Neutral Citation Number: [2019] EWHC 758 (Admin)

Case No: CO/1296/2018, CO/3924/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2019

Before :

MR JUSTICE MURRAY

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Between :

(1) BABU MORITA
(2) SHOLA BADMUS
(3) GW
(4) OKWUDILI CHINZE
(5) GRANVILLE MILLINGTON — **Claimants/ Applicants**

- and –

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant/ Respondent**

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- -

Mr Hugh Southey QC and Mr Nick Armstrong (instructed by **Duncan Lewis (Solicitors) Limited**) for the **Claimants/Applicants**
Mr David Blundell and Mr Richard Turney (instructed by **The Government Legal Department**) for the **Defendant/Respondent**

Hearing dates: 4 and 5 December 2018

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Approved Judgment

Mr Justice Murray :

1. I have before me two applications for permission to apply for judicial review in relation to two linked claims, that came before me at a "rolled-up" hearing to consider permission and, if permission is granted, the substantive claim for judicial review. Each applicant has been detained under immigration legislation and held in an immigration removal centre ("IRC" or "removal centre") in England, where he undertook paid activities for which he was paid £1 per hour under the current regime applicable to such activities.

2. The purpose of each application is to challenge by way of judicial review the decision of the respondent, the Secretary of State for the Home Department ("the Secretary of State") not to increase the rate paid for paid activities undertaken by detained persons in removal centres and not to modify the payment regime to provide more flexibility ("the 2018 Decision").

3. The 2018 Decision was taken on or around 3 May 2018, following a review commenced by the Secretary of State in 2017 and completed on 30 April 2018 ("the Pay Review"), the results of which are set out in his report entitled "Review into the rate of pay within immigration removal centres" ("the Pay Review Report"). The 2018 Decision was communicated to Duncan Lewis (Solicitors) Limited ("Duncan Lewis"), solicitors for the applicants, by letter dated 3 May 2018.

Procedural History

4. On 25 May 2017 Duncan Lewis had sent a pre-action protocol letter to the Secretary of State on behalf of six of its clients who had been detained persons undertaking paid activity in removal centres, none of whom is an applicant in relation to these claims. In that letter, Duncan Lewis set out arguments broadly along the lines pursued in these proceedings.

5. In his response dated 15 June 2017 to the pre-action protocol letter, the Treasury Solicitor on behalf of the Secretary of State stated that he considered the proposed claim to be without merit and that accordingly the Secretary of State did not intend to amend the pay regime for paid activity in removal centres in the ways sought by Duncan Lewis's clients. He did note, however, that the Secretary of State intended to review the rate of pay for paid activity in removal centres and would update, if necessary, a related policy equality statement, to which I will return in due course. The Secretary of State considered that, notwithstanding the lack of legal merit in the proposed claim, those steps would address in full the underlying complaint of Duncan Lewis's clients.

6. In further correspondence in June 2017 between Duncan Lewis and the Treasury Solicitor, the Treasury Solicitor confirmed that the Secretary of State's aim was to complete the Pay Review by September 2017. The Pay Review was not, however, completed by that date.

7. On 23 March 2018 Mr Morita, another client of Duncan Lewis, filed his claim to challenge by way of judicial review the removal centre pay regime (Claim No CO/1296/2018) ("the Morita Claim").

8. As already noted, the Secretary of State completed the Pay Review on 30 April 2018. On 1 May 2018 the Treasury Solicitor on behalf of the Secretary of State filed an Acknowledgment of Service in relation to the Morita Claim, attaching a copy of the Pay Review Report. The Treasury Solicitor accepted that the Pay Review Report was "material" to the Morita Claim and acknowledged that Mr Morita might wish to file an application to amend his Grounds of Claim in light of it.

9. By consent on 22 May 2018 it was ordered that Mr Morita could file and serve an application to amend his Grounds of Claim and the Amended Grounds of Claim by 4:00pm on Monday, 4 June 2018, with the Secretary of State permitted to file and serve his Summary Grounds of Defence within 21 days of service of the Amended Grounds of Claim.

10. On 27 June 2018, the Secretary of State filed his Summary Grounds of Defence. As they were required to be filed by 25 June 2018, he applied for a short extension of time. Mr Morita then sought permission to file a Response to the Summary Grounds of Defence.

11. On 16 July 2018, on a review of the papers, Lang J ordered that the Morita Claim be listed for a rolled-up hearing and gave case management directions.

12. By consent order sealed on 29 August 2018 the parties agreed that the Secretary of State could file detailed Grounds of Defence and any written evidence by 20 September 2018.

13. On 14 September 2018 Mr Morita filed an application seeking to have Mr Shola Badmus, GW, Mr Okwudili Chinze and Mr Granville Millington added as claimants to his claim, together with supporting witness statements from each of them. The Secretary of State resisted the application, filing a response to the application dated 20 September 2018.

14. On 21 September 2018, on a review of the papers, Cockerill J dismissed the application to add Messrs Badmus, GW, Chinze and Millington as claimants to the Morita Claim.

15. On 5 October 2018 Messrs Badmus, GW, Chinze and Millington filed their claim to challenge by way of judicial review the removal centre pay regime (Claim No CO/3924/2018) ("the Badmus Claim"). In their Claim Form, they also made an application for the Badmus Claim to be linked to the Morita Claim and then for the four of them to be substituted for Mr Morita as the claimants in the Morita Claim.

16. On 26 October 2018, on a review of the papers and by consent of the parties, Lang J ordered that the Morita Claim be linked with the Badmus Claim and also ordered that Messrs Badmus, GW, Chinze and Millington be added as the second, third, fourth and fifth claimants, respectively, in the Morita Claim. At the same time, she refused the application that they be substituted for Mr Morita in the Morita Claim.

17. Lang J noted in her reasons that matters had moved on since Cockerill J had refused permission to add the additional claimants to the Morita Claim. It appeared that Mr Morita had either lost or was likely to lose his legal funding following an award of damages made to him by the Secretary of State in respect of unlawful detention. He

was reluctant, in that case, to continue as a litigant in person. Lang J accepted that this was a test case, with common issues across the two claims, hence the desirability of linking the claims and adding new claimants to the earlier claim. She was not, however, happy to substitute the new claimants for Mr Morita on the basis of an application by the new claimants, made in the context of their own claim, without a document from Mr Morita confirming his consent to that course and confirming that he had been advised of his options and understood the consequences of his decision to be removed from the claim. He could file the requisite notice if he wished to be removed from the claim.

18. On the same day, in relation to the Badmus Claim, Lang J made an order for the Badmus Claim to be linked with the Morita Claim and to be adjourned for both claims to be listed in court to be heard at a rolled-up hearing on 4 and 5 December 2018, with a time estimate of two days. She also gave case management directions for the hearing, including provision for the Secretary of State, if so advised, to file and serve Detailed Grounds of Defence and evidence in relation to the Badmus Claim.

