Neutral Citation Number: [2012] EWHC 979 (Admin)

Case No: CO/11283/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2012

Before :

THE HONOURABLE MR JUSTICE SINGH

- -

Between :

THE QUEEN ON THE APPLICATION OF (HA (NIGERIA))	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Stephanie Harrison (instructed by **Bhatt Murphy**) for the **Claimant**
Julie Anderson (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 20th, 21st & 22nd March 2012

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Approved Judgment

Mr Justice Singh :

Introduction

1. By this claim for judicial review the Claimant challenges the lawfulness of (i) decisions to continue to authorise his administrative detention under section 36(1)(a) of the UK Borders Act 2007 (the 2007 Act); and (ii) the conditions of that detention.

2. The Claimant's detention was first authorised by the Defendant under the 2007 Act as from 27 August 2009. However, the initial period of his detention is not challenged in these proceedings. The focus of his challenge is on two periods: first, the period from on or about 16 January to 5 July 2010; and, secondly, the period from 5 November to 15 December 2010. During those periods the Claimant was detained at various Immigration Removal Centres (IRCs).

3. In the interim period, from 5 July to 5 November 2010, the Claimant was an in-patient at Hillingdon Hospital, receiving compulsory treatment for mental illness, at a time when he had been transferred under section 48 of the Mental Health Act 1983 (the 1983 Act). That period of detention, when the Claimant was still held under the 2007 Act but had been transferred to a hospital under the 1983 Act, is not the subject of challenge in these proceedings, although, as will become apparent, the Claimant questions whether the power of transfer in section 48 of the 1983 Act was as a matter of law available in his case.

4. The Claimant was granted bail by this Court (Kenneth Parker J) on 15 December 2010. He voluntarily left the United Kingdom in December 2011 and now pursues this claim in order to obtain various declarations and damages.

5. Permission to bring this claim for judicial review was granted by Lindblom J on 15 February 2011. It was agreed by the parties that the hearing before me should be confined to the issue of liability and that, if necessary, there should be a further hearing to consider quantum.

Brief Chronology

6. The Claimant is a Nigerian national who was born on 25 December 1977. He entered the United Kingdom on a visitor's visa for six months in 2005 but overstayed. On 11 June 2007 he applied for a European Economic Area (EEA) residence card on the basis of alleged marriage to a German national. This application was refused for lack of sufficient evidence on 22 February 2008.

7. On 23 March 2009 the Claimant was convicted at Newcastle Crown Court of an offence of being concerned in the supply of Class C drugs, namely cannabis. Shortly before this, on 20 March 2009, he applied for asylum while he was on remand in custody.

8. On 28 May 2009 a second application for an EEA residence card was refused.

9. On 1 July 2009 the Claimant was sentenced to 14 months imprisonment for his offence of being concerned in the supply of Class C drugs. Because this sentence was

longer than 12 months, it triggered the "automatic deportation" provisions of the 2007 Act, which I set out later in this judgment.

10. On 18 August 2009 authority to detain the Claimant under the 2007 Act was sent to Durham prison where he was then being held. His release date from his sentence of imprisonment, taking into account time served on remand, was 27 August 2009. From that date he was detained under the 2007 Act.

11. On 25 September 2009 the Claimant was transferred to Dungavel IRC and then to various other IRCs until July 2010.

12. On 16 January 2010, while he was detained at Brook House IRC, the Claimant was seen by a psychiatrist, Dr Spoto, who recommended (in a report which was completed on 21 January 2010) that the Claimant should be transferred to a mental hospital for assessment and treatment there. In fact this did not occur for several months, which is the source of the first set of complaints by the Claimant in these proceedings.

13. The Claimant was admitted to Hillingdon hospital under section 48 of the 1983 Act on 5 July 2010 and placed on Colne Ward.

14. The Claimant was finally interviewed for the purpose of his asylum claim on 8 October 2010.

15. On 5 November 2010 the Claimant was returned to Harmondsworth IRC. The Claimant's detention from that date until he was granted bail by Kenneth Parker J on 15 December 2010 is the source of his second set of complaints in these proceedings.

The Facts in More Detail

16. In a letter dated 18 August 2009, informing the Claimant that he was liable to detention under section 36(1)(a) of the 2007 Act, the reasons given by the Secretary of State for detaining him were: "You are likely to abscond if given temporary admission or release. There is insufficient reliable information to decide whether to grant you temporary admission or release."

17. During his prison sentence at HMP Durham the Claimant began to experience psychiatric problems. On 19 August 2009 he was referred to a mental health team. On that date there was filled in a mental health referral form in respect of the Claimant, which stated:

> "After a long conversation which involved several strange dreams and allusions to 'strange pastors' (maybe witch doctors) conversations with wing staff suggest odd behaviour. May have been involved in demonic or witchcraft in Nigeria."

18. The notes from HMP Durham indicate that on 26 August 2009 the Claimant was seen by the Community Psychiatric Nurse, Kathy Livingstone. It is recorded that the Claimant was neither eating nor drinking. This was said to be on religious grounds.

He was said to worship voodoo and said this was God's will. The notes state that: "Doctor [Steve] Boll has suggested discussing with Chris Anderson with a view to admission to HCC [Healthcare Centre] for a spell of observation of both physical and mental health."

19. On 28 August 2009 the Claimant was seen by Dr Boll at HMP Durham. The notes indicate that the Claimant was apparently not eating and explained that his religion recommended fasting. He also implied that some of the food he collected from the servery had been tampered with and he had thrown his food into the bin as he felt the workers had interfered with it. It was noted that he stated that he had come to the UK in 2005 and settled in Newcastle, a point which the Secretary of State has stressed before me. The notes state that:

> "Throughout the interview he did not appear distracted or distressed and although stating some paranoid ideations I do not feel he is overtly psychotic at present. However he does appear to have lost a fair amount of weight."

20. On behalf of the Claimant it was emphasised before me that there was already at that stage reference to "paranoid ideations." However, the Defendant stresses that Dr Boll did not feel that the Claimant was "overtly psychotic" at that time.

21. On 31 August 2009 the Claimant was seen by Andrea Alexander at the prison. He was seen as part of an "ACDT review" [this is a reference to self-harm measures known as Assessment Care in Detention and Teamwork], and stated he was fasting due to his religious beliefs. He stated that he had no intent to harm or kill himself. It was noted that he was currently located in a camera cell so that any food or fluid intake could be observed. He was to be offered his meal at every meal time and his response was to be documented and all intake/output was to be recorded as accurately as possible.

22. On 4 September 2009 Sonia Moody observed that the Claimant was filling his drinking cup with toilet water and then continued to wash his face and hands with the same.

23. On 7 September 2009 Mark Fowler, who was on night duty, noted that although the Claimant was not observed eating food he had had the occasional sip of flushed toilet water. His sleep pattern was erratic and he had ignored staff attempts to communicate with him. Later that morning Alison Richardson observed that the Claimant had refused breakfast and that he had not been drinking fluids that morning. She recorded that: "He has continued lying on his cell floor on his mattress for most of the morning."

24. Later that same day Dr Boll observed that the Claimant was in his cell lying on his bed with a cardboard cross in his mouth. He was undressed but covered with a single sheet. He would not engage in conversation. He had had no food over the weekend and had not been seen drinking. Dr Boll's comment was: "I am extremely concerned for this man and feel we need an urgent psych assessment and possible hospital transfer."

25. On 9 September 2009 Tracy Smith saw the Claimant in the psychiatric clinic and commented that: "Reviewed by Doctor Kaler and he is going to review in a week's time in order to assess if he needs urgent medical/physical treatment." A letter from Dr Kaler to Dr Boll dictated on 8 September and typed up on 9 September 2009 was to similar effect.

26. On 10 September 2009 an attempt was made to interview the Claimant at HMP Durham for the purpose of his asylum claim. There is a manuscript note by the relevant officer, S Smyth, who recorded that the Claimant was unwell and was in the healthcare unit. The notes continued that the Claimant had been refusing food for two weeks after previously claiming that his food had been tampered with and poisoned. The notes also included reference to the fact that the Claimant had been drinking water from the toilet bowl.

27. On 11 September 2009 an e-mail was sent to Guy Brewer, of the United Kingdom Border Agency (UKBA), which included some of the details to which I have already referred, including the fact that the Claimant had been drinking water from a toilet bowl. However, it should also be observed that, on 18 September 2009, Mr Brewer compiled a note to say that the Claimant was much better and had left the health wing and that a request for a new asylum interview had been made. On behalf of the Defendant it has been emphasised before me that the Claimant's state of health was not uniformly bad during this period up to late 2009 but in fact fluctuated.

28. On 25 September 2009 the Claimant was transferred to Dungavel IRC in Scotland. It appears that the Claimant's medical records were not obtained by the Defendant and/or not made available to or obtained by the IRC when he was transferred from prison. No medical risks were identified. The Claimant did, however, exhibit disturbed behaviour and was again refusing food.

29. On 7 October 2009 the Claimant was transferred to Colnbrook IRC.

30. On 9 October 2009 the Claimant was transferred to Dover IRC. His behaviour was disturbed and strange; he was refusing food and was reviewed by a CPN. He was placed in segregation. He was placed on an ACDT. On 23 October 2010 Dover IRC sent a fax to the Defendant stating that the Claimant had "serious mental health problems and needs to be transferred to a more suitable establishment". It is recorded that the Claimant had been seen by a CPN and a consultant psychiatrist. At the hearing before me I was told that, despite a request for disclosure of documents about any such psychiatric assessment, none has been made available to the Claimant's representatives.

31. On 24 October 2009 the Claimant was transferred to Harmondsworth IRC. On 28 October 2009 a referral for a psychiatric assessment was made. The Claimant was held in segregation under Rule 42 of the Detention Centre Rules 2001 (the 2001 Rules) between 30 October 2009 and 2 November 2009.

32. On 3 November 2009 the Claimant was again transferred to Colnbrook IRC in segregation. His medical records were not transferred with him and the Claimant was assessed by three people, including a Registered Mental Health Nurse (but not a psychiatrist), as having "nil psychotic symptoms" and his behaviour was attributed to

his personality. As will become apparent, this was later mistakenly thought to be the view of a qualified psychiatrist.

33. A UKBA record of 9 November 2010 identified the Claimant's "special needs" as including "serious mental health problems" and as a result of this he was transferred to Brook House IRC on that date. The Claimant was exhibiting bizarre behaviour but the nurse's earlier record of "nil psychotic symptoms" was repeated and wrongly attributed to a psychiatrist. On that date the Claimant was again placed in segregation because of concerns about his behaviour and interaction with others.

34. On 13 November 2009, a Doctor Gascoyne, with "no background information available" and unable to make a mental state examination, identified possible "paranoid psychosis" and stated that the Claimant "may eventually need transfer to an appropriate UNIT for psy. input".

35. On 18 December 2009 healthcare at Brook House put in a request to transfer the Claimant to a medical bed and for an assessment at Harmondsworth IRC. On 20 December 2009 Harmondsworth IRC informed the Defendant that it would not have the Claimant back because he was "not suitable due to history of food refusal, bizarre behaviour, refusing to take medication and refusing to leave R40 [Rule 40 of the 2001 Rules]" and they already had "7 in health care and on ACDT".

36. On 22 December 2009 the Claimant was seen by a physician, Dr Ian Anderson, in the GP surgery. His comments were:

> "Continues to demonstrate odd behaviour. Standing when I came to visit today. Stared at me from rel close. Did not answer my questions and did not say anything all the time I was in the room. Then started to pace forwards and backwards in front of the window whilst looking out of it. D/W PP CPN [this appears to be short for "discussed with Perry Peryagh, the Community Psychaitric Nurse"]: PP will tell UKBA to find out what they are planning re his transfer. If no transfer imminent PP will refer him to the psychiatrist."

37. On 23 December 2009 a referral was made to a psychiatrist for an assessment because the Claimant was still "sleeping in toilet area refusing to wash, bizarre behaviour alienates him from others." A letter was sent from Saxonbrook medical at Brook House IRC to a consultant psychiatrist at Longley House in Crawley. This letter observed that the Claimant:

> "sleeps on the floor on a mattress lying halfway in the toilet facility, sleeping at most times. He refuses to wash/shower or socialise with other detainees or resorts to insulting other detainees on the wing. His bizarre behaviour rather alienates him from other detainees who refuse to have any involvement with him around. Currently he is not on any medication."

