2009, he received other anti-depressant medication.

31. The FtT concluded that the Appellant's credibility was substantially undermined by the inconsistent dates when he alleged his family had died and the differences in his accounts of how he came to be ill-treated in Angola. It contrasted his explanation for his memory loss at interview, set out above, with the absence of any medical evidence that his experiences could have caused memory loss or distortion. Dr Tarn had referred to EC's memory loss during his travel to the UK, but not that it continued after arrival. Dr Tarn could not rule out that this loss had a secondary gain of protecting those who assisted EC's international travel At FtT [8(32)], the FtT said:

> "We have carefully considered what Dr Tarn says …but [he] did not have before him the various contradictory accounts which the appellant has advanced regarding his case. [Dr Tarn] also clearly states that he was not able to 'exclude that he may have chosen to embellish some of his experiences to further his immigration application.' "

32. An IRC rule 35 report from Dr Kamil found only that EC's scarring "could go with what he claimed" but did not consider other ways in which they could have been caused. It rejected the evidential value of a copy letter from his brother -in-law in support of the persecution claim. It summarised its conclusions in [8 (36)]:

> "…for the reasons given above we accept that the Appellant is suffering from post-traumatic stress disorder and a depressive illness not because of the treatment he suffered and witnessed when he was allegedly captured by the UNITA rebels but in our view because of incidents he may have witnessed during the guerrilla war in Angola, the treatment he received from his fellow villagers as a child because of his "sickness" and because of a fire in the UK in which two of his friends were killed."

33. The fire appears to have been in about 2009, and Ms Meredith suggests that this is what led to EC becoming homeless, again. That is not an unreasonable inference.

34. The FtT rejected his asylum claim because his story of persecution at the hands of UNITA was not credible; it also rejected his claim of a well-founded fear of persecution either at their hands because of a failure to join them, or at the hands of the Angolan government because they would perceive him to be a member of UNITA during the war as he was held by them. In any event the war had been ended in April 2002, and there was no background information to show that UNITA thereafter had targeted those who had refused to join them. Nor was there evidence that the government would know that he had been detained by UNITA, or that the government had targeted those it perceived as supporters of UNITA during the war. Having rejected as not credible EC's claim to have been kidnapped and tortured by UNITA, or that he would be at risk if

perceived by the government as a wartime member of UNITA, it rejected his Articles 2 and 3 protection claims.

35. The FtT also rejected his Article 3 claims based on his medical conditions and treatment. It had no background evidence, concerning his claim that he talked to himself, had a "sickness" or was possessed by a spirit, to show that a 33-year-old adult would he a target for exorcism rituals. I can pass over the stomach ulcer and skin conditions, and turn to self-harm and suicidal thoughts. EC had told Dr Tarn that in 2000 in HMP Leeds, he had attempted self-harm and had considered suicide, and in 2009, while homeless, had poured a cup of bleach to drink but had knocked it over accidentally and proceeded no further. He had had no thoughts of self-harm since then. EC had however described feelings of despair at the thought of returning to Angola, stating that "he would rather take his own life". Dr Tarn had noted that, although EC had contemplated self-harm, he had never acted on these impulses: "I am not in a position to definitely say whether he will or will not attempt suicide in the near future but I am of the view that this risk is significantly increased compared to a normal member of the public." It was his perception of the risk of harm on return rather than an independent assessment of that risk, which would be likely to exacerbate his risk of suicide.

36. EC was on a prescription drug for depression, but not for PTSD. Psychological treatment for PTSD would be beneficial, but he was now under the care of his GP, and no longer under the care of the community mental health team. The FtT had no evidence of what would happen were EC unable to take his anti-depressant drug, or whether he had taken it between 2004 and 2009, and if not with what effect. Background information from the WHO in 2005 said that mental health was not part of the primary health care system in Angola, so treatment for severe mental disorders was not available at that level. There were no community care facilities for mental health disorders. Named therapeutic drugs were available at primary care level, but the list did not include the one EC was currently taking. It included one which would be suitable, but it required specialist mental care supervision. The FtT did not accept that EC's family were all killed in Angola "having regard to his inconsistencies regarding their dates of death and therefore we find that he will have family in Angola who can support him." Applying *N v UK* ECtHR 2008, the high threshold for removal on the grounds of medical circumstances to constitute a breach of Article 3, was not crossed.

37. For the purposes of Article 8, the FtT found that he had a private life, but no family life, and that the absence of his medication in Angola was of sufficient gravity to engage the operation of Article 8. The interference was in accordance with the law, and proportionate. Considerable weight was given to the nature of his identity document offence, the sentencing remarks of the judge and to his recommendation for deportation. He had not re-offended since release from detention in May 2010, but had been tagged all the while since then. He had lived in Angola for 25 years and in the UK for 8. He could keep in touch with friends, and attend church in Angola. He was not taking medication for PTSD; he would not receive his anti-depressant medication but there was no evidence about how he had functioned without it from 2004-2009. He had resisted suicide; Dr Tarn had only said that his risk was significantly increased compared to a normal member of the public. Removal would be proportionate but should be planned.

38. The same conclusions led to the dismissal of the deportation appeal.

39. That decision cannot be challenged in law. EC's appeal rights became exhausted on 1 February 2012 after the UT refused permission to appeal, after which there were no further proceedings.

40. The next stage was the submission of representations, directed at seeking his release from detention. However, the SSHD treated them as further representations concerning his immigration status, rejecting them in a decision of 24 October 2012. The representations included medical reports, and the country report which had been before the FtT. The representations repeated the claim that EC had been tortured by UNITA. The SSHD rejected the claims as containing nothing which had not already been considered, and certified the human rights and asylum claims as clearly unfounded. EC had a right of appeal against the refusal to revoke the deportation order, but it could only be exercised from outside the UK.

41. It was this decision which was part of the subject of these proceedings lodged on 29 January 2013, and to which these proceedings used to relate. The unlawful detention challenge has remained part of the proceedings from the start, though extended in the period covered. The challenge to the 24 October 2012 decision was rejected on paper by Mrs Justice Swift on 25 July 2013. It is now an irrelevant decision.

The representations and decision of 11 February 2014, served on 4 March 2014

42. These are also referred to in the 2019 decision. After the oral renewal hearing was fixed, the SSHD agreed to consider further representations, and the hearing was adjourned by agreement. They were submitted on 9 December 2013. I shall focus on those relevant to the amended grounds of challenge, the focus of which is the risk of a breach of Article 3 ECHR because of his mental health needs, and risk of suicide, his sexuality with Article 8, and the case against his deportation primarily on account of those factors. There were three further medical reports. Their theme was that EC's mental health had worsened over time and in detention, and his condition would be worsened if returned to Angola, as would his risk of suicide which he threatened if he were to be returned. The fourth medical report was the one from Dr Tarn, dated 30 May 2011, which had already been considered by the FtT. I have already referred to it.

43. Dr Joy, a psychiatrist, who saw EC, in 2013, after his referral to Medical Justice, concluded that EC had PTSD, and a lifelong mental health problem in the form of voices which talked to him. On-going detention re-traumatised him. But he probably did not have a psychotic illness. He would be at a "moderate to high" risk of suicide if returned to Angola, based on his belief that he would be recaptured by UNITA, and tortured and killed. He told her that he intended to take his life, if he were deported. She referred to two IRC records, one from 2010, saying that EC "feels suicidal when he is going to be deported." With appropriate secondary therapy, his PTSD prognosis was good, but the risk of suicide, even with successful PTSD treatment, would remain "elevated" if returned to Angola. She could say nothing about the availability of treatment for mental health in Angola. She feared that he would not be willing to access health care because of his fear of authority. The most effective way to reduce the suicide risk would be to remove the threat of removal.

44. Dr Toon, a retired GP, saw EC in 2013 at Dover IRC, at the request of Medical Justice. He described EC as fluent in English but rambling and incoherent in his answers to simple questions. The IRC healthcare record, which appear to have covered EC's time

in prison and in IRCs, showed a number of episodes of self-harm, including attempted hanging, drinking bleach, overdoses and cutting wrists. He was currently on anti-psychotic and anti-depressant medications. EC showed Dr Toon a number of scars sustained in immigration detention but others which EC attributed to beatings in Angola, mostly on his legs with a thick stick and rifle butt.

45. Dr Toon said that many of the scars attributed to those beatings were "consistent" with the type of injury he described, but could be produced by a wide variety of injuries from blunt instruments or skin infection. The buttocks and chest were uncommon sites for accidental injury and so a deliberately inflicted injury was a more likely cause of those scars. One scar, on the buttock, was "almost certainly the result of significant trauma with a blunt instrument at a site where accidental injuries of the type to cause this appearance are unusual. It is highly consistent with the history he gives, although it is not possible to identify what type of blunt instrument caused the scar…" Injuries to the shin bone were consistent with repeated blows causing multiple injuries, similar to those experienced by hockey players, which EC denied ever having been.

46. Dr Toon concluded on this aspect:

> "101. taken individually these scars are consistent and highly consistent with the trauma he describes. Each of them individually could have been caused by accidental trauma. However to obtain the number of scars he displays, including scars on his buttocks, and the tibial osteial irregularity would be very unusual as a result of repeated accidental trauma, even in someone working outdoors.
>
> 102. It seems highly improbable that he was kept and beaten by the rebels in Angola for a period of 7 years. It is far more likely that he was imprisoned for a short period of days or weeks, and that he has a period of amnesia following his traumatic experience. This could be the result of psychological trauma, head injury or a combination of the two."

47. He agreed with Dr Joy's views over PTSD. But he thought that EC's belief that he had a "spiritual illness", and was possessed, ante-dated his ill-treatment, if his account of his early life was correct, and made a significant contribution to his current ill- health. Although not a formal psychiatric illness, these beliefs could still have a significant impact on his well-being. "He seemed unable to imagine a possible future in Angola or in the UK."

48. Dr Toon's overall evaluation was:

> "107. Overall the combination of extensive scarring and clear evidence of post-traumatic stress disorder accords with what I would expect to see in someone who had been abducted and beaten in the way he describes, and who had witnessed the sort of horrific events to which he refers. His memory problems and other cognitive deficits, combined with his lack of education and what appears to have been a rather unusual upbringing make it hard to establish precisely what happened, but also these factors

> make it less likely that the account is entirely fabricated, since I do not think he has the intellectual capacity to do so."

49. He did not think that EC's experiences at the hands of UNITA had created the psychological disturbances he now experienced. His difficulties with understanding, memory and with giving a consistent account could be due to significant deficiencies in English, a cultural aversion to the direct answer, an absence of formal education and what could be low intelligence, his significant amounts of medication, possible psychological trauma, head injury from repeated beatings, and a worsening in his cognitive functioning and memory compared to those described by Dr Tarn, which made the effect of medication, detention and psychological trauma more likely causes. He was extremely unstable psychologically, lacked any form of support system in Angola, and was very clear that he would kill himself if he returned to Angola. His history of self-harm put him at the higher end of the scale for suicide risk, a threat which Dr Toon said had to be taken seriously. EC would have considerable difficulties living independently.

50. EC saw his detention as a continuation of the torture he reported receiving in Angola. Detention might be having a harmful effect on his mental health. Some of those who have cared for him felt that a single room was desirable because of his history of aggressive behaviour, disruptive behaviour due to flashbacks, and/or OCD.

51. Dr Lisa Page, a consultant psychiatrist, who examined EC, concluded, in November 2013, that he fulfilled the criteria for a diagnosis of PTSD, and had experienced some of the symptoms when he was first seen on arrival in the UK. All five psychiatrists who had examined him had reached the same conclusion. He was suffering from more than mild to moderate depression, although his symptoms could fluctuate over time. But he was not suffering from a major depressive disorder. Nor did he have a psychotic illness such as schizophrenia, his hearing of voices was probably a culturally expressed experience, within normal limits for a man with his cultural background. Detention was likely to be worsening his PTSD, because of parallels with the abuses he experienced in Angola. She could not help with medical facilities in Angola, and thought recovery from PTSD would probably depend more on further experiences of persecution there, and the practical and social support he received there.

52. She could not comment on the overall credibility of EC's story but said that the type of trauma he described would cause PTSD in a significant proportion of those experiencing it. She found it unlikely that its onset was attributable to events after his arrival in the UK such as the house fire, or assaults when he was homeless.

53. It was not possible to say whether he had any psychiatric disorders as a child, but it is possible he had mental health problems from an early age, as he described himself as coming from a somewhat marginalised family, and as viewed as a strange child by the local community. The evidence of significant physical injuries supported the notion of severe traumatic experiences.

54. Dr Page referred to the "discrepancies" highlighted as reasons why the FtT did not find EC credible. She said she recognised "that peripheral details of asylum seekers' stories can be discrepant, particularly when a long period of time has elapsed since the events or when a person has PTSD." She was of the view that there were no discrepancies in EC's account of traumatic events experienced, and, with the evidence of physical abuse,

this "indicates that he is likely to have been subject to trauma during the conflict in Angola."

55. She could not say whether EC would or would not attempt suicide, but his distress at return would be observable, and his PTSD symptoms could increase:

> "[H]owever his risk of suicidal behaviour is likely to increase during the process of deportation and this would need to be taken into account in any management plan…Overall, his reluctance to return to Angola and the fact that he is a young, single male with a lack of social support all increases risk of suicide above that of the general population."

56. Her view was that PTSD usually improved over time, but EC's symptoms had been present for at least four years. Maintaining factors were his continued detention, and the continuing threat of removal from the UK. In Angola, it was unclear whether he had any family, but he would be likely to continue to use the church for support. Social circumstances would be the most important recovery factor. "The most important intervention is for a final decision to be made about whether he will remain in the UK for good or be deported to Angola." The uncertainty over the last decade on this point had helped maintain or even exacerbate his psychiatric symptoms.

57. The decision of 11 February 2014 set out EC's immigration history. It saw the representations as seeking to explain the discrepancies in the earlier accounts of mistreatment in Angola on the grounds of EC's medical and mental health conditions. It repeated the acceptance that EC suffered from PTSD, but rejected the further medical reports as fully or categorically explaining the inconsistencies. Dr Page had said that she could not comment on the overall credibility of EC's story of his life in Angola, beyond saying that his account was consistent with the nature and degree of his PTSD. Dr Toon had said EC's memory problems and other cognitive deficits, with his lack of education and a rather unusual upbringing, made it hard to establish what had happened, but made it less likely that the account was fabricated, as he lacked the intellectual capacity to do that. Dr Joy had said that the inconsistencies could indicate deception and "it is equally likely" that EC found it too traumatic to discuss the events. (But I note that he did discuss them, only he had two versions of how it happened.) The decision letter also noted what the FtT had found about the evidence of Dr Tarn.

58. The decision letter continued, however, that EC had "given broadly consistent accounts of his alleged mistreatment by members of, or those affiliated with, UNITA following the determination of his appeal against the notice of decision to make a deportation order", and although there were discrepancies in the account of the events leading to his departure, they were "broadly consistent" as between those given to Dr Page, Dr Toon and Dr Joy. EC had also "given a broadly cohesive and coherent account of his alleged mistreatment in Angola" to those doctors, which undermined the contention that his cognitive functioning and memory had deteriorated since interview by Dr Tarn in May 2011. The new medical evidence did not warrant any change in the assessment that EC had not been persecuted by UNITA, as claimed.

59. Although the diagnosis of PTSD was accepted, its cause was not the reasons given by EC, as the FtT found. The FtT had found the likely cause was incidents he witnessed during the guerrilla war, the treatment he received from his fellow villagers as a child

and the fire in the UK in which two friends were killed. The claim did not meet the high threshold under Article 3 for a medical condition to prevent removal. Dr Page had confirmed that anti-depressant medication was available in Angola, and the potential lack of availability of anti-psychotic drugs was irrelevant as EC had no primary diagnosis of psychosis.

60. The decision also maintained the FtT finding that EC had family in Angola. Having set out what Dr Page had to say about the treatment available in Angola for PTSD, and the uncertainty over family there, and the support here, the decision letter concluded that there had not been a "significant change in the circumstances of your clients medical and mental health condition and your representations therefore do not create a realistic prospect of success."

61. The letter then turned to suicide risk. Again, it recognised that Dr Page, Dr Toon, and Dr Joy expressed "broadly consistent" findings. What Dr Tarn had to say had been dealt with by the FtT; he had found himself unable to say whether EC would or would not attempt suicide, but he had resisted suicide on other occasions. It concluded [32]:

> "In view of the established findings concerning the potential impact of removal on your client's risk of self-harm and suicide, and no further reported incident of self-harm or suicide, it is not accepted that there has been a significant change in his circumstances that would warrant us changing our assessment of his case. It is therefore maintained that there are not substantial grounds to believe removal would expose your client to a real risk of suicide and self-harm, and that any potential risk of the same will be minimised by an availability of medical treatment in Angola, a familial support network available to him and the use of a medical escort to facilitate removal. Your representations therefore do not create a realistic prospect of success."

