Neutral Citation Number: [2012] EWHC 2569 (Admin)

Case No: CO/1561/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2012

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **On the application of EH**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Stephanie Harrison and David Chirico (instructed by **Bhatt Murphy**) for the **Claimant**
Robert Kellar (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 19th & 20th July 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimant, who is a national of Rwanda, challenged by way of judicial review:

   a) the Defendant's decision, dated 8th December 2010, to refuse leave to remain and to refuse to treat his representations as a fresh claim;

   b) the Defendant's decision, dated 11th February 2011, to remove the Claimant from the UK;

   c) the Defendant's decision, dated 19th October 2010, to detain the Claimant, and his continuing detention until his release on 1st March 2011.

2. Since the claim for judicial review was issued on 16th February 2011, there have been important developments:

   a) on 18th February 2011, the Defendant cancelled the removal directions;

   b) on 27th May 2011, the Defendant granted the Claimant discretionary leave to remain in the UK for 12 months;

   c) on 26th June 2012, the Defendant accepted, in the light of further evidence, that the Claimant had been attacked in the Rwandan genocide, and granted the Claimant discretionary leave to remain in the UK for a further 3 years, until 2015, due to the exceptional circumstances of his case, specifically, the ongoing treatment and specialist care in relation to his mental health;

   d) in the Detailed Grounds of Resistance, dated 17th June 2011 and served 28th June 2011, the Defendant conceded that the Defendant's detention was unlawful from 29th December 2010 to 1st March 2011, because of his psychiatric condition.

3. It is common ground that the Court is no longer required to make findings in respect of the Defendant's decision, dated 8th December 2010, to refuse leave to remain and to refuse to treat his representations as a fresh claim, as these have been superseded by the Defendant's subsequent decisions.

4. The Claimant now concedes that the initial detention, which commenced 19th October 2010 was lawful; his case is that it became unlawful on 26th October 2010.

5. The issues which still remain to be determined are as follows:

   a) whether Defendant acted unlawfully in detaining the Claimant between 26th October and 28th December 2010, and if so, the award of damages, if any;

   b) damages for the period of unlawful detention from 29th December 2010 to 1st March 2011;

   c) whether the Defendant unlawfully attempted to remove the Claimant, and if so, the award of damages, if any.

6. This judgment is limited to the issue of liability; damages are to be assessed at a later date.

History of events prior to detention

7. The Claimant was born in Kigali, Rwanda on 2nd June 1973. He is of Tutsi ethnicity.

8. According to the Claimant, in April 1994, during the Rwandan genocide, the Claimant, his mother, father and three sisters and three brothers were violently attacked in their home by the Hutu (Interahamwe) militia. The Claimant was beaten with a nailed club and slashed with a machete. He was the only member of his family who survived. He was traumatised by his experience, suffering flashbacks and depression ever since, especially at the time of the year when the massacre occurred. He also experiences headaches and dizziness. He received intensive psychological treatment and medication in Rwanda. By the time of his arrival in the UK in 2009, he was managing his condition successfully and no longer required treatment.

9. Since 1994, he has looked after two children, who were orphaned in the genocide. Their names are Gisele Ntazinda (born 1993) and Joyeuse Gatera (born 1994). He is engaged to be married.

10. The militia who attacked him and his family included men called Habibu (a leader of the local Militia), Muganga and Evariste. In 1995, Habibu was detained because of the atrocities he had committed.

11. In May 2005, the Claimant's attacker, Habibu, was brought before Kimihurura 'Gacaca' court (a customary court set up for trying genocide suspects). The Claimant gave evidence against Habibu. Because Habibu did not accept his guilt in the face of accusations from the Claimant (and others), he was returned to prison. The Claimant also gave evidence against a man called Nzabantenrura (who was sentenced indefinitely in 2006) and another called Chachana (who had died in 1994).

12. The Claimant became a documentary film maker, and in 2009 his film *"Tears of Rwanda"* was premiered at the Serena Hotel in Kigali. The Claimant arrived in the United Kingdom on 10th August 2009, on a valid business visit visa. The reason for his visit was to promote his documentary films.

13. On 15th December 2009, the Claimant received an email from his friend Oliver Mbabazi, who had fled Rwanda for Kenya; the email informed the Claimant that his attackers had been released and were looking for him to prevent him from giving more evidence to the *Gacaca* (which might result in their being returned to prison). On 16th December 2009, the Claimant telephoned another friend, Jean-Claude to clarify what had happened. It was Jean-Claude who confirmed that the person who had been released was Habibu.

14. On 17th December 2009, the Claimant claimed asylum and was screened. The Claimant was substantively interviewed on 4th January 2010. The interview notes recorded his account of the attack upon him and his family in 1994 and scars on his head from the injuries he sustained. At the close of his interview, he informed his interviewer that he has "psychological problems dealing with the trauma of what happened. [He gets] headaches and become[s] dizzy".

15. On 14th January 2010, the Defendant refused the Claimant's asylum claim, and leave to remain on the grounds of humanitarian protection and on the ground that the emails he had produced did not establish that Habibu was looking for him, but in any case, the Rwandan state authorities would be willing and able to protect him. The letter set out his account that he had been attacked and left for dead when his immediate family was killed by Hutus in the massacres that took place in 1994. The Defendant did not expressly accept or reject his account of the 1994 attack, and my interpretation of the decision letter is that no finding was made on the truthfulness of this part of the Claimant's account.

16. The Claimant appealed to the First-Tier Tribunal ("FTT"). By the time of the hearing, his solicitors, IAS, had come off the record and he was unrepresented and the Home Office did not appear. Immigration Judge Thornton had no medical evidence before her, and made no reference to his scars or mental health. In a Determination promulgated on 29th March 2010, the Claimant's appeal was dismissed. The Judge found that he had fabricated the account that he had received news from his friends in Rwanda that Habibu had been released and was searching for him. She concluded that he had failed to adduce any credible evidence that he would be at risk of persecution, serious harm or ill-treatment if he returned to Rwanda.

17. In paragraph 15, under the heading "Findings of Credibility and Fact", she made the following finding:

> "I do not find the Appellant to be a witness of truth. There are a number of matters concerning which I find his evidence to be incredible and inconsistent, which therefore casts doubt upon other matters. Nor is his account supported by the objective evidence. I shall set out below a number of examples of the lack of credibility of that evidence, which are not intended to be exhaustive."

18. In paragraph 35, she concluded:

> "In summary, I do not find the Appellant to be a witness of truth. I find that he came to the UK as a visitor and then fabricated his <u>entire</u> account in order to support an asylum claim in an attempt to remain in the UK." *(emphasis added)*

19. In view of these findings, I have concluded, on the balance of probabilities, that the Judge did not accept the truthfulness of his account of events in 1994. I find it inconceivable that she would have made such unequivocal findings of dishonesty and fabrication if she accepted that the Claimant was a survivor of the well-documented genocide in Rwanda. In reaching this conclusion, I have taken into account the fact that she did not make any express findings on the 1994 attack. I consider that paragraph 36, which concludes that, on the objective evidence about Rwanda, he would not be at risk as a Tutsi survivor of the 1994 genocide, was included as a precaution, and as an alternative to her primary conclusion, which was that she disbelieved his account in its entirety.

20. On 10th April 2010, the Claimant applied to the FTT for permission to appeal the determination. On 30th April 2010, the FTT refused the Claimant's application for

permission to appeal, holding inter alia that the application was made out of time. The Claimant renewed his application to the Upper Tribunal. On 24th May 2010, the Claimant's application was refused by the Upper Tribunal, on the grounds that there was no error of law disclosed in the determination. The Immigration Judge was entitled to make the findings of fact which she had made.

21. On 26th April 2010, the Claimant saw a General Practitioner (GP). During the following months, he complained of flashbacks, he was referred to the mental health team, he was prescribed Prochlorperazine and Amitryptiline, and then Citalopram, and was referred to a local charity, Solace, which provides counselling and psychotherapy for asylum-seekers and refugees. He was detained before the referral took effect.

22. On 3rd June 2010, the Defendant wrote to the Claimant informing him that, as a failed asylum seeker, he should make arrangements to "leave the United Kingdom without delay". He was also informed that his accommodation and support would be shortly withdrawn.

23. On 8th June 2010, the Claimant wrote to UKBA explaining that he was too ill to report on 9th June, and asked for another reporting date, but he received no response to this letter.

24. On 18th June 2010, his support from NASS was terminated and he was required to leave NASS premises.

25. On 26th June 2010, a UKBA file note recorded: "I am aware that this is possible absconder case. I will refer for further absconder action if he misses next reporting event. However I have also received a letter from the claimant dated 24/06/2010 explaining that he is receiving medication for his psychological problems. The Claimant encloses an NHS ... letter. This will require further consideration prior to any potential removal action. I have forwarded the letter to ART."

26. On 1st July 2010, a UKBA file note recorded: "I have entered an absconder breach on CID and completed a minute sheet requesting further absconder action."

27. On 2nd August 2010, a UKBA file note recorded: "Subject has failed to report on last two occasions and we do not currently have an address for him. IS151A authorised by CIO. Papers served to file and absconder action initiated."

28. On 2nd August 2010, an IS151A notice was issued stating that he was an illegal overstayer. It was "served on file" as his whereabouts were unknown.

History of events during detention

29. On 19th October 2012, a UKBA file note recorded: "Subject encountered as a spin off during visit to 136 Harlech Road, Leeds LS11 7DG by WY LIT Arrest Team. Subject was encountered hiding in the bathroom of the property and produced his ARC card as ID. Checks confirmed that he was a [failed asylum seeker] who became [appeal rights exhausted] 28/05/10 and deemed an [overstayer] from this point. The IS151A had been served to file as he had absconded before he could be detained. Subject stated that he had submitted a fresh asylum claim through his solicitor the day before the visit

however he later stated that he had intended to submit a fresh asylum claim, no evidence held on HO systems."

30. The Custody Record for 19th October 2010 recorded the Claimant's statement that he was a "survivor of genocide and has flashbacks which can cause him to faint and become very upset"; that he was prescribed Citalopram 20 mg daily; he had "scars on head from machete attack during genocide"; and he had TB. He was seen by a nurse and closely monitored. During the day he was described as "calm" but during the night, he had to receive emergency treatment from a nurse and paramedics when he had what was described as a "panic attack" – he was foaming at the mouth, crying out, shaking and had urinated in his clothes. He was taken to hospital but discharged the same night. He was under constant supervision.

31. The Defendant's IS91 Risk Assessment form dated 19th October 2010 identified a history or threat of "medical problems/concerns", but not "psychiatric disorder", and recorded the Claimant's statement that he had depression for which he was prescribed Citalopram 20 mg.