38. On 25 December 2009 a form was signed by Dr Sherpao. This noted that possible actions needed were: "Single occupancy and/or transfer to another centre for psychiatric treatment".

39. On 30 December 2009 it was noted that Harmondsworth IRC had again refused to accept a transfer of the Claimant because he had previously been non-compliant.

40. On 21 January 2010 a psychiatrist, Dr Spoto, completed a report to Dr Thomas of Saxonbrook Medical Centre in Crawley. He noted that he had seen the Claimant at Brook House on 16 January. He observed that the Claimant's history was that his behaviour was bizarre and he was largely unco-operative. The Claimant would lie on the floor on a mattress lying halfway in the toilet facility, sleeping at most times. In the report Dr Spoto stated that:

> "The patient is however thought not to be psychotic or to be exhibiting psychotic symptoms. Indeed according to the psychiatrist that assessed him at Colnbrook IRC he is not suffering from a psychotic illness. He is not on any medication."

41. It can be observed that Dr Spoto had fallen into the same error as many others (no doubt because of the records to which he had access) in thinking that the Claimant had been assessed by a psychiatrist at Colnbrook IRC.

42. In his report Dr Spoto then conducted a written review of the previous medical records that were available to him. His diagnosis was: "Uncertain but likely to be suffering from a psychotic illness." Dr Spoto's opinion was expressed as follows:

> "It is clear that on the 16 January 2010 it was impossible to assess [the Claimant]. I should say he certainly did appear at the time to be electively mute.
>
> However his behaviour in my opinion is unlikely to be deliberate. It is both random, and therefore likely to be meaningless, and also to have been consistent for a considerable time. Secondary gain therefore in my opinion is unlikely to provide a suitable explanation.
>
> I strongly suspect that he is suffering from a psychotic illness, and this obviously must be excluded as a priority. This is likely to entail a trial of anti-psychotic medication.
>
> It is not possible for this patient to undergo a full psychiatric assessment at Brook House or other similar custodial setting and although previously thought not to be psychotic it is clear that the assessment was also carried out in a custodial setting."

43. The doctor's recommendations were:

> "Further assessment is recommended in a suitable Mental Health Unit and early transfer to other secure non-custodial setting appears to be necessary. There is no ground to recommend release from detention.
>
> Transfer to a suitable secure unit under section 48 of the Mental Health Act is recommended."

44. As will become apparent later, the reference to section 48 of the Mental Health Act 1983 is a reference to a power of transfer to a hospital which arises in cases which are urgent. On behalf of the Claimant it has been emphasised before me that Dr Spoto was recommending an urgent transfer of the Claimant to hospital.

45. Although Dr Spoto's full report was only compiled on 21 January 2010, senior officers at the UKBA were aware of his visit and concerns before that date. On 18 January 2010 Simon Edwards, the UKBA manager at Brook House IRC, wrote an e-mail to the DEPMU [Detainee Escorting and Population Management Unit] Duty Chief Immigration Officer, which was copied to a number of recipients, including Bob Evans. The e-mail referred in some detail to the facts of the Claimant's case. It said:

> "He has shown bizarre behaviour throughout his time at Brook House since he arrived on 9th November 2009. According to notes in CID [Case Information Database] he has shown this type of behaviour previously when he had short stays (less than 2 weeks) at Dungavel, Dover, Harmondsworth and Colnbrook and where there were clear concerns for his mental state. However he had a psychiatric assessment at H/W where they deemed his issues behavioural only.
>
> He moved into RFA [Removal from Association] on 10th December after refusing to lock up at the required time at Brook House. On 18th December healthcare at Brook House put in a request to transfer the subject to a medical bed and for an assessment at Harmondsworth which was refused. He has been deemed single occupancy as he is unsuitable to share and on 22nd December was told that he could leave RFA. However, he has since refused to move from this area despite numerous attempts each day to persuade him to do so from both UKBA and G4S staff. On 16th January a Dr attempted to engage with him and carry out a psychiatric assessment, however he has continually refused to engage with healthcare here.
>
> Although unable to engage with him, the Dr has indicated that he may need to be sectioned and possibly forced medication in order to assess him regarding this. If officially sectioned then there are obviously serious issues to be considered with regards to his removal and the length of time he might remain in the UK. He has recently claimed asylum and one attempt to interview him has proved unsuccessful. We are constantly in touch with his case owner to see how we can move this forward but there seems no quick fix.
>
> In short, I think it would be prudent to move him for the following reasons:
>
> He has remained in RFA since 10th December, albeit because for the vast majority of this time he has chosen to. This is obviously not what this area should be used for and, although all of the notes clearly outline the circumstances of his case, he cannot remain here indefinitely. It would be

> better to move him into another centre under normal association rather than have him refuse to leave RFA at Brook House.
>
> He refuses to engage in conversation with UKBA staff or healthcare staff here.
>
> He has asked for a move to another centre, preferably Harmondsworth. I think that he may display more normal behaviour under different circumstances and in a different environment. I believe that we should attempt to move him to another centre before healthcare here start the process of possibly sectioning him. He was only at Harmondsworth and Colnbrook short-term for 16 days in total previously."

46. On 20 January 2010 an e-mail was sent by Bob Evans to Duncan Partridge (a UKBA area manager) and Phil Schoenenberger (Assistant Director in Detention Services at the UKBA). It stated:

> "If there has been an asylum claim which may take some time to process and he needs a mental health assessment we should be considering whether he is fit for detention under Rule 35 [of the 2001 Rules] …"

47. On 21 January 2010 a form was filled in under Rule 35 of the Detention Centre Rules 2001 (which I set out later). Under "relevant clinical information" this stated: "odd behaviour – refusing to engage? Behavioural – seen by Psychiatrist on 16/01/10. Detainee refused to engage – completely ignored his presence." On the continuation sheet it was stated that "….psychiatrist feels that he ought to be sectioned with a view to make a better assessment – has not had a wash for quite some time. ….."

48. This was considered in a file minute from Mr Brewer on 21 January 2010 addressed to his superior, Joanne Soloman. After setting out the case history this file note stated as its proposal:

> "The Detention Centre Rule 35 letter requests that the SCW reviews the decision to maintain detention within **2 working days**. The medical authorities at Brook House are considering sectioning the subject under section 2 of the Mental Health Act and/or transferring him to an alternative IRC to break his behaviour.
>
> Given the subject has used deception to enter the UK and has entirely failed to comply with immigration authorities I propose that detention be maintained as the subject is highly likely to abscond and reoffend should he be released at this stage." [Emphasis in original]

49. Earlier on 21 January 2010 an e-mail was sent by Duncan Partridge to Phil Schoenenberger and Bob Evans, which was copied to Simon Edwards. This stated that the Claimant had had a mental health assessment on 16 January. It continued:

> "We have been informed by the visiting mental health professional that it will take up to 45 days to get [the Claimant] sectioned. We have arranged with Saxonbrook here at Brook House to complete a Rule 35 referral today, however due to the lack of a valid assessment this will only include observations of his behaviour. We have also requested this morning that they push for [him] to be sectioned."

50. The e-mail also noted that the Claimant's initial asylum screening had taken place on 8 April 2009 "with little action since". Finally the e-mail said: "It is clear to me that [the Claimant] requires a move from Brook House to break this cycle although I am mindful that this is difficult to achieve without a recent assessment. ….."

51. On 22 January 2010 Alan Kittle, the Director of Detention Services at the UKBA, sent an e-mail to Bob Evans, which stated:

> "Was a R35 report submitted? What was the response?
>
> Could he go to one of the healthcare beds in Colnbrook?
>
> Brook House should in the interim be raising this with the local mental health commissioner for the PCT [Primary Care Trust].
>
> If you want me to flag this up with the DoH [Department of Health] then let me know."

52. This was in response to an e-mail of 21 January which stated "…..a difficult one…I don't want him moved because the sectioning process would have to start again….how long can we justifiably keep him in Rule 40 under these circumstances?"

53. Also on 22 January 2010 Mr Brewer wrote to the Claimant giving his formal decision in response to the notification he had received under Rule 35. He stated:

> "I am writing to you to acknowledge receipt of a report dated 21 January 2010 from Brook House notifying us that you may have a special illness or condition.
>
> Information in the report has been considered and the decision to detain you has been reviewed.
>
> Detention is being maintained as you are liable to deportation, your asylum claim will be refused on grounds of non-compliance, you pose a danger to the public and deportation is achievable in a reasonable timeframe."

54. On 25 January 2010 Simon Edwards wrote an e-mail to Bob Evans and Alan Kittle, which was copied to a number of other recipients including Duncan Partridge and Phil Schoenenberger. It said:

> "A Rule 35 was put in and detention is being maintained as, according to the response, it is considered that deportation is achievable within a reasonable timeframe. Myself and Duncan spoke to Dr Thomas, the head of the healthcare unit here, this morning and he advised that [the Claimant] refused to engage with a psychiatric Dr who came to assess him last weekend. In light of this, and of his current and previous behaviour, it is his opinion that we should be looking to section him. He has stated that he can only make an assessment from the information he has because of [the Claimant's] refusal to engage with him. We have advised Dr Thomas that he is very unlikely to be moving to another centre, therefore the sectioning process should take place asap.
>
> Dr Thomas has confirmed that he will speak today to the detainee's local PCT prior to being detained to ensure that they take responsibility for his case and start the process off asap. …."

55. On 1 February 2010 Mr Brewer wrote to the Claimant in the following terms:

> "I am writing to you to acknowledge receipt of a report 21 January 2010 from Brook House notifying us that you may have a special illness or condition. The referral was made following concerns regarding your withdrawn behaviour as you refuse to engage with others. When you do engage you come across as verbally abusive and aggressive. An attempt was made to assess you by a psychiatrist on 16 January 2010, but you refused to engage with him or indeed acknowledge his presence. You also spend a major part of the day and sleep in the toilet area which is raising further cause for concern.
>
> I have reviewed the decision to detain you after careful consideration of the information in the report. I have decided that detention will be maintained at this time in light of your behaviour. I consider that your behaviour is indicating that you will pose a risk of harm to yourself and others should you be released at this time. In addition, the fact that you have not washed for some time indicates a lack of ability to care for yourself adequately. I therefore consider that you will receive the medical attention and support that you require in detention and that you would not seek this assistance for yourself if released.
>
> The detention centre medical staff have confirmed that an appointment is being set up in an attempt to further evaluate your mental health.
>
> Your detention will continue to be monitored and reviewed regularly, with an update sent every 28 days."

56. On 5 February 2010 Simon Edwards sent an e-mail to Bob Evans and Alan Kittle and a number of other recipients. He stated:

> "[The Claimant] remains in RFA and continues to generally refuse with staff in the Centre. Healthcare have established that his local PCT is in Newcastle. They have stated that they will not come to see him until they have received the report which we are still awaiting from the local Dr who saw him previously. Healthcare are chasing this. My concern at this point is that due to the timeframes involved in this process he is more than likely going to be sitting in RFA when the HMCIP [Her Majesty's Chief Inspector of Prisons] inspectors come to visit us on 15th March. He will most probably be sleeping in the toilet area in his room, where he normally is, and the question may be asked as to why he is not in more appropriate accommodation i.e. a healthcare bed at one of our other Centres and he has remained in RFA since December. Both G4S and UKBA staff have ensured that the paperwork has been kept up to date and he is visited at least once a day. ……"

57. On 8 February 2010 Mr Edwards sent an e-mail to Mr Kittle and Mr Evans copied to others that stated:

> "….I have just spoken to Dr Thomas for an update this morning. All the necessary paperwork has, in fact, been sent to the PCT responsible for coming to see [the Claimant] and this referral is being chased each day by himself and his staff in order to establish when he is going to be seen by them. …."

58. On 12 February 2010, Mr Evans wrote to a Sarah Eliot in Newcastle seeking to speed up the assessment and in so doing so stated:

> "The G.P. who attends Brook House (Dr Thomas) has completed the referral paperwork to start the process for sectioning this young man and is extremely concerned that any delay in this process will have a detrimental effect on the young man's condition. *Although he is unclearly unfit for detention* (under section 35 of Detention Centre Rules 2001 detainees who have mental health problems fall into this category) we cannot release him in to the community until a full assessment has been completed and a care plan formulated. (Emphasis added)

59. Mr Evans also made reference to the criticism by the HM Chief Inspector of prisons for "the tardy resolution of a similar case because of the concerns of the detainee's welfare and I have equal concerns in this case".

