Neutral Citation Number: [2019] EWHC 2709 (Admin)

Case No: CO/4858/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 October 2019

**Before** :

**NIGEL POOLE QC**
**SITTING AS A DEPUTY HIGH COURT JUDGE**

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**Between :**

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|---|---|
| **R (On the application of AT (Guinea))** | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **First Defendant** |
| **FIRST-TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER, ASYLUM SUPPORT)** | **Second Defendant** |

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**Mr Ranjiv Khubber** (instructed by **Turpin & Miller LLP**) for the **Claimant**
**Mr Zane Malik** (instructed by **Government Legal Department**) for the **First Defendant**
**The Second Defendant** being unrepresented

Hearing dates: 17 & 18 September 2019

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# Approved Judgment

**NIGEL POOLE QC :**

## INTRODUCTION

1. This is an application for judicial review. The Claimant is AT ("the Claimant"). He is anonymised within this judgment because I shall refer to confidential medical matters concerning his mental health. He brings a number of challenges against the Secretary of State for the Home Department ("Secretary of State") and against the First-tier Tribunal (Social Entitlement Chamber, Asylum Support) in relation to his immigration detention. Specifically, he challenges:

    i) His detention under the Immigration Act 1971 by the Secretary of State from between 29 March 2018 and 22 March 2019.

    ii) The Secretary of State's failure fairly and rationally during the relevant period, to process his applications for accommodation and asylum support under ss.4 and 95 of the Immigration and Asylum Act 1999, and Schedule 10 of the Immigration Act 2016.

    iii) The failure of the Secretary of State to make a decision on his application for Schedule 10 accommodation after the request was made on 1 November 2018.

    iv) The decision of the First -tier Tribunal to dismiss his appeal against the Secretary of State's refusal for s.95 support.

2. The claim was brought on 5 December 2018 whilst the Claimant was still in immigration detention. Mrs Justice Cheema-Grubb expedited the claim by abridging time for acknowledgement of service but did not grant interim relief. On 15 January 2019 John Howell QC sitting as a Deputy High Court Judge gave permission for judicial review on ground 1 (unlawful detention) but refused permission on the other grounds and ordered that the hearing be expedited. The Claimant was released from detention on 22 March 2019 and so the need for expedition fell away. I have to consider the claim on ground 1 and the renewed applications for permission in relation to grounds 2 to 4 and, if permission is given, whether judicial review should be granted on any of those grounds. If the Claimant succeeds such that damages should be assessed, then directions to allow for agreement of damages or the court's assessment will be required.

3. The Claimant was kept in immigration detention following a deportation order made after his conviction and imprisonment for an offence of robbery, the last of a series of criminal offences he had committed over a period of several years. He was transferred into immigration detention upon the conclusion of the custodial sentence. As discussed below, having appealed his deportation the Claimant found himself in the unusual position of being in immigration detention whilst at the same time retaining indefinite leave to remain. There was some confusion as to the statutory mechanism by which he might be eligible for accommodation support in the event of his release from detention. He was granted bail in principle by the First-tier Tribunal on three occasions, subject each time to a condition that suitable accommodation was made available. On each occasion no accommodation was forthcoming and so bail was then refused. The legislation is complex and was not clearly understood by all those involved in his case. The overall period of detention was nearly 12 months.

4. Nevertheless, for the reasons given in this judgment, I am satisfied that his detention was at all relevant times lawful and that permission has been rightly refused for the other grounds of challenge.

## LEGISLATION

5. In order to make sense of the history of events and decisions in this case, it is necessary first to consider the applicable legislation. There are a large number of relevant provisions.

**Immigration Act 1971** ("the 1971 Act")

> Schedule 3
>
> 2 (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on immigration bail under Schedule 10 to the Immigration Act 2016.

**Immigration and Asylum Act 1999** ("the 1999 Act")

> s.4 Accommodation
>
> (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected.
>
> …
>
> s.94 Interpretation of Part VI.
>
> (1) In this Part—
>
> …
>
> "asylum-seeker" means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined;
>
> "claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom;
>
> ….

s. 95 Persons for whom support may be provided.

(1) The Secretary of State may provide, or arrange for the provision of, support for—

(a) asylum-seekers, or

(b) dependants of asylum-seekers, who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.

(2) In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded.

(3) For the purposes of this section, a person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.

…

s. 115 Exclusion from Benefits

(1) No person is entitled to universal credit under Part 1 of the Welfare Reform Act 2012 or to income-based jobseeker's allowance under the Jobseekers Act 1995 or to state pension credit under the State Pension Credit Act 2002 or to income-related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance) or to personal independence payment or to—

…

(e) income support,

…

(i) child benefit,

…. while he is a person to whom this section applies.

…

(3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed.

…

(9) "A person subject to immigration control" means a person who is not a national of an EEA State and who—

(a) requires leave to enter or remain in the United Kingdom but does not have it;

(b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;

(c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or

….

**Nationality, Immigration and Asylum Act 2002 ("the 2000 Act")**

s.82 Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where –

…

(c) the Secretary of State has decided to revoke P's protection status

…

s.78 No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be –

(a) removed for the United Kingdom in accordance with a provision of the Immigration Acts

…

(3) Nothing in this section shall prevent any of the following while an appeal is pending –

…

(a) the giving of a direction for the appelant's removal from the United Kingdom …

(c) the taking of any other interim or preparatory action …….

…

s. 79 Deportation order: appeal

…

(3) This section does not apply to a deportation order that is made in accordance with section 32(5) of the UK Borders Act 2007.

(4) But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies.

**Immigration Act 2016 ("the 2016 Act")**

Schedule 10 – Immigration Bail

Part 1

1(3) The First-tier Tribunal may, on an application made to the Tribunal for the grant of bail to a person, grant that person bail if—

(a) the person is being detained under paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971,

(b) the person is being detained under paragraph 2(1), (2) or (3) of Schedule 3 to that Act,

…

Conditions of immigration bail

2(1) Subject to sub-paragraph (2), if immigration bail is granted to a person, it must be granted subject to one or more of the following conditions—

…

(c) a condition about the person's residence;

…

Powers of Secretary of State to enable person to meet bail conditions

9(1) Sub-paragraph (2) applies where—

(a) a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and

(b) the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised.

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.

(3) But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.

**The Asylum Support Regulations 2000**

Persons excluded from support

4.—(1) The following circumstances are prescribed for the purposes of subsection (2) of section 95 of the Act as circumstances where a person who would otherwise fall within subsection (1) of that section is excluded from that subsection (and, accordingly, may not be provided with asylum support).

(2) A person is so excluded if he is applying for asylum support for himself alone and he falls within paragraph (4) by virtue of any sub-paragraph of that paragraph.

…

(4) A person falls within this paragraph if at the time when the application is determined—

…

(b) he is a person to whom social security benefits apply; or

…

(6) For the purposes of paragraph (4), a person is a person to whom social security benefits apply if he is—

(a) a person who by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 is not excluded by section 115(1) of the Act from entitlement to—

(i) income-based jobseeker's allowance under the Jobseekers Act 1995; or

(ii) income support, housing benefit or council tax benefit under the Social Security Contributions and Benefits Act 1992.