32. A Detention Review dated 20th October 2010, recorded that the Claimant had a prescription for Citalopram 20mg which he took for depression and that he said he might have TB. The Review stated "Police doctor confirms subject does not have TB and is fit to be detained and transferred". The Review concluded "Detention to be maintained to ensure subject's removal from the UK he has shown a total disregard for immigration rules and once authority obtained to remove subject RD's should be booked at the first available opportunity".

33. On 20th October, the Claimant was transferred to Brook House Immigration Removal Centre (IRC), near Gatwick Airport. On the day of arrival, he was seen by a clinic nurse. The material parts of her record read:

> "suffers with depression currently on Citalopram 20 mg OK has INP to be reviewed ...by Duty M/O for plan of care whilst at Brook House...
>
> Torture – No
>
> PTSD – Post-traumatic stress disorder
>
> Flashbacks,
>
> Insomnia
>
> Self-harm – No
>
> Seen by psychiatry – service – Yes
>
> Planning suicide – No
>
> TB – NO
>
> Mental health care plan status – Depression ON

> Orientated, communicative, contented
>
> Self medicates in the community
>
> No history self harm
>
> Never overdosed"

34. On 21st October the Claimant was examined by Dr Farrah Sherpao, a General Practitioner, who recorded as follows:

> "suffers from post traumatic stress, gets flashbacks family was killed in front of him, sleep disturbed,
>
> on citalopram on medication since Jan 2010, medication is helping but still getting flashback ... gets thoughts of suicide but no planned attempt, no hx of self harm,
>
> appetite poor, concentration poor, not hearing voices, not delusional o/e alert maintaining eye contact, speech and tone okay, objectively and subjectively euthymic, wants help in getting better,
>
> plan to inc citarlopram to 30 mg, add zopiclone [sleeping tablets] review by rmn [registered mental health nurse]"

35. Removal directions were served on the Claimant on 22nd October 2010, for removal on 25th October 2010.

36. On 22nd October 2010, the Claimant's then representatives, Chipatiso and Co, made a fresh claim on his behalf. On 25th October 2010, they issued judicial review proceedings challenging the removal directions, which were cancelled. On the same day, the Respondent refused the Claimant's fresh representations.

37. On 26th October 2010, a Detention Review stated that detention remained appropriate, without reference to his history and current mental state.

38. On 26th October 2010, the Claimant was transferred to Colnbrook IRC, at 01.52 am. A "First Reception Screening" was carried out by Nurse Godfrey at 02.12 am. The pro forma included the question "have you ever been the victim of torture or assault" to which the Claimant answered "Yes". The form then asked for details of completion and faxing of a Rule 35 report to immigration, which Nurse Godfrey completed at the same time. Nurse Godfrey referred him to the GP and RMN. The nurse recorded that he "looked very anxious and reported torture and currently experiencing flashbacks" and that he said he had been taking medication for depression. He said he sometimes felt like self -harming but denied suicidal thoughts.

39. The Rule 35 report, dated 26th October 2010, stated that the Claimant "reported he is a victim of genocide in Rwanda" and that he was "very anxious at time of interview" and showed the nurse "scars to his head which were as a result of torture during Rwanda genocide". He was reported to be suffering from flashbacks.

40. The Defendant replied by letter on 26th October 2010, rejecting his claim to be a victim of torture. The letter stated that he had not made this claim previously. The Defendant relied upon the Immigration Judge's findings in the FTT determination that he was not a witness of truth and his account of events was neither credible nor supported by the objective evidence.

41. On 27th October 2010, the Claimant was given a "Medical Officer Admission Assessment". The report stated that he was being prescribed Citarlopram and stated as follows:

> "No interpreter – poor English".
> "Torture 1994 – 2000 in Rwanda
> R35 complete.
> Machete injury to head.
> Under [care of] GP.
> PTSD.
> No sleep.
> Flashbacks.
> Nightmares."
>
> "[On examination] alert
> Co-operative
> Euthymic
> Kempt
> Eye contact
> Speech tone [illegible]"

42. The "objective assessment" of "attitude, appearance, mood, speech, orientation and behaviour" was all in the normal range. It was noted that he did not have suicidal thoughts. A clinical plan was set out which included review by a Registered Mental Health Nurse, referral to a counsellor, and medication (Zopiclone and Citalopram).

43. An RMN assessment took place on 27th October 2010. The "nursing observation" was that the Claimant was "[e]xperiencing anxiety attack, very distressed + tearful". His "appearance & behaviour" was "Very tearful + frightened. Unable to speak initially. Pointing to his head + looking around the room. Agitated and sweating." Having recorded his account of genocide in Rwanda, the death of his family and the machete injury to his head, and his past history of PTSD and depression, the nurse's "impression" of the Claimant was as follows:

> "Very frightened man, experiencing flash back of genocide in Rwanda. He claims to have been tortured by the Tutsi tribe – has a machete wound on his head to prove this."

The RMN referred him for review by a psychiatrist and for counselling.

44. On 2nd November 2010, the Claimant's representatives applied for temporary admission but not on grounds of his mental health or as a victim of torture. By a letter dated 2nd November 2010, the Defendant refused to grant temporary admission because of the fear that he would abscond again, and in the expectation that the judicial review claim would be decided within a reasonable time frame.

45. On 4th November 2010, at about 01.30 am, an Incident Report recorded that the Claimant attempted to push past staff and out of the room. He was relocated and placed under Detention Centre Rules Rule 40 (removal from association) on grounds of non-compliant behaviour. He was seen by Nurse Dyer shortly afterwards, at 02.00 am, whose notes stated "Called to see [C] in R42 where he had been taken from his room in alpha unit. Officers had been called by [his] roommate who was concerned about his level of distress. On arrival in R42, [C] was being supported on each side (but not restrained) by two officers as he was hysterical and trying to drop himself to the floor. He was crying, gabbling and staring past all staff at possible hallucinations. When a third officer brought out the wand to search him he screamed "no machete" and tried to pull himself away. Then he seemed to re-orientate himself and looked directly at all of us. He visibly settled and walked unaided to a room. He sat on the bed and accepted two cups of water. After checking his medical file, PTSD was confirmed and the incident attributed to night terror… Urgent counsellor referral made."

46. The Claimant asked to see a GP the following morning for analgesia for headaches, an ongoing problem since January 2010. The GP gave him analgesia and also noted his emotional distress and arranged for a review.

47. The Claimant was seen by Dr Lomax, visiting consultant psychiatrist, on 4th November 2010. He recorded that he was "very distressed"; "has past experience of torture and now gets flashbacks and nightmares"; he "finds some of the routines in Colnbrook trigger anxieties and flashback". The Claimant told him "if he returns to Rwanda he is likely to be killed". Dr Lomax noted that he had seen the Counsellor and was finding counselling helpful. His conclusion was that the current medication should be continued.

48. I have not seen records for the Claimant's sessions prior to 10 November 2010, but from 10th to 29th November there are records of weekly counselling sessions, in which the Claimant described events in Rwanda, and his current insomnia, nightmares and flashbacks. The record for 29th November stated that he had not seen a doctor and "no medication" which is inconsistent with other records which show that he had seen a doctor and been prescribed medication.

49. On 6th November 2010, the medical notes recorded that the Claimant said he wanted to obtain notes from his GP, and a nurse agreed to obtain them on his behalf, if he provided the doctor's name and address. Colnbrook IRC requested records from his GP on 16th November 2010 and sent a reminder letter on 29th November 2010.

50. On 8th November 2010, permission to apply for judicial review was refused on the papers and the claim was stated to be "no bar to removal without further order", indicating that the Judge considered the claim was unarguable and unmeritorious.

51. On 9th November 2010, there was a 21 day Detention Review, at which it was decided that detention remained appropriate whilst awaiting the outcome of the judicial review because the Claimant had a history of absconding.

52. On 16th November 2010, there was a 28 day Detention Review, which concluded that detention remained appropriate because the Claimant was an absconder with no family or close ties in the UK and the judicial review claim was the only barrier to removal. The outcome of the judicial review claim was expected imminently. It was noted that

the Claimant had been moved on to Rule 40 due to non-compliant behaviour. Detention was authorised by HM Inspector (a senior rank).

53. On 16th November 2010, in the first Monthly Progress Report on detention sent to the Claimant, the Defendant gave reasons for continuing to detain him. The reasons given for his continued detention were (i) to effect his removal; and (ii) because it was feared that he would fail to comply with conditions. The factors taken into account were that the Claimant had exhausted his rights of appeal, was not lawfully present in the UK, had previously failed to comply with conditions; and did not have sufficiently close ties to the UK to make him stay in one place.

54. In a letter dated 22nd November 2010, the Claimant made further representations in support of his claim for asylum, which included a reference to the trauma he experienced when his family was killed in 1994, and how his trauma had been re-awakened by his fear of being killed by those responsible. He asked for his GP to be contacted for confirmation.

55. On 22nd November 2010, there was a review of detention, and it was concluded that detention remained appropriate, pending the outcome of the judicial review claim.

56. On 25th November 2010, the UKBA was notified by the Treasury Solicitor that the court had refused the Claimant permission in his judicial review claim.

57. On 7th December 2010, there was a review of detention and it was decided that detention should be maintained pending a response in relation to the Claimant's further representations, in particular, as to whether the Claimant could seek an in-country right of appeal from refusal.

58. In a letter dated 8th December 2010, the Defendant rejected the Claimant's representations as not amounting to a fresh claim.

59. On 13th December 2010, the Defendant wrote to the Claimant giving him notice of his proposed removal three days later, on 16th December 2010.

60. On 14th December 2010, there was a 28 day Detention Review. Detention was authorised on the basis that removal was imminent and, because of his history of absconding, he was unlikely to comply with self check-in for his flight if released.

61. On 14th December 2010, the RMN recorded that the Claimant had "a severe attack of PTSD and was very traumatised ... hyperventilating, sweating and in a trance". He was re-located to VPU, given Lorazepam and referred to the GP.

62. On 16th December 2010, he was scheduled to be removed to Rwanda. He was transferred to Cayley House short term holding facility at Heathrow airport. However, his removal was cancelled following representations from his MP, who forwarded to the Defendant an email from a caseworker at the organisation "Medical Justice" referring to the medical records of his PTSD symptoms and submitting that he was not fit to fly. In consequence, the removal directions were cancelled.

63. On 16th December 2010, the Claimant was transferred to Tinsley House, where he was admitted in the early hours of 17th December 2010.