60. On 7 March 2010 the Claimant was in fact transferred from Brook House IRC to Harmondsworth IRC. The Claimant invites me to draw the inference that an impending inspection by the HM Chief Inspector of Prisons at Brook House IRC on 15 March 2010 was a factor in the timing of the move. However, the evidence for this is not clearcut on the documents before the Court and, in the absence of live evidence and cross-examination (for which no application has been made), I am not prepared to draw that inference of what would be improper behaviour. Nor, in my view, is it

necessary for the resolution of the issues in this case, for reasons that will become apparent.

61. Once he was at Harmondsworth IRC, the Claimant was transferred directly into Rule 40 segregation and not into a medical bed. This was authorised by Philip Schoenenberger. Shortly afterwards he was, in fact, transferred into Rule 42 confinement and the use of force was authorised. He remained in segregation for the following 4 months or so.

62. The Claimant continued to show disturbed and erratic behaviour. No psychiatric assessment took place on 15 March 2010. I was told by counsel for the Defendant that this was not because the Claimant had been moved to Harmondsworth IRC, since the Newcastle PCT was aware of this and was expected to examine him there but did not do so.

63. On 29 March 2010 a fresh referral was made to Hillingdon Mental Health Services for assessment but no steps appear to have been taken actively to ensure that this took place and no assessment did take place despite reiteration of the urgent need for it. The Claimant was eventually referred to Hillingdon again on 19 June 2010.

64. On 24 June 2010, the visiting psychiatrist, Dr Ahmad (who had seen the Claimant on two occasions previously), was asked to sign the relevant form and a psychiatrist from Hillingdon Hospital finally recommended his transfer to hospital on the same date. This was faxed to the Hillingdon Unit by the Ministry of Justice (MOJ) on 25 June 2010. A further section 48 report was obtained from a General Practitioner on 1 July 2011. On that date a warrant was issued by the MOJ for the Claimant's transfer to hospital. That transfer took place on 5 July 2010.

65. The hospital staff noted that the Claimant was expressing paranoid delusions, that he was self-neglecting, and had bizarre behaviour with persecutory delusions. Initially the Claimant would not eat in the dining room and would only eat bread and milk for fear of being poisoned. He slept on the floor because of his fears.

66. In August 2010 the Claimant was assessed by the psychiatric team at the hospital as suffering from a psychotic illness requiring medication. On at least three occasions drugs were administered by injection without his consent.

67. In October 2010 the Claimant instructed Bhatt Murphy Solicitors and a detailed letter before claim was written on 14 October 2010 challenging the legality of his past and continuing detention. It also asked the Defendant to confirm that the Claimant would not be transferred back to detention when clinically fit to be discharged from the hospital. A request was made for a response to that letter within seven days but no substantive response was provided before the application for judicial review was lodged on 28 October 2010.

68. An application for an urgent oral hearing for interim relief prior to any transfer of the Claimant back to detention was made on the papers. Kenneth Parker J was of the view that the Defendant should be given an opportunity to give a response in summary grounds before any such hearing and ordered that the grounds be served by 8 November 2010.

69. The Claimant's solicitors sought urgent confirmation from the Defendant that no steps would be taken to transfer the Claimant back to detention at an IRC before he could have access to the court. Following the request by the Claimant's solicitors for him to be granted temporary release a letter was sent by Toni Tomney of the UKBA on 2 November 2010, which stated:

> "You have asked that your client is granted temporary release when it is decided that on clinical grounds he no longer needs in-patient treatment at Hillingdon Hospital and that he is not transferred back into immigration detention….your request for temporary release has been carefully considered. However, on the information that you have provided, I regret to inform you that I am not minded to grant temporary release. ……"

70. In the meantime, on 26 October 2010 Dr Moodley wrote a letter to Toni Tomney. She stated:

> "[The Claimant] suffers a mental illness of Paranoid Schizophrenia and has been on Colne Ward since 5 July 2010 on a Section 48/49 (assessment/treatment order with restriction direction). His current medications include Zuclopenthixol Decanoate (Clopixol), an injectable anti-psychotic preparation which he receives fortnightly.
>
> [He] has made considerable progress since commencement of anti-psychotic medication, and is likely to continue on this over the next few years in order to maintain stability of his mental state. He is currently developing insight into his mental illness and his self-care, affect, and inter-personal relationships have improved since admission. He has not made any attempts to abscond, and there have been no recent incidents of aggressive, disturbed behaviour on the unit…."

71. On 3 November 2010 Dr Moodley signed a form which stated:

> "[The Claimant] suffers paranoid schizophrenia, a severe mental illness and will need to continue on medication (Clopixol injection) every 2 weeks in order to remain well. The nature of his illness is such that when he deteriorates in mental state, he self-neglects by refusing fluid and food and neglects his personal hygiene. Risk of self-neglect = severe.
>
> No risk of violence or aggression towards others noted.
>
> No risk of deliberate harm to self in the form of suicide or deliberate self harm noted."

72. On 4 November 2010 Dr Moodley wrote to Toni Tomney answering questions which had been raised with her in the following terms:

> "[The Claimant] is currently significantly improved in his mental state and therefore ready for discharge from the Psychiatric Intensive Care Unit. In the

> absence of a Section 48/49 he would have been ready for discharge in the community.
>
> Question 1: It is likely that [the Claimant's] mental health will deteriorate significantly were he to remain in an Immigration Removal Centre for a prolonged period of time. His past history indicates that it was several months before his aberrant behaviour (lying in a toilet for months; restricting food intake to 4 slices of white bread and milk) was recognised as possibly being related to a mental illness as opposed to him being a difficult person.
>
> He remains vulnerable as he suffers from a severe mental disorder within the meaning of the Mental Health Act 1983 (amended 2007) and should his mental health deteriorate, he may need enforced treatment which cannot be provided in an Immigration Removal Centre, and this may lead to considerable delays before appropriate treatment is given.
>
> Question 2: Whilst [the Claimant] continues to take medication he is currently stable in terms of his mental state and recognises the need for continuing treatment. He is independent in his activities of daily living. He does not require placement in a hostel or other supported accommodation and is able to obtain accommodation himself.
>
> Question 3: [The Claimant] suffers from a severe mental disorder and remains detained under Section 48/49. He is entitled to Section 117 after care services when discharged into the community. …."

73. On 5 November 2010, without notice, the Claimant was transferred back to Harmondsworth IRC and detention was maintained by the UKBA on 8 November 2010.

74. On 11 November 2010 bail was refused at a hearing before Treacy J. This was primarily on the basis of the Defendant's submission that the evidence available at the time did not disclose that detention of the Claimant in an IRC had caused deterioration in his mental health and that he could not now be adequately and properly treated within an IRC.

75. On 6 December 2010 a report was written To Whom It May Concern by Dr Wilhelm Skogstad, a consultant psychiatrist who had been instructed by the Claimant's solicitors. He stated that he had conducted a psychiatric examination of the Claimant at Harmondsworth IRC over two hours on 4 December 2010. He said that, while he was preparing a psychiatric report to be completed by 20 December, he thought he needed to express his "serious concerns as a matter of urgency." He continued:

> "In my view there is a significant risk to [the Claimant's] mental health through the detention, the inappropriateness of this setting with a severe mental illness and the lack of adequate psychiatric care within it.

> [The Claimant] suffers from paranoid schizophrenia. He was transferred to a psychiatric hospital only having suffered from this condition in detention for over half a year, probably 9 months, without any psychiatric treatment. By then his condition had become so severe that he required a lengthy psychiatric admission of 4 months for his condition to improve and stabilise. This was only possible with adequate treatment and in an appropriate environment.
>
> Since his transfer back to Harmondsworth IRC on 4 November his mental state has deteriorated again. Psychotic symptoms have returned, in particular auditory hallucinations (i.e. hearing of voices) as well as accompanying symptoms of profound sleeplessness and a tendency to isolate himself. [The Claimant] told me that since his return to Harmondsworth he has not seen a psychiatrist or a psychiatric nurse, only a general nurse who administered the injections. There has not even been a response to his repeated request in the last week to see a psychiatric nurse because of his deteriorating state.
>
> [The Claimant] is currently still in a mental state where he has insight into his illness and expresses the wish to be helped and treated however, if his condition is allowed to deteriorate further, he may well return rapidly to a much worse mental state in which he has no such insight, as was the case before he was treated in a psychiatric hospital, and would then again require sectioning and forced treatment.
>
> ….I am of the opinion as a psychiatric expert that [the Claimant] cannot be adequately treated in detention and without mental health workers experienced in the treatment of such a severe condition. A continuation of his detention therefore poses a severe risk to his mental health and is likely to lead to a further deterioration of his psychiatric condition."

76. As I have mentioned, at a further bail hearing on 15 December 2010, the Claimant was granted bail (by Kenneth Parker J), this time without objection from the Defendant.

Reviews of the Claimant's Detention

77. Monthly reviews of the Claimant's detention under the 2007 Act were undertaken by the UKBA.

78. The first review of the Claimant's detention took place on 25 September 2009. The initial review was conducted by Mr Guy Brewer. After setting out the brief case summary and noting that this was the first detention review in this case, Mr Brewer said that:

> "The subject requires a substantive asylum interview. Should the asylum claim be refused we have supporting evidence to submit to the Nigerian authorities for an Emergency Travel Document. It is believed that should the

> subject become appeal rights exhausted his removal from the United Kingdom will be achieved in a reasonable timeframe."

Under the heading "Proposal" Mr Brewer continued:

> "The subject has admitted to using a false passport to gain entry into the United Kingdom consolidating the argument that there is a risk of him continuing to use deception to prolong his stay in the UK, and if released there would be a high risk of him failing to comply with the conditions of his release and absconding. The serious nature of his offence demonstrates the risk of harm he poses to the public as well as the risk of harm if he were to reoffend.
>
> Although he has an outstanding asylum claim he only claimed asylum following his conviction for a drug offence. [Strictly speaking that is not correct as he claimed asylum three days before his conviction.] This would suggest that he has only claimed asylum to frustrate the removal process and prolong his stay in the United Kingdom.
>
> I therefore propose to maintain the detention at the one month stage."

79. The case then went to Mr Brewer's superior officer, Joanne Soloman, who had to consider whether to grant authority to maintain the claimant's detention. She said:

> "I agree with your recommendation to maintain detention. The sub has an outstanding asylum claim. An asylum interview has been booked for the 30th September. If sub's asylum claim is refused, then deportation action can commence.
>
> Based on the presumption to release, I have considered whether the continued detention of [the Claimant] is lawful. In light of his risk of further offending and the harm that this may cause, as well as his likelihood of absconding, I consider these additional factors outweigh the presumption to release. I therefore authorise his detention for a further 28 days."

80. The second detention review took place on 22 October 2009. Mr Brewer was again the case officer and expressed himself in similar terms to his first review. Mr Brewer also said: "All known facts of this case have been considered and there are no compassionate circumstances to prevent further detention pursuant to deportation action." He concluded his proposal for continued detention as follows:

> "The decision to detain is balanced and proportionate to protect the public, risk of harm and risk of reoffending therefore, to maintain detention is considered appropriate for the subject. I therefore, conclude that the presumption for liberty is outweighed by the individual circumstances of this case."

81. On this occasion the authority to maintain detention was given by Alex Forbes, Assistant Director at the UKBA.

82. The third detention review took place on 20 November 2009. The review and proposal by Mr Brewer were expressed in very similar terms to the second review. On this occasion the authority to maintain detention was given by Martin Fullick, an acting higher executive officer. In granting that authority Mr Fullick said:

> "….The subject today failed to report for his asylum interview record interview which is further proof that he would fail to comply with any conditions of release. ….."

83. Although it is not entirely clear, it would appear that the inability to secure an interview with the Claimant, which may well have been due to his medical condition or difficulties arising from it, was being regarded at this time as wilful non-compliance and therefore further "proof" that he would not comply with any conditions of release.