62. The letter also concluded that EC's medical conditions could be managed satisfactorily within the detention estate. Finally, it concluded that there remained serious reasons, in the light of the Court recommendation and the FtT decision, for EC's deportation. He had been arrested for criminal damage when released on bail. There had been no significant change to warrant taking a different view of the risk of his re-offending or of the wider harm, were he not deported; he would not have a realistic prospect of success before an Immigration Judge. He only had a non-suspensive right of appeal.

The further representations and decision of 17 January 2019

63. The principal further representations considered by the SSHD for this decision were two submissions by Lupins in 2017, a further submission from his present solicitors in August 2018, along with a witness statement from EC, and a further medical report from Dr Wootton. The SSHD also considered what was said at a further asylum interview on 25 October 2018, and the letter from Dr McQuillan. The letter listed other supporting documentation and information received.

64. The June 2017 submission from Lupins raised the question of EC's sexuality. He claimed to fear persecution on return to Angola on the basis that "he would be unable

to practise his sexuality as a homosexual man." This was not acceptable behaviour in Angola, and added to the problems which his mental health would pose for him, were he returned to Angola. A US State Department of 2017 was among those cited in support. There would be no sufficient state protection and he could not relocate to avoid the widespread homophobia.

65. The 15 August 2018 submission from Sutovic and Hartigan referred to country evidence on mental health treatment and the treatment of gay people in Angola. Bertelsmann Stiftung in 2018 concluded that there was no public health coverage, almost no institutionalised safety nets, public health expenditure was among Africa's lowest, and its health care system was ill-equipped to provide basic services. The mental health facilities in 2011 and 2012 had been very limited indeed, with physicians in very short supply, and widespread social stigma. Herbalists and traditional healers were more common, dealing with what they regarded as bad spirits. The UN Office for the Coordination of Humanitarian Affairs in 2005, detailed the daily discrimination which gay people faced.

66. The decision letter began by referring the reader to the decision of 11 February 2014 for EC's immigration and criminal history. It then summarised the further representations from Lupins, and Sutovic and Hartigan, made after that decision letter.

67. It then summarised EC's witness statement, dated 3 August 2018. He was bad with dates and needed help with them. He was born and lived in the jungle with his parents, away from other people; he did not know where. People called him names and said that he was sick, beat him and threw stones at him. His family tried to stay away from the fighting, but the village was always being looted. As a teenager, he was taken away by men in uniform, but he did not know which side they were from, UNITA or government. He had said both at various times. His house was burnt, his father died and his mother was shot. He was taken to another village where he saw the same happen to those villagers. Then, he was taken to a camp in the jungle, where he saw the trappings of black magic, and decorations of human heads. He was held captive with other men and boys, chained and beaten, fed dirty water, urine and blood. He was chained like a slave; people were mutilated, and others kept in deep holes under metal sheets, as a punishment for not fighting. He was put in the hole for a day, then taken out and then put back in. He was never forced to fight. He was sexually abused there. He did not know how long he was there.

68. He was bisexual, though he had described himself both as bisexual and as gay. He felt different as a boy; his family thought that his behaviour was part of his illness: he played in a different way from the way his brother played. He thought that the soldiers who abducted him could see that he was gay, and targeted him for sexual abuse. After he came to the UK, he had a short sexual relationship with a man in Barking, who beat him up. He had been afraid to tell anyone how he felt. Gays and bisexuals suffered in Africa. His whole life was now in the UK, where he went to church, had friends and received the medication he needed.

69. The decision then dealt with the asylum interview record from 25 October 2018. EC accepted that details of his previous asylum claim had not been correct, which he explained was due to PTSD, and the fact that he did not know where he was or what he was being asked. He was lost and had a poor memory. He had been brought up in the

jungle, because his family were excluded from the village, being seen as sick, outcasts and possessed by spirits. UNITA had killed his family.

70. He now feared persecution from government or rebels because of his sexuality. He was scared to reveal his sexuality to anyone for fear of being attacked or killed. Doctors here could see that something was troubling him. He came to realise his sexuality when he wanted to have relationships. He was gay when born; it affected how he behaved, and who he did or rather did not associate with, because he would always be alone. Were he returned to Angola. people would realise that he was gay because of this, and because he would mingle with men, and be seen at known gay clubs, or at cafes with men or holding or kissing men. The letter summarised what he had had to say about his relations with his brother and his family's knowledge in this way:

> "You do not remember if you did anything with your brother but you used to hug him on many occasions and you think you had sexual relations with him (q61,62 and 64.) You then say you discussed your feelings with your family. You suffered many things and did it with your brother on many occasions (63). However you go on to state that you cannot remember if your parents discussed your sexuality with you (q68,71) . Then you contradict this further when you state your parents must not be happy (q70). Only to then provide a completely different account when stating your parents know you are gay and your brother is gay, and they do not want to lose you. No one in Angola outside your family knew you were gay (q72-74)."

71. He had not revealed his sexuality in the UK until about 2013, as he did not know if it was allowed or if he would be attacked or killed, and he was suffering from PTSD which made it difficult to remember. He referred to the man in Barking, dealt with in his statement, as someone he had sex with, but not as part of a relationship. EC could not remember his name or address; EC put that down to being in detention and to the abuse he suffered from him. He had not been in a relationship with anyone since his release in 2014, as he was scarred as well, as a result of the abuse and beatings.

72. EC said that he could not return to Angola because he had nobody there; they were all dead. He had been rejected by the villagers. He still feared UNITA and the government; they were all the same to him. He would have no medication, and did not know if homosexuality was allowed in Angola.

73. The decision letter next referred to the letter of 12 November 2018 from Dr McQuillan to EC's GP. EC had been referred to her because of recurrent symptoms of PTSD. The mental state examination of 6 November 2018 found no "actual evidence of thought, perceptual disorder, distraction and preoccupation." but she was aware from past assessment and taking the history that those intrusions distressed EC. A management plan was to be prepared. There did not appear to be any detail of how that had progressed.

74. The decision letter then summarised the history of his representations, the decisions and the court judgment up to the refusal on paper by Mrs Justice Swift, and the decision of 11 February 2014. Thereafter, but without saying so, it approached the

representations as if there had been no decision by Haddon-Cave J or by Stanley Burnton LJ on the lawfulness of the 11 February 2014 decision.

75. The decision letter set out the relevant Immigration Rule, IR, 353, which I set out later. Next, it referred to the earlier FtT decisions, and the refusal of permission to appeal in 2012 by the UT, and the rejection of the further representations on 11 February 2014. Then it said:

> "In order for further submissions to be accepted as a fresh claim in accordance with paragraph 353 of the Immigration Rules, the further submissions must fulfil both the first and second limbs of the tests set out above.
>
> Whilst it is accepted your fear of return to Angola due to your sexuality has not been considered previously and therefore fulfils the first limb of paragraph 353, it is not accepted, following full and thorough consideration outlined below, that the further representations would, taken together with a previously considered material, create a realistic prospect of success, in accordance with the second limb of the test.
>
> On the contrary, it is considered your representations would have no realistic prospect of success before an immigration judge particularly having regard to the case of **Devaseelan** [2002] UKIAT 00702 paragraphs 40 to 42

76. The SSHD rejected so much of the claim to protection as was based on EC's imputed political opinion, which had been fully addressed and rejected in the earlier Tribunal decision, from which it cited at length. This is not challenged. However, I consider it relevant to note the justified firmness of the credibility conclusions, as his representatives had claimed him to be a credible witness in further submissions of June 2017. The letter pointed out that his accounts of events in Angola had been far from consistent. It continued:

> "Your account has been found to be inconsistent and incredible and your further representations do not provide any tenable basis for accepting your account. It is considered your inconsistencies are detrimental to your asylum submissions".

77. The letter then turned to the further representations made on 15 August 2018 that the lack of mental health treatment in Angola "would subject you to inhuman and degrading treatment and punishment." The representations had referred to EC's account of ill-treatment by local villagers because of his mental health problems. The letter referred to the findings of the FtT in 2011, accepting that EC had PTSD and a depressive illness, but attributing it to other causes than treatment he suffered and witnessed when he claimed to have been captured by UNITA rebels. It continued:

> "It is accepted in light of this that you may have experienced both verbal and physical mistreatment from members of the village due to your mental health whilst in Angola. That said, the Immigration Judge ultimately dismissed your appeal and found

> no breach of Article 3 of the ECHR, should you be returned to Angola. Notwithstanding this finding, the matter at hand now is whether or not you can return to Angola, without fear of further mistreatment due to mental health. It is not accepted you have evidenced any new information that you would receive discriminatory or adverse treatment on return to Angola due to your mental health, or that there is in fact an absence of medical treatment which would put you at risk of experiencing inhuman and degrading treatment from other people in Angola. Information contained within Angola - medical issues - mental illness and tuberculosis of 6 February 2017 that:
>
> *'A MedCOI* Response, dated 14 December 2016, stated that psychiatric treatment for people with serious mental illnesses is available in Angola. There are also psychiatrists available in Angola who can treat people with mental illnesses'*
>
> As stated above, your submissions on this basis are a reiteration of what was previously considered by the Home Office and before an Immigration Judge, at your appeal. You have not submitted anything further that will cause the Home Office to vary from these findings or create a realistic prospect of success before an Immigration Judge. Moreover, and as noted above, the country information confirms that there is treatment available to you, in Angola, should you require it. Therefore your submissions on this basis have been rejected under paragraph 353 of the Immigration Rules."

78. The next topic was the claim to protection based on sexuality. This had been raised in the further representations of June 2017, supported by EC's witness statement of August 2018, and the asylum interview which were again referred to. The letter said this:

> "It is clear you have provided an inconsistent account within your submissions that has inevitably damaged your credibility in this regard. Your very late disclosure also damages your credibility. For these reasons it is not accepted that you are gay or bisexual. That said, consideration has been given to the position of homosexuals/bisexuals within Angola. It is concluded in view of the following information that people in Angola are not in fact at risk of persecution due to their sexuality."

79. The letter set out extensive passages from the US State Department Country Report for 2016 on Angola. Its law did not criminalise sexual relations between persons of the same sex, and the 1886 penal code, which could be seen as doing so was not used for that purpose. Marriage between people of the same sex was not possible.

> "Local and international NGOs reported that lesbian, gay, bisexual, transgender, and intersex (LBGTI) individuals faced discrimination and harassment but reports of violence against the

> LBGTI community based on sexual orientation were rare. The government, through its health agencies, instituted a series of initiatives to decrease discrimination against LBGTI individuals.
>
> Discrimination against LGBTI individuals often went unreported. LBGTI Individuals asserted that sometimes police refused to register their grievances."

80. An International Lesbian, Gay, Bisexual, Trans and Intersex Association article in 2011 had stated: "Few gays in Angola risk being open about their sexuality because Angolan society is not yet prepared to accept homosexuals. A positive development for Angola's homosexual population, however, is that gays have stopped being invisible and are included in discussions on public health and the HIV epidemic." BBC News had reported in 2012 that Angola had become more open to new ideas with independence and the ending of the civil war, contrasting it favourably with other African countries such as Uganda, Nigeria, Malawi and Kenya:

> "where homosexuals are regularly victims of intolerance, violence and legal proceedings. While homosexuality is illegal in Angola [2012], there are no records of any convictions and a new penal code due to go before parliament in fact criminalises discrimination for reasons of 'sexual orientation.'…However, although …Luanda does have a small and open gay social scene, there is still an unspoken resistance to homosexuality and the country is not quite the tropical gay-friendly paradise some people imagine."

81. A former director of a health organisation which had surveyed Luanda's gay community about HIV, said that there was still quite strong disapproval of homosexuality:

> "There aren't incidents of homophobic violence but I wouldn't say either that people here were totally OK with homosexuality….There are people who are comfortable enough to be openly gay themselves, but there are also a lot of people hiding the homosexuality."

82. The Daily Mail in June 2018 had reported that Angola had given legal recognition to one of two gay rights lobby groups, which it described as marking a major breakthrough for the closed and conservative society. The group in question described the government decision as an historic moment, turning the page for gay citizens.

83. The decision letter set out the relevant case law on a sexual orientation asylum claim, from *HJ(Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31. The questions to be asked were:

> "Is the claimant gay or someone who would be treated as gay by potential persecutors in the country of origin?
>
> If yes, would gay people who live openly be liable to persecution in that country of origin?

> How would the claimant behave on return? If the claimant would live openly and be exposed to a real risk of persecution, they have a well- founded fear of persecution even if they could avoid the risk by living discreetly.
>
> If the claimant would live discreetly, why would they live discreetly? If the claimant would live discreetly because they wanted to do so, or because of social pressures (for example, not wanting to distress their parents or embarrass their friends) then they are not a refugee. But if a material reason for living discreetly would be the fear of persecution that would follow if they lived openly, then they are a refugee."

84. The SSHD then dealt with those questions. First, it was not accepted that EC had substantiated his claim to be either homosexual or bisexual in view of the contradictory answers he had given. Second, even if that had been accepted, the country information demonstrated that the law did not criminalise sexual relations between persons of the same sex; gays and bisexuals faced discrimination and harassment but reports of violence against them were rare. Moreover, any discrimination which he might experience would not amount to persecutory treatment. As to the third and fourth points, EC had stated that he would not associate with people, which would lead to him being perceived as homosexual, but he had also stated that he would live openly as a homosexual in Angola.

> "However it is considered that you are not gay or bisexual and in any event, even if you were, whether you chose to live discreetly or openly as a homosexual, you would not be at risk of treatment which would amount to persecution and therefore, your submissions on this basis do not create a realistic prospect of success before an immigration judge."

85. The letter went on to consider whether there would be sufficient protection within Angola from non-state agents. It concluded that there was a fully functioning judicial system. There was no evidence that any person he feared had such influence within Angola that he could not seek state protection, or that it would be unable or unwilling to provide it. Internal relocation would be an answer to any localised problems.

86. In all, the letter concluded that EC's representations did not amount to a fresh claim.

> "This is because your submissions on the basis of your mental health, and your alleged fear of UNITA/government officials are not significantly different from the evidence that has previously been considered by both the Home Office and the tribunal. Moreover, your submissions on the basis of the country situation and your alleged sexuality hold no realistic prospects of success, for the reasons outlined in the paragraphs above."

87. Consideration of Article 8 ECHR came next. The Article 8 claim was based on EC's presence in the UK since 2003, where it was said he had established a significant private life, and had integrated into life in the UK, such that removal would be disproportionate; he would not now fit into Angolan society; deportation would undo the good, and waste

the time and money spent on his mental health treatment, making his state worse than it had been when he arrived.

88. The SSHD rejected the claim. As EC's deportation had been deemed conducive to the public good and he had been recommended for deportation, the public interest required his deportation unless an exception applied. The only one which might be relevant was in IR 399A. But none of the three components applied, and it was necessary for all three to do so for the benefit of the exception to be given: lawful residence in the UK for most of his life, socially and culturally integrated into the UK, and facing very significant obstacles to integration in Angola. EC had not been lawfully resident in the UK for most of his life, as he had arrived in 2003, and was believed to be 25 when he did so. He was now 40. He had not spent most of his life in the UK, and his life here had not been lawful anyway, at all events after the dismissal of his first appeal. There had been no material change in EC's private life.

89. However, the SSHD went on to consider whether there were any very compelling circumstances such that EC should not be deported. He referred to EC's two offences and to the recommendation for deportation, and to the fact that since 27 January 2005, when his appeal rights were exhausted, he had no valid leave to remain in the UK, and that since 2012 he had been and remained the subject of a signed deportation order. His immigration status had been precarious throughout the whole period during which he claimed to have established his private life in the UK. There were no compelling circumstances to outweigh the public interest in his deportation. The SSHD also considered whether to revoke the deportation order, but refused it for the reason already given in relation to the public interest.

90. The last substantive topic dealt with in the decision letter was the claim that EC's removal would breach his Article 3 ECHR rights because of his medical conditions, namely PTSD and depression. The SSHD referred to various medical documents submitted with the representations, including a report from Dr Wootton, dated 13 August 2018.