19. On 13 November 2018 the parties signed a consent order seeking to stay the Morita Claim behind the outcome of the Badmus Claim. I approved the consent order on the first day of the hearing. The result is that the Morita Claim remains stayed pending any application on notice. References to the applicants in the remainder of this judgment exclude Mr Morita.

20. The Badmus Claim came on for hearing before me on 4 December 2018. Rather than hear and rule separately on the application for permission, I invited each party to make all of their submissions in relation to the Badmus Claim, both as to permission and as to the substantive claim.

Background

21. There are a number of removal centres in the United Kingdom, most of which are in England. The management of most of the removal centres is contracted out by the Secretary of State to private companies with some being operated by HM Prison & Probation Service ("HMPPS"). Healthcare at each removal centre is contracted to an appropriate healthcare service provider.

22. Part VIII of the Immigration and Asylum Act 1999 ("the 1999 Act") sets out the basic statutory provisions governing removal centres and the custody and movement of detained persons. Section 153 of the 1999 Act empowers the Secretary of State to make rules for the regulation and management of removal centres, including with respect to the safety, care, activities, discipline and control of detained persons.

23. Under various provisions of the 1999 Act, including section 153, the Secretary of State made the Detention Centre Rules 2001 (SI 2001/238) ("the 2001 Rules"), which came into force on 2 April 2001.

24. Removal centres are regulated and managed in accordance with:

    i) the 2001 Rules;

ii) Detention Services Orders ("DSOs"), in which the Secretary of State sets out guidance on a variety of issues relating to the management of removal centres; and

iii) the Detention Services Operating Standards manual, another document published by the Secretary of State setting out operating standards for the removal centres, complementing and supplementing the 2001 Rules.

25. Prior to 10 February 2003 removal centres were known as "detention centres". That was changed by section 66(1) of the Nationality, Immigration and Asylum Act 2002 and should be borne in mind when reading the excerpts from the 2001 Rules below.

26. Rule 3 of the 2001 Rules sets out the purpose of removal centres:

> "**3 Purpose of detention centres**
>
> (1) The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression.
>
> (2) Due recognition will be given at detention centres to the need for awareness of the particular anxieties to which detained persons may be subject and the sensitivity that this will require, especially when handling issues of cultural diversity."

27. The Rules governing the welfare and privileges of a detained person held in a removal centre are set out in Rules 12 to 19 of the 2001 Rules. Rule 17 governs activities, including paid activities, that are to be made available to detained persons:

> "**17 Regime and paid activity**
>
> (1) All detained persons shall be provided with an opportunity to participate in activities to meet, as far as possible, their recreational and intellectual needs and the relief of boredom.
>
> (2) Wherever reasonably possible the development of skills and of services to the centre and to the community should be encouraged.
>
> (3) Detained persons shall be entitled to undertake paid activities to the extent that the opportunity to do so is provided by the manager.

> (4) Detained persons undertaking activities under paragraph (3) shall be paid at rates approved by the Secretary of State, either generally or in relation to particular cases.
>
> (5) Every detained person able to take part in educational activities provided at a detention centre shall be encouraged to do so.
>
> (6) Programmes of educational classes shall be provided at every detention centre.
>
> (7) Arrangements shall be made for each detained person to have the opportunity of taking part in physical education or recreation, which shall consist of both sports and health-related activities.
>
> (8) A library shall be provided in every detention centre, which will meet a range of cultural, ethnic and linguistic needs and, subject to any direction of the Secretary of State in any particular case, every detained person shall be allowed access to it at reasonable times."

28. As can be seen, Rules 17(3) and 17(4) bear directly on paid activities. Prior to 2006, paid activities were not available to a detained person held in a removal centre due to a concern that the payment would attract the application of the national minimum wage. This risk was eliminated by section 59 of the Immigration, Asylum and Nationality Act 2006, which came into force on 31 August 2006 and which inserted section 153A into the 1999 Act and section 45B into the National Minimum Wage Act 1998.

29. In 2008 the Secretary of State approved a proposal to introduce a "paid work strategy" for the removal centres. This was reflected in DSO 15/2008 entitled "Detainee Paid Work", which was issued on 5 December 2008. The DSO referred to Rule 17 of the 2001 Rules and set out conditions under which detained persons could be provided with opportunities to engage in paid work in removal centres, including the following:

    i) A detained person should not be offered more than 15 hours paid work per week without special approval by the responsible Home Office official.

    ii) Paid work should only be offered to detainees who are actively co-operating with the Home Office in relation to resolution of their immigration case and only to those on the "enhanced level" of the enhancements scheme operated by the removal centre operator, the latter being a scheme intended to incentivise co-operative and constructive behaviour by detained persons. Examples of failure to co-operate would include a refusal to complete application forms, a failure to attend an interview without good reason and disruptive behaviour but would not include mounting a legal challenge to an immigration decision.

iii) Any payment for paid work would be in addition to the allowance paid to detainees (then and now, 71p per day or £5 per week).

iv) There would be two tiers of pay rate, routine work to be paid at £1 per hour and specified projects to be paid at a rate of £1.25 per hour.

v) Pay rates would be reviewed annually by the Secretary of State.

30. In her witness statement dated 28 September 2018 given on behalf of the Secretary of State, Ms Frances Hardy, a Deputy Director at the Home Office, employed in the role of Head of Risk and Assurance since November 2017, explained the background to the decision reflected in DSO 15/2008 at paragraphs 21 to 23 as follows:

> "21. … The reasons for the imposition of standard pay rates (and the level at which they are set) are summarised in internal documents dated June 2008 and 3 July 2008 …. In short, the strategy was required because:
>
> a. Paid work was available in some, but not all, IRCs;
>
> b. Where paid work was available, there was inconsistency in pay levels, with some work being paid at 25p/hour;
>
> c. Detainees who had been provided with paid work might not be able to have paid work if transferred to another centre, which might present a risk of non-compliance with transfers;
>
> d. There was a failure to link compliance with the ability to work.
>
> 22. The decision to impose a standard rate of pay was a policy position taken for operational reasons. Variable or locally agreed rates of pay at different IRCs or within an individual IRC could favour or discriminate against detainees on an arbitrary basis depending on their place of detention. Distinguishing between detainees may also cause resentment, particularly if work at higher rates is not available, and might present a risk of non-compliance with transfers between IRCs (i.e. from an IRC with a higher rate of pay to one with a lower one) or demands to be transferred from an IRC with a lower rate of pay to one IRC with a higher rate. The strategy was intended to standardise pay rates and cap the amount of work that could be undertaken by an individual detainee, to maximise opportunities for the greatest number of detainees. The ability to work was to be linked to compliance.

> 23. The reasons for setting the standard pay rate at £1.00 per hour were also explained:
>
> a. The position of prisoners, who are generally paid c. 20p per hour for work, could be distinguished;
>
> b. An hourly rate of 75p was preferred but was rejected because work was already being paid at £1.00 per hour or higher, and setting the rate at this level would result in pay cuts for many detainees which would present operational risks;
>
> c. It was noted that setting the pay rate at 75p or higher would increase the costs of operating the centres."