64. On 21st December 2010, the Claimant had an acute delusional episode described in the following terms:

> "Seen by mental health nurse. Physically he is extremely cold + has received oxygen intake. Mentally he is in an horrific delusionary state of having men with machetes in the centre, around him + everyone else, actively attacking him "they've killed me" + chopping him up. Nurse is trying to contact psychiatrist for emergency medication help... He needs to be kept warm + for his body temperature to rise, also to relax enough in order to increase his breathing. He is a very sick man."

65. Thereafter he was kept on hourly observations, and started on further medication: Olanzapine 5 mgs at night and Diazepam 5 mgs when required. The Claimant gradually recovered from this acute episode. Dr Skogstad, a consultant psychiatrist with special expertise in PTSD, instructed by the Claimant, described this period, on review of the notes, as follows:

> "Following the attempted removal […] he was initially distressed and suffering from insomnia but then developed a very seriously disturbed state described as 'psychotic delusional' in which he experienced terrifying threats. This appears to have lasted in a full form for about 36 hours and continued in a lesser form even longer."

66. On 21st December 2010, an IS91 RA Part C form was completed by Ms Ashworth-Pratt, RMN, who had treated the Claimant during the day. This recorded that the Claimant was "suffering an acute delusional psychotic disorder [and was] unfit for moving around estate and unfit for deportation until further notice".

67. Tinsley House UKBA was kept informed of the Claimant's condition and treatment by Ms Ashworth-Pratt by telephone.

68. On 21st December 2010, Rashid & Rashid Solicitors wrote to Tinsley House requesting a medical report and his transfer to hospital.

69. On 23rd December 2010, a Rule 35 Form was completed by Nurse Little. He recorded that a consultant psychiatrist, Dr Mackay had "diagnosed detainee with PTSD due to witnessing the death of his family. At present detainee is in need of hydration. Dr has increased medications".

70. On 23rd December 2010, the Claimant was removed from association under Rule 40; this was recorded on the Defendant's form DCF1 as following on from the Claimant having been "seen by a psychiatrist and medical", who were particularly concerned at his dehydration and low blood pressure: the purpose of the removal from association was to "monitor any health concerns". The Claimant was returned to association on the following day.

71. On 24th December 2011, the Defendant responded to the Rule 35 report, seeking information as to (i) the medication which had been prescribed to the Claimant; (ii) any

other treatment he was receiving; (iii) whether his healthcare needs could be met at Tinsley House (iv) whether he was fit for detention; and (v) whether he was fit for travel.

72. On 24th December 2010, the Claimant was seen, at the request of Medical Justice, by Dr Jobanputra, a GP with specialisation in psychiatry. He wrote a letter, which was copied to the Defendant, in which he (i) diagnosed the Claimant as suffering from severe complex PTSD; (ii) referred to the flashbacks precipitated "by people banging at the door of his room, by images of Rwanda, and probably by the experience of being incarcerated in general". Since his detention he has been suffering daily flashbacks, and was on multiple psychotropic medications to keep him calm, and was under constant surveillance in a single room. He said that numerous staff had expressed concerns about his mental wellbeing. Dr Jobanputra concluded:

> "I would have significant concerns that his deportation would result directly in a deterioration in his mental state. At which point total psychological breakdown and suicide would be possible outcomes.I suspect his ongoing detention is exacerbating his mental illness, and although the staff provides a high level of care, I feel that his incarceration is highly prejudicial to his health."

73. By 26th and 27th December 2010, Ms Ashworth Pratt RMN recorded that the the Claimant "looked very bright" and "is in the current world and feeling so much better". Dr Skagstod commented: "the clearly heartfelt relief by the mental health nurse about his improvement also suggest that staff were themselves very affected by his severely disturbed state".

74. On 29th December 2010, the Claimant was seen by Dr McKay, locum consultant psychiatrist, following a referral by Ms Ashworth Pratt. Dr Mackay found that the Claimant's mood was low and depressed; he could not concentrate and he had disturbed sleep with nightmares. He had intrusive memories of events in Rwanda when his family were killed. He had scars on his head. There was no formal thought disorder; he realised that his experiences were flashbacks, although they feel real at the time. Dr McKay diagnosed "severe PTSD with flashbacks in which he re-lives his trauma with re-enactment". Dr McKay reviewed his medication plan, advising that he recommence Citalopram 5 mg, and continue with Diazepam 5 mg and Olanzpine 20 mg.

75. On 29th December 2010, the Defendant responded to the Rule 35 report of 23rd December 2010 in a letter to the Claimant stating that (i) a full report in relation to the Claimant's diagnosis was still awaited; (ii) there was to be yet another assessment by a doctor the following day; (iii) the Claimant was in receipt of regular medication and that his medical needs were apparently being met. The Claimant's continued detention was said to be "justified, proportionate and necessary."

76. On 3rd January 2011, the Claimant reported that he was hearing voices and getting flashbacks. He was anxious and frothing at the mouth. At his request he was moved to a room on his own and placed on 1 hourly checks. He was given further sedation.

77. On 4th January 2011, Dr Thomas, a GP, advised that the Claimant was fit to fly but he should not be moved around the estate,

78. On 5th January 2011, Ms Theresa MacIntyre, a psychotherapist, to whom he had been referred by the medical centre in Tinsley House, wrote a letter reporting on her examination of the Claimant on the previous day. He told her that "every day for the past year memories of the mass killings came into his head, creating great distress". Triggers in the present, resembling aspects of the trauma, were the sound of running footsteps and doors opening. He was constantly watchful and had an exaggerated startle response. Ms MacIntyre could not confirm the diagnosis of full post traumatic stress disorder but said "it was very clear that he does have symptoms of Post Traumatic Stress which he is severely disturbed and affected by". She concluded that "detention does not represent a safe place ... and separation from community support exacerbates the situation". She recommended release and specialist psychotherapeutic treatment for trauma in the community.

79. On 9th January 2011, the Claimant was recorded as having a "very bad day". On 10th January 2011 at 4.00am, he was found sitting on the floor in the men's toilet hyperventilating and apparently hallucinating that there were "men with machetes after him".

80. On 10th January 2011, the Defendant issued a monthly progress report in which she notified the Claimant of the reasons for his continued detention. The reasons relied upon were the same as those in the 16th November 2010 report.

81. On 12th January 2011, Ms MacIntyre wrote to the Medical Centre at Tinsley House summarising advice she had given the Claimant on how to manage his fears and calm himself. She indicated that he would need some specialist trauma therapy to process the memories "at some future date".

82. On 13th January 2011, the Claimant's then representatives, Duncan Lewis, wrote to the Defendant asking for his release on temporary admission, on the basis of his PTSD, allegations of torture, and Ms MacIntyre's letter of 5th January 2011 which observed that detention "does not represent a safe place for him".

83. On 14th January 2011, the Defendant replied, refusing the request for temporary admission for the following reasons:

> "The decision to maintain detention in your client's case has been made with reference to your client's condition. Amongst these conditions has been your client's health. However, it is considered that your client's healthcare has been effectively managed whilst he has been detained. Your client has had access to the necessary treatment for his condition and has been cared for by doctors and a psychiatrist.
>
> You have stated that there is independent evidence that your client has been tortured. You have provided a report from a psychotherapist which provides details of an account provided by your client. The account contained within the report cannot therefore be deemed independent as it is the account which has been provided by your client.

> Notwithstanding this however, your client is extremely likely to abscond if granted temporary release ... your client has failed to leave the United Kingdom as required to do so. He was deemed liable to removal from the United Kingdom on 2 August 2010 as an overstayer. Your client was granted temporary release. Unfortunately your client chose not to adhere to these temporary release conditions ...
>
> It is considered that detention is necessary to enforce your client's removal and that your client's detention does adhere to the guidance provided in Chapter 55, given the exceptional lengths he will go to, to avoid returning to Rwanda."

84. Ms MacIntyre wrote again to Tinsley House Medical Centre on 20th January 2011, and reported that the Claimant had "been using techniques to manage his thoughts and self sooth. As a result he has only had one bad dream this week". In her opinion, although he was doing very well in managing severe symptoms of Post Traumatic Stress, "he would be better served if he were bailed so he could be supported by friends in a community environment where he feels safe".

85. On 19th January 2011, the Claimant was recorded as having had flashbacks. The Claimant applied for temporary admission on 19th January 2011, which was refused, on the same grounds as set out in the letter of 16th January 2011.

86. On 23rd January 2011, Dr Raina, a Doctor who had assessed the Claimant four days previously, and who recorded flashbacks and bad memories secondary to trauma suffered in his own country, declined to comment upon his 'fit to fly' status.

87. On 24th January 2011, Dr Thomas sent a report on the Claimant to immigration officers and advised that, having reviewed the IATA travel guidelines, he met the criteria for being suitable to travel on an aircraft.

88. On 25th January 2011, the Claimant was seen again by Ms MacIntyre when she observed an episode of "major flashback", during which the Claimant collapsed, dissociated completely and wept with terror; he was without consciousness of the present for some 15 minutes. She wrote to Tinsley House again on 26th January 2011 stating:

> "In the community I would be offering him specialised Trauma Therapy, using EMDR, one of the treatments of choice for PTSD. Unfortunately it would not be ethical to offer this to him whilst in detention where we cannot be certain of a guaranteed number of sessions together...In my clinical opinion, although I have been unable to elicit any Avoidance symptoms in the criteria for PTSD from [EH], he is suffering severely from symptoms in the other two groups, Intrusions and Hyperarousal. He needs to be able to access specialist psychotherapeutic treatment for this, outside in the community. He has numerous supportive contacts there and it is likely his psychological state would be helped by being surrounded by these people, a good basis for beginning treatment which in

> itself is often challenging. I believe his condition will deteriorate if he remains in detention, even in the relatively benign regime of Tinsley House".

89. On 25th January 2011, an officer from Detention Services at Tinsley House wrote to UKBA's West Yorkshire Local Immigration Team attaching the 'fit to fly' letter from Dr Thomas, and added:

> "As I advised you over the phone, [the Claimant's] condition has worsened [since] the fit to fly letter was issued. He experienced a flashback this morning while discussing his PTSD with the visiting psychotherapist and was visibly distressed by this.
>
> Contrary to information on CID he is still taking anti-depressants. We have arranged for him to see psychiatrist on Thursday. As it stands, [the Claimant] is physically able to get onto the plane. His PTSD, medication and current frame of mind indicate medical escorts may be required."

90. Reports from Dr McKay and Ms MacIntyre were sent to the Local Immigration Team on 26th January 2011

91. On 3rd February 2011, the Defendant set directions for the Claimant's removal on 7th February 2011. The Claimant applied to the European Court of Human Rights for a stay on his removal. This was refused.