84. The fourth detention review occurred on 17 December 2009. The report and proposal by Mr Brewer were again expressed in very similar terms to his earlier views. This time it was Joanne Soloman again who granted authority to maintain detention. In doing so she made this request to Mr Brewer:

> "Case owner – can you refer this case to the asylum team and request that asylum be refused under non compliance. Can you also draft the deportation documents so that they can be submitted with the asylum refusal. …."

85. It would appear that at this stage therefore the UKBA had come to the view that asylum was going to be refused and that this was going to occur on the ground that the Claimant had not complied with the relevant requirements.

86. The fifth detention review took place on 14 January 2010. Again the review and proposal by Mr Brewer were expressed in very similar terms to his earlier views. It was Joanne Soloman again who granted authority to maintain the claimant's detention. However this time the request was as follows:

> "Case owner – Can you arrange another asylum interview for sub. If he refuses to attend again, can you ask the asylum team to refuse the sub's asylum claim on non compliance grounds? …."

87. It would appear therefore that by now Joanne Soloman was not regarding the case as fit for immediate refusal of asylum but nevertheless still regarded the Claimant as being non-compliant and having failed to attend for interview.

88. The sixth detention review took place on 9 February 2010. It will be noted that by this time Dr Spoto had issued his report and a Rule 35 notice had been passed on to the

UKBA as well. In his report Mr Brewer noted under the heading 'Changes in Circumstances (Include full details of notified Human Rights factors)':

> "On 21 January 2010 immigration at Brook House wrote to CCD Team 3 expressing concern regarding the subject's behaviour and mental well being. A response to 'Detention Centre Rule 35' was drafted and reasons for continued detention were sent to immigration at Brook House on 1 February 2010. A psychiatrist is due to assess the subject regarding his mental health."

89. Under the heading 'Likelihood of removal within a reasonable timescale' Mr Brewer said:

> "The subject has expressed the wish to claim asylum, however, has failed to cooperate with the UK Border Agency and his asylum claim will fall to be refused on grounds of non compliance. An ETD will be obtained once the asylum decision has been made. Removal from the United Kingdom will be achieved in a reasonable timeframe."

90. Under the heading 'Proposal' Mr Brewer set out in materially the same terms what he had proposed in the past. There was no reference to the Claimant's medical condition or the information which had been brought to Mr Brewer's attention by this time. In his report Mr Brewer also said:

> "All known facts of this case have been considered and there are no compassionate circumstances to prevent further detention pursuant to deportation action."

91. In granting authority to maintain detention, Joanne Soloman said:

> "…Case owner I would suggest that you get sub's asylum claim refused under non-compliance and have this served on sub with DO and deportation documents. …."

92. The seventh detention review occurred on 10 March 2010. On this occasion the case worker was not Mr Brewer but Sarah Littledyke. After setting out a brief case summary she said under the heading 'Progress since last review':

> "Several attempts have been made to interview the subject both in relation to his asylum claim and to offer him FRS [Facilitated Return Scheme], however, he has failed to appear for these. A third asylum interview was attempted on 29 January 2010, however, the subject was again non-compliant.
>
> No further attempts have been made to interview him since the last review.

> On 5 March 2010 health care from Brook House have agreed with the health care dept. at Harmondsworth that he will be transferred to a medical bed there from Rule 40. DEPMU are to set up the move."

93. It is of some concern that under the heading 'Changes in Circumstances' there was in fact reference simply to what had already been said in the February review about events in January and early February 2010. The proposal to continue detention was expressed in very similar terms to what Mr Brewer had said previously but this time Sarah Littledyke added at the end:

> "We should continue to detain until [the Claimant's] mental health is being assessed."

94. The eighth detention review took place on 12 April 2010. On this occasion the case officer was Aina Parry. Under the heading 'Progress since last review' she said:

> "On 23 March 2010 spoke to Helen in immigration at Harmondsworth regarding the possibility of the subject being given a psychiatric assessment. Helen stated that there are plans to return the subject to Brook House as the subject was not going to be assessed at Harmondsworth.
>
> Subject remains on Rule 40 and continues to show erratic behaviour by laying next to the toilet and refusing to communicate."

95. Again it is of some concern that under the heading 'Changes in Circumstances' the same words that had been used in the previous two reviews were repeated without in fact any record being given of any changes since the last review. The proposal was the same as before and ended in the same way:

> "We should continue to detain until [the Claimant's] mental health is being assessed."

There then appeared this:

> "I have assessed this case for release under the current detention criteria and conclude that the subject is not suitable for release under conditions of temporary release due to the following facts:
>
> While it is the UK Border Agency's policy for a presumption in favour of release, this presumption is weighed against the criteria for maintaining detention. Having considered his immigration history, his criminality, the likelihood of reoffending, the seriousness of the crime, and protecting the public, it is submitted at this stage, in the light of the above, that the subject should remain in detention until such time as to when we can remove him from the UK.
>
> The subject presents a serious risk of harm to the public given the nature of his crime namely being concerned in the supply of a Class C controlled

> drug. It is strongly believed that the subject could reoffend. Furthermore, the subject has demonstrated a total disregard for the UK laws, moreover, he is aware that the UK Border Agency intends on deporting him, it is considered that the subject would have little incentive to comply with any release restrictions that would be placed upon him. *All known facts of this case have been considered and there are no compassionate circumstances to prevent further detention pursuant to deportation action*.
>
> The decision to detain is balanced and proportionate to protect the public, risk of harm and risk of reoffending therefore, to maintain detention is considered appropriate for the subject.
>
> I therefore, conclude that the presumption for liberty is outweighed by the individual circumstances of this case." (Emphasis added)

96. It will be observed that there was no mention of the Claimant's mental health in the lengthy section which closed the proposal by Aina Parry.

97. In granting authority to maintain detention, Joanne Soloman made this request of the case worker:

> "Case owner – Can you get the asylum decision done asap and have this served on sub. Has he been assessed as yet with regard to his mental health? If not, can you arrange for this to be done asap."

98. The eighth detention review took place on 7 May 2010. This time the case worker was again Mr Brewer although the report was signed by Pam Merkell on his behalf. Under the heading 'Progress since last review' it was noted that on 12 April 2010 the Claimant was served with his previous detention review, which he placed in the bin. On 20 April 2010 the case owner faxed Harmondsworth IRC requesting advice as to when they would be obtaining a psychiatric report or moving the claimant to Brook House. A response was received on the same day stating that the health care manager at Harmondsworth had confirmed that the Claimant had been referred to Hillingdon PCT but that they had not indicated when they might be able to make an assessment despite being chased by him.

99. Again it is of some concern that under the heading 'Changes in circumstances' there was simply repeated what had been said as long ago as February 2010. The proposal was in very similar terms to the one which had been drafted by Aina Parry the previous month. In granting authority to maintain detention, Joanne Soloman asked:

> "Case owner – Can you ensure that the psychiatrist report is received by the next review. If there are problems can you refer to team leader to chase."

100. The ninth detention review took place on 7 June 2010. The report and the proposal by Mr Brewer were in very similar terms to what had been said in the previous review. In granting authority to maintain detention, Alex Forbes said:

> "… Please continue to chase the psychiatric assessment as this will be important in establishing whether we maintain detention."

101. The ninth detention review took pace on 1 July 2010. The report was again compiled by Mr Brewer. Under the heading 'Changes in circumstances' he said:

> "Harmondsworth have advised that the subject has now been given an initial psychiatric assessment, however, he requires a second medic to make a further assessment in order for the subject to be admitted to a psychiatric unit for treatment. Harmondsworth have advised that they are finding it problematic finding a medic to make a further assessment."

102. The proposal was in very similar terms to the previous recent occasions. In view of the length of time that the Claimant had by now been in detention, the case had to be considered by the CCD Deputy Director, Jackie Gallop. In submitting the case to her, Joanne Soloman said that she agreed with Mr Brewer's recommendation to maintain detention. She said:

> "This sub has mental issues and has been assessed by a psychiatrist but no report has been received. We are trying to get sub seen by a second psychiatrist but this is proving difficult.
>
> The subject has claimed asylum but refuses to comply with the interview, therefore, his asylum claim will be referred to the asylum team to refuse his asylum under non compliance.
>
> Actions:-
>
> - To escalate case to G7 with regard to the second psychiatrist's assessment as this is needed to assess whether sub should be maintained in detention or sectioned.
> - To continue daily contact with Harmondsworth to assess sub's health.
> - To refuse his asylum claim under non compliance.
>
> Based on the presumption in favour of release, I have weighed up the facts and due to the nature of his offence the risk of harm and reoffending or absconding, the risks outweigh the presumption in favour of release therefore, can you consider whether continued detention should be maintained for a further 28 days."

Authority to maintain detention was given by Jackie Gallop. She said:

> "I have considered the presumption of liberty and the policy of detaining those with mental illness, but am satisfied that detention remains appropriate. The immigration history, including the use of fake documents

> suggests he would be unlikely to comply with conditions if released. There is also a risk he will reoffend. Once other barriers are removed we should be able to obtain an ETD for removal."

Detention Reviews after the Claimant's transfer to hospital

103. The Claimant's detention was again reviewed on 10 August 2010. On this occasion Toni Tomney was the case worker and the Senior Executive Officer Operations Manager who made a recommendation to the Deputy Director was Shakira Bukhari. The Deputy Director was Jackie Gallop. In the recommendation by the case worker on this occasion it was said:

> "It has been taken into account that those with a mental illness can only be detained under immigration powers in exceptional circumstances. [The Claimant] is currently in hospital under section 48 of the Mental Health Act but his Responsible Clinician has said that at the end of the assessment period he will be well enough to return to immigration detention. He has no known ties to the United Kingdom who could influence him to remain in contact with the UKBA if released and it is believed that he would abscond.
>
> A medical report has been requested and should be available shortly together with details of the CPA [Care Programme Approach]. It is proposed that he should continue to be detained at this time and that this should be reviewed when all of the information is available and he has been returned to immigration detention."

104. Shakira Bukhari in her report to the deputy director said:

> "[The Claimant] was sectioned in July 2010, and was transferred over to the MDO [Mental Disordered Offenders] team. Since the case was transferred the case owner has been liaising with the Responsible Clinician in order to assess whether [the Claimant] requires ongoing treatment under the Mental Health Act. As highlighted above initial assessments have been completed and although the case plan meeting did not take place on the 9th August 2010, the Responsible Clinician is of the opinion that [the Claimant] will not need prolonged detention in hospital and that he will be fit and well to return to immigration detention in the next couple of weeks. [The Claimant's] transfer back will be arranged by the MDO team so that the original CCD team may proceed with deportation action that has been initiated.
>
> In light of the above and whilst we await the final medical report I recommend the continued detention of [the Claimant] do you agree?"

105. The deputy director did agree that detention was appropriate and said that the Claimant had been convicted of a drugs offence, had previously used false documents and had not co-operated with asylum interviews. She concluded:

> "I note that he has been transferred to hospital under section 48 of the Mental Health Act, but we anticipate he will be able to return to an IRC shortly."

106. The documentation for the next detention review is not available in full. However, there is before the Court a report by Toni Tomney dated 27 August 2010. This includes a section headed 'Compassionate Circumstances/Medical Conditions (including mental health issues)'. This stated:

> "[The Claimant] is currently hospitalised under section 48 of the MHA 1983. A care plan assessment meeting scheduled for 9 August 2010 was cancelled but his RC advised that she thought he would be declared well enough to be released back into immigration detention at the end of the 6 weeks assessment period. However, I spoke to her today and she has said that they had not thought that Mr A had a mental illness but he has now been seen by a consultant in whose opinion Mr A has psychotic ideas about the prison service and immigration. They consider that he is paranoid and have started treating him but he is resisting and has had a forced injection. He functions around the system but has paranoid delusions about HMPS and immigration. Dr Moodley said that they are concerned that when he is well he will be returned to detention and it would be better for him to be removed from hospital if possible."

107. The next detention review took place on 22 September 2010. The case worker again was Toni Tomney. Her report under the heading 'Compassionate Circumstances etc' she said:

> "…On 22 September 2010 Dr Moodley advised that Mr A is still receiving treatment by injection, he does not take it willingly. There is some improvement and he may only remain there for a few more weeks. He still holds psychotic beliefs about immigration but is responding to medication. He does not want to be removed to Nigeria from hospital but wants to return to an IRC."