**The Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000**

> 2. Persons not excluded from specified benefits under section 115 of the Immigration and Asylum Act 1999
>
> (1) For the purposes of entitlement to income-based jobseeker's allowance, income support, a social fund payment, housing benefit or council tax benefit under the Contributions and Benefits Act, as the case may be, a person falling within a category or description of persons specified in Part I of the Schedule is a person to whom section 115 of the Act does not apply.

## BACKGROUND

6. I have been provided with evidence in three volumes with an additional witness statement from Christine Hooper , Executive Officer in the Criminal Casework Team 11 within the Home Office. The documents within the three volumes include a witness statement from Mr Poulter, the Claimant's solicitor. Page references within this judgment are to the volume number, divider and page.

*Immigration and Offending History*

7. The Claimant is a citizen of Guinea who was born on 31 December 1986 and so is now aged 32. He applied for asylum in the UK on 4 September 2006 claiming he had entered the UK two days earlier. He was refused asylum and his appeal rights were exhausted on 5 April 2007. As recorded at paragraph 14 of the judgment of the Asylum and Immigration Tribunal promulgated on 23 February 2007, the Claimant's asylum claim was found to have been a "complete fabrication" [1/D10]. Nevertheless, following further submissions, and under the government's "legacy exercise" at the time, on 27 September 2010 he was granted indefinite leave to remain.

8. Between 2 April 2012 and 11 April 2017, the Claimant was convicted of a number of criminal offences including theft, burglary and robbery. He received various sentences of imprisonment as well as community-based sentences. He was convicted of failing to surrender to custody on 10 September 2014. The seriousness of his offending appeared to escalate over this period and on 11 April 2017 he was given a sentence of 2 years 5 months imprisonment for robbery and breach of a community order which had been given for burglary only four weeks before the commission of the robbery. The Claimant's offending during this period had persisted notwithstanding that he had been warned about the possibility of deportation.

9. On 8 August 2017, in the light of the offending behaviour, the Secretary of State decided to deport the Claimant. On 17 November 2017 the Secretary of State received confirmation from the Healthcare team at HMP Huntercombe that the Claimant suffered from schizophrenia and was on medication, namely Fluoxetine and Risperidone. He was assessed against the Home Office's Adults at Risk Policy at Level 2. As discussed later in this judgment, this means that there was professional or official documentary evidence indicating that he was an adult at risk but not evidence that a period of detention would be likely to cause harm.

10. On 30 November 2017 the deportation order was signed [1/C37]. It clearly states that the order was made under section 32(5) of the UK Borders Act 2007, being an order in respect of a foreign criminal.

11. At the time of the deportation order the Claimant remained in prison. He appealed against the decision to the First-tier Tribunal on 18 December 2017. Amongst his grounds was a reliance on Article 3 of the European Convention on Human Rights. As recorded in the First-tier Tribunal's judgment, the Claimant did not have any family ties in the United Kingdom and there was a "very strong" public interest in deporting him "given the nature and repetition of his offences and the escalation of the seriousness thereof." [1/D64 at paragraph 63]. His appeal was dismissed on 19 October 2018 but he appealed to the Upper Tribunal which dismissed the appeal on 7 January 2019. Although the First-tier Tribunal had given the Claimant permission to appeal, the Upper Tribunal found that there was "no merit" in the first ground of appeal which concerned the First-tier Tribunal's refusal to adjourn, and that to support the second ground, which concerned the decision on article 3 and article 8 claims, the appellant had "cherry-picked phrases from the determination … completely misrepresenting what the judge said." Having lost his appeal in the Upper Tribunal, the Claimant's appeal rights were exhausted on 22 January 2019.

*Immigration Detention*

12. On 29 March 2018 the Claimant was taken into immigration detention by the Secretary of State on completion of his last custodial sentence. He remained in immigration detention until 22 March 2019. To understand the history of his detention, and the consideration given to his continued detention during that period, it is necessary to consider the detention notices and reviews, the General Casework Information Database notes ("GCID"), including recommendations of the Case Progression Panel ("CPP"), and the bail applications made to the First-tier Tribunal.

13. The Minute of a Decision to Detain a Person Under Immigration Powers, dated 5 March 2018, is at [2/A9]. It shows that the legal basis of detention was under paragraph 2(3) of Schedule 3 of the 1971 Act. Whilst a box is marked to indicate that the risk of the Claimant absconding was high, the body of the record shows that the risk was in fact assessed as medium. Several subsequent detention reviews repeated the same error but it is quite clear that throughout the Claimant was regarded as a "medium" risk for absconding. The Minute also records that the Claimant was a medium risk for re-offending and causing harm. He does not contend that these assessments of risk were unreasonable. His offending history is set out in the Minute alongside the sentencing remarks of the judge who dealt with the robbery offence. The Claimant's medical condition is noted and he was assessed as being at Level 2 risk as noted above. It is recorded that the Claimant's "appeal and ETD are the only barriers to his removal." "ETD" stands for Emergency Travel Documentation. ETD is required from the country to which the Claimant is to be deported – in this case Guinea. It was noted that "An ETD application was submitted on 28 November 2017, a face to face interview has been requested…" The recommendation stated,

> *"*[His] removal is not considered imminent but is considered to be within a reasonable time scale. He is considered to pose a medium risk of absconding in the light of his outstanding appeal."

The reviewing officer concluded:

> *"*[His] appeal and ETD are barriers to removal; hearing dates are expected to be listed before the first review. A request for a face to face interview has been made and will be arranged for when he is detained. Removal is not imminent but is currently considered to be within 6 months depending on the submission and progress of any appeal and ETD. The presumption to release … is outweighed by the risks posed by [him]." [2/A14].

14. The Claimant's appeal to the First-tier Tribunal had in fact been struck out for non-payment of the fee. On application the appeal had been re-instated on 16 March 2018 [1/D29].

15. The Claimant was taken into immigration detention on 29 March 2018. The first Detention and Case Progression Review was completed on 26 April 2018 [3/A/15]. The record of the Review repeats much of the content of the Minute of Decision to Detain. Under "Case Progression Actions" it is noted that a further ETD pack had been completed for submission and a further medical report requested. In relation to the appeal, notice of a pre-hearing review on 26 July 2018 and a full hearing on 9 August 2018 had been given by HM Courts and Tribunals Service on 11 April 2018 [1/D31]. Continued detention was authorised.

16. The Claimant applied to the First-tier Tribunal for bail, claiming that "bail should be granted in principle and an address provided by the Home Office under Section 10 without delay". [1/F8] The reference to Section 10 should have been to Schedule 10 (of the 2016 Act). The Claimant had solicitors acting for him and that remained the case throughout his detention. The Secretary of State opposed the application and noted [1/F15 paragraph 15] that the Claimant did not qualify for Schedule 10 accommodation but that a Schedule 10 accommodation referral form had been sent and a response was awaited. On 16 May 2018 the First-tier Tribunal granted bail subject to the condition that the Claimant was,

> "offered schedule 10 accommodation and such accommodation being approved by the Offender manager within two weeks. Such accommodation must be suitable in particular for easy access to community psychiatric care." [1/F18]

17. On 1 June 2018 the Defendant wrote to the Claimant that he did not meet the criteria for Schedule 10 accommodation. This had been the view taken prior to the bail hearing and recorded in the Secretary of State's response to the bail application. The letter of 1 June 2018 also stated that the "CCAT Application Team have advised the Home Office that you may qualify under section 4.2." [E1/19]. In the meantime, the First-tier Tribunal had refused bail on 31 May 2018, the condition for bail not having been met.