92. The Defendant sought to remove the Claimant. Four medical escorts were used and the Claimant was physically restrained by them. He became extremely distressed while being carried onto and restrained in the plane. He was eventually lowered into the food area of the plane, and then removed from it. His removal from the UK was cancelled.

93. He was transferred to Brook House on 7th February 2011, following the failed removal attempt.

94. In the early hours of 13th February 2011, the Claimant experienced a serious flashback and whilst hallucinating, he attempted to commit suicide by hanging. His room mate raised the alarm. He was removed from association for about 15 hours, and kept on constant watch. Later that day he was transferred back to Tinsley House, as it was thought to be more suitable.

95. On 16th February 2011, Ms MacIntyre wrote to Tinsley House, following a consultation with the Claimant on 15th February 2011. She stated that his condition would not improve in detention, and she recommended that he be released on bail so that he could obtain specialised psychological support for his Post-Traumatic Stress symptoms, which was not available in detention.

96. On 15th February 2011, the Claimant's representatives wrote a letter before claim, to the Defendant, challenging his continued detention.

97. On 15th February 2011, the Defendant set directions for the Claimant's removal on 20th February 2011.

98. On 16th February 2011, the Claimant's representatives wrote to the Defendant emphasising that the Claimant had made a fresh asylum/human rights claim. On 18th February 2011, the Claimant issued the present proceedings for judicial review of his detention and of the decisions to remove him. Removal directions for 20th February 2011 were cancelled.

99. On 18th February 2011, Dr Gavin McKay, Locum Consultant Psychiatrist, wrote to Dr Thomas, following a consultation with the Claimant on 15th February 2011, stating that "further detention will be particularly harmful to him as a genocide survivor with a mental illness" and notifying Dr Thomas that Dr Mckay's letter would also be copied to a UKBA caseworker to consider under Rule 35.

100. On 21st February 2011, at 04.25 am, the Claimant was found in a trance, hallucinating about men with machetes. Later that morning he was seen by an RMN and appeared physically disturbed and could hardly walk, as a result of a very bad night. He subsequently collapsed in the corridor and was brought back to the clinic.

101. On 25th February 2011, the Claimant was found crouching behind the door. He was taken to the clinic in a highly anxious and distressed state, referring to men who came to attack him.

102. On 25th February 2011, Dr Ian Anderson, physician, wrote to the Immigration service at Tinsley House concurring with Dr McKay's view that the Claimant was "not medically fit to be detained". He observed that the intensity of the Claimant's PTSD was "amongst the most intense and severe that I have seen over the last 16 years working with patients in the detention environment".

103. On the night of 25th/26th February 2011, the Claimant was taken to East Sussex Hospital, after reacting badly to medication.

104. On 28th February 2011, the Claimant's representatives wrote to the Defendant, urging her to release him.

105. Ms MacIntyre saw the Claimant again on 1st March 2011, and advised that his condition was worse and he should be dispersed to Leeds to enable treatment to begin as soon as possible. Also, on 1st March 2011, the Claimant's representatives wrote to the Defendant urging that the Claimant be released to Leeds.

106. On 1st March 2011, the Claimant was released to Barry House, a bail hostel in East Dulwich, South London.

Lawfulness of detention from 19 October 2010 to 28 December 2010

Legal basis of detention

107. The burden is on the Defendant to justify the legality of the detention (*R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, per Lord Dyson at [44]).

108. In this case, the Defendant had statutory power to detain the Claimant, pursuant to Schedule 2 of the Immigration Act 1971, as an overstayer, for the purpose of removing him.

109. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 WLR 671, the Supreme Court held, by a majority, that breach of a public law duty on the part of a person authorising detention is capable of rendering that detention unlawful and the fact that the detainee would have been detained lawfully in any event did not affect the Secretary of State's liability for false imprisonment. The fact that the detainee would have been lawfully detained was relevant to damages rather than liability; and, since the appellants in that case had suffered no loss, they were entitled to no more than nominal damages of £1.

110. Lord Dyson, in considering the power to detain under Schedule 3 to the Immigration Act 1971, identified the basis upon which a detention decision could be held to be unlawful, and the consequences of such a finding, at [66]:

> "A purported 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] 2AC 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* : see *Boddington v British Transport Police* [1999] 2 AC 143, 158D-E."

111. Lord Dyson went on to explain, at [68], that "It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment .... the breach of public law must bear on and be relevant to the decision to detain".

112. In *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23, where the Supreme Court held that the Claimant had been unlawfully detained during periods in which no detention reviews were carried out, giving rise to a a claim in tort for false imprisonment, Lord Hope said at [41] and [42]

> "41. .... a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful. I use this expression to describe a breach of public law which bears directly on the discretionary power that the executive is purporting to exercise."

> 42. ,,,, Applying the test proposed by Lord Dyson in *Lumba*, it was an error which bore on and was relevant to the decision to detain throughout the period when the reviews should have been carried out."

113. Lady Hale said at [69]:

> "While accepting that not every failure to comply with a published policy will render the detention unlawful, I remain of the view that "the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result- which is not the same as saying that the result would have been different had there been no breach" (see the *Lumba* case para 207)."

114. The Court confirmed that a material public law error will render administrative detention unlawful. The damages recoverable in respect of such a breach would be nominal, however, if detention was otherwise legally justifiable.

115. The statutory powers to detain have to be exercised in accordance with the Defendant's published policies on detention, in Chapter 55 of the Enforcement Instructions and Guidance ("EIG"), unless there is good reason to depart from them. As paragraph 55.1.1 states:

> "To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy."

116. Paragraph 55.1.1. explains that there is a "presumption in favour of temporary admission or release, and that, wherever possible, alternatives to detention are used". Detention will most usually be appropriate:

    a) to effect removal;

    b) initially to establish a person's identity or basis of claim;

    c) where there is reason to believe that a person will fail to comply with any conditions attached to the grant of temporary admission or release.

117. The power to detain is subject to the limitations set out in *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB), [1984] 1 WLR 704, where Woolf J said:

> "7. Although the power which is given to the Secretary of State in paragraph 2 [of Schedule 3 to the 1971 Act] to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the

> other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable to machinery of deportation to be carried out, I regard the power of detention as being implicitly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention ….
>
> 8. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time …"

118. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, Lord Dyson said, at [22]:

> "22. It is common ground that my statement in R (I) v Secretary of State for the Home Department [2003] INLR 196, para 46 correctly encapsulates the principles as follows: i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; ii) the deportee may only be detained for a period that is reasonable in all the circumstances; iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; iv) the Secretary of State should act with the reasonable diligence and expedition to effect removal."

Detention of the Claimant

119. Form IS.91R 'Notice to Detainee Reasons for Detention and Bail Rights' dated 19th October 2010, gave as the reasons for detention:

> "You are likely to abscond if given temporary admission or release."
>
> "Your removal from the United Kingdom is imminent."

The decision to detain was reached upon the basis of the following factors:

> "You do not have enough close ties (eg family or friends) to make it likely that you will stay in one place."
>
> "You have previously failed to comply with conditions of your stay, temporary admission or release."

> "You have previously absconded or escaped."
>
> "You have previously failed or refused to leave the UK when required to do so."

120. In my judgment, the Defendant had ample grounds to justify detention, pursuant to EIG chapter 55, since the Claimant was a failed asylum seeker, who was appeal rights exhausted, and who, when told he was required to leave the UK, failed to do and instead had gone into hiding. At the time of detention, his removal was indeed imminent since it was set for 25th October 2010, less than a week later (see IS151A notice dated 21st October 2010).

121. Although in the following months the Claimant made abortive attempts to block removal, by applying for judicial review and submitting further representations, the Defendant resolved these with the minimum delay possible, and on each occasion served fresh removal directions speedily thereafter.

122. Although the Claimant conceded that his initial detention was lawful, he contended that he should not have been detained, at least from 26th October 2010, because of his mental health, and because there was independent evidence he had been tortured.

Detention Centre Rules 2001

123. The Detention Centre Rules 2001 provide, in Rule 33, for every detention centre to have a health care team, including a general practitioner.

124. Rule 34 provides that every detained person is to be given a physical and mental examination by a medical practitioner within 24 hours of his admission to the detention centre.

125. Rule 35 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. "
>
> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (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."

EIG Chapter 55

126. The Defendant's policy on the detention of the mentally ill and victims of torture is set out in Chapter 55 of the EIG.

127. Paragraph 55.8A is headed "Rule 35 – Special Illnesses and Conditions" and provides:

> "Rule 35 of the Detention Centre Rules 2001 sets out requirements for healthcare staff at removal centres in regards to:
>
> any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention;
>
> any detained person suspected of having suicidal intention; and
>
> any detained person for whom there are concerns that they may have been a victim of torture."
>
> Healthcare staff are required to report such cases to the centre manager and these reports are then passed, via UKBA contact management teams in centres, to the office responsible for managing and/or reviewing the individual's detention.
>
> The purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case....
>
> Upon receipt of a Rule 35 report, caseworkers must review continued detention in the light of the information in the report … and respond to the centre, within two working days of receipt, using the appropriate Rule 35 pro forma."

128. Paragraph 55.10 is headed "Persons considered unsuitable for detention" and provides, so far as is material:

> "...
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> .....

- those suffering from serious mental illness which cannot be satisfactorily managed within detention...;

- those where there is independent evidence that they have been tortured;

....."

Authorities on detention of the mentally ill

129. There are a number of authorities on the Defendant's policy relating to the mentally ill.

130. In *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 Admin, Cranston J considered paragraph 55.10 (before the August 2010 amendment to the wording of the policy) and held:

> "52. There are two points to be made. The first is that in my view mental health issues only fall to be considered under Chapter 55 where there is available objective medical evidence establishing that a detainee is, at the material time, suffering from mental health issues of sufficient seriousness as to warrant consideration of whether his circumstances are sufficiently exceptional to warrant his detention. Thus consideration must be given to the nature and severity of any mental health problem and to the impact of continuing detention on it.
>
> 53. Secondly, the provision that the mentally ill be detained in only very exceptional circumstances does not stand in isolation. The opening part of paragraph 55.10 provides that for Criminal Casework Directorate 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'. Paragraph 55.13 indicates, as would be expected, that that demands a consideration of the likelihood of the person reoffending and the seriousness of the harm if the reoffending occurred. With an offence like robbery, the paragraph specifically requires substantial weight to be given to the risk of further offending and harm.
>
> 55. The upshot of all this is that although a person's mental illness means a strong presumption in favour of release will operate, there are other factors which go into the balance in a decision to detain under the policy …."