108. In her recommendation she said:

> "Full consideration has been given to liberty as outlined in Chapter 55 of the Enforcement Instructions and Guidance. It has also been taken into account that those with a mental illness can only be detained under immigration powers in exceptional circumstances. [The Claimant] has been diagnosed with paranoid delusions. There is a serious risk of harm, offending and absconding and the presumption in favour of liberty is outweighed in this case. Having considered his immigration history, his criminality, the likelihood of reoffending, the seriousness of the crime, and protecting the public, it is submitted that at this stage [the Claimant] should remain in detention until his doctor declares that he is fit for discharge when his continued detention should be reviewed."

109. In her report to the Deputy Director Sarah O'Flaherty said:

> "[The Claimant] was previously detained in immigration detention but became unwell and so was hospitalised under section 48 of the Mental Health Act on 5 July. He has been assessed as having paranoid delusion but it is expected that he will be well enough to leave hospital within 2 weeks. However I am concerned that we have been advised that his return to immigration detention could result in a relapse due to delusions he has about the immigration authorities. The case owner will therefore have to seek the advice of the IRC regarding [the Claimant's] possible discharge.
>
> In the meantime it is appropriate for him to remain in the Riverside Centre….."

110. The Deputy Director on this occasion was Nick Hearn, who gave authority to maintain detention and said:

> "A high risk of absconding given his current mental condition for which he is receiving appropriate treatment. He is also likely to pose a risk of harm. These factors outweigh the presumption of liberty."

111. After the Claimant had been returned from hospital to Harmondsworth IRC, the final detention review in his case took place on 8 November 2010. In the section headed 'Progress since last detention review' Toni Tomney said:

> "Mr A was transferred back to Harmondsworth on 5 November 2010, having been released from section 48 of the Mental Health Act 1983. Mr A's RC has stated that it is likely that [his] health will deteriorate significantly should he remain in Immigration Detention for a prolonged period of time. His past history indicates that it was several months before his aberrant behaviour (lying in a toilet for month; restricting food intake to 4 slices of white bread and milk) was recognised as possibly being related to a mental illness as opposed to being a difficult person.
>
> He remains vulnerable as he suffers from a severe mental disorder within the meaning of the Mental Health Act 1983 and should his mental health deteriorate, he may need enforced treatment which cannot be provided in an Immigration Removal Centre, and this may lead to considerable delays before appropriate treatment is given.
>
> Whilst Mr A continues to take medication he is currently stable in terms of his mental state and recognises the need for continuing treatment. He is independent in his activities of daily living. He does not require placement in a hospital or other supported accommodation and is able to obtain accommodation himself….

> Consideration has been given to proposing to release Mr A however, there is no evidence that the release address is suitable. The reps have provided copies of a tenancy card and other documents but on 5/11/10 I wrote to the reps asking for handwritten evidence that the surety's tenancy agreement allows her to accommodate Mr A and that she is willing to do so indefinitely."

112. In a note to the case owner the Deputy Director said:

> "What is the realistic timescale for removal having regard to the asylum claim and obtaining an ETD [Emergency Travel Document]?
>
> Please discuss this case with your assistant director and subject to the suitability of the sureties consider referring this case for release to the Strategic Director."

113. The recommendation for continued detention was expressed in very similar terms to the previous occasion. In granting authority to maintain detention the Director of the Criminal Casework Directorate (CCD), Richard Quinn, himself took the decision and said:

> "I note the current status of this case and agree the proposed next step. I agree with the assessment of risk in relation to reoffending and absconding, but also note the effect detention has on his mental state. Based on the presumption of liberty, the risks highlighted outweigh a decision to release. I therefore authorise his detention for a further 28 days."

Material Legislation

The 2007 Act

114. Section 32 of the 2007 Act provides that:

> "(1) In this section 'foreign criminal' means a person –
>
> (a) who is not a British citizen,
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months……
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ..."

115. Section 33 lists specified exceptions to the otherwise mandatory requirements of section 32(4) and (5). One such exception is where removal of a person would breach the United Kingdom's obligations under the Refugee Convention: see subsection (2). Another exception is where a transfer direction under section 47 of the Mental Health Act 1983 has effect in respect of the person concerned: see subsection (6)(c). I will return to this later.

116. Section 36 of the 2007 Act provides that:

> "(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State –
>
> (a) while the Secretary of State considers whether section 32(5) applies, and
> (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order. ..."

The 1983 Act

117. Section 2 of the 1983 Act provides for the compulsory admission to a hospital and detention there of a person for the purpose of assessment, where both the substantive and the procedural criteria in that section are satisfied. The maximum period for such detention for the purpose of assessment is 28 days: see subsection (4).

118. Section 4 of the 1983 Act provides for some of the criteria in section 2 to be dispensed with where assessment is needed in cases of emergency but this permits compulsory admission for up to 72 hours only.

119. Section 136 of the 1983 Act provides for cases that may be even more urgent. Subsection (1) states that, if a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in "immediate need of care or control", the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons, remove that person to a place of safety. A person removed to a place of safety may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved mental health professional and of making any necessary arrangements for his treatment or care: see subsection (2).

120. Section 3 of the 1983 Act provides for the compulsory admission to a hospital and detention there of a person for the purpose of treatment, where the substantive and procedural criteria in that section are met.

121. It can be seen, therefore, that the 1983 Act seeks to cater for the various scenarios that may arise, in which very urgent cases, cases calling for assessment and cases calling for treatment can be dealt with using compulsory powers if necessary and with appropriate safeguards and time limits for the use of those powers.

122. Section 47 of the 1983 Act addresses the situation where a person serving a sentence of imprisonment needs to be transferred to a hospital for treatment because he is suffering from a mental disorder. It enables the Secretary of State to make a "transfer direction" where the substantive and procedural criteria in that section are satisfied. It does not directly address the situation of a person who is detained under administrative powers conferred by immigration legislation but is cross-referred to in the next provision in the 1983 Act.

123. Section 48 of the 1983 Act provides that:

> "(1) If in the case of a person to whom this section applies the Secretary of State is satisfied by the same reports as are required for the purposes of Section 47 above that –
>
> (a) that person is suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and
> (b) he is in urgent need of such treatment; and
> (c) appropriate medical treatment is available for him;
>
> the Secretary of State shall have the same power of giving a transfer direction in respect of him under that section as if he were serving a sentence of imprisonment.
>
> (2) This section applies to the following persons, that is to say –
> …..
>
> (d) persons detained under the Immigration Act 1971 or under section 62 of the Nationality, Immigration and Asylum Act 2002 (detention by Secretary of State). …."

124. No challenge has been made in these proceedings to the lawfulness of the Claimant's transfer from an IRC to hospital under section 48 of the 1983 Act. However, at the hearing before me it was submitted that as a matter of law such a power is not available because there is no reference in section 48(2(d) to detention under the 2007 Act. If that submission were correct, and the Secretary of State disputed it, it was agreed before me that it raises an important issue of interpretation of potentially wider application on which I should express a view.

125. It was also submitted on behalf of the Claimant that this interpretation receives support from the fact that, when Parliament enacted the 2007 Act, it expressly had in mind certain provisions of the 1983 Act and referred to them in terms: section 33(6) includes express reference to transfer under section 47, but does not refer to transfer under section 48. I do not find that subsidiary argument persuasive. This is because, in my view, the reference to section 47 is sufficient to include a transfer under section 48 too. Close reading of those two sections of the 1983 Act makes it clear that there is no separate power to make a transfer direction under section 48. Rather, the drafting technique adopted is that under section 48(1) the Secretary of State is given

the same power to make a transfer direction "under that section", i.e. section 47, as if the detainee were serving a sentence of imprisonment.

126. Nevertheless, I do see force in the Claimant's primary argument, that section 48 simply does not apply to detention under the 2007 Act since it does not refer to it, whereas it does refer to detention under the Immigration Act 1971 or section 62 of the Nationality, Immigration and Asylum Act 2002. It should be noted that, when Parliament enacted the latter provision, it expressly amended section 48 of the 1983 Act. In contrast, the 2007 Act did not amend the 1983 Act as it could have done. Nor can it be said that detention under the 2007 Act is simply to be regarded as an example of detention under the Immigration Act 1971: although section 32(4) of the 2007 Act cross-refers to the 1971 Act, that is only for the purpose of deeming a foreign criminal's deportation to be conducive to the public good. It is clear that section 36(1) of the 2007 Act confers an additional, and distinct, power of detention and was not treated by Parliament as simply an example of the exercise of the power of detention in the 1971 Act. The 2002 Act similarly refers to the 1971 Act but also confers an additional, and distinct, power of detention. Yet, when enacting that Act, as I have already said, Parliament thought it necessary to amend section 48 of the 1983 Act and make express reference to section 62 of the 2002 Act.

127. I have considered whether a purposive construction should be given to section 48, since otherwise a detainee who needs urgent treatment for a mental disorder may not receive it as the power to transfer will not be available to the Secretary of State. I am not persuaded that such a purposive construction is necessary, since there are other provisions available in the 1983 Act itself which would cater for the need for compulsory detention of a person in an emergency (section 4 or, in more limited circumstances, section 136), for the purpose of assessment (section 2) or for the purpose of treatment (section 3). In any event, however desirable a construction may be, it can provide no warrant for departing from the natural meaning of the words used by Parliament in the present context. In my view, it is difficult, if not impossible to read the words of section 48(2)(d) of the 1983 Act as if they included reference to detention under section 36 of the 2007 Act when they simply do not. If that interpretation is considered to be an unfortunate one, the remedy must lie with Parliament, which may need to consider amending section 48.

The Public Sector Equality Duties

128. Section 71 of the Race Relations Act 1976 (the 1976 Act), as amended, in the version that was in force at the material time (before its repeal and replacement by the Equality Act 2010), provided that:

> "(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need –
>
> (a) to eliminate unlawful racial discrimination; and
> (b) to promote equality of opportunity and good relations between persons of different racial groups.…"

129. Section 49A of the Disability and Discrimination Act 2005 (the 2005 Act) was also in force at the relevant time, although it too has been repealed and replaced by the Equality Act 2010. Section 49A, in the version that was in force at the material time, provided that:

> "(1) Every public authority shall in carrying out its functions have due regard to –
>
> (a) the need to eliminate discrimination that is unlawful under this Act;
> (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
> (c) the need to promote equality of opportunity between disabled persons and other persons;
> (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably that other persons;
> (e) the need to promote positive attitudes towards disabled persons;
> (f) the need to encourage participation by disabled persons in public life."

130. It was common ground before me that "disability" in this context includes a *mental* impairment which has a substantial and long-term adverse effect on a person's ability to carry out day-to-day activities, as the statutory definition in section 1 of the Disability Discrimination Act 1995 itself made clear.

131. The duties in section 71 of the 1976 Act and section 49A of the 2005 Act are often referred to as the "public sector equality duties". Although those provisions are no longer in force, having been repealed by the Equality Act 2010, they have been replaced by similar provisions in section 149 of that Act, which has the sidenote "Public sector equality duty."

Human Rights Act 1998

132. The provisions of the Human Rights Act 1998 (HRA) are too well-known to need lengthy citation here. The Claimant submits that the Defendant acted unlawfully under section 6(1) of the HRA by reason of conduct which was in breach of the following Convention rights, as set out in Sch. 1: Article 3 (in particular the prohibition on inhuman and degrading treatment); Article 5 (right to personal liberty) and Article 8 (right to respect for private life).

Lawfulness of Detention during the First Period

133. The Claimant's first main ground of challenge is to the lawfulness of his detention on or after 16 January to 5 July 2010. He submits that there were relevant errors of public law which vitiated the decisions to continue his detention during that period. Accordingly, he submits, that detention was unlawful.

134. The relationship between public law errors and the tort of false imprisonment was recently and authoritatively considered by the Supreme Court in R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245. The main judgment was given by Lord Dyson JSC.

135. At para. 62 of his judgment Lord Dyson rejected the approach which had found favour in the Court of Appeal and which became known in the case as the "causation test". He said:

> "The causation test entails the surprising proposition that the detention of a person pursuant to a decision which is vitiated by a public law error is nevertheless to be regarded as being lawfully authorised because a decision to detain could have been made which was not so vitiated. In my view, the law of false imprisonment does not permit history to be rewritten in this way."