91. The decision letter did not set out the substance of Dr Wootton's report, though acknowledging the diagnosis of PTSD, Moderate Depressive Disorder, and Generalised Anxiety Disorder, and recording the five medications EC currently was taking. It is convenient to set out its substance here. Dr Wootton is a Consultant Forensic Psychiatrist, approved under s12 Mental Health act 1983. She interviewed EC on 24 July 2018 for some two hours. The introduction to her Report contained this summary of her conclusions:

> "[EC] has a number of scars which have been assessed as consistent with a history of torture and he reports symptoms of PTSD, depression and anxiety. He has been diagnosed with PTSD and depression by a number of experts and has received treatment for these disorders. He has given contradictory accounts of some parts of his history (primarily related to who tortured him, when and which family members died and how he came to the UK). He offered me two explanations for this - trauma and the interpreter not translating what he said correctly. It is my opinion that trauma cannot fully account for these

> inconsistencies. This does not mean he does not have PTSD, however, it makes it more difficult to rely on his account."

92. He was currently on five different medications, including one anti-psychotic olanzapine, and one anti-depressant, sertraline.

93. Dr Wootton noted that there was general agreement among the many psychiatrists and other medical professionals who had examined EC that he had being correctly diagnosed with depression and PTSD. There was also general agreement that he did not have a psychotic illness and that hearing voices was most likely to be a cultural phenomenon.

94. She had considered whether EC could be feigning or exaggerating his symptoms as she recognised patients with court proceedings could do; the legal process and associated stress could also perpetuate and increase symptoms. Fabrication of symptoms required detailed knowledge about the symptoms which individuals rarely possessed. But the inconsistencies in his account made it difficult to rule out feigning or exaggeration completely. His symptoms of depression and PTSD were more likely to fluctuate with circumstances, and were likely to be increased at the time of the report because of the asylum process and other stressors such as social isolation, lack of family support, inability to work, lack of money, and difficulty in accessing health and social care.

95. Dr Wootton concluded that his detention in the UK would have contributed to his mental health problems. His trauma would have made him particularly sensitive to these circumstances and his experience of detention was likely to have had "a negative impact on his long-term prognosis by contributing to the complexity of his traumatic experiences."

96. EC, in her view, was at an increased risk of suicide compared to the general population because of a number of risk factors, which left him clearly vulnerable and more sensitive to stress than others would be. He was extremely keen to stay in the UK, and " It was therefore quite possible he may make desperate efforts to resist his removal which could also include self-harm or a suicide attempt." Accordingly, provision should be put in place to monitor his mental health before, during and after removal, if that were the outcome. On arrival and in Angola, it would be very difficult for his symptoms to improve, as he would be in a stressful situation which would be likely to be worse there. It was also a place he feared and wished to avoid. Waiting for his asylum application to be dealt with, and facing removal, had affected his mental health. His symptoms would worsen as would his prognosis in Angola. He associated Angola with stresses closely linked to his traumatic experiences, which he wished to avoid. His symptoms would be compounded by the difficulties he would experience in Angola including in finding shelter, work, supporting himself, social isolation and witnessing further traumatic events. His impaired level of functioning would probably make it more difficult for him to meet his needs, than other people would find it.

97. Dr Wootton explained that she had no expertise on what treatment would be available to him in Angola and she had no country report on that topic. Although anti-psychotic medication was not indicated, EC's reporting that it calmed him down meant that, without it, he might experience some initial difficulties with sleep and arousal. Anti-depressant medication continued to be appropriate.

98. Dr Wootton's diagnosis and the medication EC was on were noted. The SSHD referred to the FtT decision of 2011 on the question of suicide risk; [35] above. She also noted the rejection of the suicide risk argument in the decisions of 24 October 2012 and 11 February 2014 in which the issues were "fully considered." The letter acknowledged that EC had had medical appointments and assessments in the UK, and that he had "some medical issues" for which he was receiving or seeking medication.

99. The letter considered next the change in ECtHR jurisprudence since that FtT decision on Article 3 and the removal of those with serious medical conditions; *Paposhvili v Belgium* [2017] Imm AR 867. The SSHD referred to the judgments of the Court of Appeal in *AM (Zimbabwe) v SSHD* [2018] EWCA Civ 64, [2018] 1 WLR 2933, and in *MM (Malawi) v SSHD* [2018] EWCA Civ 2482. Although these cases have subsequently been to the Supreme Court, the approach taken by the SSHD in her letter, matters. She cited *MM* citing *AM*, starting with its citation from *Paposhvili*.

100. The ECtHR said at [183] of the Imm AR that the other very exceptional circumstances referred to in *N* included:

> "…situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or a significant reduction in life expectancy…."

101. The citation continued, but not in the letter: "The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

102. The Court of Appeal in *AM* had treated this as creating only a very modest relaxation of the *N* test, moving it from imminence of death in the receiving state to imminence of intense suffering or death, leaving the Article 3 threshold in medical cases still high. A "significant reduction in life expectancy" was not to be taken as a very wide extension, in view of the way in which the ECtHR had applied it to the facts. It emphasised the words "serious", "rapid" and "intense".

103. In her decision, the SSHD referred to the MedCOI report extract above, and concluded:

> "Your medical conditions do not appear to be life-threatening or likely to lead to the rapid experience of intense suffering or death. We do not consider that the conditions stated are of a type or severity that would found a claim to remain in the UK, nor preclude removal from it. We consider that Angola has a health-care system which we consider to be capable of assisting you if necessary.
>
> The SSHD can see no reason why any medical treatment you are receiving cannot be continued when you return to Angola, you do not need to remain in the UK to receive treatment."

104. She also concluded that Article 8 would not provide an answer more favourable to EC under this head. And the representations were dismissed as not amounting to a fresh claim.

The principles to be applied to a fresh claim

105. IR353, as amended by HC 1112, provides:

> "When a human rights or asylum claim has been refused 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 been previously considered. These submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

106. Thus, IR353 provides for the SSHD first to consider whether the further material is significantly different from that which has already been considered. If not, that is the end of the matter for her. If she considers that it is significantly different, she next has to decide whether she herself should allow the fresh claim to succeed, and third, if not, whether it nonetheless constitutes a fresh claim which has realistic prospects of success before the FtT. The principles, to be followed in applying it, were set out in *R (WM) (DRC) v SSHD* [2006] EWCA Civ 1495 at [6-7] in the judgment of Buxton LJ with whom Jonathan Parker and Moore-Bick LJJ agreed. He said at [6]:

> "That …judgment [as to the prospects of success] will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot to be automatically suspect because it comes from a tainted source."

107. A challenge to the rejection of further representations as amounting to a fresh claim is a challenge based on conventional *Wednesbury* principles; *WM* [8]. But a decision made without "anxious scrutiny" will be irrational. Ms Meredith properly prays in aid the need for further representations to be examined with "anxious scrutiny". This commonly cited, but problematic phrase, adopted in *WM*, requires the material to be examined thoroughly and carefully, especially where a factor favours the applicant, and bearing in mind the potential gravity of the consequences for the individual. It does not

require gullibility. While the decision of the SSHD to reject the fresh claim is the starting point for his enquiry into the prospects of success before the FtT, the making of his own decision on the merits and his appraisal of their prospects before the FtT are distinct intellectual exercises.

108. Although the threshold for representations to constitute a fresh claim under the IR is "somewhat modest" as Article 3 ECHR and asylum claims themselves require no more than a real risk to be shown for success, the challenge has to show the decision to reject them as amounting to a fresh claim was irrational, ignored material considerations or applied the wrong test. The anticipated prospects of success in showing a real risk, where that is the test, must be realistic; they presuppose a rational and realistic FtT, applying its own settled principles.

109. One of those principles concerns the approach to be adopted in second appeals to its earlier appeal decisions. These are set out in *Devaseelan* above.

> "(1) The first Adjudicator's determination should *always* be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle, issues such as whether the Appellant was properly represented properly represented, or whether he gave evidence, are irrelevant to this.
>
> (2) Facts happening since the first Adjudicator's determination can *always* be taken into account the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the Appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent….
>
> (4*)* Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility…. It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not generally lead to any reconsideration reached by the first Adjudicator.
>
> (6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his

> findings in line with that determination rather than allowing the matter to be re- litigated.
>
> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to reduce relevant evidence before the first Adjudicator should not be, as it were, held against him.' "

110. I have set out more of the judgment in *Devaseelan* from [2003] Imm AR 1 than did the SSHD, because it is useful to have all the relevant citation in one place. She had cited only the first sentence of (4), plus (6) and (7).

111. Of course, the conditions in the country to which the applicant would be removed depend on the position before the FtT at the time of the further decision. Fundamentally, the second appeal still has to be decided on its merits. The FtT would have to consider the effect which a person's trauma and mental health may have had on recall, consistency, or accuracy. Further evidence may make earlier adverse credibility findings unsafe.

112. However, the application of that latter cautionary point here is limited by the current basis of the protection claims, which does not include any fear from the malign attentions of either UNITA or the government for imputed political opinions, and there is no challenge to the decision on that basis.

113. I also accept that when considering the revocation of a deportation order under s5(2) Immigration Act 1971, there is no fixed weight to be attached to the public interest, but it may be affected by the gravity of the offence, future risk and rehabilitation.

The submissions on the fresh claim representations

114. **Article 3 and mental health**: Ms Meredith submitted that the SSHD was wrong to say that there was nothing to cause her to vary from the findings of the FtT or which would create a realistic prospect of success before the FtT. The SSHD had not challenged the findings of Dr Wootton, or the other medical reports, and was therefore bound to accept the representations as a fresh claim. It went to EC's credibility, the risk of his mental health deteriorating and suicide in the absence of sufficient medical treatment.

115. The SSHD had also applied the wrong test to the nature or level of treatment which could cause a return to breach Article 3 on medical grounds. The Supreme Court in *AM (Zimbabwe)* [2020] UKSC 17 had disagreed with the Court of Appeal decision on which she had relied.

116. Ms Meredith also submitted that the ECtHR in *Sufi and Elmi v UK* [2011] ECHR 1045 had rejected *N* in favour of a different test for those facing an inability to cater for their most basic needs. I regard that as a misunderstanding of that decision at [280-284]. The *N* test was not appropriate where human agency had brought about the total collapse of civil society, rather than natural disaster, as in Somalia. Ms Meredith contended however that inability to cater for basic needs such as food, hygiene and shelter, vulnerability to ill-treatment and the prospect of the individual's situation improving within a reasonable time frame meant that return would breach Article 3. This is something of an additional point to those raised directly in the written

representations, though the problems he would face are touched on at least in Dr Wootton's Report.

117. In any event, submitted Ms Meredith, if lawfully rejecting the representations as sufficient to warrant success on the fresh claim, the SSHD unlawfully found that there was no realistic prospect of the FtT allowing an appeal. The FtT had acted unlawfully in requiring certainty as to suicide before return could breach Article 3. The SSHD had failed to give anxious scrutiny:

i) to the evidence of Dr Toon, evidence which was seemingly accepted, and which should have been seen as supporting the account given by EC, and was at least a matter for the FtT to consider;

ii) to the new material "overall." This was notably the consistency between the reports as to scarring and its significance, including the evidence from the treating psychiatrist, psychologist and counsellor, and the IRC records;

iii) to the weight which could be given to the new medical evidence in explaining "infelicities and inconsistencies" in the account which the FtT had rejected. Dr Toon's 2013 evidence showed a deterioration from what Dr Tarn had considered in 2011. The FtT could now hold that the inconsistencies were explained without damage to credibility. The SSHD had not taken issue with the medical evidence which underlay that submission. This was not a question of re-opening the risk of persecution but pointing to the risk which return would pose for his mental health as a vulnerable person. The medical evidence answered the question of how the PTSD had been caused, and the scarring; the causes were clearly not natural events;

iv) to the lack of medical treatment or EC's inability to access what there was; the burden had shifted to the SSHD in the light of *Paposhvili* and *AM Zimbabwe* to demonstrate the availability in practice of the necessary medical treatment, or to obtain a statement from Angola; there was no evidence about treatment for PTSD, moderate depressive disorder or generalised anxiety disorder, as diagnosed by Dr Wootton, or of the medication he was taking for them, (and indeed for psychosis which he did not have), or for others he took for physical ailments. The SSHD had no basis for departing from the findings of the FtT that there were no mental health treatment facilities in Angola, and the MedCOI report contained a disclaimer about the accessibility of the treatment available; there was no evidence about the availability or accessibility of trauma focussed psychotherapy; the SSHD's evidence showed suicide intervention was not available; there was no information as to the cost and availability of Sertraline and Olanzapine, Lansoprazole, Certrizine and Hydrocortisone; once there was no evidence as to the availability of treatment, EC was bound on *Paposhvili* to succeed;

v) to the Bertelsmann Stiftung evidence about public health coverage and its cost or the evidence about mental health treatment;

vi) to the evidence about EC's inability to access treatment in Angola because of his worsening symptoms of PTSD and increased isolation, absence of occupational support, as shown by his inability at times to access health care in

the UK, his need for security in his immigration status, his past mistreatment as an outcast in Angola, and who needed care so that he could access mental health treatment;

vii) the SSHD had also failed to apply anxious scrutiny to the evidence of suicide risk from Dr Toon and Dr Joy. She had applied the wrong principles, not in her decision letter because that did not deal with suicide, but in her Detailed Grounds of Defence. The issue should be whether a genuine, albeit unfounded, fear of return created the relevant risk of suicide. Certainty of suicide was not required.

118. Mr Hansen for the SSHD submitted that the starting point for any fresh claim consideration by the FtT, which is what the SSHD had to consider, would be the two previous adverse appeal decisions, applying *Devaseelan*. No amount of medical evidence could overcome the "myriad credibility problems" EC faced from them, based on mutually inconsistent accounts of a fundamental aspect of his case: who had kidnapped him, and what had happened. It was not sufficient for him to say that he was bad with dates, or to blame the interpreter. There was evidence before the SSHD on the availability of treatment in Angola, and none from Dr Wootton.

119. The judgment of the Supreme Court in *AM(Zimbabwe)* created no materially greater chance of success in this case than had *N*, or the decision of the Court of Appeal in *AM*. There was still a high and demanding threshold to be crossed: evidence had to demonstrate substantial grounds for believing that removal would expose EC to "a significant reduction in life expectancy" or a "serious, rapid and irreversible decline in…mental health resulting in intense suffering." These were expected to be very exceptional cases. If error there had been, it was highly likely that the outcome would have been substantially the same as it would have been without the error, and s31(2A) Senior Courts Act 1981 should be applied.

120. Mr Hansen cited what Dyson LJ said in *J v SSHD* [2005] EWCA Civ 629 at [28] in a passage which has not been overtaken by the later cases above, and in which Brooke and Lloyd LJJ agreed:

> "Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of *Bensaid."*

121. Dr Wootton's evidence was consistent with the evidence accepted by the FtT about EC's PTSD and depression; this could not satisfy the high threshold required for Article 3 to prevent removal, and it did not require some point by point rebuttal. Her evidence about attempts to resist removal which "could also include self-harm or a suicide attempt" fell far short of a real risk of a reduced life expectancy.

122. None of the medical reports expressed a degree of risk more significant than saying that it was higher for EC than the normal. Dr Wootton did not put it as high as Dr Tarn had, but that had been some years earlier and there was evidence that those conditions could

ameliorate with time and treatment. There was a high degree of consistency between the various reports in their diagnoses. But none of the evidence supported a case reaching the threshold of *Paposhvili* and *AM(Zimbabwe)*. None of EC's evidence had addressed the question of what would happen without treatment, and whether his condition could reach the level required for return to breach Article 3.

123. **Sexual orientation:** the second ground alleged that the SSHD had again failed to apply "anxious scrutiny" to this claim. Ms Meredith submitted that it could not rationally be said, as it depended on a view of the credibility of EC, that no reasonable FtT could find in his favour on the facts. If gay, the evidence could not preclude the FtT finding that he could not live openly. An overall assessment of his mental health, its deterioration, its manifestation in hearing voices and being seen as possessed by spirits, added to his homosexuality, was required.

124. Mr Hansen submitted that, as this was an entirely new claim in 2017, the SSHD was entitled to treat it with the greatest circumspection. It was "riddled with inconsistencies," as the decision letter showed, by reference to EC's asylum interview and his own witness statement. If he had always been bisexual, there was no reason for him not to have raised it earlier. The issue had been considered in the correct framework of *HJ (Iran)*. It was not just a question of credibility but of the conditions for gays in Angola, now. EC had no prospects of showing that he would be at risk of persecution in Angola.

125. **Integration in Angola and the compelling case against deportation:** the third ground was a failure, again, to apply anxious scrutiny, submitted Ms Meredith. The errors under the previous grounds created an error in the Article 8 decision. This was a claim outside the Immigration Rules, but the SSHD had not dealt with it in line with *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60. It could include the risk of re-offending. A separate structured analysis was required.