131. Cranston J's analysis in *Anam* was approved on appeal (see [2010] EWCA Civ 1140, per Black LJ at [81]), and also by the Court of Appeal in *R (OM) v Secretary of State for the Home Department* [2011] EWCA Civ 909, per Richards LJ at [12]. It was also approved by the Court of Appeal in *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ 597, where Richards LJ confirmed that the "seriousness

threshold" applied equally to the revised policy introduced in August 2010, saying, at [41]:

> "It is difficult to see why special provision requiring detention to be justified by very exceptional circumstances should have been made for those with a mental illness that could be satisfactorily managed in detention so that illness was not significantly affected by detention and did not make detention significantly more burdensome.... I am not impressed by Mr Southey's argument based on the uncertainty involved in the application of a seriousness threshold: a threshold of that kind had to be applied in any event under the original policy in relation to serious medical conditions, and has to be applied to mental illness as well as to medical conditions under the August 2010 amendment to the policy. Although the approach in *Anan* involves reading in a substantial qualification which is not expressed in the original policy, I am satisfied that such a qualification was implicit and gives effect to the true meaning of the policy."

132. In *LE (Jamaica)* Richards LJ distinguished between the court's role when considering the legality of detention on *Hardial Singh* principles and when considering a challenge to the Secretary of State's application of her policy towards the mentally ill. He said, at [29]:

> "ii) It is also common ground that the power to detain is limited by the *Hardial Singh* principles, in particular that detention is lawful only if it is for a reasonable period, and that it is for the court itself to determine whether a reasonable period has been exceeded. This was spelled out in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, most clearly by Keene LJ at [71]-[75]. Although Mr Southey placed considerable weight on that authority, it does not appear to me to be directly in point since the reasonableness of the period of detention and the application of the Hardial Singh principles are not in issue here.
>
> iii) Subject to the limits imposed by the *Hardial Singh* principles, the power to detain is discretionary and the decision whether to detain a person in the particular circumstances of the case involves a true exercise of discretion. That discretion is vested by the 1971 Act in the Secretary of State, not in the court. The role of the court is supervisory, not that of a primary decision-maker: the court is required to review the decision in accordance with the ordinary principles of public law, including *Wednesbury* principles, in order to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by the statute."

The Claimant's mental illness

133. In this case, the Defendant was aware from the early days of the Claimant's detention that the Claimant was reported to be suffering from mental illness, namely:

    a) depression, for which he was being prescribed anti-depressants by his GP; and

    b) post-traumatic stress, evidenced by episodes of flashbacks and nightmares accompanied by physical symptoms of stress.

134. On the basis of the initial assessments carried out in October 2010, I consider that the Defendant was entitled to conclude that the Claimant was not suffering from a "serious" mental illness. He had no history of self-harm, he was not suicidal, and he was not delusional. Despite his acute episodes of post-traumatic stress and his on-going depression, he was well orientated; able to communicate, with good eye contact; and euthymic. He was able to self-medicate with anti-depressants, and there was no history of in-patient treatment or any suggestion that it might be required.

135. However, by late October/early November, I consider that there was sufficient evidence to indicate that the Claimant was suffering from "serious" mental illness.

136. A Registered Mental Health Nurse assessed him on 27th October 2010 and observed him experiencing an anxiety attack. She recorded that his "appearance & behaviour" was "very tearful + frightened. Unable to speak initially. Pointing to his head + looking around the room. Agitated and sweating." She referred him for review by a psychiatrist and for counselling.

137. On 4th November 2010, in the early hours of the morning, he had another acute episode. Nurse Dyer's notes stated: "Officers had been called by [his] roommate who was concerned about his level of distress. On arrival in R42, [C] was being supported on each side (but not restrained) by two officers as he was hysterical and trying to drop himself to the floor. He was crying, gabbling and staring past all staff at possible hallucinations. When a third officer brought out the wand to search him he screamed "no machete" and tried to pull himself away. Then he seemed to re-orientate himself and looked directly at all of us. He visibly settled and walked unaided to a room. He sat on the bed and accepted two cups of water. After checking his medical file, PTSD was confirmed and the incident attributed to night terror… Urgent counsellor referral made."

138. In my view, these two acute episodes of post-traumatic stress, accompanied by hallucinations, were sufficient to indicate that the Claimant was suffering from serious mental illness. The Claimant was on medication and yet he had two episodes within a week, and they appeared to be escalating, in that the second one was significantly more worrying than the first.

139. The Claimant was given a high standard of care. He was seen by a nurse immediately after the incident on 4th November 2010, even though it was 2 am. He was seen by a GP and a consultant psychiatrist, Dr Lomax, later the same day.

140. Dr Lomax recorded that the Claimant was "very distressed" and had flashbacks and nightmares, sometimes triggered by the routines at Colnbrook. However, he clearly

considered that the Claimant's mental illness could be satisfactorily managed in detention, with the aid of medication and counselling.

141. The Claimant had weekly counselling during November 2010, and there is no record of any acute episode of post traumatic stress. Dr Skogstad, the Claimant's expert, suggests this may indicate that the counselling was helping him. No doubt the counselling was helpful, but I suspect that the Claimant may also have been calmer because his application for permission to apply for judicial review was pending and the immediate threat of removal to Rwanda had been deferred.

142. By December 2010, his application for judicial review and his further representations had been refused and removal directions were set for 16th December 2010. On 14th December 2010, the Claimant had an acute attack of post traumatic stress, and after an intervention by Medical Justice and his MP, the removal directions were cancelled.

143. On 21st December the Claimant had an even more severe episode of post traumatic stress, accompanied by delusions that he was being attacked by men with machetes. Ms Ashworth-Pratt, RMN, who treated him, completed Form IS91 RA Part C Form (to be completed when there are changes in risk factors) which stated:

> "Suffering an acute delusional psychotic disorder. Unfit for moving around estate and unfit for deportation until further notice".

It is noteworthy that she did not advise that he was not fit to be detained.

144. On 23rd December 2010, Nurse Little completed a Rule 35 report which stated:

> "Dr Mackay has diagnosed detainee with PTSD due to witnessing the death of his family. At present detainee is in need of hydration. Dr has increased medications."

The Rule 35 report did not advise that he was unfit to be detained.

145. On 24th December 2010, the Claimant was seen, at the request of Medical Justice, by Dr Jobanputra, a GP with specialisation in psychiatry. He advised that the Claimant was suffering from severe complex PTSD and flashbacks were being precipitated "by people banging at the door of his room, by images of Rwanda, and probably by the experience of being incarcerated in general". He was on multiple psychotropic medications to keep him calm, and was under constant surveillance in a single room. Numerous staff had expressed concerns about his mental wellbeing. Dr Jobanputra concluded:

> "I would have significant concerns that his deportation would result directly in a deterioration in his mental state. At which point total psychological breakdown and suicide would be possible outcomes.I suspect his ongoing detention is exacerbating his mental illness, and although the staff provides a high level of care, I feel that his incarceration is highly prejudicial to his health."

146. Dr McKay, locum consultant psychiatrist, wrote his report on 29th December 2010, and found that the Claimant's mood was low and depressed; he could not concentrate and he had disturbed sleep with nightmares. He diagnosed "severe PTSD with flashbacks in which he re-lives his trauma with re-enactment". Dr McKay did not advise that he was unfit to be detained.

147. The Defendant now concedes that immigration officers should have released the Claimant from detention by 29th December 2010, in response to the Rule 35 report, and the medical evidence of the Claimant's mental illness which followed.

148. Prior to the Defendant's response to the Rule 35 report, on 24th December 2010, there is nothing in the formal Detention Reviews or the immigration case notes to suggest that the Claimant's mental illness was taken into account when his detention was being reviewed. No witness statement suggesting otherwise has been filed by the Defendant. The absence of any reference to the Claimant's mental illness leads me to infer that, when reviewing detention, the Defendant did not have any regard to her policy on the mentally ill, set out in EIG paragraph 55.10.

149. In my judgment, she should have had regard to her policy, particularly once his illness was properly regarded as "serious", following the acute episode on 4th November 2010, which led to medical intervention.

150. The Defendant has submitted that, in the absence of a formal Rule 35 report, she was not officially notified of his state of mental health and so could not be expected to consider it.

151. This submission gave rise to a discussion as to the extent of the Defendant's responsibility for the detention of the mentally ill when the running of Detention Centres has been contracted out to private companies, and healthcare staff are not employed by the Defendant. In my judgment, the Defendant retains full legal responsibility for persons detained in Detention Centres, and it makes no difference whether day to day management and healthcare is being provided by civil servants or private contractors.

152. The Defendant also retains overall responsibility for the lawful implementation of the Detention Centre Rules and EIG in relation to detainees. In order to implement her policy in respect of detaining the mentally ill, the Defendant must ensure that she is kept informed of the condition of mentally ill detainees on a regular basis when detention is being reviewed. Reliance solely on Rule 35 reports, which appear to be used only as a last resort by healthcare staff, will rarely be sufficient. Whether healthcare staff are self-employed, or employed by private contractors, or by the local Primary Care Trust, they are carrying out functions on behalf of the Defendant, as her agents, when they are assessing the mental health of detainees. Generally, it is no defence to an allegation of unlawful detention or breach of Convention rights for the Defendant to assert that she was not aware of the mental illness of a detainee, if the condition was known to healthcare staff in a Detention Centre.

153. Although healthcare staff are bound by their professional guidelines on patient confidentiality, in practice this should not restrict their ability to pass information to immigration officers, since most detainees will readily consent to information about their ill health being disclosed to the UKBA since that might secure their release. As is

evidenced in this case, healthcare staff can communicate information about a detainee's mental health to immigration officers, without using the formal Rule 35 procedure.

154. I received detailed evidence about the procedures at each Detention Centre for ensuring that information about detainees is shared appropriately. These include daily meetings attended by senior officers and team leaders and daily reports on, for example:

    a) Detainees on Rule 40 (removal from association) or Rule 42 (temporary confinement);

    b) Use of force under Rule 41;

    c) Recorded Incidents;

    d) Detainees on ACDT plans; raised awareness support plan; food refusers.

155. The evidence in this case indicates that information about the Claimant's mental state would have been communicated to immigration officers by one or more of these routes at various times.

156. In relation to the episode on 4th November 2010, it was recorded in an Incident Report and involved a Rule 40 removal from association, and so it was reported to immigration officers in accordance with standard procedure. Even if this were not the case, I consider that the immigration officers and healthcare staff who attended the Claimant and recorded his condition were the servants or agents of the Defendant, and accordingly the Defendant is deemed to be on notice of the Claimant's mental illness, for the purposes of this claim for judicial review.