136. At para. 63 Lord Dyson accepted that the Court of Appeal had been right to say that the mere existence of an unlawful policy is not sufficient to establish that any particular exercise of a statutory discretion is unlawful. The decision to detain and/or continue detention will not be vitiated on the grounds of an unlawful policy "unless the policy has been applied or at least taken into account by the decision maker." But in Lord Dyson's view this did not shed any light on the correctness of the causation test.

137. At para. 64 Lord Dyson said:

> "Trespassory torts (such as false imprisonment) are actionable per se regardless of whether the victim suffers any harm. An action lies even if the victim does not know if he was imprisoned. … By contrast, an action on the *case* (of which a claim in negligence is the paradigm example) regards damage as the essence of the wrong."

138. In the same paragraph Lord Dyson quoted from the opinion of Lord Griffiths in Murray v Ministry of Defence [1988] 1 WLR 692, 703A-B, where he said:

> "The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage."

139. At para. 65 Lord Dyson said:

> "All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. …"

140. At para. 66 Lord Dyson said:

> "… a purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the Wednesbury sense, it is unlawful and a nullity. The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires…."

141. At para. 68 Lord Dyson said:

> "… It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain under conditions different from those described in the policy. Errors of this kind do not bear on the decision to detain. They are not capable of affecting the decision to detain or not to detain."

142. Later in his judgment Lord Dyson made it clear that, although damage is not necessary to establish liability for the tort of false imprisonment, it will be highly relevant to the quantification of damages. This is because, as he put it at para. 95:

> "Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. [Turning to the facts of the cases before the Court] If the power to detain had been exercised by the application of lawful policies….it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages."

143. I derive the following principles from those passages:
    (1) The tort of false imprisonment requires proof that the Claimant was detained directly and intentionally.
    (2) The Defendant must then be able to show that there was lawful authority for that detention.
    (3) If the Defendant had the power to detain but exercised that power in a way which is vitiated by an error of public law, the apparent authority will fall away and the Defendant will not in truth have the lawful authority she needs in order to justify the detention.
    (4) Not all public law errors will vitiate the authority to detain, only those which bear upon and are relevant to the decision to detain.

(5) Since the tort is actionable per se and does not require proof of damage, the Defendant will have committed that tort even if, had she not made the relevant error of law, she could and would have detained the Claimant. There is no requirement for 'causation' in that sense.

(6) However, the question of whether the Claimant would have been detained in any event will be relevant to quantum of compensatory damages.

144. The Claimant also placed reliance on a passage in R (Kambadzi) v Secretary of State for the Home Department [2011] 1 WLR 1299, at para. 86, where Lord Kerr JSC said:

> "…If it is illegal to hold a person in detention where it has been established that there are no good grounds for doing so, can it be lawful to hold someone without examining whether such grounds continue to exist? In my view it cannot. Since it has been recognised, in cases such as the appellants, periodic review is necessary in order to vouch the continued justification for detention, where that review does not take place, the detention can no longer be considered justified. The justification for continued detention cannot be said to exist and, absent such justification, the detention is unlawful. Likewise, in my opinion, where the review does take place but does not partake of the quality or character required to justify the continuance of detention, it becomes unlawful and gives rise to a right to claim false imprisonment."

145. The Claimant submits that the detention reviews in his case were inadequate and flawed and did not have "the quality or character required to justify the continuance of detention." He relies on a number of alleged flaws in the decision-making process.

146. Initially the Claimant's submissions, as made in writing, made a number of complaints in relation to the decision-making process from September 2009 until mid-January 2010. However, it became clear at the hearing before me that the real focus of the Claimant's challenge was to the lawfulness of his detention on or after 16 January 2010. If the complaints relating to that earlier period had been pursued, I would not have been inclined to accept them. In the months between August 2009 and January 2010, as the Defendant has submitted to me, the Claimant's condition fluctuated and was not uniform. Even Dr Spoto in his report of 21 January 2010 was not saying that the Claimant was mentally ill but recommending transfer to a hospital precisely so that he could be assessed in an appropriate psychiatric unit. As the Defendant submitted before me, even once the Claimant had been admitted to hospital, it was not immediately apparent that he was suffering from mental disorder and this was clearly diagnosed only about two months into his stay there.

147. The Claimant's first contention in this context is that the Defendant acted contrary to relevant policy in the course of the decision-making process and that this vitiates the authority to continue his detention in January/February 2010.

148. Rule 35 of the Detention Centre Rules 2001 provides:

> "(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> …
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
>
> (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care."

149. The Claimant submits that the purpose of Rule 35 is to ensure that persons considered unsuitable for detention in an IRC because their continued detention is likely to be injurious to their health are released promptly.

150. The Claimant also relies upon the policy in the Defendant's Enforcement Instructions and Guidance (EIG) in which Chapter 55.8 provides that, once a Rule 35 report is received by the Secretary of State, caseworkers must review continued detention in light of the information in the report and respond to the IRC, within two working days of receipt, using the appropriate Rule 35 pro forma.

151. As I have indicated in the earlier summary of the facts, the decision made on 22 January 2010 refusing to release the Claimant was on the basis that "you are liable to deportation, your asylum claim will be refused on grounds of non-compliance, you pose a danger to the public and deportation is achievable within a reasonable timeframe". The Claimant submits that it was unlawful, in particular because:
    (1) no regard was had to the policy contained within Rule 35 and explained in Chapter 55.8 of the EIG not to detain those where to do so is likely to be injurious to health; and

    (2) the Claimant's asylum claim was not and/or could not lawfully be refused on non-compliance grounds given his mental state.

152. Furthermore, the Claimant submits, no reference was made to the further information available to the Defendant through its officers and/or servants or agents, Mr Evans, Mr Schoenenberger and Mr Partridge, that the Claimant was:
    (1) likely to be suffering from a psychotic illness;
    (2) had been held for a prolonged period in segregation and could not be moved out of it;
    (3) required urgent psychiatric assessment;
    (4) such assessment was not likely to be obtained promptly, at that stage estimated as taking up to 45 days (six weeks).

152. The Claimant also submits that it is clear from Mr Evans' email of 12 February 2010 that he did not consider that the Claimant was "fit to be detained" in accordance with Rule 35 and/or its purpose but nowhere was this view addressed in any decision to continue to detain the Claimant.

153. As I have mentioned in the summary of the facts, a further decision was issued on 1 February 2010, although it is unclear why. It may be that further time was needed in order to digest the information which had been provided to the UKBA, including the report of Dr Spoto of 21 January and the exchange of emails between officials in late January. In the absence of clear evidence I am prepared to make that assumption in favour of the Defendant: at the hearing before me counsel for the Claimant realistically accepted that the focus of her complaint was to the decision to continue detention from 1 February 2010.

154. In essence, I accept the submissions for the Claimant on this issue. In my judgement, the Defendant's decision to authorise the Claimant's continued detention was flawed from 1 February 2010, when the Defendant had had the opportunity to consider the matter more fully and in particular to digest the implications of the report by Dr Spoto of 21 January 2010 and the Rule 35 notice. In my view, the way in which the UKBA responded to that report and the other information emanating from senior officials both at Brook House IRC and in the UKBA itself was flawed as a matter of public law.

155. The Defendant had no real answer to these submissions. In substance her response was to accept that the Claimant was in need of a transfer at about that time for assessment and, if necessary, treatment in a psychiatric setting but to deny that it was her responsibility that this did not happen as quickly as it might have done, that responsibility lying with others such as the Primary Care Trust. I will return to that submission later. However, what is important in the present context is that it does not begin to answer this particular part of the Claimant's complaints. At this stage of the argument, the Claimant focuses squarely on the Defendant's own decision-making process and contends that her authority to continue his detention was flawed as a matter of public law because of errors in that decision-making process. As I have already said, the decision to detain the Claimant was at all times that of the Defendant and nobody else. The Defendant's attempts to answer this have failed because she has been unable to meet that fundamental point.

156. The consequence is that, in my judgement, the apparent authority to detain the Claimant was ultra vires and a nullity as from 1 February 2010, in accordance with the principles set out by Lord Dyson in Lumba.

157. Accordingly, the Claimant's detention was unlawful from then. It remains to be seen what, if any, loss flowed from that but, as the Supreme Court held in Lumba, proof of special damage is not required to establish liability for false imprisonment. Questions of loss and causation go to quantum. The Claimant accepted before me that he would have been liable to some continued detention since he was appropriately detained in a mental hospital as he needed compulsory treatment there. However, the Claimant submitted that his detention should and would have come to an end earlier than it did; and also that questions of aggravated or exemplary damages may arise. Such questions will have to be considered at a quantum hearing in this case.

158. In the light of my conclusions on the lawfulness of the Claimant's detention, it is not necessary to lengthen this judgment unduly by consideration of the alternative submission by the Claimant that, in any event, his detention was unlawful by

reference to the well-known principles in R v Governor of Durham Prison, ex p. Hardial Singh [1984] 1 WLR 704, at 706 (Woolf J), as approved by the Supreme Court in Lumba, at para. 22 (Lord Dyson), and as modified in the context of section 36(1) of the 2007 Act in R (Rashid Hussein) v Secretary of State for the Home Department [2009] EWHC 2492 (Admin), at para. 44 (Nicol J).

Article 5

159. The Claimant submits that his detention was incompatible with Article 5(1)(f) as an arbitrary interference with his right to liberty because it was, for the reasons set out earlier, contrary to domestic law: R v Governor of Brockhill Prison, ex p. Evans (No. 2) [2001] 2 AC 19, 38C (Lord Hope of Craighead). Although that is right, that submission does not add anything of substance to his argument.

160. However, the Claimant also submits that, in any event, his detention was (from on or after 16 January 2010) in breach of Article 5(1)(f) because the Claimant was held in a place and in conditions (including in prolonged segregation) which were wholly unsuitable and he required urgent admission to a mental health facility and treatment for a psychotic mental illness, which did not occur for over 5 months.

161. The Claimant placed reliance on two Strasbourg authorities. The first, and main authority, is Aerts v Belgium (2000) 29 EHRR 50. In that case, as the European Court of Human Rights noted at para. 45 of its judgment, the Committals Chamber of the Liège Court of First Instance found that the applicant had committed acts of violence. It ordered his detention on the ground that at the material time he had been severely mentally disturbed to the point where he was incapable of controlling his actions. As he was not criminally responsible, there could be no conviction within the meaning of Article 5(1)(a), and in any case the Committals Chamber could not give such a ruling. At para. 46 the Court reiterated that in order to comply with Article 5(1), the detention in issue must take place "in accordance with a procedure prescribed by law" and be "lawful". As the Court said, the Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness. Furthermore there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient would only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution. In the circumstances of the particular case before it the Court found, at paras. 47 to 49, that the proper relationship between the aim of the detention and the conditions in which it took place was deficient. As the mental health board itself had found, the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. Accordingly the Court found there to have been a breach of Article 5(1).

162. The second case on which the Claimant relies in this context is Pankiewicz v Poland (application number 34151/04, judgment of 12 February 2008), at paras. 38 to 46 of the judgment of the European Court of Human Rights, a case which was similar to Aerts.

163. I do not accept these submissions that there was a breach of Article 5 independent of domestic law. As the Defendant submitted, the submissions involve an element of hindsight. It was not clear that the Claimant was suffering from a severe mental illness until about two months into his compulsory admission to hospital where he could be assessed by psychiatrists. He was detained at all times under the 2007 Act, in other words for immigration purposes, although a transfer was made under sections 47 and 48 of the 1983 Act. He was not detained in an IRC on the ground that he had a mental illness. In other words, his detention at IRCs was covered by Article 5(1)(f) (for the purposes of deportation) and not Article 5(1)(e) (persons of "unsound mind").