31. A similar account of the origin of and rationale for the decision to impose a standard rate of pay for paid work undertaken by detained persons in removal centres is set out in paragraphs 10 to 16 of the Pay Review Report.

32. A Policy Equality Statement was completed in March 2012 to demonstrate that DSO 15/2008 complied with section 149 of the Equality Act 2010. It indicated that the next review would occur in March 2015, however that did not happen.

33. Following a review of the paid work regime in 2012, a new DSO governing paid work, DSO 01/2013, was issued on 26 March 2013. It is broadly consistent with DSO 15/2008, with the principal exception that the maximum number of hours of paid work that could be offered was raised to 30 hours. The rates of pay remained the same.

34. One of the demands made by Duncan Lewis in its pre-action protocol letter dated 25 May 2017 to the Secretary of State was that he confirm whether there was a Policy Equality Statement in relation to DSO 01/2013 "and/or to confirm any other means by which it is alleged that the duty in section 149(1) of the [Equality Act 2010] has been discharged." In his response dated 15 June 2017, the Treasury Solicitor for the Secretary of State confirmed his decision to review and, if necessary, update the Policy Equality Statement dated March 2012, which had related to DSO 15/2008.

35. At paragraph 4 of her witness statement, Ms Hardy explained that the Home Office has recently begun to use the term "paid activity" in preference to "paid work" as the former is the term used in Rule 17 of the 2001 Rules and because "it better reflects the nature of the full range of voluntary activities undertaken by individuals in detention".

36. Mr Hugh Southey QC, counsel for the applicants, suggested there was something "Orwellian" about the change of terminology, which, as acknowledged by Ms Hardy, occurred after Duncan Lewis had sent their pre-action protocol letter of 25 May 2017. The Secretary of State does not, however, appear to dispute that the paid activity carried out under the paid activity regime is "work". None of the specific examples of paid activity referred to, for example, in paragraph 11 of Ms Hardy's witness

statement or in paragraph 17 of the Pay Review Report would fall outside the normal meaning of that term. A person undertaking such an activity outside a removal centre would be unlikely to undertake such work without payment, unless it was being done for personal, family or charitable purposes. In this judgment, I generally use the term "paid activity" rather than "paid work", simply to reflect the current terminology used by the Home Office.

37. In January 2016 the Secretary of State published a report that he had commissioned from Mr Stephen Shaw, a former Prisons and Probation Ombudsman, entitled "Review into the Welfare in Detention of Vulnerable Persons – A report to the Home Office" (CM 9186) ("the 2016 Shaw Report"). At pages 193-198 of the 2016 Shaw Report, Mr Shaw set out a list of 64 recommendations to the Home Office. Recommendation 31 (at page 195) reads:

> "Recommendation 31: I recommend that the Home Office reconsider its approach to pay rates for detainees in light of my comments on the benefits of allowing contractors greater flexibility."

38. In response to this recommendation, the Secretary of State conducted the Pay Review, the results of which are set out in the Pay Review Report. In paragraph 3 of the Pay Review Report, the Secretary of State refers to the Duncan Lewis pre-action protocol letter dated 25 May 2017 as part of the background to the Pay Review. The Secretary of State's response to the pre-action protocol letter is set out in Appendix B to the Pay Review Report.

39. Part of the Pay Review involved a comparison of the removal centre paid activity regime with the regime for paid activities in the prison estate operated by HMPPS. The results of this comparison are set out at paragraphs 21 to 25 of the Pay Review Report.

40. Paragraph 17 of the Pay Review Report summarises the types of paid activity available under the regime:

> "17. Paid activities provide detainees with the opportunity to earn extra money before they depart from the UK, and some types of paid activities require training and certification (e.g. in food hygiene) which detainees can use in their home countries. Examples of paid activities are wide ranging and including wing orderly, sports hall assistant, safer community orderly, refectory cleaner, music room orderly, library orderly, kitchen orderly, gym assistant, interpreter, diversity orderly, classroom assistant, chapel assistant, barber and activities assistant. Where possible detainees are encouraged to undertake relevant work-related certification which detainees can use in their home countries. For example, detainees undertaking paid activities as a kitchen assistant in [a removal centre] must have obtained a level 1 catering certificate for their first 8 weeks work and a level 2 catering certificate for continued employment beyond the initial 8 weeks."

41. Four recommendations for consideration by Home Office Ministers were set out in the Pay Review Report:

> "**Recommendation 1**: Strengthen contract provisions in relation to paid activities
>
> **Recommendation 2**: Ministers should be invited, subject to financial affordability, to decide between the following options:
>
> > **Option 1**: To bring the pay rates and weekly allowance for detainees in [removal centres] up to be in line with inflation, with an estimated annual cost to the Home Office of £290,000 per annum;
> >
> > **Option 2**: To bring the weekly allowance up to be in line with inflation, with an estimated annual cost of £145,000 per annum, but leave pay rates unchanged;
> >
> > **Option 3**: To bring the pay rates up to be in line with inflation, with an estimated annual cost of £145,000 per annum, but leave the weekly allowance unchanged; or
> >
> > **Option 4**: To leave the rates unchanged.
>
> **Recommendation 3**: Retain the current cap on weekly hours
>
> **Recommendation 4**: Maintain current position on compliance and remove the automatic ban on re-applying"

42. For present purposes, we are concerned only with Recommendation 2. On 3 May 2018 the Treasury Solicitor wrote to Duncan Lewis to confirm that Home Office Ministers had agreed to Recommendations 1, 3 and 4. In respect of Recommendation 2, they had decided to leave the rates unchanged, in other words adopting Option 4.

43. In paragraph 13 of her witness statement, Ms Hardy confirms that detainees continue to be paid a weekly allowance of £5 and any pay received for paid activity is in addition to that. The weekly allowance is not dependent on participating in paid activity. At paragraph 14 she notes that each removal centre has a shop where a range of goods are available, including "toiletries, tobacco products, international phone cards, snacks, drinks, writing materials and postage stamps". In paragraph 15 she notes that detainees do not pay for food or any of the activities or services provided to them in the removal centre, including "healthcare and medication, entertainment, hair dressing, laundry, initial consultation with legal advisors, or access to the internet".

Evidence

44. For the applicants, I was provided with a number of witness statements from the applicants and other detained persons concerning the work they undertook while detained in a removal centre. A common theme in these witness statements is that the level of pay for the work done made them feel exploited. For example, the final paragraph in the witness statement of a Czech national detained at Yarl's Wood IRC reads:

> "I just want pay that recognises the job that I do within the detention centre and to feel that my work is valued."

45. A number of the witness statements focus on the unpleasantness and difficulty of some of the cleaning work they undertake. Some of the detainees had previously had the right to work in the UK and compared their pay and conditions in the IRC unfavourably with the pay and conditions they had previously enjoyed before becoming subject to immigration detention. A number complained about how relatively expensive items were in the shop in the IRC, and set out various reasons why they needed money, including to send to family members. Another common theme in the witness statements is that the detainee undertook paid activity because he or she needed the money, rather than simply as a way of passing the time. Exhibited to the witness statements provided by each of the applicants is his account showing recent credits for his paid work and his allowance and debits for his purchases in the shop.