18. Also on 1 June 2018, a second Detention and Case Progression Review was completed [3/A23]. This noted the bail application proceedings and outcome. No further progress with the ETD was recorded. The Authorising Officer recorded that given the timeframes for appeal and ETD a release referral should be drafted ahead of the next review.

19. On 13 June 2018 a Case Progression Panel ("CPP") reviewed the Claimant's detention. There is a record within the General Casework Information Database Notes at [3/B108] dated 16 June 2018. These panels have been in operation since February 2017 and provide an internal independent review of detention and case progression. I have been provided with guidance published by the Home Office in April 2019 entitled "Detention Case Progression Panels" which, whilst post-dating the events in question, provides helpful information about the work of these panels. On 13 June 2018 the CPP did not note any factors in favour of maintaining detention, noted that bail had been granted in principle, and recommended release. The record indicates that the CPP was unsure whether the Claimant was eligible for Schedule 10 support. It did not note that bail had ultimately been refused.

20. On 14 June 2018 the Claimant applied for s.4 accommodation and made another bail application to the First-tier Tribunal.

21. There was a further Detention and Case Progression Review on 29 June 2018 [3/A31]. It was noted that "Removal is not imminent but is considered to be within 3-6 months". Another ETD pack had been completed for submission on 16 June 2018. The Authorising Officer commented that "Removal is not imminent but is currently considered to be within 6 months depending on the progress of his appeal and ETD. A release referral should be considered." A note was made to monitor the appeal and ETD closely.

22. The Secretary of State again opposed the Claimant's bail application. On 4 July 2018 the First-tier Tribunal granted bail "conditional on the applicant being offered section 4 accommodation and such accommodation being approved by the Offender Manager within two weeks. Such accommodation must be suitable in particular for easy access to community psychiatric care."[1/F39]. In a document dated 5 July 2018 at [1/F41] the same First-tier Tribunal Judge who granted bail on 4 July, refused bail noting that the Home Office had not been able to provide suitable accommodation. The date on this document must be incorrect. The Judge noted, "There is at present no reasonable alternative to detention, and in the circumstances I consider detention to be proportionate."

23. On 18 July 2018 the Secretary of State refused s.4 support [1/E59]. The principal reason given was that it was not accepted that the Claimant was destitute as he still had indefinite leave to remain and so was able to secure access to other forms of public or private support. The Claimant appealed the Secretary of State's decision of 18 July whereupon the decision was withdrawn.

24. The next Detention and Case Progression Review took place on 27 July 2018 [3/A40]. It was noted that the ETD pack had been re-submitted to the Guinean Embassy and that a face to face interview there had been arranged for 7 August 2018. The history of the most recent bail application was noted. The Authorising Officer noted the forthcoming Tribunal hearings and face to face interview, and commented that "Removal is not imminent but is currently considered to be within 6 months depending on the progress of his appeal and ETD. A release referral should be considered once ongoing time scales for his appeal and ETD are obtained."

25. The next Review was on 24 August 2018 [3/A50]. It was noted that progress with both the appeal and the ETD had been delayed. The appeal had been adjourned at the

Claimant's request. The ETD interview had been postponed because the relevant official at the Guinean Embassy was on leave until the end of August. In fact, the appeal had been re-listed for 21 August at the pre-hearing review, and then vacated at the Claimant's request and adjourned to 5 October 2018. That order was made on 24 August [1/D53] and so was not known to the officers conducting the review on the same date. Continued detention was authorised for a further 28 days.

26. On 18 September 2018 a further CPP recommendation was made for release [3/B120]. The reason for the recommendation was said to be because "there is no prospect of imminent removal." On the same date the Claimant applied for asylum support under section 95 of the Immigration Act 1999 [1/E83]. Initially the Secretary of State refused the application on the grounds that the Claimant was not an asylum seeker. He was in fact an asylum-seeker within the meaning of s.94 of the 1999 Act because he had a pending appeal before the First-tier Tribunal at that time which included an Article 3 ground. The Secretary of State withdrew her decision and produced a fresh decision on 5 October 2018 [1/E147] refusing support under section 95 because "you are in an Immigration Removal Centre held in Immigration Detention … your essential living needs, including accommodation, are being met in full." The Claimant appealed that decision to the First-tier Tribunal.

27. Three days after the CPP recommended release, a further Detention and Case Progression Review took place [3/A60]. It was noted that in fact the relevant official from the Guinean Embassy had not been available until mid-September and that a date for the face to face interview was awaited. It was noted that the appeal hearing before the First-tier Tribunal was now listed for 5 October 2018. Again, the decision was to continue detention but to monitor the appeal and ETD closely.

28. On 19 October 2018 there was a further Detention and Case Progression Review [3/A70]. It is noted that the Claimant's appeal against the deportation order had been heard by the First-tier Tribunal on 5 October and that the outcome was awaited. On 11 October a release referral had been submitted for consideration. A face to face interview at the Guinean Embassy had been arranged for 22 October 2018. Continued detention was authorised.

29. The Claimant's appeal against deportation was dismissed by the First-tier Tribunal on 19 October 2018. The judgment [1/D57] shows that the Claimant had applied unsuccessfully for an adjournment at the start of the hearing.

30. The First-tier Tribunal heard the Claimant's appeal against the refusal of s.95 support and gave its decision on 30 October 2018 [1/E163]. The Tribunal Judge, Ms Sally Verity Smith, found that until such time as the Claimant's appeal rights were exhausted in terms of his deportation, he would, and so did, continue to enjoy indefinite leave to remain. As such, the benefits attached to that status took the Claimant outside the definition of destitution under Section 95(3) of the 1999 Act. The Claimant was entitled to social security benefits and so had the means to obtain accommodation and was not destitute. She also held that regulation 4(4) of the Asylum Support Regulations 2000 applied so as to exclude the application of s.95. The appeal was therefore dismissed.

31. The Claimant applied for permission to appeal the earlier decision dismissing his appeal against the deportation order, by written application dated 1 November 2018.

The First-tier Tribunal itself gave permission on 7 November 2018 and the hearing before the Upper Tribunal was listed for 17 December 2018 (by notice dated 21 November 2018 [1/D79]).

32. The next Detention and Case Progression Review was dated 16 November 2018 [3/A80]. It was noted that the Claimant's appeal against deportation had been dismissed by the First-tier Tribunal but that he had sought permission to appeal which had been granted. The ETD interview had not yet taken place because of cancellation by the Guinean Embassy but it was being re-scheduled. Detention for a further 28 days was authorised.