164. It is for that reason, in my judgement, that the two authorities on which the Claimant placed reliance, Aerts and Pankiewicz, can be distinguished. In both of those cases the state sought to invoke Article 5(1)(e) to justify the applicant's detention (i.e. that he had a mental illness or, in the words of that provision, was of "unsound mind") and yet he was detained in a non-therapeutic setting. Such detention was therefore unlawful under Article 5(1). In contrast, the general position under Article 5 is that it covers the lawfulness of detention and not simply the conditions of detention: see Ashingdane v United Kingdom (1985) 7 EHRR 528, at para. 52. There the Court was addressing the right to a judicial remedy to challenge the lawfulness of detention in Article 5(4) but also referred to Article 5(1) in the following terms:

> "[the applicant] was claiming an entitlement to accommodation and treatment in the more 'appropriate' conditions of a different category of psychiatric hospital, a matter not covered by paragraph 1(e) of Article 5."

Transfer to Hospital for Assessment and Treatment

165. The Claimant submits that the Defendant breached her duty to transfer him to hospital and, in particular, that the delay between 16 January, when Dr Spoto saw him at Brook House and shortly after recommended urgent transfer to hospital, and 5 July 2010, when in fact he was transferred, was unacceptable.

166. In support of this submission the Claimant relies, by way of analogy, upon the decision of Stanley Burnton J (as he then was) in R (D) v Secretary of State for the Home Department and another [2005] 1 MHLR 17, which concerned a prisoner rather than an immigration detainee. At para. 33 Stanley Burnton J said:

> "Once the prison service have reasonable grounds to believe that a prisoner requires treatment in a mental hospital in which he may be detained, the Home Secretary is under a duty expeditiously to take reasonable steps to obtain appropriate medical advice, and if that advice confirms the need for transfer to a hospital, to take reasonable steps within a reasonable time to effect that transfer. In many cases, the medical advice as to the appropriateness of a transfer will serve as the reports required by section 47 [of the Mental Health Act 1983]. The steps that are reasonable will depend on the circumstances, including the apparent risk to the health of the prisoner if no transfer is effected. Inappropriate retention of a prisoner in a prison or YOI [Young Offenders Institution] may infringe his rights under

> Article 8. If the consequences for the prisoner are sufficiently severe, his inappropriate retention in a prison may go so far as to bring about a breach of Article 3, in which case the State is under an absolute duty to prevent or bring to an end his inhumane treatment."

167. The Claimant submits that, even if (as I have already indicated) section 48 of the 1983 Act does not apply to detention under the 2007 Act, the Defendant has the means to transfer immigration detainees to hospital by a variety of other means:

> (a) granting temporary admission or bail to permit access to community services on a voluntary basis;
> (b) release on temporary admission or bail on condition of transfer to a specified hospital;
> (c) release on temporary admission or bail on condition of transfer to a specified hospital and, if considered necessary, under compulsion by virtue of section 2 and/or section 3 of the 1983 Act;
> (d) a direction for detention in a hospital, under what is now paragraph 3(1)(d) of the Immigration (Places of Detention) Direction 2011 (there was a similar provision in a Direction of 2009, which was in force at the material time).

168. The Claimant also relies on the policy governing the use of the power in section 48 of the 1983 Act in relation to immigration detainees *in prison* at the relevant time, which was contained in Prison Service Instruction (PSI) 50/2007 and Joint Guidance issued in conjunction with the Department of Health. No such specific policy was in place for detainees in IRCs but I was informed (without contradiction by the Defendant) that it was treated by the Defendant as equally applicable in that context. The following passages were emphasised by the Claimant:

> ***"Need for urgency in identifying and transferring mentally ill prisoners***
> The Head of Healthcare (HHC) at the prison, in conjunction with the Prison Mental Health Team, must ensure that prisoners, who may need treatment in hospital, are identified as soon as possible. It is Government policy that people who are suffering from mental disorder who require specialist medical treatment need to receive it from Health and Social Services. The fact that the person is a prisoner must not prevent or delay access to appropriate care and treatment, in hospital if necessary. (p.11)
> […]
> **Immigration Act Detainees**
> For those detained under the Immigration Act, Border Immigration Agency (BIA) case-workers <u>will need to be approached by the Healthcare Manager initially for a decision on whether Temporary Admission is appropriate.</u> Admission may be by Sections 2 / 3 if the case-worker decides on Temporary Admission. Where continued detention is required transfer will be by Section 48. If Section 48 is used it is imperative that the Border Immigration Agency case-worker is informed by the Healthcare Manager and that there is good subsequent communication between the case-worker and the patients' RMO [Responsible Medical Officer]. (p.13)" [Emphasis added]

169. I accept the Claimant's submissions on this point. Although I have already indicated that section 48 of the 1983 Act is not available in cases of detention under the 2007 Act, and so the policy in relation to that is not directly in point, the principle of law identified by Stanley Burnton J in D is, in my judgment, equally applicable in the context of detention in IRCs, including detention under the 2007 Act. It is a principle of public law. A public authority has a duty to act rationally and will not be acting rationally if it breaches the principle identified by Stanley Burnton J. This will be particularly important in the context of a person, like this Claimant, whose transfer is recommended by a psychiatrist as a matter of urgency.

170. It is the Defendant who is in law responsible for the decision to detain the Claimant. Moreover, the Defendant is in overall control and management of IRCs through the UKBA manager and his/her team who are on the ground in an IRC. Furthermore, it is clear that, on the facts of this case, the Defendant's officers (at a senior level) were aware of this particular case and the need for the Claimant's urgent transfer to hospital.

171. In my judgement, as from the time when Dr Spoto made the recommendation that he did on 21 January 2010, the Defendant had a duty to take reasonable steps to secure the Claimant's transfer to a hospital for appropriate assessment and treatment and to do so reasonably expeditiously. Although such arrangements cannot necessarily be made overnight, or even within a few days, on any view, the delay of over five months in this case was manifestly unreasonable.

172. I do not regard it as unreasonable that the Defendant initially sought to liaise with the Newcastle PCT with a view to the Claimant's transfer. As the Defendant points out, the Claimant had given an indication that he had been settled in the Newcastle area. However, even if the delay in agreeing an assessment of the Claimant by the Newcastle PCT until 15 March 2010 was reasonable, and although the reason why the assessment did not take place on that date was not, it would seem, due to the fact that the Claimant had been moved from Brook House to Harmondsworth IRC in early March, there was then an undue delay, in my view, before the local PCT for Harmondsworth, Hillingdon, was goaded into action in June 2010. No active steps appear to have been taken after the initial referral to Hillingdon on 29 March 2010 until 19 June 2010. It is noteworthy that, when active steps were taken in late June and early July 2010, it was possible to secure the Claimant's transfer within a few weeks.

Article 3

173. The following principles relating to Article 3 are well-established in the Strasbourg jurisprudence and can be summarised by reference to the decision of the European Court of Human Rights in Kudla v Poland (2002) 35 EHRR 11, although many other cases could be cited:

    (1) Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading

treatment or punishment, irrespective of the circumstances and the victim's behaviour (para. 90).

(2) However, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (para. 91).

(3) The Court has considered treatment to be inhuman because, inter alia, it was premeditated, was applied for hours at a stretch, and caused either bodily injury or intense physical or mental suffering (para. 92).

(4) It has deemed treatment to be degrading because it was such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them (para. 92).

(5) On the other hand, the Court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element connected with a given form of legitimate treatment or punishment (para. 92). Measures depriving a person of liberty may often involve such an element (para. 93).

(6) It cannot be said that Article 3 lays down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to receive a particular kind of medical treatment (para. 93). Nevertheless, the state must ensure that a person is detained in conditions which are compatible with his dignity and that the manner and method of execution of measures used do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (para. 94).

174. The Claimant also relies upon Kalashnikov v Russia (2008) 36 EHRR 34, where the Court said, at para. 95:

> "In considering whether a particular form of treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3."

No such improper purpose was alleged in the present case. However, as the Claimant submits, that is not decisive.

175. Although the primary obligation in Article 3 is a negative one, the Court has recognised that a positive obligation to protect individuals from ill-treatment may also arise under it. In particular, as the Claimant points out, detained persons have frequently been said by the Court to be "in a vulnerable position" and "the authorities are under a duty to protect them": e.g. Edwards v United Kingdom (2002) 35 EHRR 19, para. 56. This includes persons in administrative detention for immigration purposes: Slimani v France (2006) 43 EHRR 49.

176. Furthermore, an obligation may even arise under Article 3 where there is no ill-treatment from the state or from other people. As the Court put it in Pretty v United Kingdom (2002) 35 EHRR 1, at para. 52:

> "… The suffering which flows from *naturally occurring illness*, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible." (Emphasis added)

177. The Claimant submits, placing reliance on Bensaid v UK (2001) 33 EHRR 10, at para. 37, that the suffering associated with relapse in mental health could in principle, fall within the scope of Article 3.

178. As Keenan v United Kingdom (2001) 33 EHRR 38, paras. 110-115, illustrates, the distinction between negative and positive obligations is not always clearcut when a person with mental health problems is in custody and there may be a combination of factors, both acts and omissions, which leads to the overall conclusion that there has been a breach of Article 3. In Keenan the following factors led the Court to make a finding of inhuman and degrading treatment in breach of Article 3: inadequate medical records; lack of recourse to specialist psychiatric input; the imposition of seven days of segregation; and punishment in the form of an additional period of 28 days imprisonment for an assault on officers.

179. The Claimant submits that from on or after 16 January 2010 he was subjected to a combination of acts and omissions which together cross the high threshold of inhuman or degrading treatment required by Article 3. In summary the Claimant relies upon the following factors:

    (1) as was eventually recognised, the Claimant was suffering from a serious mental illness while he was in detention at IRCs;

    (2) his behaviour, which was described by many observers as "odd" or "bizarre", included acts which violated his own dignity in that:

        (a) he spent prolonged periods of time in isolation in segregation or temporary confinement;
        (b) he was sleeping on the floor, often naked, in a toilet area;
        (c) he drank and washed from the toilet;
        (d) he was self-neglecting by not maintaining adequate nutrition;

(e) he did not wash or change his clothes for prolonged periods, perhaps for over one year, and was described as "grossly unkept" on arrival at the hospital;
(f) he suffered insomnia;

(3) his behaviour alienated him from others in the IRCs, so that he had to be segregated;

(4) he was not given appropriate medical treatment to alleviate his mental illness for a prolonged period of more than 5 months;

(5) the use of force against the Claimant was authorised on several occasions.

180. Furthermore, the Claimant submits that senior officials within the UKBA were aware of the main features of the Claimant's case by 1 February 2010, particularly after they had received not only Dr Spoto's report of 21 January but also various other accounts of the Claimant's behaviour and the fact that he was having to be kept in segregation.

181. In essence I accept those submissions on behalf of the Claimant. The Defendant submitted that it was not her responsibility but that of other authorities. It was submitted on her behalf that the Claimant was seeking to mount what was in essence a clinical negligence action against those who had responsibility for his care and treatment. In my judgement, that is not the right way to look at it. The Claimant has not sought to mount a negligence action but submits that, in all the circumstances of his case, the combination of acts and omissions of those for whom the Defendant is in law responsible crossed the threshold of ill-treatment required by Article 3. I agree that there was a breach of Article 3 in this case: the Claimant suffered degrading treatment within the meaning of that provision.

182. In the light of that conclusion it is not necessary to address the Claimant's alternative submission, that there was a breach of Article 8. For similar reasons, it is unnecessary to address the separate submissions on behalf of the Claimant that the use of the power to keep him in segregation under Rules 40 and 42 of the 2001 Rules was unlawful.

The Challenge to the Policy on or after 26 August 2010

183. The policy which was in place until 26 August 2010 provided in Chapter 55.10 of the EIG that certain categories of person were considered unsuitable for detention as follows:

> "Certain persons are normally considered suitable for detention in only very exceptional circumstances. In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention.

> The following are normally considered suitable for detention in only very exceptional circumstances...
>
> - Those suffering from serious medical conditions or *the mentally ill"*
> (Emphasis added)

184. The reformulation of the policy, to use what I hope is a neutral word since the Defendant disputed that there was a policy change, was introduced on 26 August 2010 and provides as follows:

> "Certain persons are normally considered suitable for detention in only very exceptional circumstances... In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances...
>
> - those suffering from serious medical conditions which cannot be satisfactorily managed within detention;
>
> - *those suffering serious mental illness which cannot be satisfactorily managed within detention."*
> (Emphasis added)

185. As Cranston J had previously held (in October 2009), the original form of the policy created a strong presumption in favour of release for those with a mental illness: R (Anam) v Secretary of State for the Home Department [2009] EWHC 2496 (Admin), paras. 51-55 (the decision was upheld by the Court of Appeal: [2010] EWCA Civ 1140).