46. I was also provided with evidence relating to the development of the paid work or paid activity policy in IRCs, including excerpts from Hansard, excerpts from the two Shaw reports, excerpts from the contracts between the Secretary of State and various operators of IRCs, evidence relating to the regime for paid work in prisons for purposes of comparison, as well as correspondence between the parties and other relevant documents.

47. The principal evidence relating to the pay regime for paid activities included the Secretary of State's original proposal to introduce paid work in IRCs in June 2008, DSO 15/2008 and DSO 01/2013, the Policy Equality Statement prepared by the Secretary of State in March 2012 and in November 2017, the Pay Review Report and the witness statement of Ms Hardy.

48. The Pay Review Report summarises in paragraph 4 the evidence gathered for the Pay Review. It included evidence from questionnaires sent to the removal centre operators. The questionnaire responses for removal centres at Gatwick, Heathrow, Campsfield, The Verne, Dungavel, Yarl's Wood are set out in Appendix C. I note that the removal centre operators in general favour introducing more flexibility into the pay regime, the ability to offer different rates for different work and the ability to offer higher rates, and they provide reasons for these suggestions.

49. The Pay Review Report sets out at paragraphs 21 to 25 the principal features of the payment regime for work undertaken by prisoners in the prison estate. The rate per hour is in general terms considerably less than £1.00 per hour, but is variable according to a number of factors, in particular to encourage and reward a prisoner's constructive participation in the regime. The Governors of individual prisons have the power to set rates of pay for their particular prisons to reflect regime priorities. In addition, I was provided with Prison Service Order Number 4460 on Prisoner's Pay, two reports by the Howard League on Penal Reform on prison work published in 2010 and 2011, and a findings paper by HM Inspectorate of Prisons entitled "Life in prison: Earning and spending money" (January 2016).

The Applicants

50. Mr Badmus became subject to immigration detention on 3 June 2018, the release date of his custodial sentence at HMP Erlestoke. He was transferred from there to Brook House IRC on 5 June 2018 and transferred to Harmondsworth IRC on 9 July 2018. He was released on immigration bail on 9 October 2018. In light of his level of education, he was able to undertake paid activity at Harmondsworth IRC as a welfare "buddy", helping fellow detainees with a range of problems.

51. GW, a Jamaican national, became subject to immigration detention on 28 April 2018, the release date of his custodial sentence at HMP Chelmsford. He was transferred from there to Brook House IRC in July 2018. He was released on immigration bail on 8 November 2018. He had experience prior to his detention as a specialist cleaner and undertook cleaning as a paid activity while at Brook House IRC.

52. Mr Chinze, a Nigerian national, became subject to immigration detention on 21 December 2017, the release date of his custodial sentence at HMP Wandsworth. He was detained there until 12 January 2018, when he was transferred to Campsfield IRC. A few days after he arrived at Campsfield IRC, he started paid activity as a cleaner. He was quickly promoted to cleaning supervisor. On 24 January 2018, he was transferred to Colnbrook IRC. In light of his ability and level of education, he was eventually able, like Mr Badmus, to undertake work as a welfare "buddy". His work included organising legal advice surgeries and Home Office interviews for other detainees, as well as helping detainees with a range of other issues.

53. Mr Millington, a Trinidad and Tobago national, became subject to immigration detention on 18 July 2017, his release date in respect of the custodial sentence he was then serving at HMP High Point. He was transferred to The Verne IRC in August 2017, where he initially worked in the servery. His responsibilities included collecting food from the kitchen and cleaning. In November 2017 he was transferred to Brook House IRC, where he initially undertook paid activity as a cleaner. After a couple of months, he was able to undertake paid activity as a barber, an occupation for which he had trained in Trinidad and Tobago, which he had carried on when he first came to the UK and therefore in which he had considerable skill. He was released on bail on 1 October 2018, by which time he had completed 14 months of paid activity.

54. GW and Mr Millington each noted in his evidence that he had never seen a cleaner at his removal centre who was not a detainee.

Are the claims out of time?

55. The first issue to resolve is whether the claims are out of time. The applicants seek a declaration that the fixing of a flat rate of £1 per hour for paid activity and £1.25 per hour for special projects is unlawful. Although the challenge is ostensibly to the 2018 Decision, given that the fixing of those rates was effected most recently by DSO 01/2013, the relief sought is in substance an order quashing that DSO. If that is right, then it appears that the challenge is five years out of date.

56. The applicants rely on *R (DSD) v Parole Board* [2018] 3 WLR 829 at [167] for the principle that the time to challenge the policy runs from the date when the policy was applied to the applicants. In the *DSD* case at [167], the Divisional Court said:

> "We agree with the claimants that there is a distinction between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract."

57. The Divisional Court cited three cases as examples of cases falling into the first category and found that the *DSD* case itself fell into that category. The Divisional Court cited *R (Cukurova Financial International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin) as an example of a case falling into the latter category. In the *Cukurova* case, Moses LJ considered a judicial review challenge in 2007 to the Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226 ("the FCA Regulations"), which had come into force on 26 December 2003. At [29]-[30] of *Cukurova*, Moses LJ stated:

> "29. The Regulations were made on 10 December 2003 and came into force on 11 and 26 December 2003. At that stage, Cukurova had no possible reason to question the validity of those Regulations and no standing to do so. In my view, the date when the grounds to make the claim first arose must be ascertained by reference to the nature of the challenge and not by reference to the identity or circumstances of the challenger. (See in particular *R v HM Treasury Office, ex parte Smedley* (1985) QB 657 and *R v Customs and Excise Commissioners, ex parte Eurotunnel* (1995) CLC 392). In *Eurotunnel*, Balcombe LJ made clear that the grounds arose when the orders came into force. (400 at F).
>
> 30. The challenge is to the vires of the Regulations. The grounds for making that challenge arose when, as is alleged, the Regulations were unlawfully made or came into force. Accordingly, these proceedings were neither made promptly nor in any event not later than three months after the grounds to challenge the vires to the Regulations first arose. In order to bring this challenge, Cukurova require an extension of time in which to apply for judicial review."

58. In my view, this case also falls into the second category referred to in the *DSD* case. The application of DSO 01/2013 to each applicant did not involve a separate decision by the defendant to apply the fixed rates in relation to that applicant in any meaningful sense. An immigration detainee may participate in the regime or he may not. He is not required to. He does so voluntarily. If he does participate, the fixed rates apply, with the higher and rarely used rate applying to special projects. The challenge is therefore necessarily to the pay regime, not to any decision of the defendant in relation to an individual applicant. The position is more akin, therefore, to the situation in *Cukurova* where the parties voluntarily sought to bring themselves within the FCA Regulations, but then one party sought to challenge the vires of the FCA

Regulations, rather than a decision, action or failure to act in relation to it taken by the defendant. The challenge in this case is, in substance, a challenge to the vires of DSO 01/2013, not to a decision taken in respect of any applicant. Accordingly, these judicial review claims are, in my view, out of time.