33. The Claimant attended a face to face interview at the Guinean Embassy on 21 November 2018.

34. The CPP reviewed the Claimant's detention for a third time, on 27 November 2018 [3/B137] and again recommended release, this time on the grounds that "there are factors which suggest that removal within a reasonable time frame, in the particular circumstance of this case, may not be possible".

35. The Claimant brought the judicial review claim now before this court on 6 December 2018 with the order for expedition made by Mrs Justice Cheema-Grubb on 6 December.

36. A Detention and Case Progression Review was completed on 12 December 2018 with a further authorisation for continued detention. It was noted that the Upper Tribunal was due to hear the appeal on 17 December. The Judicial Review claim and order were noted. The ETD interview was also noted. Continued detention was authorised.

37. The Upper Tribunal heard the appeal on 17 December 2018 and promulgated its decision to dismiss the appeal on 7 January 2019 [1/D81].

38. A further Detention and Case Progression Review was completed on 14 January 2019 [3/A100]. It was noted that the ongoing Judicial Review prevented removal but had been expedited. Continued detention was authorised.

39. As already noted, the Claimant's appeal rights in respect of his deportation were exhausted on 22 January 2019. On the same date the Claimant brought at fresh application for s.4 accommodation [1/E171]. On 28 January 2019 the First-tier Tribunal granted immigration bail in these terms: "Bail is granted in principle. The applicant is not to be released until the Home Office has found accommodation. Such accommodation to be provided by Monday 18 February 2019 or the decision lapses."

40. On 31 January 2019 the Secretary of State granted s.4(2) support which was for the Criminal Casework Accommodation Team to arrange in conjunction with the Claimant and/or his representatives. Unfortunately, the date of release under the bail condition lapsed, but once accommodation was found bail was granted, on 22 March 2019, with a condition of residence at that address [1/F101] and a reporting condition. Two further Detention and Case Progress Review had been completed on 11 February 2019 [3/A111] and 11 March 2018 [3/A122]. At the February review it was noted that the ETD had been agreed and the Guinean authorities were expected to issue the documentation later in the month. Bail in principle had been granted. At the March

review continued detention was authorised because removal was regarded as reasonably imminent. Nevertheless, a further bail application was made on 15 March 2019 and, specific accommodation having been found, conditional bail was granted by the First-tier Tribunal and detention ended on 22 March 2019.

## GROUNDS 2 TO 4 – RENEWAL OF PERMISSION

41. It is not disputed that once the Claimant appealed the deportation decision on 18 December 2017, and until he had exhausted his appeal rights on 22 January 2019, the Claimant was an asylum-seeker as defined by s.94 of the 1999 Act. Accordingly, he was not entitled to expect the provision of facilities for his accommodation under s.4 of the 1999 Act. This was plain on the face of the legislation and although the Secretary of State did raise the possibility of a s.4 application during the period when the Claimant was an asylum-seeker, this was not a decision and was not sufficient, in my judgment, to amount to unlawful conduct. At most it was maladministration but I would not even describe the indication given in those terms. It was merely a suggestion. In relation to s.4 of the 1999 Act, and her conduct and decision-making in relation to that provision, the Secretary of State acted lawfully at all relevant times.

42. The deportation decision of 30 November 2017 was made under s.32(5) of the UK Borders Act 2007. The Claimant's appeal against the decision to deport was an appeal under s.82(1) of the 2002 Act, and so, whilst the appeal was pending, s 79 (4) of the 2002 Act applied and the deportation order did not invalidate the Claimant's indefinite leave to remain. Again, it is not disputed that whilst the appeal against deportation was pending, and until 22 January 2019, the Claimant continued to have indefinite leave to remain.

43. Being an asylum-seeker during the period identified, s.95 of the 1999 Act applied, but only if (i) the Claimant appeared to the Secretary of State to be a person who was destitute or who would be likely to become destitute within the prescribed period, and (ii) the Claimant was not a person who was excluded from s.95 provision because of "prescribed circumstances". If the Claimant had adequate accommodation or the means of obtaining it, then he was not destitute.

44. The Claimant was, until 22 January 2019, a person with indefinite leave to remain. Accordingly, whilst the appeal against his deportation order was pending, he was not under "immigration control" for the purposes of the 1999 Act, and therefore he was not excluded from eligibility to benefits under s.115 of the 1999 Act. Those benefits included housing benefit. Thus, the Claimant was, at all relevant times, not excluded from eligibility for housing benefit and other social security benefits. As such he had the means of obtaining adequate accommodation upon his release from detention, were that to occur. Under s.95(3)(a) of the 1999 Act he was not destitute. Accordingly, he was not entitled to the provision of support under that section.

45. I have seen little evidence that the Claimant took steps to secure benefits or accommodation support to which he was entitled. Some correspondence has been provided from after the First-Tier Tribunal's decision that s.95 did not apply, but there is generally a lack of evidence of timely or sustained engagement with the local authority or other authorities and agencies. It was not argued before me that the Claimant would not have been granted benefits or which he was potentially entitled. I

have not been provided with evidence that the Secretary of State obstructed the Claimant from seeking benefits and support to which he was potentially entitled.

46. A more difficult point is whether the Claimant was also disentitled to provision of support under s.95 because the Claimant was in "prescribed circumstances" within the meaning of s.95(2). Under regulation 4 of the Asylum Support Regulations 2000, "prescribed circumstances" under s.95(2) of the 1999 Act are defined. For the purpose of this case, a person is within those prescribed circumstances if they are applying for asylum support for themselves alone and they fall within regulation 4(4). The Claimant was applying for support for himself and would have fallen within regulation 4(4)(b) if at the time of the determination of his application he was a person "to whom social security benefits apply". For the purposes of regulation 4(4) a person is a "person to whom social security benefits apply" if (as relevant to the present case) he is a person who "by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 is not excluded by section 115(1) of the Act from entitlement to" a range of benefits.

47. The Claimant had indefinite leave to remain and so was not excluded from the range of benefits by reason of section 115 of the 1999 Act. However, that non-exclusion did not arise "by virtue of regulation 2" of the specified 2000 Regulations because he did not fall within the Schedule to those Regulations. Accordingly, in my judgement, he was not a person in prescribed circumstances within the meaning of s.95(2) of the 1999 Act.

48. Nevertheless, for the reasons given, at all relevant times up to 22 January 2019, the Claimant was not excluded from benefits, including housing benefit, and so he had the means of obtaining adequate accommodation if released and therefore was not destitute.

49. This was also the express finding of the First-tier Tribunal on 30 October 2018 [1/E167 at paragraph 22]. I respectfully disagree with the Tribunal Judge that the operation of Regulation 4 of the Asylum Support Regulations 2000 also excluded the Claimant from asylum support, but that does not assist the Claimant. It is clear that he did not meet the all the conditions necessary to allow for the provision of support under s.95 of the 1999 Act. The Tribunal Judge included the following within her judgment, "The appellant should contact the welfare services within his detention centre to establish how he might apply for mainstream benefit and assistance with housing benefit before he is released." She pointed out that the Secretary of State had confirmed the Claimant's status as continuing to have indefinite leave to remain on a number of occasions.

