Neutral Citation Number: [2018] EWCA Civ 57

Case No: C4/2016/1954

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT AND DIVISIONAL COURT)
HIS HONOUR JUDGE SEYS LLEWELLYN QC
[2016] EWHC 273 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LEWISON
and
LORD JUSTICE BEATSON

- -

Between :

THE QUEEN ON THE APPLICATION OF VC (BY HIS LITIGATION FRIEND, THE OFFICIAL SOLICITOR)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -
- -

Ms Stephanie Harrison QC and Ms Amanda Weston (instructed by **Bhatt Murphy**) for the **Appellant**
Ms Julie Anderson and Ms Belinda McRae (instructed by **the Government Legal Department**) for the **Respondent**
Ms Helen Mountfield QC (instructed by **the Equality and Human Rights Commission**) filed written submissions on behalf of the **Intervener**

Hearing dates : 28, 29 November 2017
Further submissions : 1, 3 December 2017, 22 January 2018

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APPROVED JUDGMENT

Lord Justice Beatson :

I. Overview

1. There are broadly two questions before the court in this appeal. The first concerns the application of the Secretary of State for the Home Department's policy governing the detention under the Immigration Act 1971 ("the 1971 Act") of persons who have a mental illness, and the consequences if she is found not to have applied that policy correctly. The second concerns the adequacy at common law and under the Equality Act 2010 ("the Equality Act") of the procedures under which mentally ill detainees can make representations on matters relating to their detention.

2. The appellant, VC, a Nigerian national, suffers from bipolar affective disorder with psychotic features and had been admitted to hospital on some ten occasions for treatment under the Mental Health Act 1983 ("the 1983 Act") between 2007 and June 2014. Between 11 June 2014 and 5 May 2015, he was detained under the 1971 Act by the respondent, the Secretary of State, in four Immigration Removal Centres ("IRCs"). He was then transferred to a psychiatric hospital, and compulsorily detained ("sectioned") under the 1983 Act.[1] His detention under the 1971 Act formally ended on 9 September 2015, although he remained detained under section 3 of the 1983 Act until April 2016. In these proceedings, lodged on 30 April 2015, he challenges the legality of his detention under the 1971 Act and the delay in securing his transfer to hospital for treatment. He appeals against the order of HHJ Seys Llewellyn QC dated 8 April 2016 dismissing all but one of his claims.

3. At the material times, the policy governing such detention, commonly known as "immigration detention", was chapter 55 of the Secretary of State's Enforcement Instructions and Guidance, "Detention and Temporary Release" ("the policy"). §55.10 of that policy[2] provided that "those suffering from serious mental illness which cannot be satisfactorily managed within detention" are considered "suitable for detention in only very exceptional circumstances". The policy has been the subject of a number of decisions. The submissions before this court focussed on two of those decisions, that of the Supreme Court in *R (O) v Secretary of State for the Home Department* [2016] UKSC 19, [2016] 1 WLR 1717, handed down some two months after the judge's decision in this case, and that of this court in *R (Das) v Secretary of State for the Home Department (Mind and another intervening)* [2014] EWCA Civ. 45, [2014] 1 WLR 3538, which was carefully considered by the judge. In *O's* case, the Supreme Court considered and, with one qualification (see [75] below), approved the decision in *Das'*s case. The policy that is relevant to this appeal was replaced by a new policy, *Adults at risk in immigration detention*, on 12 September 2016.[3]

4. The appellant's case can be summarised as follows.

    a. His detention was unlawful because of public law errors made by the Secretary of State. The first limb of this public law ground is that the Secretary of State (i) misinterpreted chapter 55 of her policy on the detention of those with mental illness, and, (ii) failed to make enquiries into the appellant's

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1 See [10] – [11] below.
2 It is set out at [18] below.
3 See [19] below.

mental health. The second limb is that the detention breached the established common law principles applying to immigration detention under the 1971 Act derived from the decision of Woolf J in *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704 and known as the *Hardial Singh* principles.[4] The appellant claimed damages in respect of the unlawful detention.

b. His treatment in detention was inhuman and degrading amounting to a breach of article 3 of the European Convention on Human Rights ("the ECHR").

c. The Secretary of State's decision-making processes did not meet common law requirements of procedural fairness, and failed to make reasonable adjustments to avoid discrimination against detainees suffering from mental illness as required under the Equality Act.

5. In his judgment, handed down on 16 February 2016, the judge accepted that the Secretary of State had misinterpreted her policy[5] but held that, save for the period between 3 and 27 April 2015, the detention was not unlawful. This, he stated, was because, before 27 March 2015, the Secretary of State could have rationally concluded that the appellant's mental condition could be satisfactorily managed within detention, and between 27 March and 3 April, and between 27 April (when a direction was made for his removal to a psychiatric hospital) and 5 May 2015 when he was transferred to hospital she could rationally have decided not to release him pending his transfer.[6] He held that the respondent was liable in damages only in respect of the period between 3 and 27 April 2015. Cross-references to his judgment are identified as "J, [xx]". An appellant's notice was filed on 16 May 2016, and permission to appeal was given by Moore-Bick LJ on 2 December 2016. The way the bundles were prepared for the appeal was unsatisfactory. They did not comply with CPR PD 52C and shortly before the hearing the parties sought to file a supplementary bundle of 967 pages for the court to pre-read, including the full medical records.