59. As indicated by Moses LJ in *Cukurova*, the merits of the claims are relevant to the question of whether the court should consider extending the time for filing the claims. As the substantive merits were fully argued, I give my views on the merits below. Before turning to consider them, I will deal with a couple of other points concerning timing.

60. Following the hearing of this claim, the Court of Appeal handed down its decision in *R (TN (Vietnam)) v SSHD* [2018] EWCA Civ 2838, in which Singh LJ (with whom the other two members of the Court agreed) said at [94]:

> "I do not accept the first of those submission, which concerns delay. In my view, the Judge was correct to emphasise the need for finality in litigation. In theory a very strict view might be taken: that time begins to run from the date when secondary legislation is made or at least when it comes into force. *However, that would be contrary to both principle and authority. It is unnecessary to go into that in detail since, at the hearing before this Court, Mr Tam made it clear that the Secretary of State accepts that time for judicial review begins to run not from the date of the legislation (the 2005 Rules) but from the date when that legislation was applied in a particular case* (in other words here the relevant appeal decisions in 2014). Nevertheless, as the Judge observed, no challenge was made for another five months even after the decision of the Court of Appeal in *DA6*, on 29 July 2015." (emphasis added)

61. In a Post-Hearing Note dated 5 January 2019 sent by Mr Southey and Mr Nick Armstrong for the applicants, the emphasised language was relied on to support the submission that this case falls into the first category in *DSD*. In my view, however, Singh LJ's comment does not support the applicants' case on timing. *TN (Vietnam)*, which was an appeal from an order made by Ouseley J, concerned whether decisions taken in relation to individuals under the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 SI 2005/560 ("the 2005 Rules"), which Ouseley J had found to be *ultra vires*, were unfair and should be quashed. In other words, there were individual decisions in relation to specific individuals in that case, which brought it within the first category in *DSD*. Singh LJ did not develop what he meant by the words "contrary to principle and authority" and there is no reason to consider that, *sub silentio*, he was overruling *DSD* in its approval of *Cukurova* as a second category of case, to which a different rule applies as to timing, as I have already outlined.

62. Mr Southey submitted that the completion of the Pay Review resulted in "fresh decisions" that have been challenged in time. Although Mr Southey's reference to decisions is in the plural, I have already rejected the idea that the application of the paid activity pay regime to an individual is a "decision" in a meaningful sense. An individual IRC operator will, in each case, have taken a decision to allocate paid activity to a qualifying detained person, but the application of the fixed rates follows

as a matter of course. The applicants are not challenging individual decisions to allocate paid activity to any of the applicants.

63. As already noted, the Pay Review Report set out as Recommendation 2 an invitation to Home Office Ministers to decide between four options. As evidenced by a letter dated 3 May 2018 from the Treasury Solicitor to Duncan Lewis, to which I have already referred, the Home Office Ministers took a decision to leave the rates unchanged, namely, the 2018 Decision. I accept that it is arguable that the 2018 Decision is amenable to challenge by way of judicial review. I note, however, that paragraph 1 of the Amended Detailed Statement of Facts and Grounds for the Morita Claim filed on 4 June 2018 (which, although stayed, I mention for the sake of comparison) made it clear that the challenge was:

> "… to the decisions of the Defendant to (a) fix a flat rate of payment for work carried out by detainees in immigration detention; and (b) to fix that rate at £1 [per hour] (or £1.25 [per hour] for special projects …). Both those decisions are contained in a Detention Services Order, DSO 01/2013. By decision dated 3 May 2018, and following a review which is undated by which was sent to the Claimant's solicitors on 30 April 2018, both those decisions were maintained. These grounds have been amended to take account of these developments."

In substance, therefore, it seems to me that it is the DSO that was being challenged in the Morita Claim, rather than the decision to "maintain" the decisions, namely, the 2018 Decision.

64. Paragraph 1 of the Detailed Statement of Facts and Grounds in the Badmus Claim is worded similarly but refers to the challenged decisions being "reviewed and retaken" on 3 May 2018. It also adds the words "and applied to the Claimants on various dates between August 2017 and July 2018 and continuing". I do not view the "application" of DSO 01/2013 to any of the applicants as constituting a "decision, action or failure to act in relation to the exercise of a public function" (CPR 54.1(2)(a)(ii)) that is amenable to judicial review, for the reasons I have already given. The reference to the application of DSO 01/2013 "continuing" throughout the period that each applicant participated in the paid activity regime is relevant to the Human Rights Act 1998 claim, to which I will turn in a moment.

65. Assuming, for the sake of argument, that the 2018 Decision is amenable to judicial review, the Badmus Claim is out of time, having been filed on 5 October 2018.

66. The Morita Claim, as I have already noted, is stayed, so I say nothing further about it in relation to timing, other than to note in passing that it was arguably in time in relation to the 2018 Decision.

67. Given that the merits have been fully argued and given that the merits are, in any event, relevant to the question of whether an extension of time should be granted, I have decided that I should go on to consider whether the grounds the applicants have advanced in support of their claim are arguable.

68. A final point to note on timing is that the fourth ground is a discrimination claim under the Human Rights Act 1998, where it is alleged that the unlawful conduct of the defendant was continuing while the applicants were subject to the allegedly discriminatory policy, and this claim was brought within the one-year time limit laid down by section 7(5)(a) of the Human Rights Act 1998. Mr Southey referred to the judgment of Lord Lloyd-Jones JSC in *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 (SC(E)) at [39] in support of this proposition. Mr David Blundell, counsel for the Secretary of State, submitted in reply that the Secretary of State did not accept that the application of the paid work regime is analogous to the "continuing act" of the regulatory investigation at issue in the *O'Connor* case. I do not consider that it is necessary for me to resolve this point, and I express no view on it.

Grounds

69. In summary, the applicants are seeking to apply for judicial review of the pay regime for paid activity in removal centres on the following grounds:

    i) first, that setting and maintaining a flat rate of £1 per hour for paid activity, with a rarely applied exception of £1.25 per hour for special projects, is contrary to the statutory purpose of the paid activity regime set out in the 2001 Rules;

    ii) secondly, that the setting of a flat rate, with no meaningful exception, prevents the furtherance of the statutory objectives set out in the 2001 Rules and therefore is an unlawful fetter on the discretion of decision-makers required to apply the paid activity regime to individual detained persons;

    iii) thirdly, the 2018 Decision, following the Review, to maintain a flat rate at £1 per hour, with the rarely applied exception of £1.25 per hour for special projects, is irrational in the sense of *Wednesbury* unreasonable (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223);

    iv) fourthly, the differential treatment of prisoners and immigration detainees in respect of pay for work undertaken in custody/detention contravenes the prohibition on discrimination in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR");

    v) fifthly, the Secretary of State failed to comply with his duty under section 149 of the Equality Act 2010 to have due regard to relevant matters in reaching the 2018 Decision; and

    vi) sixthly, the Pay Review frustrated the applicants' legitimate expectation that all matters raised by their solicitors in correspondence with the Secretary of State would be addressed "in full".