157. The Defendant therefore acted unlawfully in failing to consider whether he should still be detained, under the terms of her policy, even though he was suffering from a serious mental illness, from 4th November 2010 onwards. I accept that the Defendant's immigration officers could not immediately evaluate the new evidence of the seriousness of his mental condition, but I consider that this could, and should, have been done in time for the 28 day Detention Review which took place on 16th November 2010, together with the monthly progress report. By 24th December 2010, the Defendant was giving due consideration to the Claimant's mental health, as evidenced by the response to the Rule 35 report.

158. The Defendant's breach of her public law duty plainly had a bearing on the decision to detain: see *Lumba* and *Kambadzi* above.

159. However, even if she had properly applied her policy, in my view she would have concluded that detention should continue, on lawful grounds. The medical evidence at that time, which I have summarised above, indicated that the Claimant's mental illness could be satisfactorily managed in detention, with medication and counselling. There was no medical advice that he was not fit for detention. There was scant evidence, prior to late December 2010, that detention (as opposed to the threat of return to Rwanda) was exacerbating his mental illness. Although he had applied for judicial review, the claim was not based upon his mental illness, and he did not challenge the decision to detain him. The Claimant's past history of absconding, and the medical evidence which confirmed that he was terrified, to the point of mental breakdown, at the prospect of

returning to Rwanda, meant that there was no realistic prospect of the Claimant voluntarily attending at the airport and checking in for a flight home to Rwanda. As the Defendant observed in the letter of 14th January 2011, the Claimant will go to "exceptional lengths ... to avoid returning to Rwanda".

Authority on the detention of victims of torture

160. In *R (on the application of D & K) v Secretary of State for the Home Department & Ors* [2006] EWHC 980 (Admin), a case concerning the detention of asylum seekers who claimed to be victims of torture, Davis J. examined the law and policy relating to potential victims of torture and held:

a) the making of a claim of torture does not of itself mean that the applicant will not be detained as independent evidence is ordinarily called for;

b) if there is sufficient independent evidence, and absent exceptional circumstances, an applicant will not be detained;

c) any concerns as to torture which may be identified by a medical practitioner upon medical examination under the Detention Centre Rules "would at least be *capable* of constituting "independent evidence". However, it is for the Secretary of State to decide upon the weight to be given to such evidence. Whether or not it will constitute "independent evidence" will depend upon factors such as the level of experience of the medical practitioner; whether the examination was summary or detailed; the way in which the concerns are raised and the strength of those concerns.

The Claimant's allegation that he was a victim of torture

161. When he was first detained, the Claimant was medically assessed by a nurse and a GP as part of an initial health screening. The Claimant appears not to have claimed to be a victim of torture at that stage. He was seen by Nurse Williams on 20th October 2010 who specifically noted "Torture – no". He was seen by Dr Sherpao on 21st October 2010, who did not make any reference to torture and did not submit a Rule 35 report.

162. On 26th October 2010, a Rule 35 Form was completed in respect of the Claimant by a nurse in Reception at Colnbrook Detention Centre. The Form records that the Claimant "reported that he is a victim of genocide in Rwanda" and, in a section under the heading Clinical Information, records that "This gentleman who was very anxious at the time of interview showed scars to his head which were as a result of torture during Rwanda genocide period. Reported to be currently suffering from flashbacks." The Form also stated that an appointment had been made with a doctor in the centre to address the detainee's healthcare needs and his legal representatives were already aware of this issue.

163. I do not accept the contention by the Claimant that the entries on the Rule 35 Form amounted to "independent" evidence of torture. The nurse was merely completing a pro forma which required her to ask whether the detainee was a victim of torture, and if the reply was in the affirmative, she was required to complete a Rule 35 form. The extent of her medical assessment of him was to observe that he looked "very anxious" and that he had scarring, which he told her was the result of torture. She did not

purport to conduct any psychological or physical examination which could assess the likelihood of the Claimant having suffered torture, nor was she qualified to do so. This was a brief "First Reception Screening" carried out in the early hours of the morning, upon the Claimant's arrival at Colnbrook. As Davis J. said in *D and K*, at [52], "*A concern as noted on an AOT form by, for instance, a relatively inexperienced nurse after an initial screening may be regarded as very different from a concern noted by an experienced doctor contained in a Rule 35(3) report in deciding whether to continue to detain*." Nurse Godfrey referred the Claimant on for a fuller assessment by a GP and Registered Mental Health Nurse.

164. The Claimant sought to rely on the case of *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521 but in that case the evidence was quite different in character. The Secretary of State was presented with a detailed expert report, prepared in accordance with the Istanbul Protocol on the investigation of torture, by a specialist nurse working as a clinical co-ordinator for an organisation offering support to survivors of torture.

165. In this case, the Defendant reviewed the evidence and responded stating:

> "The rule 35 application states that you have scars on your head as a result of torture in your home country, we note however that in your asylum claim, appeal and further representations you have never claimed to have been the victim of torture or raised this issue.
>
> We draw your attention to paragraphs 15, 16, 34, 37 and 42 of the adjudicator's findings at appeal and rely on these and your statements in relation to the reasons you sought asylum in the UK after entry on a business visa. We do not accept that you are a victim of torture as you have submitted no evidence nor previously claimed to have been ill-treated in your home country in any of your applications or legal submissions."

166. It was accepted by the Defendant that the letter was factually inaccurate because, in his asylum interview and at the FTT hearing, the Claimant had given an account of the violent attack upon him in the course of a genocidal massacre in Rwanda. In the asylum interview he expressly referred to the scars from his injuries.

167. However, in my judgment, the Defendant was correct to submit that the decision would have been the same even if the Claimant's earlier account had been correctly recorded. The Defendant rejected the Claimant's claim of torture, relying upon the determination of the FTT which flatly rejected the Claimant's account, finding that it had been fabricated in order to support a false asylum claim. In my judgment, the Defendant was entitled to prefer the determination of an independent Immigration Judge who had assessed the Claimant's evidence and rejected it, and whose decision was upheld on appeal.

168. This case may be contrasted with the case of *D* and *K*, where no judicial determination was available to the Secretary of State, because the applicants' asylum claims had not yet been determined. This case is also distinguishable from *AM* because in that case the Claimant's assertion was supported by an expert report which post-dated the earlier judicial determination.

169. I have reached the same conclusion in relation to the medical notes of Dr Lomax, consultant psychiatrist, made following the acute episode of post traumatic stress on 4th November 2010. In my judgment, when he stated that the Claimant "has past experience of torture" and that "if he returns to Rwanda he is likely to be killed", he was recording the history which the Claimant gave him, as psychiatrists routinely do. Dr Lomax was not giving independent evidence of the truth of the Claimant's allegations.

170. By December 2010, further evidence became available to the Defendant, confirming that the Claimant had post traumatic stress, in which he appeared to be re-living his earlier experiences in Rwanda. The Rule 35 report, made on 23rd December 2010, attributed his post traumatic stress to the horror of witnessing the death of his family, rather than torture. However, the report of Dr McKay, consultant locum psychiatrist, dated 29th December 2012, which described the Claimant's disoriented state when he was hiding under a chair, examining his body for blood, did indicate that the Claimant had been under attack. Dr McKay concluded that he had "severe PTSD with flashbacks in which he re-lives his trauma with re-enactment". He did not refer to the Claimant being a victim of torture.

171. Although this evidence appeared to support the Claimant's account of being attacked in Rwanda, in my view it fell short of being "independent evidence" of torture.

172. The "independent evidence" was eventually provided by Dr Skogstad, consultant psychiatrist, on 6th April 2011, and Dr Arnold, specialist in wounds, on 18th April 2012. The differences between their detailed analyses and the earlier medical records on which the Claimant relies are self-evident.

Detention unlawful on Hardial Singh grounds

173. The Claimant submitted that his detention exceeded that which was reasonable in all the circumstances, and so was unlawful on the principles set out in the case of *Hardial Singh*.

174. The Claimant relied upon his mental illness which meant that detention was harmful to him; the fact that he posed no risk to the public; his strong community ties in Leeds; that NASS accommodation was available to him, and that any risk of absconding could be effectively managed by imposing conditions.

175. In my judgment, the Claimant's detention was both justified and reasonable prior to 29th December 2010 on the following grounds:

a) he had exhausted his appeal rights and had no right to remain in the UK;

b) his removal was imminent - delays were caused by the Claimant's efforts to resist removal by unsuccessfully applying to court and making further representations but the Defendant reinstated removal as soon as reasonably possible thereafter;

c) he had failed to leave of his own accord when required to do so;

d) when previously given temporary admission, he was in breach of reporting and residence conditions;

e) he had previously absconded and gone into hiding to avoid removal;

f) it was probable that, if released, he would not voluntarily attend the airport to board his flight to Rwanda because of his fear and horror at the prospect of returning there;

g) his mental illness, even once it became serious, was capable of being managed with medication and counselling.

176. The Defendant has conceded, on the proper application of her policy towards mentally ill detainees, that he should have been released from 29th December 2010 onwards.

Conclusion

177. The Defendant acted unlawfully in failing to have regard to the Claimant's serious mental illness, under the terms of her policy in EIG paragraph 55.10, when reviewing his detention from 16th November 2010 onwards. Continued detention would, nonetheless, have been justified and lawful.

178. The Defendant has conceded that detention was unlawful from 29th December 2010 onwards.

Detention in breach of Article 5 ECHR

179. By s.6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Plainly the decision to detain in this case was made by a public authority and this Court, in determining the legality of the decision to detain, is also a public authority within the meaning of s.6(1), and must apply the Convention.

180. Article 5 ECHR provides, in so far as is material:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

181. In *Saadi v United Kingdom* (2008) 47 EHRR 17, the ECtHR held:

> "67. It is well-established in the Court's case-law under the sub-paragraphs of Article 5(1) that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) – (f) be lawful. Where the "lawfulness"

> of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness..."
>
> "74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur § 43)*; and the length of detention should not exceed that reasonably required for the purpose pursued."

182. The Claimant submitted that the detention was unreasonable and excessive. In particular, the Defendant detained the Claimant:

    a) arbitrarily, in breach of and/or without regard to her published policy;

    b) for longer than was reasonable; and/or

    c) for longer than was reasonable in the particular circumstance of his severe mental illness.

183. In my judgment, a breach of Article 5 has occurred solely in respect of those periods where I have found that detention was unlawful under national law because of the requirement in Article 5(1) that deprivation of liberty must be "in accordance with a procedure prescribed by law". For the reasons given above, in relation to the lawfulness of detention under domestic law, I do not consider that there has been any other breach of Article 5.

Breach of Article 3 and/or Article 8 ECHR

(1) Detention

184. The Claimant submitted that the decision to detain him and/or the conditions of his detention constituted a breach of Article 3 and/or Article 8 ECHR.

185. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

186. Article 3 is intended to protect an individual's dignity and physical integrity, including both physical and mental suffering: *Tyrer v UK* (1978) 2 EHRR 1, [33]. It provides

absolute protection against treatment falling within its scope; in no circumstances can such treatment be rendered lawful.

187. "Inhuman" or "degrading" treatment is not defined in the Convention, and the case law demonstrates that the standard to be applied will depend, to some extent, on the particular circumstances in which the treatment or punishment takes place. The Convention is a 'living instrument which must be interpreted in the light of present day conditions': *Tyrer v UK* at [31].

188. However, the ECtHR has frequently cited as a guide the description given in *Ireland v UK* (1978) 2 EHRR 25 at [167]:

> "The five techniques [deprivation of sleep, food and drink; wall standing; hooding; noise] were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3.
>
> The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."

189. The ECtHR also held in *Ireland*, at [162]:

> "'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 duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'"

190. Since Article 3 imposes on a state both negative obligations to avoid ill-treatment and positive obligations to take steps to prevent ill-treatment, the state is obliged to take measures to ensure that individuals within its jurisdiction are not subjected to inhuman / degrading treatment: *R (Suppiah and ors) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), at [150]; *A v UK* [1998] 27 EHRR 25. Such measures must include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge: *Z v UK* [2002] 34 EHRR 3.

191. The state must take operational measures to protect a specific individual who is known or ought to be known to be at real and immediate risk of treatment which would breach Article 3; this includes a duty to take positive steps to protect the individual from a deterioration in his/her mental health: *Pretty v UK* at 52; *Keenan v UK* [2001] 33 EHRR 913; *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74; *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) at [206].

192. A failure to provide adequate medical care to people deprived of their liberty may constitute treatment in breach of Article 3: *Mousiel v France* [2004] 38 EHRR 34 at [40]; *Keenan v UK* [2001] 33 EHRR 913.

193. Where conditions, including detention conditions, are inhuman and lead to a sufficient level of suffering, the absence of an intention to humiliate or debase does not rule out a violation of Article 3: *Price v UK (App. No. 33394/96)*; *R (Suppiah and Ors) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), at [150].

194. When assessing the effects of detention, account has to be taken of the cumulative effects of the relevant considerations: *Dougoz v Greece* [2002] 34 EHRR 61 at [46].

195. These principles have been applied in three domestic cases: *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin), *R (BA) v SSHD* [2011] EWHC 2748 (Admin) and *R (HA (Nigeria)) v SSHD* [2012] EWHC 979 (Admin)) where the Court has found a breach of Article 3 ECHR arising from the detention of those with mental illness by the Defendant in immigration removal centres.

196. The Claimant submitted that the Claimant's detention was in breach of Articles 3 and/or 8 on the ground that continuing detention of the Claimant from 21st December 2010, given cogent expert medical evidence that it was likely to (and in fact did) cause his mental health substantially to deteriorate, to create in him acute anguish and distress, and to give rise to a real risk of serious self-harm

197. Further or alternatively, the Claimant submitted that the Defendant was in breach of her positive duty under Article 3 to take steps to avoid serious harm to the Claimant, where it was, or should have been, known to her that he faced a risk of such harm; she did not do so between 26th October 2010 and 1st March 2011 (and particularly from 21st December 2010) and consequently breached his Article 3 rights.

198. I accept the Defendant's submission that it is erroneous to assume that every case of unlawful detention will amount to a breach of Article 3. The legal tests are quite different. The Defendant has conceded that the Claimant's continued detention from 29th December 2010 was unlawful in the light of her policy in EIG Chapter 55.10 on the detention of the mentally ill. It does not follow that his continued detention constituted "inhuman or degrading treatment or punishment" under Article 3. Plainly, detention of the mentally ill does not of itself necessarily constitute a breach of Article 3, as the mentally ill can be appropriately detained in prisons, immigration detention centres and mental hospitals.

199. In my judgment, the Claimant was not subjected to inhuman or degrading treatment or punishment and the threshold for a breach of Article 3 was not reached in this case.

200. His detention was both justified and reasonable on the following grounds:

a) he had exhausted his appeal rights and had no right to remain in the UK;

b) his removal was imminent - delays were caused by the Claimant's efforts to resist removal by unsuccessfully applying to court and making further representations but the Defendant reinstated removal as soon as reasonably possible thereafter;

c) he had failed to leave of his own accord when required to do so;

d) he breached his conditions when granted temporary admission;

e) he had previously absconded and gone into hiding to avoid removal;

f) it was probable that, if released, he would not voluntarily attend the airport to board his flight to Rwanda because of his fear and horror at the prospect of returning there.

201. I do not consider, on the evidence, that his mental illness rendered it inhuman or degrading to detain him.

202. The healthcare records and notes during the period of his detention confirm that the primary cause of the Claimant's acute episodes of post traumatic stress whilst in detention was his deep-rooted fear of being returned to Rwanda, where he believed he would be killed. It appears that it was the ongoing threat of imminent removal to Rwanda which triggered these episodes, rather than the fact that he was detained.

203. According to the Claimant's evidence, his post traumatic stress disorder had receded, with the help of intensive psychotherapy, in the years that had passed since the murder of his family in 1994. He said that it revived in about December 2009 because of his fear of violence at the hands of his attacker who had been released from jail. Whilst still in the community, he had to seek medical advice, and he was prescribed anti-depressants, and referred for counselling and psychotherapy. Since his release from detention, he has continued to experience symptoms of post traumatic stress.

204. In assessing whether the Defendant acted in breach of Article 3, it is important to consider carefully the medical evidence from those who were assessing his condition at the time. Although on 29th December 2010, Dr McKay, visiting consultant psychiatrist, diagnosed post-traumatic stress disorder, he did not advise that release from detention was advisable or necessary. In common with Dr Lomax, the consultant psychiatrist who had seen him in November 2010, he believed his illness was capable of being managed with medication and counselling, which was available in the detention centre.

205. The RMN, Ms Ashworth-Pratt, who on 21st December 2010 completed an IS91 RA Part C form to inform of a change in the risk assessment, stated the Claimant was suffering an acute delusional psychotic disorder and was unfit for moving around the estate and for deportation. However, she did not state that he was unfit for detention.

206. Ms MacIntyre, psychotherapist, who treated him in January 2011 and February 2011, recommended bail but she was initially of the view that she could teach him techniques to help him to manage his fears in the detention setting. She subsequently concluded that he needed specialist psychotherapeutic treatment which ought to be given in the community.

207. Dr Thomas, the Centre's GP, advised that he was fit to fly on 4th and 24th January

208. It was not until 18th February 2011 that Dr McKay, visiting consultant psychiatrist, advised that further detention would be harmful to the Claimant. This view was

endorsed by Dr Anderson, visiting consultant psychiatrist, on 25th February 2011 who concluded that he was not medically fit to be detained.

209. This advice resulted in his release on 1st March 2011.

210. Prior to this, on 24th December 2010, only Dr Jobanputra, a specialist GP instructed by the Claimant, had advised that detention was exacerbating his mental illness and was "highly prejudicial to his health".

211. The expert instructed by the Claimant, Dr Skogstad, who first saw the Claimant in March 2011, after his release, said at paragraph 5.2.9 of his report dated 6th April 2011:

> "In my view, from reviewing the records, what led to the deterioration in his mental state was not so much a lack of awareness in staff of the serious nature of his mental disorder or a lack of responsiveness by them, but factors relating to the detention itself and to the removal attempts. First, detention itself is in my opinion potentially highly detrimental for someone with a severe mental disorder and history of trauma; being locked up with complete uncertainty about one's future and with the threat of being removed at any time would be very stressful even for a healthy person, but is extremely difficult and disturbing for a very vulnerable person with a mental disorder and likely to reawaken traumatic experiences. Secondly, the actual attempts at removal would have reaawakened aspects of the trauma through the use of force and stirred up very severe anxieties of being killed through the prospect of having to return to Rwanda."

212. This passage fairly acknowledges that even a healthy person is likely to experience stress, distress and fear when held in immigration detention, pending removal to a country where he fears his safety is at risk. From a purely medical perspective, it will invariably be detrimental to a mentally ill patient to expose him to such pressures, and therefore detention will always be contra-indicated.

213. However, the Court is required to adopt a wider perspective, which is not purely focussed on the health of the patient. In relation to Article 3, the ECtHR has recognised that a degree of suffering is an inevitable consequence of detention; the question the Court has to go on to determine is whether any additional level of suffering by a mentally ill detainee amounts to inhuman or degrading treatment. There is no general obligation to release a detainee on health grounds, but his health and well-being must be secured by providing him with the requisite medical assistance (see *Kudla v Poland* (2002) 35 EHRR 11, at [93], [94] cited in *R (HA (Nigeria)) v SSHD* [2012] EWHC 979 (Admin), at [173]).

214. Applying these principles, even assuming Dr Skogstad's medical assessment of the effect of detention to be correct, it does not follow that the Claimant was subjected to inhuman or degrading treatment or punishment.

215. A decisive factor in my conclusion that the Claimant was not subjected to inhuman or degrading treatment or punishment is that the care which the Claimant received in

detention was of a high standard. He was closely monitored. When he was believed to be at risk he was under constant observation. He had frequent and prompt access to nursing care when required. Ironically, this level of care and supervision would not have been available to him or anyone else in the community. He was seen by a number of RMNs, GPs and consultant psychiatrists. He was treated with a wide range of medication and he was given counselling and psychotherapy. The impression given by the notes is that the healthcare staff showed genuine care and concern.

216. In my judgment, this case is clearly distinguishable, on its facts, from the case of *Keenan*, where the ECtHR found that the treatment of a mentally ill prisoner breached Article 3 because of "significant defects" in the medical care of a mentally ill prisoner, including an absence of records, no "effective monitoring of his condition" and "the lack of informed psychiatric input into his assessment".

217. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of heath or moral, or for the protection of the rights and freedoms of others."

218. In my judgment, detention was, of itself, an interference with the Claimant's right to respect for his private life under Article 8.

219. Unlike Article 3, the rights under Article 8 are qualified, and may be justified if the conditions in Article 8(2) are satisfied.

220. In the light of the Defendant's concession that the Claimant's detention from 29th December 2010 was unlawful, on a proper application of her policy towards the mentally ill, I conclude that his continued detention from 29th December 2010 was not in accordance with domestic law. Although detention was maintained for the legitimate aim of implementing a firm and effective immigration policy, the Defendant has conceded that it was not appropriate to detain him for this purpose. In the light of this concession, I conclude that the detention was also disproportionate, in the particular circumstances of this case.