126. EC's private life had strengthened over the 9-10 years after the 2011 FtT decision; the medical evidence showed that he was "highly vulnerable" with PTSD and depression, needing proper occupational and professional support which he now had in the UK, but had lacked in 2011. He had been in the UK for 17 years, "seeking to vindicate his ECHR rights". His false identity offence was over 11 years ago, he was in the lowest category of offender in IR 398(c), classified as relatively low serious offence on the SSHD's criteria, at a low risk of offending. He spoke English. There was no evidence of family or support in Angola, where as a child he had lived in the jungle. Dr Wootton's evidence was clear that EC had no family in Angola and that was a basis for departing from the FtT finding that he did have family. In any event, there was no evidence that he had maintained contact or could re-establish contact with them were he returned. The family however had been a factor in both SSHD decisions. This could not rationally be called a repeat of the 2011 claim.

127. Mr Hansen submitted that this claim was largely a repeat of the claim which failed in 2011. If a medical condition claim failed under Article 3, it would be unlikely to succeed under Article 8. That was a claim outside the Rules. However, since the 2011 FtT decision, the 2012 recommendation for deportation had been made, which had led the SSHD to treat the representations as including an application to revoke the deportation order; she had applied the correct legal framework from the Immigration Rules. The SSHD had concluded that the offence of using a false passport, endorsed

with a false residence permit, was serious. EC, now 42, had lived in Angola for 25 years, the FtT had found that he had family there, he had no family in the UK and could maintain contact with his UK friends by "modern means of communication." The only other change was that he had had a further 10 years of living in the UK without leave; little weight should be given to a private life established over that period. He had not been lawfully resident in the UK for most of his life. Nor could he establish significant obstacles to his integration into Angolan life, on the application of IR 276ADE to private life. There was no realistic prospect of EC establishing an exception by reference either to his private life or very compelling circumstances.

Conclusions

128. The 2014 decision letter has to be treated as subject to the present grounds of challenge, as the judicial review of it is yet unresolved. Permission to apply for judicial review was granted by consent. It has not been wholly superseded by the 2019 decision to the extent that that decision draws on the 2014 decision, and relies on the way it considered the medical reports earlier than those put forward in the 2017-2018 representations. It is not possible simply to ask what has changed since the 2014 decision, treating that as the starting point, beyond legal challenge. As Mr Hansen put it, it is effectively incorporated by reference.

129. **Article 3/Refugee Convention and sexuality**: It is not disputed that this raises a new issue. So, the question for me is whether the SSHD reached a reasonable view in her assessment that it had no reasonable prospects of success before the FtT. The claim is dependent on a view first as to the credibility of EC's assertions, and second as to the way in which a gay man would be treated in Angola. I accept that it requires a strong case for the SSHD to be able to reach the view, rationally, that no reasonable FtT would find the claim credible, based as it is on the evidence of one person. But I am satisfied that this is just such a case.

130. First, the claim emerged in 2017, after EC had been in the UK for 14 years. His 2018 witness statement and asylum interview stated that he was aware of his sexuality well before he left Angola. If in 2004 he could credibly say that he did not understand how he would be treated in the UK were he to reveal his sexuality, it is difficult to see how that could have remained the position by 2011, after several years of living, independently, in the UK. It is hard to see that he was not also in a position to raise it in representations well before the February 2014 decision, and well before the 2017 representations. He had had legal assistance and representation for his second appeal, whom he could have asked about sexuality and its lawfulness in the UK. Any lawyer in this area would have been quick to recognise its potential significance in an asylum case; *HJ(Iran)* was decided in 2010. The claim was still not raised. It was not mentioned in any of the medical reports of 2013. It was not raised in the further representations leading to the 2014 decision. He could speak English. He had connections in a church with whom he could have raised the question of how gays or bisexuals were viewed in the UK, without revealing his own sexuality. His comment that he did not raise it earlier in the UK because he did not know how he would be treated, and feared that he would be attacked or killed, is simply not believable by a rational FtT, at least by the time of preparation for his second FtT appeal, or in his further representations leading to the February 2014 decision.

131. He claimed in his asylum interview that he told both his previous and his current solicitors about his sexuality; the latter is borne out by the 2017 and later representations. But there is no evidence that he told them before 2017, by when he had had a complete lack of success in his persecution claim on the grounds of imputed political opinion. EC did raise his sexuality in Dover IRC, as he claimed; there is one note, and only one, in the detention records which referred, on 31 October 2014, to a letter EC sent to an unidentified person, in which he claimed to be bisexual. The doctor told him that homosexuality was lawful; EC says that he disclosed it to his previous and present solicitors. He does not say when he disclosed it to Lupins, his previous solicitors, but there was no longer any reason for him not to have disclosed it to them straightaway. If he disclosed it straightaway, no later than October 2014, it is difficult to see why it was not raised by them straightaway, as a new point, in view of the ongoing litigation. If he did not tell them straightaway, it does rather undermine his credibility. Dr Wootton does not mention it, though it is difficult to see, had it been mentioned to her, that it would not have featured in her report in discussing risks and support on return. EC has not explained what it was that first caused him to consider in 2014 that his sexuality would not lead to persecution or official discrimination in the UK, which did not or could not have occurred earlier. There were doctors he saw, support groups, lawyers. He has not said that he feared his fellow detainees. Nor is it believable that he forgot all about his sexuality or that his PTSD caused him to forget, particularly as he said that it was fear which had kept him from forming relationships in the UK.

132. Second, there was no evidence for his sexuality other than his own comments. Up to a point that is in the nature of the claim. There had been, however, no relationships, so no evidence of them could be provided. It appears, from his case that he had been living "discreetly" for years, because he was afraid, but that is difficult to reconcile with the length of time he had been in this country, by 2011, or by 2013-4. There was no evidence after his release in December 2014 of any relationships, before the January 2019 decision. There was no evidence of any other activities or associations which could support his claim.

133. Third, his claim both in his witness statement and in his asylum interview is internally inconsistent in crucial areas. His statement said that he thought that the soldiers could see that he was gay, but his family thought his behaviour from boyhood stemmed from illness. His asylum interview, making all allowance for garbled English and note-taking, contains the significant contradictions, highlighted in the decision, about whether he had sexual relations with his brother, whether his parents knew of or discussed it with him, (there appears to be evidence of family other than parents with whom this was discussed). He also said that people in Angola would know he was gay by the people he associated with, and then that they would know he was gay because he did not associate with people and would always be alone.

134. Fourth, the FtT would be bound to consider the adverse credibility findings of the earlier FtT about his claim to have been persecuted for imputed political opinions. These are significant, and reasoned findings. The main difference was over which side in the civil war was he claiming had abducted and mistreated him. The differences in his accounts of when his parents died, as between his screening interview and his asylum interview, are also quite remarkable, making full allowance for the fact that one version was given at a screening interview. The differences in his accounts of how he came to be in the UK are also quite striking. Those findings would continue to tell against EC's

credibility on a claim where the sole evidence was his own statement. It is simply not possible to expect the FtT to wash away those findings on the basis of the later psychiatric reports. There is no reason why those produced in 2013, in so far as they went to his credibility, should not have been produced for that appeal. Credibility was obviously going to be an issue in 2011.

135. Ms Meredith pointed to the medical evidence as capable of changing that position. I disagree; this could not go to the adverse credibility findings. Dr Toon found that the scars were very likely to have been produced by the sort of beatings he described. Dr Toon considered other causes for those scars which EC said were caused by UNITA beatings, acknowledging that each could have been caused accidentally, but together that would have been "very unusual", and one, on the buttocks, was "highly consistent" with beating with a blunt instrument. He explained how he thought the scarring, with the mental health problems, and the difficulty in fabricating his account, supported its truthfulness. Dr Toon's analysis does not bear on the credibility problem; this arose from two wholly inconsistent accounts of the events in which the abduction and beatings were said to have occurred. He has focussed on the wrong point. Dr Toon has simply referred to beatings by UNITA, whereas the question was beating by whom, UNITA or the government. EC asserted at times that it was UNITA and at others that it was the government. One or both were untrue. This led the FtT not to make something of a random choice between which of those two it preferred and to reach a different conclusion about who administered the beatings and their role in PTSD: ill-treatment by villagers was a likely cause to the FtT. Dr Toon, unlike Dr Kamal in his rule 35 report, had considered alternative causes; for example, he even considered hockey injuries to the shin as a possible cause of one group of injuries, but he did not consider the one which the FtT decided upon and which Dr Toon's analysis cannot rule out, because the FtT findings also assume beatings, but by villagers. Besides, no amount of medical evidence can deal with the fact that EC told at different times two wholly inconsistent stories, and on any view one at least was untrue. Dr Toon also did not accept EC's version of events, as he found that it was not likely to have occurred over the long period of years as EC claimed, but rather over a short period of days or weeks, albeit a marked discrepancy for which he gave a possible explanation. Dr Toon also did not see the beatings, which he considered had occurred, were the cause of EC's psychiatric problems.

136. Dr Page saw no discrepancies in EC's account of traumatic events. I find that a very surprising comment; the differences in his account of how he came to be ill-treated, in the deaths of his parents are not peripheral or overly pernickety details to a credibility finding. She may mean that his account of the ill-treatment was always consistent, which misses the nature of the "discrepancy" which troubled the FtT.

137. Even if EC were arguably credible in his claim to be gay or bisexual, the background evidence does not support the contention that there are reasonable prospects of success before an FtT on Article 3 grounds. Whatever the position may have been during or before the civil war, and when EC was last in Angola, the evidence relied on by the SSHD in her decision makes it abundantly clear that there is no real risk of persecution on account of membership of this particular social group. Her material dates from 2011 and 2012, on through 2017-2018. The does not criminalise homosexual activity. Homophobic violence is rare. The more recent evidence from the US State Department report acknowledges continuing discrimination and harassment, but also government

initiatives to combat them, especially in health care. The position seems to have moved on from that in 2012, when the BBC reported that while some were content to be open in their sexuality, many still hid it. Although the evidence does not show that there is no discrimination, still less that there is no disapproval from any parts of Angolan society, and that all feel entirely comfortable at being open as gay, the SSHD conclusion that there is no treatment which amounts to persecution is manifestly one which she can reasonably hold and that there were no realistic prospects of the FtT coming to a different view.

138. The SSHD applied the tests in *HJ (Iran)*, 2010. If EC were gay or bisexual, he might or might not chose to live openly as such. But he would not live "discreetly" because of a well-founded fear of persecution; actual fears would not be well-founded.

139. Accordingly, this aspect of his fresh claim is dismissed. The SSHD concluded reasonably that there were no reasonable prospects of success before the FtT. I agree with her.

140. **Article 3 and mental health**: I consider that the SSHD was plainly right, in the 2014 decision, that the medical reports after the 2011 decision were not significantly different from the material already considered, in terms of the nature and extent of EC's mental health problems. I also consider that the SSHD was again plainly right that Dr Wootton's report was not significantly different from the material already considered by both the FtT and in 2014, so far as it concerned the nature and extent of EC's mental health problems. I do not read the SSHD's decisions as taking issue with the medical evidence put forward either in leading to the 2014 decision or the 2019 decision, including that of Dr Wootton. She is however entitled not to read more into the opinions they express than they contain. The SSHD was entitled not to treat them as evidence of the truth of what EC said, although considering the effect which their views could have on the way in which his credibility could be assessed by a third Tribunal. She was also entitled to consider the extent to which they have recognised and grappled with the obvious inconsistencies in his evidence, and the fact that two adverse judgments on his credibility have been reached, ultimately a judgment which is not for them to make.

141. The first FtT had had no evidence about mental health. The 2011 FtT had Dr Tarn's diagnosis of PTSD and a depressive disorder, which it accepted. The cause was not accepted, and the debate about it rumbles on through the later reports, but the FtT conclusion was lawful and would feature large in any further FtT appeal. It also had evidence from Dr Wardek. It had the evidence that EC was on drugs for depression but not for PTSD, but there was no evidence as to what would happen were he to cease to take it, or whether EC had in fact taken it between 2004 and 2009. It also had evidence from Dr Tarn that EC's suicide risk "is significantly increased compared to a normal member of the public," and that it was EC's perception which mattered more than objective fact. The main purpose of the medical reports before the FtT had been to support EC's claim to have been persecuted for his imputed political opinion in the way in which he described. This was rejected.

142. That was also a significant part of the purpose of the 2013 reports. The 2013 reports from Drs Toon, Page and Joy added nothing different by way of diagnosis of mental health problems, which is after all the key aspect of their evidence on this issue. None said he had a psychotic illness. They did all convey that EC's mental health had declined in detention. Dr Joy concluded that he would be at a "moderate to high" risk of suicide

on return to Angola, even with successful treatment for PTSD. But this was based on a view that EC believed that he would be recaptured and tortured or killed by UNITA. That claim had been rejected by the FtT, and EC's asserted belief to Dr Joy about his fears cannot be given weight in the absence of a realistic prospect of successfully challenging the two FtT adverse credibility findings on that issue.

143. Dr Toon agreed that EC had PTSD; he was on anti-psychotic drugs without having a psychotic illness. His belief that he was possessed by spirits made a significant contribution to his ill-health in 2013, but were not a formal psychiatric illness. Notably, he was of the view that EC's psychological disturbances were not caused by EC's experiences at the hands of UNITA; his extreme psychological instability, lack of support in Angola, and his assertions that he would kill himself if returned to Angola put him at a "high "risk of suicide.

144. Dr Page agreed with the diagnosis of PTSD and more than mild to moderate depression. EC did not have a major depressive disorder, nor a psychotic illness. Hearing voices was probably a cultural phenomenon. PTSD would have been caused probably by events in Angola rather than in the UK, taking issue with the FtT which had attributed it in part to a house fire in which two friends were killed. It was possible that EC had had mental health problems since childhood, but the physical injuries supported severe traumatic experiences. Dr Page took the same view as Dr Tarn of the risk of suicide: his return would need to be managed and his risk of suicide would be above the level of that of the general population.

145. This does not amount to significant new material in relation to the nature or extent of EC's mental health problems. Two are expressed with differing degrees of strength from Dr Tarn, but not to such a degree as to amount to significant new material. I am not concerned at this stage with significant new material in relation to the availability of or accessibility to treatment in Angola. Their relevance to medical conditions went to the existence of PTSD, which is not disputed, nor are any of the other mental health problems EC has.

146. The evidence of Dr Wootton is not significant new material either, although it brings the picture of EC's mental health more up to date than the 2013 reports. Mr Hansen accepted that Dr Wootton's evidence, the most recent, should be taken "at its highest". She came to the same conclusions on diagnosis. She concluded that EC was probably not feigning or exaggerating his symptoms, which was not something alleged against him, but was still a point properly for her to cover. She acknowledged EC's inconsistencies of account. Detention would have worsened EC's conditions. She too described his risk of suicide as higher than the general population's. She identified similar stressors.

147. She noted the effect his impaired functioning would have, compounded by difficulties he would experience in Angola in finding shelter, work, in supporting himself and in social isolation. These were issues before the FtT. The fact that this evidence is more recent does not make it significantly different from what has already been considered. It makes the same points and in much the same way. There still is no specific evidence about the effect on EC of not taking any medication for his depression or PTSD, for which he takes sertraline. The effect of his not taking anti-psychotic medication was dealt with: initial difficulties with sleep and arousal. There was evidence that EC had had 14 sessions of psycho-therapeutic counselling before he was detained in 2012, and

one session in detention; he had also seen a therapist in 2013. There was no evidence of any later therapy of that sort. But that is relevant to the issue of the effect of return; the nature and extent of EC's medical conditions come first.

148. Accordingly, I do not consider that the SSHD erred in law in her conclusion that there was no significantly different evidence on the nature and extent of EC's medical conditions.

149. I accept that the SSHD did not apply the test from *Paposhvili* as analysed in the Supreme Court in *AM (Zimbabwe)* but applied instead the narrower reading of it favoured by the Court of Appeal. In my judgment, the appropriate way to approach this is to ask whether there is a realistic prospect of the FtT, in the light of all the evidence about EC's medical condition, holding that his removal would breach Article 3.

150. The Supreme Court said:

> "23. Its new focus on the existence and accessibility of appropriate treatment in the receiving state led the Grand Chamber in the *Paposhvili* case to make significant pronouncements about the procedural requirements of article 3 in that regard. It held
>
> (a) in para 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;
>
> (b) in para 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;" ["any" meant "any serious" doubts, para.33]
>
> "(c) in para 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to article 3;
>
> (d) in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and
>
> (e) in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant.