Ground One: contrary to/frustrating the legislative purpose

70. In relation to the first ground, Mr Southey on behalf of the applicants submitted that the setting and maintaining of a flat rate of £1.00 per hour (with the very limited exception of £1.25 per hour for special projects) is contrary to the statutory purpose of

the paid activity regime set out in the 2001 Rules. The 2001 Rules are made under section 153 of the 1999 Act, which requires rules for the regulation and management of removal centres. Mr Southey submitted that the key provisions setting out the legislative purpose of the 2001 Rules in relation to the paid activity regime are:

i) Rule 3(1), which provides that the purpose of the centres is to provide "secure but humane" accommodation and "to encourage and assist detained persons to make the most productive use of their time, while respecting in particular their dignity and the right to individual expression";

ii) Rule 17(1), which provides that:

> "All detained persons shall be provided with an opportunity to participate in activities to meet, as far as possible, their recreational and intellectual needs and the relief of boredom.";

iii) Rule 17(2), which provides that "[w]herever reasonably possible the development of skills and of services to the centre and to the community should be encouraged".

71. Mr Southey made the following points in relation to these provisions:

i) It is inconsistent with the purpose of providing "secure but humane" accommodation and the need to respect the dignity of detainees to impose restrictions on the work that detainees may carry out or what they can be paid for the work beyond what is necessary for safety or security.

ii) The 2001 Rules impose a positive duty on the Secretary of State to ensure that the IRCs strive, as far as possible, to meet the recreational and intellectual needs of detainees and, as far as possible, to encourage the development of skills and services both to the centre and to the community.

iii) The setting of a flat rate of £1 per hour for all work regardless of the type of work, quality of the work, effort required to perform the work or the benefit to the IRCs of the work performed is incompatible with detainee dignity, as well as demeaning and exploitative. This is supported by the evidence of the detainees and others. The Secretary of State simply failed to engage with the value of the work performed by detainees in reaching the 2018 Decision not to change the rates of pay set out in DSO 01/2013.

iv) The lack of flexibility in the pay regime prevents the IRCs from developing schemes that might assist both the centre and the community. This point is supported by the evidence of the IRC operators, as well as respondents to Mr Shaw's review, and Mr Shaw in his reports. The experience of flexible pay regimes in prisons has led to successful innovative schemes, as evidenced by Howard League for Penal Reform reports in 2010 and 2011 on the prison work regime. This evidence shows that a uniform fixed rate is incompatible with Rule 17(2) and, in particular, the requirement to encourage the development of skills and of services to the centre and the community "wherever reasonably possible".

v) The flat rate of pay goes beyond what is necessary for reasons of safety and security, as demonstrated by the position in prisons, where more varied rates of pay are found. The restriction of the rate of pay to a flat fixed rate is unnecessary for purposes of safety and security and therefore unlawful.

72. In response, Mr Blundell for the Secretary of State submitted that the applicants' case on Ground One is based on a misreading of the 2001 Rules. Section 153(2) provides that the rules to be made under section 153(1) of the 1999 Act for the regulation and management of removal centres "may, among other things, make provision with respect to …activities … of detained persons". The 2001 Rules made under section 153(1), he submitted, need to be read with that in mind. He made further submissions on this ground as follows:

i) Rule 3(1) of the 2001 Rules sets out the purpose of removal centres which is to provide "secure but humane accommodation of detained persons". In other words, the principal purpose is detention, although it must be humane. The Secretary of State is empowered to set conditions for the detention of detained persons through the management of the removal centres.

ii) There is no requirement that the power of the Secretary of State to set rules for the management of removal centres is limited to "restrictions" that are necessary for safety and security. Section 153 contemplates the Secretary of State's making rules with respect to a range of issues, including activities that may be undertaken by detainees. Rule 17 of the 2001 Rules deals with the provision of activities, including paid activities. There will be restrictions on the activities offered to detained persons that go beyond what is necessary for safety and security. For example, Rule 17(8) requires each removal centre to have a library. There will inevitably be a limitation on the extent of library stock, which is not a restriction going to safety or security.

iii) Paid activity in the form of work is just one of a range of activities contemplated by Rule 17. It is an entitlement, subject to the extent to which the removal centre is able to provide work and certain other conditions.

iv) Rule 17(4) provides that paid activity undertaken under Rule 17(3) shall be paid at rates approved by the Secretary of State, either generally or in relation to particular cases. It cannot sensibly be said that setting a fixed rate of pay under Rule 17(4) is contrary to the purpose of the 2001 Rules or the 1999 Act.

v) The fact that the applicants or third parties such as Mr Shaw, the removal centre operators or other commentators disagree with the Secretary of State's exercise of a statutory power does not mean that he has exercised that power contrary to the statutory purpose.

73. In my view, the setting of a fixed rate for paid activity is neither contrary to nor does it frustrate the legislative purpose of section 153(1) of the 1999 Act or of Rule 3(1) and/or Rule 17 of the 2001 Rules. The overarching legislative purpose of section 153(1) of the 1999 Act and of the 2001 Rules is to provide for "secure but humane accommodation" of persons detained on immigration grounds.

74. No one disputes that the removal centres should be secure. It is not, in my view, inhumane to set a fixed rate for paid activity that a detained person is not compelled to do. Paid activity is only one of a range of activities contemplated by Rule 17 to meet the "recreational and intellectual needs" of detained persons and for "relief of boredom".

75. It is not part of the legislative purpose of the 2001 Rules to ensure that detained persons have the opportunity to earn money to meet their basic or other needs (for example, to assist their family members). The fact that certain activities are paid is a recognition that the activities, such as a cleaning, provide a service and confer a benefit on the removal centre and its occupants, including detained persons and staff. For this there should be some reward. Each detained person, however, has his or her basic needs in terms of accommodation, food, healthcare and so on met by the removal centre and, in addition, is entitled to a weekly allowance that is not dependent on participating in paid activity.

76. As to the argument that paying at a fixed rate of £1.00 per hour for paid activity frustrates the legislative purpose of respecting the dignity of detainees, the key point is that detainees are not required to work. That is fundamental. A detained person may well feel that it is incompatible with his dignity and/or exploitative to work for £1.00 per hour cleaning or doing any other type of work. That is understandable. But the detained person is not compelled to undertake it.

77. It seems to me that the arguments advanced by Mr Southey on this ground depend, at least in part, on an assumption that detained persons, by virtue of their personal circumstances, have no choice but to work. In short, they need the money for various purposes, including to make additional purchases in the removal centre shop (beyond what they can afford on the basis of the weekly allowance) and/or to send to family members for their support. The evidence of the applicants and other detained persons supports this assumption.

78. I accept that some detainees may feel "compelled" by their circumstances to undertake paid activity, and I have sympathy for them. But I am not persuaded that this feeling or perception amounts to compulsion, properly speaking. It is not part of the legislative purpose of the scheme governing removal centres that detained persons should be provided a means of earning an income. The paid activity regime is solely concerned with meeting "recreational and intellectual needs and the relief of boredom" (Rule 17(1) of the 2001 Rules).