50. The Claimant's solicitor did contact the Welfare department for assistance, which was an appropriate step to take. Two days after the First-tier Tribunal's decision the Claimant's solicitors also wrote to the Secretary of State seeking an end to his detention but also seeking reconsideration of the Claimant's "eligibility for Immigration Act 2016 Schedule 10(9) accommodation". This was not the approach that had been advocated by the Tribunal Judge. Moreover, Schedule 10, paragraph 9 applies when a person "is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition" and " the person would not be able to support himself or herself at the address unless the power [to give support] were exercised". As of 1 November 2018, when the Claimant's solicitors wrote their

letter, he was not on immigration bail, let alone with a condition requiring him to reside at a specified address. In response the Secretary of State wrote on 20 November 2018, adopting the approach of the CCAT (Accommodation Team, Liverpool), namely that the Claimant had indefinite leave to remain status and therefore had access to support, including benefits, to help him to provide accommodation. Accordingly, he would be able to support himself at any specified address if the power under Schedule 10 were not exercised. The letter also states, "your client is required to produce a bail address for the Immigration Judge's consideration before his release on bail which was previously granted in principle." It seems very clear that the Claimant was not eligible for support under paragraph 9 of Schedule 10 to the 2016 Act in the circumstances. He did not have bail subject to a requirement of residence at a specific address and, if he had enjoyed bail on those terms, he would have had the means to support himself at that address because he was entitled to benefits, including housing benefit.

51. For the avoidance of doubt, it is clear in my judgement that Schedule 10 did not apply at the earlier date of 16 May 2018. At that time the Claimant was granted bail on condition of being offered schedule 10 accommodation. He was however entitled to benefits and so would have been able to support himself at an address if one had been specified. Further, since no specific address was identified in the bail application or grant of bail, it is difficult to see how Schedule 10 would be engaged, notwithstanding the reference to it in the condition for bail granted by the First-tier Tribunal.

52. Mr Khubber sought to construct an argument that the Secretary of State was under a duty to provide accommodation support on a temporary basis pending the receipt of benefits. He relied on page 55 of the Home Office guidance on Immigration Bail, published August 2018, where it states, "The power under paragraph 9 may be used to provide temporary accommodation pending a local authority's assessment of whether it has a duty to provide accommodation." He argued that there was no reasonable basis to exclude the ability to grant temporary accommodation whilst the Claimant is seeking to secure advice to obtain assistance. In fact, the Claimant and his advisors did not, so far as I am aware, approach the local authority and so there was no pending assessment. Furthermore, the Secretary of State may only exercise a power under paragraph 9 of Schedule 10, even on a temporary basis, if the conditions under paragraph 9 are met. They were not met in this case.

53. For these reasons I am quite satisfied that grounds 2 to 4 are not arguable and do not have a realistic prospect of success. Applications for accommodation and support, including the request made on 1 November 2018, were properly and lawfully dealt with by the Secretary of State. The First-tier Tribunal properly dismissed the Claimant's appeal against the First Defendant's refusal of the Claimant's application for s.95 support. Deputy High Court Judge John Howell QC was right to refuse permission on those grounds and I dismiss the renewed application for permission.

## GROUND ONE – UNLAWFUL DETENTION

*Legal Principles*

54. The Secretary of State's power to detain the Claimant was under paragraph 2(3) of Schedule 3 to the 1971 Act which allows for detention of a person in respect of whom there is a deportation order in force, pending his removal or departure from the United

Kingdom. The exercise of the power to detain is subject to well-established limitations. Known as the *Hardial Singh* principles, they were set out clearly by the Supreme Court in *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245, [2011] UKSC 12; 1 AC 245 per Lord Dyson at [22]:

> "(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."

55. Lord Dyson set out how those principles are to be applied, stating at [103]:

> "A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place … 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…if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful."

56. He referred to those factors that are relevant to the determination of a reasonable period at [104]. The non-exhaustive list included the length of the period of detention, the nature of the obstacles which stand in the path of the Secretary of State so as to prevent a deportation, the diligence, speed and effectiveness of steps taken by the Secretary of State to surmount the obstacles, the conditions of detention and effect of detention upon the detainee and his or her family, the risk that if released they would abscond, and the danger that if released they would commit criminal offences.

57. At [121] of his judgment Lord Dyson said, "The risks of absconding and re-offending are always of paramount importance*."* When a person is in detention and pursuing an appeal then,

> "… in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one."

58. In *R(MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112, at [65] Richards LJ held that,

> "There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or

> period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all …. There must be a *sufficient* prospect of removal to warrant continued detention when account is taken of all other relevant factors."

59. An assessment of the lawfulness of detention, and continued detention, has to be conducted on a case by case basis and depending on the facts of each case. The Secretary of State bears the burden of proof to justify detention. The court must form its own judgment rather than reviewing on *Wednesbury* grounds a decision or judgment made by the Defendant. There are no absolute time limits. The Court should make its assessment on the basis of circumstances as they presented themselves to the Secretary of State at the time, rather than with the benefit of hindsight – *Fardous v Secretary of State of the Home Department* [2015] EWCA Civ 231 at [42].

60. The courts have recognised that there may be a lapse of time between the point when it becomes clear that detention is no longer required to effect removal and the end of detention. The Secretary of State must act reasonably, but there will be allowance for the need for decision-making and to make arrangements – *FM v Secretary of State for the Home Department* [2011] EWCA Civ 807.

*The Claimant's Case*

61. The Claimant contends that the second and third *Hardial Singh* principles have been breached in his case, that his detention was unlawful under public law principles, and that it was contrary to Article 5 of the European Convention on Human Rights. The Claimant does not challenge the detention on the first or the fourth *Hardial Singh* principles.

62. Mr Khubber, Counsel for the Claimant, submits that the detention was unlawful from the beginning because there was a slender hope of removal rather than a realistic prospect, there was known to be an appeal process ongoing, and difficulties with the ETD, the Claimant was suffering serious mental ill health, the Claimant had a clear incentive not to abscond, namely to pursue his appeal and, in any event, the risk of absconding could be met with stringent conditions such as residence and reporting. All these matters were relevant to the second *Hardial Singh* principle. Additionally, in relation to the third *Hardial Singh* principle, Mr Khubber submits that it should be have been evident that there was not a realistic prospect of removing the Claimant within a reasonable time.

63. In the alternative, Mr Khubber submits, detention became unlawful by 18 May 2018, which was 48 hours after the first conditional grant of bail. If not then, detention became unlawful by 7 July 2018, again shortly after the further conditional grant of bail. In the further alternative, the detention became unlawful by 1 November 2018, 48 hours after the Claimant had lodged his application for permission to appeal to the Upper Tribunal.

*Policy Documents*

64. Two Home Office policy documents are relevant to consider. The first is known as Chapter 55 of Enforcement Instructions and Guidance. It begins with the assertion

that "there is a presumption in favour of immigration bail and, wherever possible, alternatives to detention are used." Decisions to detain should be "properly evidenced and records should be kept of fully justified explanations and reasoning behind the decision". Detention should be used "sparingly and for the shortest period necessary." At 55.3.1, factors influencing a decision to detain are set out. They reflect the *Hardial Singh* principles and the *Lumba* judgment.