186. The written policy went from stating that "the mentally ill" were "normally considered suitable for detention in only very exceptional circumstances" to treating those suffering from mental illness as being suitable for detention unless "suffering serious mental illness which cannot be satisfactorily managed within detention".

187. The understanding of the Defendant as to the intended effect of the reformulation of the policy was that it related to "a practical consideration" (see Mr Barrett's witness statement, para. 37) where "the evidence indicates clearly that intensive physical or mental medical management is needed as to whether, exceptionally, those conditions cannot be managed within the special conditions that apply within immigration detention". At para. 39 Mr Barrett explains the concern that led to the change in the EIG as follows: "the words (of the pre-August policy) led the Court to attribute a

meaning to the guidance which did not reflect the actual policy. The Secretary of State was concerned that there was a disjuncture between the guidance as interpreted and the policy, so the terms of the guidance were updated by the addition of a few words to say explicitly what had always been understood as the policy".

188. The review and decision to reformulate the policy was introduced without any prior notice or consultation with relevant government departments, for example the Department of Health; or Primary Care Trusts, in particular those serving the main detention centres such as Hillingdon PCT; or relevant non-governmental organisations like MIND, the Medical Foundation, Bail for Immigration Detainees and Medical Justice.

189. Concern about the implementation of this and other policy changes without consultation and regard to the public sector equality duties was raised by the Immigration Law Practitioners Association in a letter dated 11 October 2010 with particular emphasis on the mentally ill at paragraphs 7-21.

190. A response to this letter was provided on 20 December 2010 by Alan Kittle, the Director of Detention Services, in which he confirmed that the reformulation of the policy was not "considered to be a change in policy rather it reflected more explicit statement of our existing policy. It follows that we did not consider it necessary to consult on the issue and that it was not necessary to prepare an equality impact assessment". It was acknowledged that there had never been any equality impact assessment [EIA] of the original policy and it was said that "we will undertake an EIA when we are in a position to do so."

191. A similar point is made in the evidence of Mr Barrett at para. 39, who states that there was no need to make any assessment of the impact of the change for the purpose of the equality and disability legislation as it would have produced nil returns since there "can be no impact if there is no actual change".

192. The Claimant submits that the following principles are now well-established in respect of the public sector equality duties:

    (1) The obligation to have due regard to the need to eliminate discrimination and promote equality of opportunity etc. is mandatory and is a continuing one.

    (2) The duty must be fulfilled before and at the time that a particular policy or decision is under consideration, not afterwards. For example, in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, at para. 274:

        "It is the clear policy of section 71 [of the 1976 Act] to require public bodies to whom that provision applies to give advance consideration of race discrimination before making any policy decision that might be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance

with that provision was not a very important matter."

(3) The duty applies to both formulation of policy and decisions of public authorities: R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141, at para. 29 and R (JL) v Islington LBC [2009] EWHC 458 (Admin), at para. 114.

193. The Claimant also submits that on the evidence before the Court, which includes evidence filed on behalf of a number of relevant non-governmental organisations, it is clear that there are serious concerns which have been raised about the impact that the new wording of the policy in August 2010 may have on people with mental illness (hence the relevance of section 49A of the 2005 Act) and on people from minority ethnic communities, since detention for immigration purposes affects foreign nationals (hence the relevance of section 71 of the 1976 Act).

194. In my judgement there was a change in at least the stated policy. There was obviously a change of wording, in other words a reformulation of it. Even if the Defendant did not intend that to be a substantive change in her own policy, there are two reasons why the public sector equality duties were triggered by that reformulation. The first is that the meaning of a policy is an objective matter: whatever the subjective intentions of its authors, the formulation matters because the words which express a policy affect the public, not just officials within a department, for example individuals who are liable to detention and those who advise them. The reason why public law has in recent years come to recognise the importance of adherence (in general) to policy statements is that they serve an important function in maintaining the rule of law, which is of particular importance when fundamental rights such as the right to personal liberty are at stake.

195. The second reason is that, even on the Defendant's own evidence, she was seeking to reformulate the policy to re-align it to what had been thought within the department to be its practice all along. The courts had given an interpretation to the policy which did not accord with the practice of the Defendant's department. But that is implicitly to acknowledge that in fact there was a change of policy if not of practice. It was common ground before me that, in the present context at least, the meaning of a policy is ultimately a question for the courts, not one for the executive. If that is right, then when the words of a policy are altered, that is a change in policy. It was clearly intended to have some effect, otherwise it would have been a pointless exercise.

196. It was argued on behalf of the Claimant that, even if there was no change in policy, the public sector equality duties were applicable since they do not require there to have been a change: they apply in the exercise of a public body's functions generally. Although I see force in that submission, it is unnecessary to consider it further since the Defendant accepts in these proceedings that, if there was a change of policy in August 2010, the usual practice under the public sector equality duties was not followed. For example, there was no equality impact assessment. In my judgement, there was a breach of the duties in section 71 of the 1976 Act and section 49A of the 2005 Act.

197. It was common ground before me that, nevertheless, the Court has a discretion whether to grant any remedy. I was invited to exercise that discretion in favour of the Defendant, especially since I was informed that the Defendant is currently in the process of carrying out an equality impact assessment. However, it became clear after the hearing that, in fact, this has not yet started. In a witness statement filed on 23 March 2012 Mr Kittle, who is the Director of the Returns Directorate of the UKBA, informs the Court, at para. 2, that:

> "the Secretary of State takes the duties under the Disability Discrimination Act 1995 (DDA 1995) [sic] and Race Relations Act 1976 (RRA 1976) seriously across the full range of areas of responsibility. The Secretary of State benefits from a whole range of sources of ongoing information and advice on issues arising in relation to administrative detention generally and detention of those with mental illness in particular including public bodies and non-governmental organisations."

198. At para. 3, Mr Kittle provides an undertaking to the Court in these terms:

> "The Secretary of State is committed to undertaking a formal Equality Impact Assessment of the policy concerning the detention under immigration powers of those suffering from mental illness. I undertake to ensure that this EIA is commenced within 7 days from the date of this statement."

199. I do not consider that it would be appropriate to exercise the Court's discretion to refuse any remedy to the Claimant in this regard, for the following reasons. First, as has been acknowledged in the authorities, the duties are important ones and non-compliance cannot be regarded as unimportant. Secondly, they must normally be followed before a relevant decision is taken, not afterwards. This is in accordance with normal principles of administrative law: whenever a relevant consideration is not taken into account, the normal remedy will be for the Court to quash the resulting decision, or at least declare it to be unlawful: see e.g. Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service [1978] AC 655, 694A and 695A (Lord Diplock); and R (C) v Secretary of State for Justice [2008] EWCA Civ 882, at paras. 41 and 85. It is not normally for the Court to anticipate or pre-empt what a lawful decision would be if the correct process had been followed. This is precisely because the function of the court in judicial review cases is to assess the legality of the executive's actions and not to substitute its own view of the merits of a decision or policy. Thirdly, it seems to me that the context of personal liberty is important. It may well be that individuals have been detained under the new formulation of the policy who would not have been detained under the old one. Fourthly, although section 71 of the 1976 Act and section 49A of the 2005 Act have been repealed, they have been replaced by similar provisions in section 149 of the Equality Act 2010. As Mr Kittle's witness statement makes clear in the passages I have already quoted, the Defendant takes those duties seriously and is committed to undertaking a full EIA in the present context. The issue is on any view far from academic.

200. The Claimant further submitted that the policy was unlawful because it creates an unacceptable risk or serious possibility of unlawful decision making and, in particular, a risk of violation of human rights under Articles 3 and 8. However, it seems to me to

be unnecessary to address that submission in the light of my decision that the policy was unlawful because it failed to comply with the public sector equality duties. There will have to be a reconsideration of the policy in the light of this judgment. Furthermore, the Defendant is committed to a consultation exercise, as Mr Kittle says in the passages I have quoted, in which the views of interested organisations will be taken into account. The policy may well end up in a form which is satisfactory to those organisations or which, on any view, does not carry the risks of which the Claimant complains.

Application of the Policy in this case

201. The Claimant submits that, even if the policy was a lawful one, the Defendant acted in breach of that policy in detaining the Claimant on 5 November 2010 because he clearly had a serious mental illness which had not been and could not be satisfactorily managed within the IRC.

202. I accept that submission. In particular, I note that the Claimant's illness was not satisfactorily managed in detention for many months before his transfer in July 2010 and he had required in-patient treatment in a hospital to manage to treat his condition; on the information that was before the Defendant, in particular the letter by Dr Moodley dated 4 November 2010, it was likely that any prolonged detention would cause deterioration in his mental health which could not be managed in the IRC setting; medication could not be administered by force within the IRC; and any further need for treatment that required hospitalisation was likely to be subject to delay.

203. In all the circumstances of this case I conclude on this issue that the Defendant acted irrationally since no reasonable Secretary of State could have reached the conclusion that the Claimant could be detained in an IRC on or after 5 November 2010 in a manner which would be compatible with her then policy.

Human Rights issues in relation to the Claimant's return

204. The Claimant also contends that his return to detention in November 2010 was in breach of his rights under Article 3 and/or 8 since it subjected the Claimant to a further distressing and disturbing episode in which his recently stabilised mental health began to deteriorate, with the return of strong auditory hallucinations and paranoia causing him fear and anguish at the prospect of relapse. The Claimant submits that the Defendant acted in breach of her negative duties and also failed to comply with her positive duties.

205. The Claimant points out that his mental health did in fact deteriorate (as anticipated) upon his return to detention: he had signs of psychosis which were not picked up or treated adequately. He did not see a psychiatrist at all for the five weeks that he was in detention and he only saw a Registered Mental Health Nurse (RMN) because he referred himself on 8 December 2010.

206. In my judgement, the Claimant's return to detention at an IRC in November 2010 and his subsequent detention there until 15 December 2010 was in breach of Article 3. This is borne out not only by the Claimant's witness statement in these proceedings but also Dr Skogstad's letter of 6 December 2010 and other evidence from him which is before the Court. The Defendant had also been warned of what the likely consequences of return would be by Dr Moodley, for example in her letter of 4 November 2010.

207. By the time of his compulsory return to an IRC it was known that the Claimant had a severe mental illness which had not been treated for many months when he was previously in IRC detention. It was known that his mental illness had been stabilised (but not eradicated) by the use of medication, which had to be administered using force. It was known that the IRC did not have the medical facilities that the Claimant would need if he suffered a relapse. It was known that the nature of the Claimant's illness concerned in part a paranoia about IRC staff. It was also known that, when he had been in IRC detention previously, he had had to be in segregation for many months and had engaged in behaviour that was described as "odd" or "bizarre" and which included self-neglect and drinking water from the toilet. In all the circumstances of the case, in my view, to force the Claimant to return to and stay in IRC detention in November and December 2010 was at least degrading treatment and, if it were necessary to say so, inhuman treatment, contrary to Article 3: I make this last point because by this stage, unlike the first period of detention between January and July 2010, the Claimant's serious medical condition was clearly known to the Defendant. It was therefore unlawful by virtue of section 6(1) of the Human Rights Act 1998. Again, it is unnecessary to consider the Claimant's alternative argument under Article 8.

Conclusion

208. For the reasons I have given this application for judicial review is granted. In summary my conclusions are that:

    (1) The Claimant was unlawfully detained from 1 February to 5 July 2010 and from 5 November to 15 December 2010.

    (2) The length of time that it took to secure the Claimant's transfer to hospital between 1 February and 5 July 2010 was manifestly unreasonable and unlawful.

    (3) The policy introduced on 26 August 2010 in relation to detention of people with mental illness was unlawful in breach of the Defendant's duties under section 71 of the Race Relations Act 1976 and section 49A of the Disability Discrimination Act 2005.

    (4) The circumstances of the Claimant's detention were unlawful in breach of section 6(1) of the Human Rights Act 1998 as being incompatible with the Claimant's rights under Article 3 of the Convention rights, both in the period from 1 February to 5 July 2010 and the period from 5 November to 15 December 2010.

209. I will consider the parties' submissions as to remedies and also as to the further directions which may be required in this case in relation to a hearing on quantum.