> These procedural obligations on returning states, at first sight very onerous, will require study in paras 32 and 33 below."

151. Lord Wilson set out the passage from the Court of Appeal judgment quoted above from the decision letter, and continued:

> "30. There is, so I am driven to conclude, validity in the criticism of the Court of Appeal's interpretation of the new criterion. In its first sentence the reference by the Grand Chamber to "a significant reduction in life expectancy" is interpreted as "death within a short time". But then, in the second sentence, the interpretation develops into the "imminence … of … death"; and, as is correctly pointed out, this is achieved by attributing the words "rapid … decline" to life expectancy when, as written, they apply only to "intense suffering". The result is that in two sentences a significant reduction in life expectancy has become translated as the imminence of death. It is too much of a leap.
>
> 31. It remains, however, to consider what the Grand Chamber *did* mean by its reference to a "significant" reduction in life expectancy in para 183 of its judgment in the *Paposhvili* case. … Here the general context is inhuman treatment; and the particular context is that the alternative to "a significant reduction in life expectancy" is "a serious, rapid and irreversible decline in … health resulting in intense suffering". From these contexts the adjective takes its colour. The word "significant" often means something less than the word "substantial". In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with an expectancy of life normal for that age. Were that person's expectancy be reduced to, say, two years, the reduction might well - in this context - not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant.
>
> 32. The Grand Chamber's pronouncements in the *Paposhvili* case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said… The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But "Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle

> …": *DH v Czech Republic* (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate "substantial" grounds for believing that it is a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: …
>
> 33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the *Paposhvili* case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. …"

152. EC has to establish substantial grounds for believing that he is at a real risk of a breach of Article 3 on return, of inhuman and degrading treatment; for these purposes that is a real risk of "of a substantial reduction in life expectancy" or "a serious, rapid and irreversible decline in … health resulting in intense suffering". Given the sequence of the steps in *Paposhvili*, that has to be established on the basis that no treatment is available or accessible. But it does require him to establish what the effect on him would be of not receiving such treatment in Angola. The burden does not fall on the SSHD. She is not to be presumed to be able to judge that, or to assert it or to have better means of finding out.

153. The conditions, by nature and severity, described by the medical experts, and especially taking Dr Wootton as the most up to date, do not describe any conditions which involve a substantial reduction in life expectancy, nor a rapid, serious, irreversible and leading to intense suffering, on return. The experience of EC in Angola without medication or treatment has to amount to inhuman and degrading treatment and

not simply the absence of the sort of treatment which he ought to have to improve his well-being and health, as would be recommended for an NHS patient.

154. The significant medication is for depression and PTSD, sertraline. There is, however, no evidence as to what the effects of its withdrawal would be, or of the loss of any therapy he is presently receiving. If the anti-psychotic drug used to calm him, though he has no psychosis, is withdrawn, it would have the effects which Dr Wootton describes. No one suggested that the withdrawal of the antihistamine, cortisone, or stomach drug would have any significant effects, although it is to be expected that life would be more uncomfortable.

155. None of them are experts on the drugs or treatments which are available in Angola, and their reports make no assumption about whether any would continue to be available. Dr Wootton says, and it is not disputed that EC's symptoms would worsen in Angola, and that his symptoms would be affected by other difficulties. She made no assumption about any family or other non-medical support. I do not consider that Dr Wootton's references to difficulties in finding accommodation, work, and a social support network, because of his mental health problems are sufficient to demonstrate a real risk on return of breach of Article 3. So the language in which EC's circumstances are described do not come close to establishing a real risk of the sort of worsening of his medical conditions in Angola, which would be required to establish step one of *Paposhvili*.

156. For those reasons, I do not consider that there are any prospects of persuading the FtT that there is a real risk that he would suffer to that degree on return without medical treatment or support from any source. The medical experts have approached the effect of removal to Angola on the basis that he would have no or no significant support there. At any rate, they have not stated what other assumptions they are making and on what basis. Given the way they have accepted EC's account, it is highly unlikely that any assumed that either parent was alive, or that any family was available to help. No difficulties were attributed to EC's sexuality.

157. I should add that I consider that the presence of family support, the second FtT finding notwithstanding, is not one which the SSHD could reasonably believe that any reasonable FtT would now adopt; some might and some might not. That FtT finding was based on the proposition that EC was lying about how they died, rather than on other positive evidence. But their continued life cannot be assumed with the passage of time in Angola, and they would be in their 60s now, if EC had been born to them in their early-mid 20s. There is no evidence that his brother is alive, or any other family members, of whose existence nothing is known. After an absence of now nearly 20 years, it is not likely that any network of friends would be readily re-established, if contact had by now been lost.

158. If, however, I had thought that EC had reasonable prospects of persuading the FtT that his return would breach Article 3, without treatment, or had depended on assumptions about support, I would have found that the SSHD was wrong to consider that there were no reasonable prospects of success for EC on the other steps. The burden would have passed to her, which is not how she approached the case, and the evidence of the availability and accessibility of medicine and other treatment was too general and skimpy.

159. **Article 3 and suicide risk**: this is another facet to which *Paposhvili* and *AM(Zimbabwe)* apply. It is for EC to establish the real risk of a completed act of suicide. Of course, the risk must stem, not from a voluntary act, but from impulses which he is not able to control because of his mental state. The evidence of Dr Tarn, considered by the second FtT was that EC's perception of the risk to him on return, which included his asserted fear of persecution at the hands of UNITA or the government, would be likely to exacerbate the risk of suicide. But EC had never acted on his impulses to commit acts of self-harm. His risk was significantly greater than that of the normal member of the public.

160. The medical experts in 2013 did refer to acts of self-harm in detention, which appear to be those already referred to by Dr Tarn, and noted that his symptoms worsened in detention. They too referred to an elevated risk of a completed act on return. Dr Toon put EC at the higher end of the risk scale. Dr Wootton referred to the possibility of a suicide attempt to prevent removal, but that is plainly something against which measures could be taken in the UK. EC was already at a higher risk level than the normal, and his symptoms would worsen in Angola, where he would face a variety of difficulties. I consider that the SSHD could reasonably conclude that this added no significant new material to that which the second FtT considered. I also consider that, if new, the SSHD reached an unarguably reasonable decision that it afforded no reasonable prospects of success before the FtT. Of course, one risk that would be reduced or dispelled on return to Angola is the risk based on a false perception, if he has it, that he would be at risk from either UNITA or the government.

161. Dr Wootton referred to the difficulties which EC would face, in finding shelter, work, in supporting himself, and social isolation. These are related to his medical conditions, rather than because of specific circumstances in Angola about which she is not able to give evidence, although there would be some interaction between the two. I am not persuaded at all that there is a realistic prospect of a reasonable FtT finding that this showed that removal created a real risk of degrading and inhuman treatment. The medical condition related claims fail.

162. **Deportation and Article 8**: Although Ms Meredith submitted that his was a claim which was made outside the IR, there is a body of relevant IR which nonetheless have to be considered.

163. The relevant statutory provisions are to be found in s117A-D Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2014. S117A requires a court or tribunal, considering whether a decision under the Immigration Act would breach Article 8, has to have regard to factors set out in s117B. S117C does not apply as the definition of "foreign criminal" in s117D excludes someone sentenced to 12 months or less imprisonment. S117B (1) affirms that the maintenance of effective immigration control is in the public interest. S117B (2) and (3) state the public interest in those who seek to enter or to remain in the UK being able to speak English, and being financially independent. S117B (4) and (5) require "little weight" to be given to a private life established by a person when in the UK unlawfully, or when that person's immigration status was precarious.

164. The relevant IR are A362, which applies where deportation is deemed to be conducive to the public good or where a court has recommended deportation, 390A, A398(c) and 399A. IR 398(c) applied as the sentence was less than one year, EC's deportation was

deemed to be conducive to the public good and in the public interest because the SSHD considered that his offending caused serious harm. If the SSHD considered that neither IR399 or 399A applied, "the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A." IR 399 did not apply. IR399A applies where a person has been lawfully resident in the UK for most of his life, is socially and culturally integrated in the UK, and there would be very significant obstacles to his integration into the country to which he is to be deported, here Angola. IR 390A, in slightly different language from IR 398(c), states that where paragraph 398 applies but neither paragraph 399 or 399A apply, "it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

165. In *Hesham Ali*, Lord Reed said:

> "Administrative decision-making
>
> 36 …Where article 8 claims are made by foreign offenders facing deportation, rule 398 explains that the Secretary of State will first consider whether rule 399 or 399A applies. …The fact that a claim under article 8 falls outside rules 399 and 399A does not, however, mean that it is necessarily to be rejected. That is recognised by the concluding words of rule 398, which make it clear that a claim that deportation would be contrary to article 8 will not be rejected merely because rules 399 and 399A do not apply, but that "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".
>
> 37. How is the reference in rule 398 to "exceptional circumstances" to be understood, compatibly with Convention rights? …[T]his did not mean that a test of exceptionality was being applied. Rather, the word "exceptional" denoted a departure from a general rule:
>
> "The general rule in the present context is that, in the case of a foreign prisoner (sic) to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'." (para 43)
>
> The court added that "the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (para 44). As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.
>
> 38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the

> deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria)*. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life.
> …
>
> Appellate decision-making
>
> 50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed."

166. The SSHD was unarguably correct in her application of the Act and IR, to Article 8. She was obliged to give weight, as would the FtT, to the importance of maintaining effective immigration control, and in giving little weight to EC's private life, established while his immigration status was precarious, which covers almost all of the time he has been in the UK. She applied IR398(c) correctly. The SSHD was entitled to deem EC's presence to be not conducive to the public good, and to regard his false document offence, as causing serious harm, particularly as it was committed after the

refusal of his first appeal, and especially so in the context of maintaining effective immigration control, as emphasised by the recommendation for deportation. None of the exceptions in IR399 or 399A applied. There is no prospect of the FtT taking a different view on any of this. The question for her, therefore, as it would be for the FtT, was whether there were "exceptional circumstances" or "very compelling circumstances" which outweighed the public interest in EC's deportation. That analysis is what *Hesham Ali* shows is required. It was applied by the SSHD, and it permits only of one answer. There are no such exceptional or compelling circumstances, and it would be irrational for an FtT to hold otherwise. She did in fact consider the same points under both Article 8 and in relation to the application to revoke the deportation order.

167. As to Article 8, in his favour is the private life which he has established, but that is quite limited, and does not cover any work friendships, or any identified beyond his church or medical network. He has been here for 17 or so years and speaks English, and will have some degree of integration. He has no family life here. He benefits from medical treatment which he needs for his health, and which, I assume, will not be available to him in Angola. All of that was established while his status was precarious and so has to be given little weight in the Article 8 context. His removal would pursue the strong public interest in the maintenance of effective immigration control, as he has no leave to remain, and never has. He should have left the UK. He was not staying on to vindicate his rights; he wanted to stay, though he has had no right to do so, and no other rights under the ECHR would be breached by his removal.

168. He has also committed a serious immigration offence, for which he was sent to prison and recommended for deportation. NOMS assessment of its gravity is not persuasive in this context. Before that, he had become an absconder, albeit that after some years, when in desperation, he gave himself up. I accept that he has not absconded since. He was found by two FtTs to have told lies to maintain his presence in the UK. He committed a further offence, on the day of his release in 2013. Whether or not he was intended for release to single occupancy accommodation, and regardless of whose fault it was that he did not get it, his anger at not getting what he wanted or expected, led him to damage badly a room which someone else could have used, and threaten the housing manager, and to his re-detention. The fact that NOMS regard him as being of a low risk of further offending is of no real significance in reducing the weight of the factors against him.

169. He would be returning to a country in which he grew to adulthood, and where he speaks the language. There are no significant obstacles to his reintegration into Angolan life. I see no reason why he would not be able to maintain contact with friends in the UK, via modern means of communication. Applying the language of Article 8, the interference with EC's private life would plainly not be disproportionate.

170. I accept Ms Meredith's point that the fact that a medical condition may not breach Article 3 on return does not mean that it cannot be part of the Article 8 proportionality exercise, and that the SSHD appears to have concluded wrongly that it had no further part to play once it had failed under Article 3. I have considered it in my analysis of proportionality with the other factors. But it does not begin to amount to a compelling case to outweigh the public interest factors, or to make removal disproportionate. I do not think that the SSHD was wrong to regard this as a repeat claim in its essence, but either way, the decision was unarguably lawful, and the SSHD was clearly right to say that it would have no realistic prospects of success before the FtT.

171. Accordingly, the fresh claims part of this case is dismissed.

The lawfulness of detention

172. The two periods of detention at issue are 21 September 2012 to 6 February 2013, 139 days, and 7 February 2013 to 4 December 2014, 666 days. The whole of both periods is said to be unlawful. This, first, is on the basis of the second and third principles in *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704, as analysed by Lord Dyson in *R (Lumba)(WL) v SSHD* [2011] UKSC 12, [2012] 1 AC 245:

> "22. …It is common ground that my statement in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [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.

173. Lord Dyson said this about the second principle:

> 24. As for the second principle, in my view this too is properly derived from *Hardial Singh*. Woolf J said that (i) the power of detention is limited to a period reasonably necessary for the purpose (as I would say) of facilitating deportation; (ii) what is reasonable depends on the circumstances of the particular case; and (iii) the power to detain ceases where it is apparent that deportation will not be possible "within a reasonable period". It is clear at least from (iii) that Woolf J was not saying that a person can be detained indefinitely provided that the Secretary of State is doing all she reasonably can to effect the deportation.
>
> 26. As regards the second proposition accepted by Mr Beloff, a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth *Administrative Law*, 10th ed (2009) p 316.
>
> 30. But all that the *Hardial Singh* principles do is that which article 5(1)(f) does: they require that the power to detain be

> exercised reasonably and for the prescribed purpose of facilitating deportation. The requirements of the 1971 Act and the *Hardial Singh* principles are not the only applicable "law". Indeed, as Mr Fordham QC points out, the *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030B-D) and reasonably in the *Wednesbury* sense (*Associated Provincial Picture House's Ltd v Wednesbury Corporation* [1948] 1 KB 223). But they are not exhaustive. If they were exhaustive, there could be no room for the public law duty of adherence to published policy, which was rightly acknowledged by the Court of Appeal at paras 51, 52 and 58 of their judgment."

174. This is what Lord Dyson then said about the third principle:

> "103 A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place. As I said at para 47 of my judgment in *R (I),* there may be situations where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a period that is reasonable in all the circumstances, having regard in particular to time that the person has already spent in detention. I deal below with the factors which are relevant to a determination of a reasonable period. But if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful.
>
> 104. How long is a reasonable period? At para 48 of my judgment in *R (I),* I said:
>
> 'It is not possible or desirable to produce an exhaustive list of all the circumstances that are, or may be, relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view, they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.'
>
> 105. So far as I am aware, subject to the following qualifications, the relevance of these factors has not been questioned. The qualifications are first that the relevance of the risk of offending on release is challenged on behalf of the appellants in the present

> case. Secondly, "the nature of the obstacles" begs two questions that have been raised on this appeal, namely what is the relevance, if any, of delays attributable to the fact that a detained person (i) is challenging the decision to deport him by appeal or judicial review and will generally not be deported until his challenges have been determined; and (ii) has refused to return voluntarily to his country of origin?"

175. It is not in dispute but that it is for the Court to decide whether those principles have been breached.

176. The second basis upon which it is said that detention was throughout unlawful is that the SSHD failed to comply with her policies on detention. The obligation to do so is a public law obligation, summarised at [26] and [30] in *Lumba* above. Damages for a breach of the obligation may be nominal or compensatory, depending on whether, if the unlawfulness had not occurred, the detainee would have been detained lawfully anyway.