65. The Home Office "Immigration Act 2016: Guidance on adults at risk in immigration detention, July 2018" states at paragraph 3,

> "The clear presumption is that detention will not be appropriate if a person is considered to be "at risk". However it will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them."

66. At paragraph 9 of the Guidance three levels of evidence of risk are identified. Level 1 is where there is a self-declaration of being an adult at risk. This should be afforded limited weight. Level 2 is where there is professional or official documentary evidence indicating that the individual is an adult at risk. This should be afforded greater weight. Level 3 is appropriate where there is additional professional evidence that a period of detention would be likely to cause harm. This should be afforded significant weight.

*Evidence Relevant to the Decision to Detain and to Continue Detention*

67. As noted, the evidence of the Claimant's immigration history shows that he fabricated his initial asylum claim. After his initial asylum claim was dismissed he did not leave the jurisdiction.

68. The evidence also clearly shows a pattern of escalating criminal offending beginning in 2012 and culminating in an offence of robbery in 2017 for which he received a substantial prison sentence. His offending included failure to abide by community-based sentencing.

69. Whilst there is some evidence of a claim to a relationship and child within the UK, the weight of the evidence is that the Claimant had no family ties in the United Kingdom. It was not suggested at the hearing that he had any such ties.

70. The Claimant has a history of mental health difficulties. His medical records are within Volume 2 of the hearing bundle. They show problems with sleeping and with auditory hallucinations. Inconsistent self-reports of past drug use are recorded [2/A273 and 2/A275] and he had admitted to smoking "spice" whilst in detention [A2/266]. There is in fact some dispute, within the medical records, as to his true diagnosis. For example, on 27 July 2018 Dr Hillier, Psychiatrist records that he did not have a history of schizophrenia, but rather had psychotic depression. Counsel at the hearing did not take me to these records and it was not disputed that the Claimant had schizophrenia and was taking prescribed medication. I am content to accept that premise for the purposes of this judgment.

71. The Detention and Case Progression Reviews are detailed documents but they contain a great deal of repetition from previous reviews and the original Minute of a Decision to Detain. The Authorising Officer's comments appear also in the GCID case records, for example at [3/B109], sometimes following minutes of the case progression panel. Given that the CPP recommended release on three occasions whereas the Authorising Officers did not authorise release during the period of detention, there ought to have been specific reference to the CPP recommendations in the Authorising Officer's comments. This is what the Home Office guidance on Detention Case Progression Panels says should happen. However, the quality of the reasoning set out in the Detention and Case Progression Reviews is far better than that recorded for the CPP reviews.

72. Counsel for the Secretary of State, Mr Malik submitted, and I agree, that the Detention and Case Progression Reviews consistently show an engagement with the following matters:

    i) The presumption in favour of release in accordance with the policy documents.

    ii) The risk of absconding which was assessed as medium for all material purposes.

    iii) The medium risk of re-offending.

    iv) The Claimant's mental illness, his vulnerability and his level 2 status as an adult at risk.

    v) The Claimant's immigration history including his previous asylum claim, which had been dismissed as wholly fabricated, and his failure to comply with the adverse decision on that claim (before he was given indefinite leave to remain in 2010).

    vi) The progress of the appeal against deportation.

    vii) The progress with securing ETD.

    viii) The bail applications and the lack of identified accommodation.

    ix) The period of time in which the obstacles to removal of the Claimant could be expected to be surmounted.

73. The appeal process and ETD were the obstacles to removal. Having careful regard to all the evidence I make the following findings in relation to those matters.

74. The Claimant complied with the process for completion of ETD at all relevant times. The GCID documentation and Ms Hopper's statement demonstrate the efforts made by the Secretary of State to progress the ETD process, and the fact that this was delayed on occasion by events or failures at the Guinean Embassy that were beyond the Secretary of State's control. The Claimant's representatives helpfully provided some extracts from the Home Office's own on-line information about ETD requirements for Guinea from the Country Returns Guide, June 2019. It reveals "no established timescales" for obtaining ETD. The evidence from the Reviews demonstrates that the Secretary of State anxiously monitored the progress of the ETD.

The Guinean Embassy agreed to interview the Claimant on 7 August 2018 which was just over four months into his immigration detention, and did interview the Claimant on 21 November 2018, nearly seven months after he had been first detained. It authorised the ETD. That is not the end of the ETD process. The Guinean authorities would then have to produce the documentation itself. Indeed, Mr Khubber told the Court that the ETD has not, even now, been provided notwithstanding that it had apparently been authorised early in 2019. I have no evidence as to why there has been such further delay. However, I am satisfied that, in the absence of evidence to the contrary, once an interview has taken place then it can reasonably be expected that the decision on authorisation will follow shortly, and once the authorisation has been given then it can be expected that the documentation will be forthcoming. There was no such contrary evidence before the Secretary of State to suggest unusual delay should be expected in the Claimant's case.

75. In other cases there might be general information or awareness that a particular country will typically delay producing documentation after an interview or at other stages of the procedure, but I have not been provided with such evidence that delay can usually be expected from the Guinean authorities.

76. The Claimant's appeal against his deportation was delayed following an adjournment granted at his request. He applied unsuccessfully to adjourn it again at the First-tier Tribunal hearing. The evidence does not suggest that the Secretary of State knew that adjournment was likely. The Claimant's appeal failed. It was not obviously without merit but neither was it obviously a strong appeal. He was given permission to appeal to the Upper Tribunal and so it would be wrong to conclude that that appeal was without merit, although the Upper Tribunal ultimately dismissed it without much hesitation. Overall I would assess his prospects on his deportation appeal as being neither strong nor hopeless. The appeal ultimately failed and so it would be difficult to describe it as having merit. It should not necessarily have been assumed that the Claimant would appeal to the Upper Tribunal or bring this claim for judicial review. It was foreseeable that he might do so, but equally it was possible that he might choose not to do so. The length of time for the appeal process to be completed could not be predicted with precision. In fact, the appeal process was completed by 7 January 2019 and all appeal rights were exhausted by 22 January 2019, which was just less than 10 months after the start of immigration detention.

*The Decision to Detain*

77. Detention began on 29 March 2018. In considering whether detention was lawful from the beginning, I take into account the following factors and, as indicated, further findings.

    i) Detention should be used sparingly and only where it is justified. The Secretary of State recognised a presumption for release from the outset of the Claimant's detention.

    ii) It is not disputed in this case that the Secretary of State intended to deport the Claimant and that detention was for that purpose at all relevant times.

    iii) It is not contended that the Secretary of State failed to act diligently so as to breach the fourth *Hardial Singh* principle.

iv) The Claimant's immigration history and offending history gave rise to a significant risk that he would abscond should he be released from detention. This was properly assessed as being medium. Although the "high risk" box was ticked on a number of occasions I am satisfied that the text within the Detention and Case Progression Reviews shows that the risk was assessed as medium whilst the appeal process was ongoing, see for example [3/A18]. Had an address been identified, secured and approved at which the Claimant would have been compelled to reside upon his release, that would been a factor in reducing the risk of absconding. But that did not happen until his actual release in March 2019. I am satisfied that without a condition that the Claimant should reside at an approved address, there was at the beginning of his detention, and remained, a significant risk of the Claimant absconding upon release. He had a significant history of offending behaviour. His offending behaviour had escalated and it included non-compliance with community-based sentencing as well as a serious offence of robbery. This history was relevant not just to the risk of re-offending, but also to the potential for his absconding. His immigration history included a fabricated asylum claim and he had remained in the jurisdiction after his initial asylum claim had been rejected and until he was granted Indefinite Leave to Remain in 2010. His prospects on appeal against deportation, whilst not hopeless, were not strong either. The risk of his absconding was of paramount importance in the justification for his detention.