79. The case that work undertaken by immigration detainees is compelled and therefore exploitative is forcefully made by two academic commentators, Katie Bales and Lucy Mayblin, in an article entitled "Unfree labour in immigration detention: exploitation and coercion of a captive immigrant workforce", 47 *Economy and Society* 191 (2018). The article is, however, principally concerned with policy arguments that go well beyond what it would be appropriate for this court to engage with in relation to these applications. Their general thesis is that:

> "The socio-economic position of detainees, their immigration status and their deportability compel detainees to sell their labour power and place them under the dominion of the detention centre." (Bales & Mayblin, at p 209)

80. This would not be cured, in their view, by recognising that detainees engaged in paid activities are working under contracts of employment and should thereby enjoy the range of employment rights set out in law, including the minimum wage. I note, in passing, that such a recognition would not only meet the relief sought by the applicants in this case, but would, in fact, considerably exceed what is sought by the applicants in relation to these claims.

81. I also note the concession made by Ms Bales and Ms Mayblin (at p 192) that under current International Labour Organization (ILO) guidelines paid work in removal centres does not constitute "*forced* labour" (their emphasis), although they maintain that it is, nonetheless, an example of "state-sanctioned exploitative, coercive and unfree labour" and notably would remain so, even if the paid work were treated as governed by and benefitting from full employment law rights and protections. This is due to "a number of structural factors that cross borders" (p209).

82. I have given anxious consideration to the question of whether immigration detainees are, in effect, compelled to work. But, for the reasons I have given, I can see no basis for concluding that they are compelled in the strict sense, which is the only sense that I am able to recognise in this public law challenge.

83. I see no valid basis for Mr Southey's submission that the Secretary of State's ability to impose restrictions on the work that detainees may carry out or what they can be paid for such work is limited by the legislative scheme to "what is necessary for safety and security". Rule 17(3) provides that detained persons shall be entitled to undertake paid activities "to the extent that the opportunity to do so is provided by the manager". Complaints by detainees about the level of paid activity opportunities provided by removal centre managers seems principally focused on the 30 hours per week cap and, of course, the level of pay. Not all forms of paid activity will be available in all removal centres and, even where offered, there will be limitations on the amount and type of work that needs to be done that have nothing to do with safety or security.

84. As to the "positive duty" on the Secretary of State under Rule 17(2) to ensure, "wherever reasonably possible", that removal centres strive as far as possible to encourage the development of skills and of services both to the centre and the community, this is aspirational language that applies to the entirety of Rule 17 and not merely in respect of paid activity and which is far too weak to bear the weight Mr Southey wishes it to bear, bearing in mind that the core purpose of a removal centre is to provide secure but humane accommodation.

85. Accordingly, this ground of the claim is not arguable.

Ground Two

86. In relation to the second ground, Mr Southey submitted that it overlapped with the first. The setting of a flat rate, with no meaningful exception, prevents the furtherance of the statutory objectives he identified. It fetters or abdicates that function by setting an inflexible policy. He noted that Rule 17(4) refers to "rates" in the plural, to be approved by the Secretary of State "either generally or in relation to particular cases". This wording is a recognition that there should be flexibility in the pay regime.

87. In my view, given my rejection of the first ground, there is nothing substantial in this ground. There is no fetter or abdication by setting an inflexible policy. The Secretary of State originally decided in approving DSO 15/2008 that a fixed rate of £1.00 per hour, with a special rate of £1.25 per hour for special projects, was sufficient to satisfy the objective of providing paid work. He concluded that there was no need for a more flexible pay regime, apart from the limited exception for special projects. DSO 01/2013 and the 2018 Decision each confirmed this position. The use of the word "rates" in the plural in Rule 17(4) as a matter of construction encompasses the setting of a single rate, even in the absence of a special rate for projects. This ground is also not arguable.

Ground Three

88. In relation to the third ground, Mr Southey submits that the 2018 Decision to maintain (and the earlier decisions reflected in the DSOs to fix) a flat rate of £1.00 per hour, subject only to the rarely used exception of £1.25 per hour for special projects, is irrational (presumably, although he does not say so, in the sense of *Wednesbury* unreasonable) for several reasons:

    i) The 2018 Decision is based on the false premises that:

        a) the paid activity regime benefits only the detainee and not the removal centre;

        b) the paid activity regime is not exploitative; and

        c) the work carried out by detainees would not otherwise have to be carried out by staff.

        Accordingly, the Secretary of State has failed to take into account material matters and has materially misdirected himself in reaching the 2018 Decision (and, presumably, DSO 15/2008 and DSO 01/2013).

    ii) The original rates were set more than ten years ago in DSO 15/2008 and so ignores ten years of inflation, as well as the fact that detained persons tend, on average, to be held for longer periods in detention than was the case in 2008.

    iii) The Secretary of State has ignored the benefits of a flexible approach and failed to weigh anything, or anything material, against that, notwithstanding Mr Shaw's recommendations, the evidence provided by the removal centres and the evidence relating to the more flexible prison pay regime.

    iv) The Secretary of State has ignored the statutory purpose of the removal centre regime and Rule 17(4).

    v) The 2018 Decision is unreasoned. No justification is given as to why a more flexible approach or a higher rate has not been adopted or, in other words, why Option 4 under Recommendation 2 in the 2018 Pay Review was adopted. Given the strength of the arguments in favour of a more flexible approach or a higher rate, an answer is called for and, in the absence of one, irrationality can be inferred.

vi) Given that the paid activity regime concerns a vulnerable group, namely, immigration detainees, a high intensity review (relying on *Pham v SSHD* [2015] 1 WLR 1591 at [107]) is justified.

89. Mr Blundell made a number of submissions in response to these submissions, with which I largely agree. To avoid repetition, I will simply set out my views. The overarching point is that the setting of the rate is a matter of judgment for the Secretary of State. The applicants, to succeed, would need to show that no rational Secretary of State could have made the same decision. That is a high hurdle. In my view, the applicants do not come close to surmounting it.

90. The Secretary of State's rationale for setting the fixed rate pay regime in 2008 and for confirming it in 2013 was set out in Ms Hardy's witness statement and in the Pay Review Report, as discussed at [30]-[31] above. The fact that the applicants or third parties such as Mr Shaw, academic commentators or others disagree with the reasons given does not mean that the Secretary of State's decision is irrational.

91. In relation to the submission that the 2018 Decision was based on various false premises, a fair reading of the Pay Review Report does not support this. The Pay Review Report does focus on the benefits to the detained person of paid activity rather than the benefit to the removal centre (and therefore indirectly the Secretary of State), but that does not mean that the benefit of the work is ignored. The fact of payment, albeit at a low fixed rate, is also a recognition that the work is beneficial.