177. The relevant policy is Chapter 55 of the Enforcement Instructions and Guidance 2012, amended in immaterial ways during the periods of detention. Apart from those paragraphs which repeat the *Hardial Singh* principles, Ms Meredith relied on the following:

i) there was "a presumption in favour of temporary admission or release, and, wherever possible, alternatives to detention" should be used; 55.1.1;

ii) detention had to be used sparingly and for the shortest period necessary; 55.1.3;

iii) the presumption applied in criminal cases but would be balanced with the risk of re-offending or absconding, EC's offence was a "less serious offence" 55.3.A and 55.3.2; NOMS would assess the risk of harm; 55.3.2.6, though I note that it would not have been a very up to date assessment by the time now material;

iv) non co-operation with the documentation process was relevant to the risk of absconding, as well as the record of compliance or non-compliance; 55.3.2.4; where documentation was a significant barrier to removal, non-co-operation by the offender weighed strongly against release.

v) removal was imminent if it were free of barriers and could be effected within 4 weeks; 55.3.2.5; the resolution of legal proceedings before removal could proceed had to be taken into account in deciding whether continued detention was appropriate, and they could reduce the prospects of someone absconding; 55.1.4

vi) although a notice had to be served on each person detained explaining why and the basis upon which they have been detained, there had to be filed a properly evidenced and fully justified explanation of the reasoning behind the decision to detain; 55.6.3;

vii) "Detention Reviews are necessary in all cases to ensure that detention remains lawful and in line with stated detention policy at all times"; 55.8 with more senior officers carrying out the review at specific periods;

viii) Detention Centre Rule 35 reports, on those whose health was likely to be harmed by continued detention, or who were suspected of suicidal intentions, or for whom there were concerns that they may have been a victim of torture, needed to be considered in deciding whether continued detention was appropriate; those suffering from serious medical conditions which could not be satisfactorily managed within detention or in respect of whom there was independent evidence that they had been tortured, would not normally be considered suitable for detention.

178. It was for the SSHD to show that she had considered whether EIG 55.10 applied, whether the test was met and whether to maintain detention or grant release. This relates to the unsuitability for detention of those who have been tortured or those suffering from serious mental illness which cannot be satisfactorily managed in detention.

The sequence of events

179. On 6 March 2010, after the end of the custodial period of his sentence, EC was transferred to immigration detention, where he remained until released on 26 May 2010 to s4 accommodation, on Chief Immigration Officer bail, tagged and with reporting requirements, twice a week. While he was in detention, an interview for ETD was arranged for 9 April 2010. EC attended this interview but refused to sign the ETD form as he said he feared UNITA on his return to Angola. He missed a large number of meals; a Rule 35 report, from Dr Kamil, said that his scars "could go with" his claim to have been tortured; EC said that he feared torture and black magic in Angola, and said that he was not fit to be detained. No claim is made in respect of this period of detention.

180. EC complied with his reporting requirements, thereafter, including the period after his appeal rights were exhausted in February 2012. After permission to appeal to the UT was refused on 19 December 2011, the SSHD re-commenced the process of obtaining ETD, and on 17 January 2012 an interview was booked for 10 days later. The Home Office General Case Information Database, GCID, notes that EC was unwilling to complete the bio-data information section while he was still appealing against the deportation decision. The note adds that there was uncertainty over whether the Criminal Casework Directorate, CCD, were aware of EC's mental health issues; documents relating to that were to be faxed and held on file. On 20 April 2012, passport photographs were taken of EC for EDT purposes, recording his height and that he spoke Portuguese. A week later on 27 April 2012, the SSHD sent the application for ETD to the Angolan Embassy with an accompanying submission, bio-data form and photographs for the passport. It was anticipated that there would be an interview with the consulate co-ordinated by the Country Returns Operation and Strategy Unit, CROS, which would give instructions for movement orders to be arranged once the interview slot had been allocated, but it was noted that there was no "established time scale" for the completion of that process.

181. No action was taken to arrange a face to face EDT interview with the Angolan Consulate until 15 June 2012 when an interview was arranged for 20 June. EC did not attend; a week later, Lupins wrote to the SSHD, saying that he was afraid of the

Embassy and of being returned to Angola. Although he had been on a priority weekly review list since 4 July until the EDT outcome was received, EC was removed from that list on 16 July because he had not shown up for his interview on 20 June. On 1 and 29 August 2012, the SSHD wrote to Lupins asking for details of EC's fear of return to Angola, to which they responded saying that EC would not attend a face to face interview with the Angolan Embassy "as he has a deep and cerebral fear" of Angola, its Embassy and other authorities.

182. A further interview at the Embassy for 15 Aug 2012 was cancelled in the light of representations by Lupins. A yet further interview for 24 October 2012 was booked, on 25th September 2012. On 12 September 2012, the SSHD decided to detain EC because of his refusal to cooperate with the removals process, and on 16 September 2012, she authorised his detention. The statutory minute of detention accepted that EC had complied with his reporting restrictions since being released on bail, but considered but he was "not complying with the EDT process as he refused to be interviewed by the authorities as he states he has a fear of them." The need for EDT was a barrier to removal, but once they had been obtained after a face to face interview, "removal will be imminent". The minute also referred to EC's claim to suffer from acute medical conditions; he was currently on medication for depression/PTSD. Authority was given for EC to be re-detained "in order to attend an embassy interview."

183. The letter to EC explaining the justification for his detention said that it was to effect removal, because he was likely to abscond if released; he had obstructed the removal process by failing to cooperate with the ETD process; there was a lack of satisfactory evidence of his identity, nationality, or lawful basis to remain; he lacked close ties with the UK; his conviction showed a lack of respect for UK law, and an unacceptable character, conduct or associations. The only bar to his removal was the need for ETD.

184. On 21 September 2012, EC was detained on reporting. On that day, a Rule 35 Report noted EC's experience of torture, his PTSD and depression for which he was taking citalopram. He was placed on Assessment, Care in Detention and Teamwork, ACDT, on 25 September, so that he could be monitored for self-harm or vulnerabilities. EC's detention was also reviewed that day, and it was continued, with a recommendation that his mental health and care should be monitored, and to ensure that the risk of suicide was minimised. Should his mental health change, detention should be reviewed. He was assessed as being of a low risk of harm to the public, with a low risk of re-offending, and a medium risk of absconding; this was based on a NOMS assessment. On 26 September, the Rule 35 Report was rejected because his claim to have been the victim of torture had been rejected by the FtT.

185. On 25 September, he was asked to attend a meeting at the Angolan Embassy, and the next day he agreed to a telephone interview with the Embassy, but refused a face to face interview, in case the Embassy detained him and refused to release him. On 5 October, an interview at the Embassy was arranged for 24 October, and the interviewing officer was asked to attend with EC to allay his fears.

186. On 22 October, the 28-day detention review maintained the detention in order to document EC. The 24 hour, 7- and 14-day reviews were not disclosed. The Monthly Progress Report to Detainees, MPRD, of 23 October 2012, identified the EDT process and Lupin's further submissions of 8 October 2012, which included the psychiatric report of Dr Tarn and the Rule 35 Report of Dr Kamil from his first period of detention

as barriers to removal. On 23 October, the IRC locum consultant psychiatrist, Dr Ozbilet, wrote recording that EC had flashbacks, and difficulty sleeping, was hearing voices, and had reported being chained up and tortured in Angola, and seeing torture there.

187. On 24 October 2012, EC was taken in handcuffs to the embassy, but was turned away by an official as the interview had been "cancelled." GCID noted that the interview would not go ahead because the Angolan authorities had written to UKBA "to inform them of their new procedures regarding interviews." The SSHD told CROS to wait for further instructions, as they did not know what the procedure now was, and they needed to discuss it with the Embassy. EC told his IRC caseworker that detention was not good for his health, and that he had co-operated by going to the Embassy. On 24 October, the SSHD refused the further representations, and found that they did not amount to a fresh claim.

188. At the start of November, EC asked to be released. A third Rule 35 Report was produced about his particular condition. This too was rejected by the SSHD for the same reasons as he had given in response to the earlier Rule 35 Reports. But she recorded that no progress had been made with the documentation process. The three-month detention review of 5 November said that the maintenance of detention was necessary for EC to be interviewed by Angolan officials for EDT, which, were it successful, would mean that EC could be removed within a reasonable time. The SEO accepted that EC suffered from PTSD, recommended continued monitoring of his mental health, but believed that EC's abscond risk remained high. The Detention Review checklist, "medium" risk, however, had not changed, and there had been no further risk assessment. A GCID enquiry of CROS elicited the answer on 9 November and again on 15 November that there had been no progress on how to obtain EDTs from Angola. Meanwhile on 11 November, EC had been placed on an ACDT plan because he refused to eat for three days.

189. On 26 November 2012, on the four month detention review, detention was authorised by an SEO, who noted that the barrier to removal was the need for ETD: "we are still in discussions with the Angolan authorities regarding a new EDT process." A medical review advised that "ideally" EC should be moved back to Brookhouse IRC where he had been until 30 November, "to maintain continuity with his mental health care". His medical needs should be reviewed every two weeks by a consultant psychiatrist through the local health service. Two days later, following a medical request, EC was moved to a single room because of his disturbed sleep and flashbacks of people trying to kill him.

190. On four occasions in December 2012, the notes record the absence of progress with the ETD process. One said that a change in Embassy personnel meant that no EDTs were currently being issued; the Embassy was reviewing their processes. But on 28 December, on the fifth month review, detention was maintained for EDT interview. At the end of November EC refused to eat for three days or so, and again in December he refused to eat or to take his medication.

191. On 4 January 2013, EC again reported disturbed sleep and flashbacks of someone trying to kill him. His counsellor wrote to the SSHD saying that EC's mental health and physical condition were deteriorating rapidly. The IRC records noted his previous suicide attempts, but these were not during this period of detention. By 7 January, his medical notes recorded that EC had not taken his medication for a month, nor had he

eaten for a month (which seems unlikely in view of the records). He was advised to contact Medical Justice and other support groups. He asked again to be released, on tag. Angolan ETDs were still on hold.

192. EC asked to be moved to Brook House IRC but was moved to Dover IRC as it had single occupancy rooms. The latter were alerted to EC's mental health problems. The medical records contain the same concerns over sleeping, and hearing voices. Two reports about his PTSD were provided. The HO Asylum Support Team were put on notice to find single occupancy accommodation. Dover IRC stated that EC was distressed but had no serious mental illness; he was referred for counselling.

193. On 25 January 2013, EC applied for bail, with a supporting letter saying that he needed single occupancy accommodation. Meanwhile the pre-Action Protocol process was under way. The 6-month review, and the SSHD bail summary of 29 January 2013, noted that there was no new EDT process as yet, and no ETDs were being issued; continued detention was however authorised. These proceedings began, challenging detention and the certification decision of 24 October 2012.

194. On 31 January 2013, EC was granted bail by an Immigration Judge, with weekly reporting, but he was not released, as only shared accommodation was available. On 5 February 2013, EC was released at 16.00, but not tagged. Risks noted were suicide, food refusal and psychiatric illness. But he arrived too late to be admitted to the intended accommodation, was refused entry, and so he was accommodated at another address. But this was shared accommodation. When the housing officer arrived on the morning of 6 February, where he also had to be tagged, EC got distressed and angry, saying that he did not want to live with others; he became very aggressive towards the housing officer, swinging a bike towards the officer and "trashed the whole room, which caused severe damage." The damage was to room, bed, cupboard and TV cabinet. He was arrested and remanded into custody. The care home would not take him back, which left EC effectively homeless.

195. On 7 February 2013, he pleaded guilty to causing criminal damage, and was fined £100. The SSHD decided to detain him, thus beginning the second period of detention at issue in these proceedings. She decided to do so because EC was homeless and that was the only option. He had been in police detention under immigration powers, until space became available at an IRC; EC was detained in Brook House, until April 2013. The SSHD minute and letter of 7 February repeated in essence the previous minute of detention, and letter to EC, though referring to a new ETD process being set up by the Angolan authorities. The CCD proposed that he be detained "due to his failure to comply with the ETD process. Once he has a face to face interview and the EDT is agreed his removal will be imminent." The note of "compassionate circumstances" referred to his acute medical conditions. Next day, CROS was contacted for an update about the Angolan EDT process.

196. The one month detention review of 4 March 2013 noted that EC had been re-detained as he was made homeless because of the damage he had done to the property. After talks with the Angolan Embassy, it had agreed a new process to start re-issuing ETDs again with a schedule of interviews, with all cases requiring a face to face interview. Detention was authorised to secure compliance with an ETD interview, which was next scheduled to take place in April. On 2 April, the two month review, continued detention was authorised on the same basis. The ETD and judicial review were the bars; EC did

not wish to return, had refused two face to face interviews and it was not considered that there was an incentive for him to remain in touch with UKBA were he released.

197. However, on 4 and 10 April, CROS asked CCD for the ETD documents to be scanned and posted in readiness for an interview on 17 April. EC's fingerprints were provided to the Angolan Embassy. Bio-data was completed. EC was transferred to Morton Hall IRC, where nurses were informed of his PTSD. But it appears that mistakes made by the SSHD meant that the interview did not go ahead on 17 April as planned; the interview was due to take place at Colnbrook IRC, but Morton Hall had not been told that arrangements for a further transfer needed to be made. Various documents had also not been gathered into the single file. EC was then to be placed on the "next ETD scheme." EC was then transferred to Dover IRC on 20 April where he stayed until 13 August 2013.

198. There is a medical record at Dover IRC of EC complaining on 28 April that his wrists had been broken by handcuffs at Morton Hall; there were scars but investigations at hospital showed that his wrists were not broken. On his three month detention review, his continued detention was authorised. Two barriers to removal existed: the absence of ETDs, and these judicial review proceedings in which the SSHD's AoS and SGD had recently been filed.

199. On 1 May 2013, his detention was again authorised, but the review recorded that it was "not known how long the ETD will take to be granted" or how long the judicial review would take. However, the review also concluded that EC was aware that, once the judicial review was resolved, his removal would be imminent, giving no incentive to abide by immigration restrictions. His place on the list for June ETD interview was to be confirmed. His risk of absconding, re-offending and of harm were assessed as medium. Ms Meredith suggested that this was a raising of the risk levels without reasons being given. On the same day, 1 May 2013, the IRC medical records refer to EC complaining about "spiritual attack that has increased since admission, he sees two people at either side of him who are responsible for his back pain. Although he claims his mental health is worsening, I could not see any evidence of this." A few days later, he complained of PTSD symptoms, but denied thoughts of suicide. On 15 May, he complained that he saw "2 visions. He believed them to be his ancestors who are upset because of his ill-treatment."

200. The same barriers to removal as were present on the third detention review, remained at the fourth review on 29 May 2013. The SSHD expressed the hope that the judicial review proceedings would be concluded within a reasonable timeframe, although adding that it remained to be seen whether EC would co-operate with the Angolans in the ETD process. They remained in place as the fifth detention review noted on 26 June, the day before Mrs Justice Swift refused permission on paper in these proceedings. The renewal application followed shortly.

201. However, on 6 August 2013, the CCD case worker noted that the absence of ETD was now the sole barrier to removal, for which an interview at the Embassy had been arranged for 14 August. EC attended that interview.

202. On the next detention review, the renewed application was noted as a barrier to removal, with the hearing then fixed for November. The risk of EC absconding outweighed the presumption in favour of liberty. It was anticipated that EDT could be issued "within a

reasonable timeframe" and the reviewer would intervene to expedite the outcome of the 14 August interview.

203. On 12 September 2013, the SSHD received a letter, according to the records, from the Angolan Embassy saying that EC had refused to co-operate at the interview, and so it had been inconclusive. There is no detail in the record as to the ways in which the Embassy said that EC showed his lack of co-operation, and the letter has not been produced, if it still exists. The same two barriers to removal remained at the 8 month detention review. A support group, which had been supporting EC for many months, the Gatwick Detainee Welfare Group, wrote to the SSHD on 23 September 2013, asking for a bail address for EC, providing self-contained accommodation. The group provided a medico-legal report to support the request for s4 accommodation.

204. On 8 October 2013, the SSHD questioned EC about the interview of 14 August, asking if he had or had not co-operated. EC answered, saying: "What? They refused to cooperate with me saying I was not from Angola??? what more is there to say." "Yes of course [he answered all their questions], do you think we sit there for hours and talk about nothing?" The interviewer asked if he had misled or become difficult with the Angolan official; EC replied: "Of course not, but I was not happy with them. They interviewed me on two occasions telling me I was a liar". EC had then said that he was sick and suffering from mental health problems, and did not want to speak any more.

205. At the next review on 16 October, detention was again authorised. Advice was to be sought from a specialist team about how to proceed with the ETD application "given his recent refusal to comply and the negative response received from the Angolans." The SSHD, on 1 November, asked that EC be referred for a further interview to take place on 4 December 2013. On 6 November, the parties agreed to adjourn the renewal hearing fixed for the next day, as by this stage EC had been seen by Dr Page, who was preparing her report.

206. The 12 November detention review maintained EC's detention for a further 28 days because of the risk of absconding; it noted that without an ETD, EC could not yet be removed, and these proceedings acted as a barrier to removal as well. But it added: "However, the case owner should prepare a release referral for my attention in this. Once he is clear on the timeline for conclusion of the JR, a question which TSOL should give a clear response to…" A release referral was to be sent at the beginning of December, but shortly afterwards it was decided not to proceed with it.