v) The lack of an address to which the Claimant could be released (until March 2019) was not, I find, due to any lack of diligence or unlawful conduct on the part of the Secretary of State. The Claimant was not eligible for accommodation support under s.4, s.95 or Schedule 10. He was entitled to benefits which could have provided support for him but I can find no evidence that he applied for them. It may be, as evidence from Mr Poulter indicates, that it was difficult to secure the assistance of agencies that might have been expected to be able to assist him to apply for benefits and support, but there is scant evidence of early or sustained attempts to engage with such agencies or a local authority.

vi) The Claimant's offending history gave rise to a significant risk of re-offending which was rightly assessed by the Secretary of State as being at a medium level.

vii) The Claimant was an adult at risk and vulnerable due to his mental health. This was an important matter bearing on the effect on him of detention. This was recognised and he was rightly assessed as being at "level 2" as defined by the Home Office's Adults and Risk policy. As such there was no professional evidence that detention was harmful to his mental health. The Claimant has not suggested that there was any such evidence, and has accepted level 2 as the correct level. The First-tier Tribunal was clearly anxious to impose a residence condition on any bail so as to afford him easy access to mental health services. It is not obvious that release from detention would have been beneficial to the Claimant's mental health. Nevertheless his vulnerability was an important factor to be weighed in the balance when considering questions of detention.

viii) There was a realistic prospect of the Claimant being removed pursuant to the deportation order. This was not a case where there was no "light at the end of

the tunnel". To the contrary, once the obstacles referred to below were surmounted, there was no reason to suppose that removal could not follow forthwith.

ix) There were two obstacles to the Claimant's removal: the appeal against the deportation order, and obtaining the ETD.

x) It could not be known, at the beginning of the period of immigration detention, precisely how long it would take to surmount those obstacles. However, the appeal process was ongoing, the appeal having recently been reinstated, and an interview had been requested for the ETD. There is no evidence to suggest that it should have been known that the Guinean ETD process would be likely to take an inordinately long time. It was reasonable to anticipate that the deportation appeal would be listed and heard within the next few months. In all the circumstances it was, I find, reasonable to expect these obstacles to be surmounted by about six months from the start of detention as was the Authorising Officer's recorded expectation.

xi) All these matters should be, and were, weighed to determine what was a reasonable time for detention and whether there was a sufficient prospect of removal within a reasonable time. Removal was not imminent and was likely to be several months away, but in all the circumstances, including the important factor of the risk of absconding, there was a sufficient prospect of removal within a reasonable time of 29 March 2018 to justify detaining the Claimant from that date.

78. In my judgment the decision to detain was reasonable and in accordance with the *Hardial Singh* principles. Detention was justified and the evidence clearly shows that the Secretary of State recognised the factors relevant to the decision to detain from 29 March 2018, engaged with them and weighed them in the balance, reasonably coming to her decision. The decision-making was in accordance with the policy documents.

*Continued Detention after Bail was Granted in May 2018*

79. Many of the considerations set out above continued to be relevant to the Claimant's continued detention until 22 March 2019.

80. In considering the lawfulness of continued detention at certain fixed points identified by Mr Khubber on the Claimant's behalf, I am mindful of three risks which I must avoid:

i) It is somewhat artificial to "stop the clock" and look at the evidence at a single point of time. I remind myself that time does not stand still and that the situation was constantly evolving. Decision-makers are entitled to take into account reasonable expectations of developments such as the listing of a court hearing, or news from the Guinean Embassy of a date for an interview, even if they do not yet know exactly when those developments will occur. The fact that such developments had not happened by a certain date is relevant, but it is important also to bear in mind realistic expectations. Depending on all the circumstances, the passage of time might mean that the prospect of

overcoming an obstacle and effecting removal is nearer rather than further away.

ii) On the other hand, the period of detention that has passed, and delays that have already occurred in overcoming obstacles to removal, must not be overlooked. They are relevant to the question of whether the period of detention was reasonable in all the circumstances, and to whether, at a particular point, the period within which there was a sufficient prospect of effecting removal, was reasonable. Depending on all the circumstances, a period of six months to effect removal might be a reasonable period at the beginning of a period of detention, but not if a year of detention has already passed. As Richards LJ said in *R(MH)* (above, at [68]): "As the period of detention gets longer, the greater the degree of certainty and proximity of removal I would expect to be required in order to justify continued detention." It is always important to consider all the circumstances including the length of detention to date.

iii) Whilst I will examine the lawfulness of continued detention at various fixed points, I must consider the lawfulness of the detention throughout the relevant period. If the evidence requires me to find unlawful detention at some point other than that identified by Mr Khubber, then I must follow the evidence and make the appropriate finding. Mr Khubber did not dispute this approach and provided the fixed dates to provide some focus on key developments.

81. Bail was granted by the First-tier Tribunal on 16 May 2018 but it was conditional on the Claimant being offered Schedule 10 accommodation approved by the Offender Manager within two weeks. As I have already determined, the Claimant was not eligible for accommodation support under Schedule 10 in May 2018. The Secretary of State had indicated as much when opposing the bail application. The fact that the Secretary of State did not provide accommodation and that the condition was not met, did not render the detention unlawful. Indeed the very fact that the Claimant was not eligible for accommodation provision under Schedule 10 meant that bail was refused. The First-tier Tribunal was therefore of the view, then, that continued detention was appropriate.

82. Mr Khubber did not contend that the fact that the First-tier Tribunal granted bail “in principle” rendered the detention unlawful. He submitted that it was a relevant consideration. I accept that. Likewise, the recommendations of the CPP were relevant to the decision to continue to detain. However, these were factors to be weighed alongside all the other relevant circumstances. I need not repeat the list of relevant factors that are set out above. They continued to be relevant as the detention continued. However, there were also changes that had to be taken into account.

83. By 18 May 2018 the appeal to the First-tier Tribunal had been set down for hearing on 9 August 2018. There does not appear to have been further progress in relation to the ETD but in my judgement there remained a sufficient prospect that the appeal and ETD would be concluded within the next few months. Having regard to all the relevant circumstances there was a sufficient prospect of removal within a reasonable time as at 18 May 2018. The period of detention remained reasonable and continued detention was justified.