92. Mr Southey in submissions made much of the following sentence in Ms Hardy's witness statement at paragraph 18:

> "It is specified in all IRC contracts with private service providers that no detainee shall be required to perform any work or service where such work or service constitutes an obligation placed upon the Service Provider [i.e. the operator of the removal centre] by the contract [between the operator and the Secretary of State]."

93. This is the basis of his submission, to which I referred at [88(i)(c)] above. Reading paragraph 18 of Ms Hardy's witness statement as a whole it is clear to me that what is meant is that a removal centre operator must discharge all of its contractual and statutory obligations in relation to the operation of the removal centre regardless of whether detainees take part in paid activity. The contractual arrangements between the Secretary of State and each removal centre operator require the operator to offer paid activities to detained persons, subject to various conditions, but the operator is not relieved of its obligation, for example, to keep the removal centre clean if no detained persons is willing to undertake cleaning as a paid activity. So, there is a potential overlap between paid activities and what the removal centre operator is required to do. However, a detainee cannot be required to clean and, where it does not clean, the removal centre operator must itself do so. That position is not inconsistent with the evidence given by some of the applicants that they had never seen any cleaners other than detained persons. That appears to be one of the more common types of paid activity on offer, and there appears to be demand among detained persons to undertake it.

94. As to Mr Southey's criticism that the Secretary of State has "ignored" the benefits of a flexible approach, that is not sustainable. It is clear from the Pay Review Report that the Secretary of State took into account Mr Shaw's recommendation, the evidence from the removal centre operators and evidence relating to the prison pay regime. Four possible options were considered in relation to the level and rates of pay. He nonetheless concluded that it was appropriate to maintain the status quo.

95. As I have already mentioned, the Pay Review Report summarised at paragraphs 10 to 16 the original rationale for the decision set out in DSO 15/2008, which was confirmed, except as to the weekly cap on hours, by DSO 01/2013. At paragraph 36 of the Pay Review Report, the feedback from removal centre operators regarding their desire for a more flexible regime is acknowledged, but the rationale for the current system is affirmed.

96. As to the 2018 Decision, which simply announces without reasons that Option 4 under Recommendation 2, namely, maintaining the status quo, has been chosen, the Home Office Ministers were not under an obligation to give reasons. That does not mean that the decision was irrational. The rationale is clear from the Pay Review Report and is supported by the evidence of Ms Hardy.

97. It is unclear to me how or why a "high intensity" of review would have led the Secretary of State to a different decision. In any event, it is a policy decision on financial matters within the broad discretion of the Secretary of State, with which the court should be slow to interfere.

98. This ground, therefore, is also not arguable.

Ground Four

99. In relation to the fourth ground, which is a human rights challenge rather than a conventional public law challenge, Mr Southey submitted that:

    i) The rights of the applicants under article 14 of the ECHR are engaged by virtue of falling within the ambit of articles 4 and/or 8 of the ECHR and/or within the ambit of article 1 of protocol 1 to the ECHR.

    ii) The applicants status as immigration detainees held in a removal centre rather than in a prison is a relevant status for the purpose of article 14.

    iii) Prisoners are a relevant comparator group for immigration detainees. They are sufficiently similar that a difference of treatment between members of the two groups must have a reasonable and objective justification.

    iv) For the foregoing reasons, article 14 of the ECHR is engaged. The Secretary of State has not put forward a reasonable and objective justification for the difference in treatment in relation to pay for work undertaken. The difference in treatment is therefore unjustified discrimination, prohibited by article 14.

100. Accepting Mr Southey's first three submissions for the sake of argument (although there are potential difficulties with all three, and in particular the first submission), it seems to me that this ground in any event fails on the basis that there is a reasonable

and objective justification for the difference in treatment in relation to pay for work undertaken. The purpose of the prison regime is to punish offenders and to address their offending, for example, with rehabilitative activities, training and counselling. The prison work regime is compulsory, and the prisoner pay regime is designed, against that background, to encourage and reward positive behaviour from prisoners. The purpose of the removal centre regime is to provide immigration detainees secure and humane accommodation pending their removal from the UK. The removal centre paid activity regime is voluntary, and the pay regime rewards detainees for work undertaken, but against the background that the principal purpose of the paid activity regime is to provide meaningful activity and to alleviate boredom. I note in passing that neither regime has as its purpose the provision of an income to the person undertaking the work, although that is a benefit of each regime for the relevant person.

101. Prisoners are generally paid substantially less for work undertaken, which reflects the fact that they are being punished. Prisoners are paid on a variable basis determined by various criteria, which reflects the fact that they are being rehabilitated, including being incentivised through work. Each of the prison and removal centre work regimes has a different structure, purpose and relevant background. The difference in treatment between prisoners and immigration detainees is objectively and reasonably justified. Accordingly, this ground fails.

Ground Five

102. Mr Southey submitted that the Secretary of State failed to discharge his duty under section 149 of the Equality Act 2010 because he failed to have regard to various factors that the applicants say he should have had regard to and because his decision was premised on the erroneous basis that the detainees were not doing work that would otherwise have to be done by staff. In relation to the various factors that the Secretary of State should have had regard to, those were raised by Mr Southey in relation to the first three grounds, and I have dealt with and dismissed those. In relation to the decision being premised on an erroneous basis, I have also already dealt with this point at [93]. This ground does not advance matters for the applicants on its own. The Secretary of State prepared a Policy Equality Statement in 2012 and again while carrying out the Pay Review. It was rational for the Secretary of State to conclude that there are no adverse impacts from the fixed rate policy on the grounds of race. Pay for immigration detainees cannot be properly compared to paid work outside a removal centre. By its nature, immigration detention only affects foreign nationals, but in considering the impact of the pay regime for paid activity in removal centres the Secretary of State was entitled to conclude that there is no difference of treatment as between detained persons on the grounds of race. This ground is also, in my view, not properly arguable.

Ground Six

103. The applicants' sixth ground is that their legitimate expectations that all matters raised in correspondence between Duncan Lewis on behalf of the applicants and the Secretary of State would be addressed "in full". Mr Southey submitted that the Pay Review was not a proper or effective review in light of its failure properly to consider the various arguments that the applicants have raised in these proceedings.

104. I do not find any merit in these submissions. I do not accept that the correspondence created specific legitimate expectations that are capable of forming the basis of a public law claim. The Secretary of State indicated that he intended to carry out a review of the paid activity regime, and he did so, as reflected in the Pay Review Report. The fact that Mr Shaw, the removal centre operators and/or any third-party commentators consider that more flexibility should be introduced into the pay regime for paid activities in immigration detention centres does not mean that the Secretary of State has failed to meet any legitimate expectations in not accepting those views. Accordingly, this ground fails as well.

Conclusions

105. For the reasons given above, my primary conclusion in relation to the Badmus Claim is that it is out of time.

106. I have gone on to consider the merits of the Badmus Claim because that is relevant to the question of whether time should be extended. I have concluded that none of the grounds are arguable. Therefore, I do not consider it appropriate to extend time.

107. If I am wrong on the question of timing, then I dismiss the application for permission to apply for judicial review in respect of the Badmus Claim on the basis that none of the grounds are arguable.