207. On 3rd December, EC was placed in single occupancy, following his transfer to Colnbrook IRC for 8 days, and was regarded as having a raised risk requiring two observations an hour by the ACDT because of concerns over his mental health. Further submissions were made by Lupins, supported by the new medical evidence of Drs Toon, Page, and Joy. Dr Tarn's report, before the FtT, was also sent to the SSHD. On 10 December, EC was returned to Dover IRC.

208. On 10 December 2013, the eleventh detention review authorised EC's continued attention pending resolution of the judicial review proceedings, and believing that "the obtaining of an EDT removal could proceed within a reasonable time scale."

209. EC had another interview with the Angolan Embassy on 12 December, but the SSHD records that EC refused to co-operate.

210. The January 2014, 12th monthly, detention review maintained detention: "on the basis that as JR and further reps should be dealt with within two months his removal remains imminent." The barriers to removal were the absence of ETD, the judicial review proceedings, and the unanswered further submissions. At the next detention review, on 4 February 2014, continued detention was authorised because removal was a realistic prospect within the next two to three months and therefore within a reasonable period." The same three barriers remained. The further representations were refused on 11 February 2014, with no right of appeal from that refusal. This was served on the morning of the oral renewal permission hearing on 4 March 2014.

211. On 21 February 2014, the SSHD received an email from the Angolan Embassy stating that EC had refused to be interviewed on 12 December 2013. The Embassy would send the documents, which the SSHD had sent to it, back to Angola for verification. it gave no time scale for its reply. On 3 March, detention was again renewed, although judicial review proceedings and the ETD remained unresolved and were barriers to removal. On 27 March 2014, it appears to have been accepted that there was no further need for an ETD interview with EC, as documents had been sent to Angola, and fingerprints were to be presented within a week. The fingerprints were provided to the embassy "to be submitted along with evidence already held to the [Ministry of Foreign Affairs] in Angola and the fingerprint database. The Angolan Embassy cannot give a time scale for response."

212. On 15 April 2014, UK Visas and Immigration responded to a letter sent by EC, saying that it had been decided that EC was entitled to s4 Immigration and Asylum Act 1999 support, for bail purposes, but he needed to make an application for bail. On 22 April 2014, the Medical Officer at Dover IRC wrote to the SSHD saying that EC suffered from a medical condition which made it difficult for him to share living accommodation. The next detention review followed three days later. Detention was again authorised as the updated ETD application and fingerprints had been sent to Angola for the checks to be completed. It was "reasonable to assume we will get an answer within the next couple of months." On 23 May 2014, at the 15 month detention review, this was essentially repeated.

213. On 24 May, an IS151F form was served on EC**,** and other documents related to s4 accommodation were sent to the CCD caseworker, including a report from a doctor saying that EC suffered from medical problems and needed non-shared accommodation. An interview was arranged with Angolan officials at Colnbrook IRC; EC said he would co-operate, although he had previously refused to speak to them. This interview took place in late July, it seems.

214. On 20 June 2014, the detention review noted that the absence of ETD and the proceedings, now in the Court of Appeal, were barriers to removal. Detention was authorised as the interview was arranged for late July, and "we remain optimistic of receiving an outcome to the EDT application within 2-3 months." There was a clear risk of absconding. On 18 July, detention was again authorised as the interview was to take place within a few days, it was hoped that ETDs would be obtained, and that EC would be removed within a "reasonable timescale." A week later, Sir Stanley Burnton refused permission to appeal to the Court of Appeal, and a week later still, the renewal application was made. There was an interview in July.

215. On 15 August 2014, the detention review said that there ws no information to suggest that EC did not attend the interview, the outcome of which was awaited. His risk of absconding was described in these terms:

> "[He] has demonstrated a propensity to use deception and to not abide by Immigration Rules. [EC] failed to leave the UK after his asylum appeal failed and he did not come to light until his arrest on 3 November 2009 when he was found to be working illegally. It is evident that he does not wish to return to Angola. Therefore, it is not considered that there is an incentive for him to remain in touch with the Home Office if he was released ."

216. The reference to how and when he came to light is not quite right, but the essence of the point remains sound. He was considered to pose a medium risk of re-offending, but the risk of wider harm was low, notwithstanding his conviction and behaviour on bail. The author explained why he differed from NOMS: it was his criminal conviction and subsequent behaviour following his release on bail. He was made homeless from his s4 accommodation address because of the criminal damage he caused; the report upon his arrest noted that "he was very aggressive towards the housing officer and he caused substantial damage to his room." The review referred to EC's noted mental health problem with depression and PTSD, which may have been diagnosed as far back as 2003. It referred to the FtT and UT findings that they had not been caused in the way claimed, and that his account of persecution had not been found credible. The medical report dated 3 November 2013, received on 22 April 2014, one of the three in the further representations, confirmed that his suicide risk was currently being managed appropriately at Dover IRC. The presumption in favour of liberty was outweighed by the risk of re-offending, harm and of absconding.

217. In the 10 September review, the outstanding ETDs remained a barrier to removal. But on 20 September, this was noted on the detention records: "Priority review form submitted to CROS under the new pilot priority list process. Priority list response - Angolan Embassy advised CROS at the meeting, that there has not been a response from Luanda yet. The Embassy do expect a response, but this is likely to take a considerable length of time and they cannot give any time scale." Ms Meredith emphasised that last passage.

218. On 10 October 2014, detention was again authorised. The record noted that EC "has attended an interview with the Angolan officials in support of his ETD application and I understand that further inquiries are required in Luanda before they are prepared to issue a document. At present we cannot establish a time scale as to how long this process will take, however, removal can be effected swiftly once a document is received as this is the only remaining barrier." Ms Meredith emphasised that last sentence. The presumption of release was outweighed by the risk of harm, absconding and re-offending. The upshot of the interview was that the Embassy told the SSHD on 17 October that the documents would be sent to Angola for verification.

219. EC's medical problems became more obvious. On 31 October 2014, Dover IRC faxed CCD to say that EC was "mentally suffering in detention and wants something done before he dies. Included is a letter from a Medical Officer stating he suffered significant mental illness and takes anti-depressants and antipsychotics and has a delusional thought process. Also included is a note from [EC] stating that he is bisexual." This led

to a letter being sent to Healthcare to see if EC's medical condition could be managed in detention and if he was fit for detention. Healthcare replied stating that EC suffered from "serious mental illness but at present he is fit for detention but likely to deteriorate if detained for prolonged periods." Although further detention was authorised on 7 November, his referral for release was drafted a week later, to be re-submitted on 27 November once the outcome of the application for a release address was known. Next day, the s4 accommodation was granted, and the procedures for his release were completed leading to release on 4 December 2014 with a requirement for regular reporting.

220. There are a few later points to note. In February 2017, the criminal cases review team concluded that mental health issues would at present make removal difficult. The case had been submitted to the Foreign and Commonwealth Office at the end of February for it to raise with the authorities in Luanda. There was no time scale for a response. Thirteen months later, the matter was again raised with the Embassy, which said that it would submit the case to Luanda for investigation.

The submissions

221. Ms Meredith submitted that the third *Hardial Singh* principle had been breached at the outset of and throughout the first period of detention. It should have been apparent to the SSHD that EC could not be removed in a reasonable time, because of the lack of an ETD, the absence of a timetable for its production or other response from Angola. There had been no response to the application submitted in April 2012, before the decision to detain was taken in September 2012. Although it was lawful to detain a person for the purpose of securing his attendance at an ETD interview, EC had been turned away from the interview in October 2012, as Angola was instituting new procedures. The records showed that none were being issued at least between October 2012 and April 2013. No records of what passed between the SSHD and the Angolan authorities have been produced. There were barriers throughout, including the legal processes, still not resolved. The SSHD had also failed to act diligently in pursuing the ETD.

222. Ms Meredith identified the following dates as dates when the SSHD ought to have realised that there was no realistic prospect of removal within a reasonable time: 8 and 24 October 2012, and 29 January 2013. What had happened during his period of detention between March and May 2010 was also relevant. No progress was made with obtaining ETD. He had complied with the reporting requirements over the period from 26 May 2010 to 21 September 2012, including 7 months after his appeal rights were exhausted.

223. He had been detained for administrative convenience; alternatives to detention had not been considered for the purpose of securing compliance with the ETD process. EC was not trying to sabotage the removal process in view of his deep fears of the Angolan authorities, and the extent of co-operation he did show. He was willing to be interviewed by phone or in the presence of a Home Office official. Even if he had been unco-operative, he could still not be detained for more than a reasonable period.

224. Adverse inferences should be drawn from the absence of witness evidence from the SSHD, and the lack of disclosure over the August 2013 interview

225. All those factors together with the medical and other circumstances also meant that his detention had not been reasonable either, breaching the second *Hardial Singh* principle: the evidence showed the adverse effect which detention had on his mental health; there was no effective psychological treatment available; Rule 35 reports identified his problems; EC was a vulnerable detainee.

226. The SSHD had also failed to take account of his compliance with his bail terms from 2010-2012, the NOMS assessment that he was at a low risk of re-offending, or causing harm to the public and a medium risk of absconding, and the fact that EC had notified himself to the SSHD before he was found working unlawfully.

227. Ms Meredith submitted that the second period of detention also breached the third *Hardial Singh* principle throughout. The EDT process was on hold at the start and throughout; in April 2013 fingerprints were provided, but no timescale for a response was given. EC attended the interview on 14 August 2013, and answered all the questions, but the Angolans, EC said, denied that he was Angolan. EC was interviewed again in December 2013, but there was no timescale for the response, even by February 2014. It was simply assumed by the SSHD in April 2014 that the Angolan authorities would be assisted by EC's fingerprints, and would respond within two months, but there was a delay in submitting them and no reply had been received within two months of submission, that is by mid-July. Even after two years detention, CROS advised in September 2014, that a reply would be likely to take a considerable length of time. The barriers to removal also always included these proceedings, and the submission of further substantial medical based representations in 2013.

228. In November 2013, on the seventh monthly review, the Assistant Director of CCD had asked that a release referral be prepared; it was prepared but a decision was made not to act on it for no recorded or known reason. It was thought that EC could be removed within 2-3 months, both then and 3 months later.

229. All those factors were relied on to show a breach of the second *Hardial Singh* principle. There were also concerns about EC's mental health expressed throughout his detention, the worsening effect of detention, and of increasing severity and frequency, culminating in the Medical Officer's report of 31 October 2013.

230. Ms Meredith submitted, in relation to the overall period of detention, that it had also breached the SSHD's policies within Chapter 55 EIG. The SSHD had ignored all the factors set out above. Apart from the couple of days which broke up the two periods of detention, EC had been detained for 805 days, and had not been detained for the shortest possible time. There had been no imminent prospect of removal or of removal within a reasonable time. There was only a low risk of re-offending or harm; the medium risk of absconding should have been lowered by his record of compliance after being granted bail in 2010. Detention had not been kept under proper review as the documentation and medical picture developed. Proper risk assessments had not been carried out. Alternatives to detention had not been considered. EC had been detained for administrative convenience.

231. The medical evidence also showed a breach of Chapter 55 EIG, paragraph 55.10 and of Rule 35(3). On 17 May, Burnett J ruled in *R (EO) v SSHD* that "torture" for these purposes meant [82]:

> **"**Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind."

232. There was independent evidence at the time of detention and throughout from Rule 35 Reports and clinical assessments that EC had been tortured. The SSHD failed to engage with this, relying rather on repetitive and general answers. Similarly, there was evidence that EC suffered from a serious mental illness which was not being managed satisfactorily in detention, rather it was being untreated and worsening, as the evidence of Drs Page, Joy, Toon and later Wootton showed, along with the IRC records.

233. Mr Hansen submitted that the only barrier to removal during the first period of detention was the absence of ETD. The reasons for detention were: the high absconding risk, failure to co-operate with the ETD process, his lack of any lawful basis to remain, his lack of close ties, and his lack of respect for the law as shown by his conviction. His failure to co-operate was shown by his refusals to attend the interviews scheduled for June 2012 and August 2012. Had he co-operated, his removal would have been either imminent or likely within a reasonable time.

234. Mr Jonathan Swift QC, sitting as a Deputy High Court Judge, said this in *Simukonda v SSHD* [2017] EWHC 1012 (QB) at [21]:

> "21. Thus lack of cooperation on the part of the detained person is neither a trump card for him, nor a trump card for the Secretary of State. The fact that the person detained is a non-cooperative detainee does not dilute or diminish the obligation to pursue removal with appropriate diligence. Yet in such a case, the Secretary of State can be expected to seek to exhaust every option available to her, and in principle is to be afforded the opportunity to do that. In such a case, it is quite possible that detention over an extended period will be consistent with *Hardial Singh* principles. But at some point the options for the Secretary of State will run out, and at that point detention under the powers in Schedule 3 to the 1971 Act will cease to be lawful. This is the same as the approach that applies in any instance in which the Schedule 3 Immigration Act 1971 power of detention is used… The only difference in circumstances such as those in the present case is in respect of the practical assessment of the limits of what is reasonable, and of the point at which there ceases to be any prospect of removal."

235. The approach to non co-operation was also considered by the Court of Appeal in *R (DZ (Eritrea)) v SSHD* [2017] EWCA Civ 14, in which Gloster LJ said at [37 and 39]:

> "37.Thus, for example, the appellant's non-cooperation throughout the entire period of his detention was clearly relevant to the judge's conclusion that the appellant had not been unlawfully detained, since it was the only reason that the

> appellant's detention had been prolonged. As Miss Anderson submitted, the appellant could at any time have brought his detention to an end by complying with the deportation order and leaving the UK, as indeed he had a statutory obligation to do. Even if, which the appellant certainly had not established on the evidence (and which the respondent denied), the appellant would not have continued to be recognised as an Ethiopian national and, if he had applied for renewal of his passport, that would have been refused, there was every reason to suppose that he would have been able to obtain an Eritrean identity card, as his siblings in the UK had done, and to go to Eritrea to join a further brother who was there. The fact that in interview the appellant had said that he did not want to return to Eritrea could not count as a factor against the respondent in assessing whether the delay was reasonable; on the contrary, it demonstrated further lack of cooperation on his part.
>
> 39. It is clear from the authorities dealing with the application of the *Hardial Singh* principles that a distinction has to be drawn between genuine resistance to removal based on a subjective well-founded fear of persecution and deliberate obstruction such as the appellant engaged in in the present case. I accept Miss Anderson's submission that those principles cannot be used to facilitate an individual defeating the statutory purpose and forcing his release from detention, on the basis of deliberate obstruction of the lawful deportation process. Necessarily, what amounts to a reasonable period for the respondent to implement the removal process will be critically dependent on the extent to which the FNP obstructs or cooperates with the deportation process. In the present case the judge was, in my view, clearly entitled in evaluating what was a reasonable period, to conclude that significant weight should be given to the factor of the appellant's non-cooperation, notwithstanding the lengthy period of his detention."

236. There was no indication that the application made for ETD on 27 April 2012 would be unsuccessful, if EC co-operated. EC did pose a significant risk of absconding in the light of his immigration history, and the specific offence of which he had been convicted; he lacked ties and never had leave to remain. If a person absconded, it would defeat the primary purpose for which Parliament had given the power to detain, that is to effect removal. EC had gone to ground for 4 years; he worked for a while illegally and in possession of a false identity document and stamp to enable him to do so. He was encountered by chance, working, though he had renewed contact with the Home Office earlier than that.

237. An interview was arranged for October 2012, and EC attended; it was the Angolan authorities which prevented it going ahead as they had not told the SSHD of their new procedures. Contact was however retained with them, and they did explain that they were reviewing procedures and asked for a meeting in January 2013. Despite the delays and difficulties, it was never apparent to the SSHD that removal could not be effected

within a reasonable time. It was not enough that the period simply be uncertain for detention to be unlawful. The SSHD did make arrangements for EC to be released.

238. The second period of detention was necessitated because EC damaged his accommodation. He went to single accommodation on release, but was not allowed in as he was too late, whoever was at fault. EC smashed up the shared accommodation he then went to, and threatened the housing officer. He was not allowed to remain there and would otherwise have been homeless. His detention lasted as long as it did in large part because EC repeatedly failed to co-operate with the ETD process about which he was regularly warned in the monthly detention reviews. He could not force his release in that way. The new process was notified in March 2013. EC was interviewed in August 2013, but the Angolan authorities said that he had refused to co-operate. On 28 November 2013, he was specifically requested to co-operate with the forthcoming interview. However, he refused to co-operate with the interview arranged for 4 December 2013, as the SSHD was advised on 21 February 2014. She was then told that EC's identity could be verified by fingerprints. On 11 March 2014, a certified copy of EC's fingerprints was sent to the Angolan Embassy. There was a further interview on 23 July 2014, and the SSHD continually chased for the outcome, to be told that it would take a considerable but unknown time. The response of October 2014 was that the documents were being sent to Luanda for verification. At no point was it apparent to the SSHD that removal could not be effected within a reasonable time.