*Continued Detention after Bail was Granted in July 2018*

84. Unfortunately, the Secretary of State had floated the possibility of an application for accommodation/support under s.4 of the 1999 Act. For the reasons given, the Claimant was not eligible for such support. Nevertheless, he applied for it and, on 5 July 2018, the First-tier Tribunal granted bail conditional on his being offered s.4 accommodation and the accommodation being approved within two weeks. The accommodation was not provided because he was not eligible for it under that provision. It is unfortunate that this was not recognised earlier by all concerned. Bail was accordingly refused. I have already noted that the First-tier Tribunal judge recorded, when refusing bail, that she considered detention to be proportionate. In doing so she took into account matters such as the immigration history, risk of absconding, the Claimant's schizophrenia and his lack of family ties in the United Kingdom. The absence of suitable accommodation in which to release the Claimant was clearly a relevant factor in determining whether his continued detention was justified.

85. The CPP had made its first recommendation on 13 June 2018. Early in July a further ETD pack was sent to the Guinean Embassy. Later in July an interview appointment was made for 7 August.

86. By early July 2018 the Claimant had been in immigration detention for over three months.

87. Again, the continuing factors such as risk of absconding pertained. Acknowledgement of a presumption against detention was recognised throughout. The continuing factors to be considered were repeated in the Detention and Case Progress Review on 29 June 2018. The fact that the Authorising Officer did not agree with the CPP recommendation does not mean that the detention was unlawful. Indeed, the CPP records do not show the same level of detailed engagement with all the relevant factors as do the Review records. The CPP record at [3/B108] identifies no factors at all in favour of maintaining detention, which was clearly not the case given, amongst other factors, the risk of absconding. In those circumstances, it is difficult to give the CPP's recommendation much weight. Whilst bail had been granted in principle, it was later refused and the First-tier Tribunal Judge held that continued detention was proportionate.

88. In my judgement continued detention from early July 2018 was justified and lawful bearing in mind all the factors, and the period of detention was reasonable. The Secretary of State gave proper consideration to them and to the balancing exercise that it was necessary to perform. Progress had been made in relation to the appeal and the ETD. There was sufficient prospect of removal within a reasonable time. Whilst removal was not imminent and was likely be several months away, the risks of absconding and re-offending, and the absence of specified and approved accommodation to which the Claimant could be released, were, when weighed alongside all the circumstances, factors that rendered reasonable the time within which there was a realistic prospect of effecting removal.

*Continued detention from 1 November 2018*

89. By 1 November 2018 the First-tier Tribunal had promulgated its decision to dismiss the Claimant's appeal against his deportation but he had applied for permission to appeal to the Upper Tribunal. It was not inevitable that he would be granted

permission. The face to face interview at the Guinean Embassy had been delayed. On 6 November it was re-scheduled for later that month. The Claimant had remained in immigration detention for just over seven months. The CPP had twice recommended release.

90. Again, I am satisfied that the Authorising Officer(s) conducting the Detention and Case Progression Reviews to this point, consistently engaged with all the relevant issues, the presumption for release, and the developing situation. Delays to the appeal process had been at the Claimant's instigation. Delays in the ETD process had been due to the Guinean Embassy but the fact that they had occurred was something that had to be taken into account. Nevertheless, in my judgement, as at the beginning of November, whilst mindful of the time that had elapsed, and that it had already been longer than had been anticipated at the beginning of the period of detention, there were sufficient grounds for believing that the obstacles to removal could soon be surmounted, within a matter of weeks.

91. The CPP's second recommendation for release was given on the basis that there was no prospect of "imminent release", a test which sets the bar somewhat lower than the *Hardial Singh* principles, and the Chapter 55 guidance, indicate. There was no obligation on the Secretary of State to adopt that recommendation, particularly since the Authorising Officer(s) had continued to engage much more thoroughly in the balancing exercise required to justify continued detention. As before there was no accommodation into which the Claimant could be released. That continued to be relevant to the risk of absconding. Again, I find that the period of detention was reasonable and that there was sufficient prospect of removal within a reasonable time. The continued detention of the Claimant from the beginning of November was justified and lawful.

*Continued Detention to 22 March 2019*

92. The Claimant's appeal to the Upper Tribunal was dealt with promptly. The face to face interview at the Guinean Embassy took place on 21 November 2018. The Claimant chose to bring this judicial review claim which presented an additional obstacle, but an order was made to expedite it.

93. Throughout the period of detention, up until 22 March 2019, proper consideration was given by the Secretary of State to the justification of continued detention. The records of the Reviews demonstrate that. They are detailed and they show an engagement with the relevant issues.

94. Once the Claimant's appeal rights were exhausted on 22 January 2019, he became eligible for accommodation support under s.4 of the 1999 Act. Within a reasonable time bail was granted and accommodation identified and approved. He was then released from detention on reporting and residence conditions. Those conditions were relevant to the risk of absconding and were clearly material to the decision of the First-tier Tribunal to grant bail.

95. I can identify no undue delay nor any breach of the *Hardial Singh* principles during the last weeks of the Claimant's period of immigration detention. There was no identified accommodation into which to release the Claimant until towards the end of that period. The risk of absconding remained high. Indeed, as it became more likely

that the appeal against deportation would fail, the risk of absconding, if anything, increased.

96. Considering the whole period of detention, and bearing in mind the burden of justification lies with the Defendant, I do not find detention to have been unlawful at any stage. Whilst it continued for just under one year, there were unanticipated delays in securing ETD and concluding the appeal process. It is true that there was confusion on the part of various parties about the Claimant's eligibility for accommodation support, but in fact he was not eligible for the reasons set out above. Without bail to a specified and approved address, the risk of absconding was very real. The continued detention was justified throughout the period having regard to the balance of factors that ought to have been, and were, taken into account.

*Public Law Grounds and Article 5*

97. A public law error bearing directly on the decision to detain will render the detention unlawful even where there has been no breach of the *Hardial Singh* principles: *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299. Departures from published policy may render detention unlawful

98. For the reasons already given, in my judgement, the Secretary of State acted in accordance with the Chapter 55 EIG and the Adults at Risk published policies. The Claimant's vulnerability was recognised throughout and the Secretary of State engaged in the balancing exercise that is set out in the policies.

99. The Claimant's grounds for judicial review do not rely on published policy in relation to the functioning of the Case Progress Panels, but during the hearing it was observed that the detention Reviews did not expressly refer to the CPP's recommendations. That is so, but the Authorising Officers' reasons for maintaining detention appear in the GCID records alongside the CPP recommendations and can be read as expressing a different view from the CPP having regard to all the circumstances, and with an awareness of the CPP's position. I have already commented that the level of reasoning and engagement with the relevant factors was better shown in the Reviews than in the CPP records. The Authorising Officers engaged with the factors that the CPP had raised but simply came to a different, and in my judgment, justified view. In doing so they fully complied with the published policies on detention.

100. The delay in providing accommodation was not unlawful. The policies were followed, and the decisions on detention were made on the basis of detailed reasons which were recorded. The detention was not unlawful on public law grounds.

101. For the same reasons as set out above, the Claimant's detention was not contrary to Article 5 for the European Convention on Human Rights.

## CONCLUSION

102. The renewed application for permission to claim judicial review on grounds 2 to 4 relied on by the Claimant is dismissed.

103. The Claimant's claim for judicial review on the grounds of his unlawful detention between 29 March 2018 and 22 March 2019 is dismissed.

104. I would like to record my gratitude to the Claimant's solicitors for the preparation of the papers in the case and to both Counsel for their helpful submissions.