(2) Use of handcuffs

221. The Claimant further submitted that, on 25th February 2011, the Defendant acted in breach of Article 3 by authorising the transfer of the Claimant to hospital in handcuffs. It was argued that this was excessive force, which was not strictly necessitated by the conduct of the Claimant, and it diminished his human dignity and amounted to a further breach of his Article 3 rights.

222. In *Raminen v Finland* (1997) 26 EHRR 563, the ECtHR held:

> "[T]he Court is of the view that handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance whether there is reason to believe that the person concerned would resist arrest or abscond…"

223. Where a prisoner is seriously ill and undergoing medical treatment, restraint with handcuffs may be disproportionate and may amount to inhuman and degrading treatment: *Mouisel v France* (2004) 38 EHRR 34; *Henaf v France* App. No. 65436/01.

224. It is evident that each case turns on its own facts. In this case the Claimant was taken to hospital because he collapsed one evening. Upon examination at the Accident & Emergency Department of the local department, no health problem was found and he was advised to eat and drink normally to keep his strength up. He was discharged the following morning.

225. He was escorted by two officers and handcuffed, in accordance with standard procedures. In my judgment, it was a reasonable security measure to handcuff him in view of the fact that he had previously absconded, and he had to be physically restrained by up to four escorts during earlier removal attempts.

226. Unlike the cases of *Mousiel* and *Henaf,* the Claimant was not so ill as to render this security measure either a breach of Article 3, or Article 8.

(3) Removal directions on 7th February 2011

227. The Claimant submitted that, by ordering the Claimant's removal to Rwanda on 7th February 2011, the Defendant subjected the Claimant to inhuman and/or degrading treatment in breach of Article 3. He also submitted that it amounted to a disproportionate interference in his right to respect for his moral and physical integrity under Article 8.

228. I do not accept the Claimant's submission, for the following reasons.

229. The Defendant had previously refused the Claimant's application to remain in the UK on asylum, human rights and humanitarian protection grounds, in a reasoned decision. That decision had been scrutinised and upheld by the FTT, the UT and the Administrative Court. Further representations from the Claimant had been considered and refused. It is important to note that the Claimant had had the benefit of legal representation by several law firms, with experience in this field. The Defendant was therefore lawfully entitled to remove the Claimant from the UK. His application for judicial review to challenge removal had also failed.

230. On 4th February 2011, Medical Justice applied on the Claimant's behalf to the European Court of Human Rights for an order to stop his removal to Rwanda under Rule 39 of the Rules of Court, submitting that it would violate his Article 3 and Article 8 rights, by reason of his post traumatic stress disorder and vulnerable condition.

231. On 7th February 2011, the European Court of Human Rights replied stating that the Acting President of the Section had decided to refuse the application and would not prevent his removal.

232. Thus, the Defendant had confirmation from the European Court that removal to Rwanda did not appear, prima facie, to be a breach of his Article 3 or Article 8 rights.

233. By February 2011, the Defendant, and the immigration officers and healthcare staff who acted on her behalf, were well aware that the prospect of removal was likely to trigger an adverse reaction on the part of the Claimant, because of his PTSD and his response to earlier removal directions, as documented in the records.

234. In the light of this knowledge, the Defendant took reasonable steps to investigate whether or not the Claimant was medically fit to be removed and she acted on the basis of medical advice received.

235. On 16th December 2010, the previous occasion when removal was due to take place, Medical Justice made representations that he was not fit to be removed, which were passed on to the Defendant by the Claimant's MP. In consequence of these representations, the removal was cancelled.

236. On 21st December 2010, the Claimant had an acute delusional episode which led to Ms Ashworth Pratt RMN completing an IS91 RA Part C form stating that he was unfit for deportation until further notice.

237. The Rule 35 report on 23rd December 2010, identified his PTSD but did not specifically raise the issue of fitness to be removed. In response, on 24th December 2011, the Defendant asked for an assessment whether he was fit for travel.

238. On 29 December 2010, Dr McKay, consultant psychiatrist, provided a report on this condition. He did not advise that the Claimant was not fit to be removed.

239. On 4th January 2011, Dr Thomas, a GP, advised that the Claimant was fit to travel but he should not be moved around the estate.

240. On 24th January 2011, the Claimant's case was again considered by Dr Thomas who confirmed that he was fit to travel. He said:

> "This man has now been seen by our psychiatrist, as well as getting support from psychologists. He is suffering from issues of PTSD linked to the circumstances he experienced prior to his arrival in the UK, and these are triggered by fears for his life that he has about his return. I am obviously unable to validate his story, but there does appear to be some underlying anxieties that our team are treating him for. It would appear prudent that whilst detained he remains with us so that he can receive some continuity of the care.
>
> His removal is obviously subject to the processes surrounding your assessment of the risks he may have, but with regard to a fitness to fly, I have reviewed the IATA travel guidelines and

> am of the opinion that he meets such criteria as being suitable to travel on aircraft."

241. On 25th January 2011, an officer from Detention Services at Tinsley House wrote to UKBA's West Yorkshire Local Immigration Team attaching the 'fit to fly' letter from Dr Thomas, and adding:

> "As I advised you over the phone, [the Claimant's] condition has worsened [since] the fit to fly letter was issued. He experienced a flashback this morning while discussing his PTSD with the visiting psychotherapist and was visibly distressed by this.
>
> Contrary to information on CID he is still taking anti-depressants. We have arranged for him to see psychiatrist on Thursday. As it stands, [the Claimant] is physically able to get onto the plane. His PTDS, medication and current frame of mind indicate medical escorts may be required."

242. In my view, this letter did not advise that the Claimant was not fit to travel. It informed the Local Immigration Team that his condition had worsened and because of his condition, medical escorts were likely to be needed.

243. On 3rd February 2011, the Defendant set directions for the Claimant's removal on 7th February 2011. On the day of removal his mood was "very low" and so observations were increased to 4 times per hour, to safeguard him. At removal, four medical escorts were used, as had been recommended, and the Claimant had to be physically restrained by them. He became extremely distressed and eventually had to be removed from the plane. His removal from the UK was cancelled.

244. He was transferred to Brook House following the failed removal attempt. He was in good spirits. The Case Review, at 02.45am on 8th February 2011, recorded:

> "On arrival to Brook House from his failed flight, [the Claimant] seemed fine. Healthcare know him from Tinsley and stated that he was on food refusal whilst at Tinsley but ...[he] did have a meal on arrival. He .. seems to have settled in. He has been sleeping. Due to his failed flight, which was his main issue, [observations] have been dropped to hourly."

245. On 9th February 2011, the Case Review recorded that he "appeared relaxed ...he said he was happy to not return to Rwanda."

246. A week later, on 13th February 2011, he experienced a serious flashback and whilst hallucinating, he attempted to commit suicide by hanging. Later that day he was transferred back to Tinsley House, as it was thought to be more suitable.

247. In my judgment, the attempted removal on 7th February 2011 was a legitimate action by the Defendant to give effect to lawful immigration decisions. Because of the Claimant's mental illness, the Defendant obtained medical authorisation that he was fit to travel. Anticipating that he would obstruct removal, medical escorts were provided,

who used a reasonable level of force to restrain him. When it became apparent that the Claimant would not co-operate, the attempt at removal was abandoned.

248. Although the attempted removal was undeniably a distressing experience for the Claimant, the contemporaneous notes for 8th and 9th February 2011 make it clear that he made a rapid recovery, and was relaxed and happy. Therefore it is misleading to attribute the acute episode one week later, and the suicide attempt, to the events of 7th February 2011, rather than the other issues affecting the Claimant.

249. In my judgment, the attempted removal did not amount to inhuman and/or degrading treatment in breach of Article 3, nor was it a disproportionate interference in the Claimant's right to respect for his moral and physical integrity under Article 8.

Unlawful policy in relation to mentally ill detainees

250. In *R (on the application of HA (Nigeria) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin), Singh J. held that the re-formulation of the policy in EIG paragraph 55.10, in August 2010, was a change which triggered the statutory equality duties in section 71 Race Relations Act 1976 and section 49A of the Disability Discrimination Act 2005, both of which have been replaced by the Equality Act 2010, section 49A. In *HA*, the Secretary of State for the Home Office denied that there was a change in policy which triggered the duties, but having failed on that point, conceded that the equality duty had not been complied with. The revised policy was held to be unlawful, and the detention pursuant to the policy was quashed.

251. Although the Claimant in this case relied upon the same point in his Grounds, he did not pursue this issue before me, because *HA* is currently under appeal to the Court of Appeal. He reserved his position pending the outcome of the appeal.

252. The Claimant pursued his alternative submission, namely, that the Defendant's policy in paragraph 55.10 was unlawful because its wording and its application gave rise to a real risk of the following unlawful consequences:

a) arbitrary and inconsistent decisions made by non-experts as to whether a person's mental illness is being adequately managed in detention;

b) a 'wait-and-see' approach, in which a person's mental illness will be presumed to be capable of being treated in treatable in detention until his health breaks down;

c) a short-termist approach, in which short periods of apparent improved health are seen as adequate management of a mental illness, thus failing to recognise the fluctuation in the symptoms of sufferers of mental illness.

253. I accept the Defendant's submission that the Claimant's submission is without merit. The existing policy is clear. It is not the function of this Court to usurp the Defendant's role by suggesting ways in which her policy could be re-written.

254. The Defendant has to exercise her judgment and discretion in relation to each particular case, on the evidence available to her at any particular time. The observations made by Wyn Williams J. in *R (Suppiah) v. Secretary of State for the Home Department* [2011]

EWHC 2, at [215], in relation to the detention of families with children, aptly summarise the reasons why the policy cannot be unduly prescriptive:

> "It is neither necessary nor even desirable for the SSHD's policy to attempt to prescribe in advance what constitutes exceptional circumstances or when detention is justified as a measure of last resort or to lay down each and every step which a decision-maker should take along a long and difficult road leading to an anxious decision requiring sound and informed judgment."

Conclusions

255. The claim for judicial review is allowed, on the grounds that:

a) the Defendant acted unlawfully in failing to consider whether the Claimant should still be detained, under the terms of her policy, even though he was suffering from a serious mental illness, from 16th November to 24th December 2010; and

b) as conceded by the Defendant, the Claimant's detention was unlawful from 29th December 2010 to 1st March 2011.

256. The claim under the Human Rights Act 1998 is allowed on the basis that:

a) the Claimant's detention for the two periods from 16th November to 24th December 2010, and from 29th December 2010 to 1 March 2011, was in breach of Article 5 ECHR;

b) the Claimant's detention from 29th December 2010 to 1 March 2011 was in breach of Article 8 ECHR.