239. EC produced a letter dated 10 November 2017 from the Angolan authorities saying : "Following a face to face conversation with your client [EC] in which he requested a letter from us with the result of his previous interviews made by members of the Angolan Embassy, we can inform that all interviews taken were inconclusive due to his mental state, he was unable to collaborate during the interviews." Mr Hansen responded that EC had never suggested that his mental health problems prevented him providing basic bio-data to verify his nationality and identity, which he had refused to do while his deportation case was outstanding. A degree of scepticism was justified about this in view of the change in language from January and February 2012.

240. The claim to have been tortured by UNITA rebels was raised in the Rule 35 report of 21 September, but this was a claim which had been rejected by the FtT in 2011. The Rule 35 Report in October simply repeated the same claim. They were not independent evidence, as they were dependant on EC's version of events, nor did they disclose a serious mental illness which could not be satisfactorily managed in detention. Nor was that supported by EC's medical records, so there was no breach of policy at that stage. There was no evidence that EC had been on medication during those 4 years of absconding. His health problems were considered at regular intervals and it was reasonably concluded that his conditions could be managed satisfactorily in detention.

241. Mr Hansen submitted that, even had there been evidence of such an illness, EC would have been detained in any event, because the risk of his absconding was so high that it would have created an exceptional case for detention. The release was prepared in the light of the further representations in November 2014, and further medical evidence.

242. Mr Hansen contended that no adverse inferences should be drawn from the asserted non-disclosure. Although Ms Meredith's chronology pointed out that various documents were not in the bundles, there had been no applications for further disclosure. I note that it was just one sentence at the end of her Skeleton Argument.

Any witness would have been dependant on the written record of what they had said. There had been full candour and disclosure of what there was.

Conclusions

243. I accept Mr Hansen's submission that the lawfulness of detention cannot be judged with the benefit of hindsight, but has to be judged on the basis of what the SSHD knew and thought at the time of detention and subsequently, as time moved along. She was entitled to hope and expect events to occur or not to do so. Whether the fruits of experience should have tempered her expectations of what would happen was, in the first place, a matter of her reasonable judgment.

244. I also consider that the two periods have to be considered more as one continuous period in various respects, notably over the time which the ETD process was taking, and the effect of detention on EC. The second period of detention does need its own justification as EC had only just been released on bail, but his threats and destructive behaviour on release, because the accommodation was not immediately what he expected or wanted, was obviously going to pose problems for future risk assessment of re-offending, harm and of absconding. This, I accept, changed the situation for release from the second period of detention. It could not simply be a question of making a further effort to obtain single occupancy accommodation. There were no bail applications to the FtT.

245. I am not prepared to draw adverse inferences against the SSHD: I agree that witness statements from the many witnesses would have been very unlikely to do more that refer to what the documents showed, which would have added nothing. I see no basis for supposing that documents have been held back, in view of the very extensive disclosure. Far more likely is that they have been lost over time, if they existed.

246. I do not find much assistance in factual comparisons with other cases, and I do not refer to them.

247. I agree with Mr Hansen that the SSHD did not act unlawfully in detaining EC in September 2012. It is not disputed that he was detained for a lawful purpose. EC had had two appeals dismissed; he had absconded for four years, and seemingly had made his presence known to the SSHD as life had become hard for him; he committed an immigration document offence which she was entitled to regard as serious. He had no ties and had worked illegally. He was unco-operative with the ETD process, not showing up for the June 2012 interview. It is not enough for him simply to allege fear, especially when the asylum claim based on that fear had been rejected on appeal, and his appeal rights exhausted. The SSHD is entitled to approach detention on the basis that that is but an excuse for non-co-operation. His representatives for the same reason then said that he would not go to a face to face interview, and sought a relaxation of his bail terms. A further interview was booked for October 2012. I also accept Mr Hansen's point that there is greater urgency to obtaining ETDs for those in detention, and that upon release other cases then get pursued with greater vigour; so, there is an incentive to make progress while someone is in custody.

248. During the first period of detention, no progress was made with an ETD through no fault of either EC or the SSHD. The October 2012 interview, to which EC was to have been accompanied by a caseworker or the like, was cancelled by the Angolans. There were discussions but there is little evidence of any pressure being brought to bear, or

of the Angolans being chased for an answer as to when the new process would be in place, or of any assessment being made of how long that was likely to be. From month to month, and without such an assessment being made of how that affected the prospects of removal within a reasonable time, there appears to have been only the hope and expectation that the new process would be in place soon. Removal was thought to take place within a reasonable time of the new process being put in place, but that was a stage which had yet to be reached and for which no timetable was assessed. I do not see a picture of the assessment being that the new process would be in place within reasonable time.

249. However, what is required for detention to be lawful is that there be a reasonable prospect of removal within a reasonable time. The removal of the ETD barrier was seen, reasonably, as dependant on the new process being put in place rather than on the outcome of the process; that was seen as likely to succeed, and indeed EC had been prepared to be interviewed, with a UK official present, in October 2012. The uncertainty from month to month about when the new procedure would be notified does not, in my judgment, prevent a reasonable prospect of removal being maintained throughout that period; there was a reasonable prospect of it being put in place, with documentation and removal following quite quickly thereafter. I am satisfied that a reasonable prospect of removal within a reasonable time endured throughout the first period of detention; its uncertainty was frustratingly prolonged; expectations may not have been released from month to month, but the expectation that the block, created by the slowness of the Angolan authorities to put in place its new ETD procedure, would be removed in a short space of time, would have become more firmly based as time went on. The decision at the end of January 2013 that EC should be released on bail, was not the result of any detention review expressing doubts about continued detention. The 28 December 2012 review thought that continued detention was necessary and justified. There is no record of the basis for the decision. The detention litigation, I infer, played a very large part, not because of the barrier it raised, but perhaps in an attempt to avoid the risk of its continued course. The note for 4 February, that EC was released with tagging, which "has not been done and sub can no longer be lawfully detained by ourselves", is of rather uncertain meaning; it appears to be related to the absence of tagging or powers to re-detain to tag, but it is not an acceptance that EC was released at the point where his detention was becoming unlawful.

250. The making of further representations in October 2012, was not a bar to removal within a reasonable time, although they required to be answered and in the nature of the process that could lead to litigation. There was no litigation barrier to removal, until the end of January 2013, and it was not of its nature such that it would have had to be regarded as preventing removal in a reasonable time. Anyone who told the SSHD that they would still be going in 2021 would not have been taken seriously.

251. I do not accept the further submission from Ms Meredith that detention was unreasonable in all the circumstances. For this period, the particular offence, the years of absconding, the illegal working, the past and recent refusal to co-operate, the rejection by the FtT of the reasons given for that refusal were all factors which told against a release. The period of compliance from May 2010 to September 2012 was not sufficient, as the prospects of removal grew closer and greater, to outweigh those factors.

252. The medical circumstances were not of any great weight either. The Rule 35 Reports were not independent evidence of torture by either UNITA or by the government. The FtT judgment on what happened to EC in Angola contradicted the accounts he continued to give to the IRC staff and to his own medical experts. The SSHD was entitled to rely on the FtT decision in her appraisal of the reports in concluding that EC could be detained conformably with the EIG. He was supplied with the medication he needed; there was no reason for him not to take it, save that he wanted to be released. He was recommended for counselling. There is nothing in the reports to show that the judgment that he did not have a serious mental illness which could not be managed satisfactorily in detention was wrong, or one to which the SSHD was not entitled to come. The flashbacks, PTSD and disturbed sleep do not warrant a different conclusion. Of course, others argued that he should be released, but the SSHD judgment was both reasonable and, on the material, correct.

253. Turning to the second period of detention, I also accept that the start of the second period of detention was lawful. Within a very short period of his release on bail, EC committed an offence, which involved damage making his accommodation unusable, and threatening the manager. He had no good reason for such a violent reaction, and it is troubling, for the risk assessments and his co-operation if on bail, that it came so soon. I cannot see that the SSHD had any other option but to detain him; he had nowhere to go and could not be left on the streets for his own good, or with bail requirements to be met. The purpose of re-detention was still the lawful one of enabling removal to be effected. The risk of absconding, of committing further offences and causing public harm had obviously increased at least unless he were in single accommodation, and the willingness of providers to take him would have been reduced by his own behaviour. In substance, the conditions of his bail could no longer be met.

254. So far as the third principle of *Hardial Singh* is concerned, I accept that the clock did not start again, and that, so far as the reasonableness of the prospects of removal within a reasonable time are concerned, time had to be regarded as continuing with actions already taken, with what limited effect they had had. However, within a fairly short period of time, less than two months from re-detention, the new procedure was being resolved, and that uncertainty was over, as the SSHD had reasonably anticipated it would be, although it had taken longer than would have been expected at the outset or at many of the intervening detention reviews. Early in April 2013, the documents for the ETD were to be scanned and posted to the Angolan Embassy, along with fingerprints, in readiness for an interview on 17 April. It appears that the new procedure was in place before 4 April.

255. Between then and release in December 2014, there were persistent efforts to procure the ETD, undermined in the first place by the SSHD. It was not EC's fault, but the SSHD's, that the interview fixed for 17 April 2013 was cancelled, due to a failure in communication between IRCs about transfers for that purpose, and assembling the documents. But bio-data had been collected. That does not alter the realism of the prospect of removal within a reasonable time, though it does go to the overall reasonableness of the time taken, and of course it goes to show that problems are not always to be attributed to EC or non co-operation.

256. The interview was re-arranged and took place in August 2013, which I regard as a reasonable time later. The response from the Embassy came a month later; it was an inconclusive interview for which it blamed a lack of co-operation from EC. He denied

that, when asked about it and put the blame on the Embassy. It was and is not possible to establish the truth of what happened, and to what extent there were crossed wires. But the SSHD was entitled to treat EC as having been to blame; he had a real desire not to return to Angola. He had expressed a refusal to co-operate in the past. It would be odd in view of the material provided to it, if Angola had simply denied that he was Angolan. I do not find it difficult to imagine that arguments broke out, in view of EC's recorded behaviour. What is clear to me is that, in view of what the Embassy reported, the SSHD was entitled to approach detention and the prospects of removal on the basis that what the Embassy had said was correct. I do not regard the letter from the Embassy in 2017 as of any value. It is more than three years later and does not accord with the contemporary record; and it was not available for the SSHD to consider when making her judgments about detention and the prospects for removal within a reasonable time.

257. There then followed discussions as to how to proceed. A further interview was requested and arranged for 12 December 2013, which EC attended, and at which SSHD noted again that he refused to be interviewed, which it must have been told by the Embassy. I see no basis upon which the SSHD can be criticised for taking that view, and taking that into account in her judgements about detention. The Embassy did not inform the SSHD of the outcome of the interview until 21 February 2014. It said on about 27 March 2014 that no further interviews were required, but that the documents would be sent to Luanda for verification. This does not appear to be a lack of co-operation on its part, although it was not moving fast. The fingerprints were to be sent to Luanda as well. Although there was no timescale for a response, the detention review for April 2014, thought it reasonable to expect a reply in the next two months. By this time, the further challenge to the new decision of 11 February had been dismissed at an oral hearing by Haddon-Cave J, and all that was left was the application to the Court of Appeal. So far, in my judgment, the third *Hardial Singh* principle had not been infringed.

258. A further interview was in fact arranged for late July, which was properly instrumental in enabling the June and July detention reviews to conclude that removal was a reasonable prospect within a reasonable time, and to expect the ETD process to be concluded within 2-3 months' time. Indeed, in July, Sir Stanley Burnton refused permission to appeal on paper to the Court of Appeal, although the application was renewed.

259. By September 2014, the only barrier as the SSHD understood it to be, was the absence of ETD. That error was not hers and the fact of the outstanding litigation played no part in her decision to detain or release. It was an irrelevant error. It is however by 20 September that the notes record, pursuant it appears to the new procedure, that EC was on a priority list, which led to the meeting at which the Embassy said that there had been no response from Luanda, and that the Embassy could give no timescale for one. This implies that the SSHD was told that the upshot of the interview in July was that the documents would be sent to Luanda for verification. The October 10 detention review noted that position and judged that the risk of harm, absconding and re-offending outweighed the presumption in favour of release. However, it judged that the process of removal would be swift, but only once the ETD was issued. On 17 October, the Embassy sent the interview results, saying that the documents would be sent to Angola for verification.

260. I consider that, between 20 September and 13 November 2014, there continued to be reasonable prospects of effecting EC's removal in a reasonable time. The interview process and documentation process had been convoluted but had concluded with the documents being assembled and sent for verification. The authorities in Angola had proved slow in the past, but some degree of priority was now apparently being given to this case by them. They had eventually produced the new scheme. It was reasonable to conclude that this would end within a reasonable time. A considerable proportion of the time taken was due to what the SSHD was entitled to conclude had been EC's lack of co-operation in the interview process, although he did attend them as required. By 13 November 2014, the release process was underway, with accommodation being sought, leading to release on 4 December 2012.

261. So, although the process had taken overall a long time in retrospect and was over-optimistic in retrospect and, with the benefit of hindsight, EC perhaps should have been released a few months earlier, the lawfulness of detention has to be judged as at the time. At each monthly review, there were reasonable prospects of removal within a reasonable time, throughout the second period of detention, despite the ETD barrier.

262. I do not regard this litigation as having constituted a significant barrier, on any realistic view. EC lost every round; the fact that the procedures permit many rounds cannot mean that the inception of litigation precludes lawful detention. The further submissions of late 2013 were dealt with by 11 February, and the litigation proceeded quickly at the hearing before Haddon-Cave J on 4 March, and on to the paper application before Stanley Burnton LJ on 23 July. The renewed application in the Court of Appeal would not have held up removal unless permission had been granted, and it could reasonably have been expected to have been dealt with shortly in the normal course of events. No new point was raised until 2017. The problem the litigation was actually to create was not known to the SSHD.

263. Looking over the whole of the two periods of detention, I do not consider that the third principle in *Hardial Singh* was infringed. There was always a reasonable prospect of removal within a reasonable time at each review; a good deal of the delay was due to EC's lack of co-operation, some was due to failings by the SSHD, and large part was due to slowness on the part of the Angolan authorities. But the expectation that their response would be forthcoming within a reasonable timescale, although they were providing none, was itself not unreasonable even though events proved that there was a considerable degree of optimism.

264. I do not consider that the second principle in *Hardial Singh* was infringed. EC was reasonably thought not to have co-operated in two interviews during this period. He was plainly an abscond risk, and his behaviour on his earlier release was troubling; his risk to others was increased, as was his offending risk. I see nothing in the various medical records to justify any particular concern that he should be released, nor any concern that a policy in the EIG was breached. In May 2013, he made complaints of spiritual attack, seeing people, leading to his back pain, and that his mental health was worsening. The medical notes record disagreement that his mental health was worsening. EC denied contemplating suicide. There are in fact very few occasions, before October 2014, when EC or a medical report raised a concern about his health. By the end of 2013, the medical reports which underpinned the further representations were sent to the SSHD, not primarily with a view to his removal from detention, but containing comments about his existing mental health and how it was considered that

detention would have made it worse. But these do not sustain a case that EC was suffering from a serious mental illness or that it could not be managed satisfactorily in detention. Indeed, the records seem less troublesome than in earlier periods of detention.

265. I appreciate that the definition of "torture" to be applied when judging the suitability of a person for detention was widened beyond state actors in *EO*, above, to include non-state actors such as UNITA. The basis upon which the SSHD proceeded was not to draw a distinction between the government and UNITA, but to say that events had been found not to have occurred as EC had described them. It found that there had been ill-treatment by villagers, but it did not say how severe, and although it may have caused some scarring, there was no basis in its conclusion for treating that as torture, or for the SSHD, applying *EO*, in so treating it. The basis put to her that EC had been tortured and so was unsuitable for detention, was the basis upon which the truthfulness of EC's account had been rejected. There was no real evidence, let alone from Dr Toon who dealt the most fully with this point, that that violence would have had to occur in the same way EC described, even if EC had lied completely about who did it.

266. Neither the second *Hardial Singh* principle nor the EIG were breached in this second period of detention.

Overall conclusion

267. The claim that detention was unlawful is dismissed.

268. The whole claim is dismissed.