6. The Equality and Human Rights Commission ("the Commission") did not intervene below but was granted permission to do so by written submissions in this appeal. The Commission filed a detailed skeleton argument focussing on points of legal principle concerning the third limb of the appellant's case, that the Secretary of State had discriminated against the appellant by failing to make reasonable adjustments to her decision-making procedures for detainees suffering from mental illness as required by the Equality Act, and that the decision-making processes were procedurally unfair under the common law. It also filed a reply to the Secretary of State's revised skeleton argument, which *inter alia* submitted that the Commission's submissions went far beyond the appellant's pleaded grounds of claim.

7. The remainder of this judgment is organised as follows. Part II contains the legal and policy framework relating to immigration detention under the 1971 Act. Part III summarises the relevant facts. The summary is principally taken from the detailed judgment below, but also from documentation relied on by the parties in support of their submissions. Part IV comments on the evidential position and records the reasons given by the court for rejecting the submission that the judge erred in refusing to admit the evidence of the appellant's treating clinician, Dr Meganty, on the question of whether his mental illness could be satisfactorily managed in detention,

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4 The principles are summarised at [20] below.

5 See J, [73] – [75] and [40] below.

6 See J, [77] ff and [104] and [41] – [42] and [89] below.

and that we consider that report although it had not been considered by the judge. Parts V – VIII consider the relevant sections of the judgment below and contain my discussion and analysis of the issues.

8. Part V summarises the public law duties owed by the Secretary of State and the public law errors she made, which are not disputed. It then considers the legal consequences of those errors. I have concluded that the judge erred in concluding that, save for the twenty-four day period in April 2015, the appellant's detention was not unlawful and that his detention was unlawful for virtually the entire period during which he was held in IRCs. I have concluded that the consequence is that the respondent is liable in damages for the period between 30 June 2014 and 27 April 2015. It is therefore not necessary for this court to address the *Hardial Singh* principles. Parts VI and VII deal with the appellant's claim under article 3 of the ECHR and his claims, supported by the Commission that (a) the Secretary of State had discriminated against him by failing to make reasonable adjustments to her decision-making procedures for detainees suffering from mental illness as required by the Equality Act, and (b) that the decision-making processes were procedurally unfair under the common law. I have concluded that the judge erred in relation to the Equality Act ground and would make the declaration sought, but, despite my concerns about the overall fairness of the procedures for decisions concerning detainees in IRCs with mental illness, for the reasons given at [190] below, I would not grant a declaration in the terms sought by the appellant.

II. The legal and policy framework

9. ***(a) Legislation:*** The principal statutory provisions authorising the detention of those who the Secretary of State wishes to remove from the United Kingdom are contained in the 1971 Act. Paragraph 2 of schedule 3 to the 1971 Act provides:

> "(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

10. Section 48(1) of the Mental Health Act 1983 ("the 1983 Act") empowers the Secretary of State to transfer a person detained under the 1971 Act or under section 62 of the Nationality, Immigration and Asylum Act 2002 to a psychiatric hospital if certain conditions are satisfied. Under section 47(1) the Secretary of State must be satisfied by reports from at least two registered medical practitioners that:

> "(a) that person is suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and
>
> (b) he is in urgent need of such treatment;
>
> (c) appropriate medical treatment is available for him;
>
> …"

11. The appellant was detained in September 2015 under section 3 of the 1983 Act. That provides that a patient may be admitted to a hospital and detained there if the patient is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; it is necessary for the health or safety of the patient or for the protection of other persons that he or she should receive such treatment and it cannot be provided unless he or she is detained under this section; and appropriate medical treatment is available: section 3(2)(a), (c), (d). Section 3(3) requires an application for admission for treatment to be founded on the written recommendations of two registered medical practitioners in the prescribed form stating that the conditions in section 3(2) are met, and the grounds and reasons for that opinion.

12. The focus of the appeal was on the legislative and policy framework governing immigration detention. But the appellant's case that his detention was unlawful also relied on the prohibition on "inhuman or degrading treatment or punishment" in article 3 of the ECHR, various provisions of the Equality Act, and the common law principles of procedural fairness, in particular the decisions in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 A.C. 531 and *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 which I consider at [178] – [179] below.

13. As to article 3, the appellant maintains that, in the light of his mental health, his treatment was inhuman or degrading, and that, under section 6(1) of the Human Rights Act 1998, "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right". His claim that, as a detainee suffering from mental illness, he suffered from discriminatory treatment relied on the following provisions of the Equality Act:

    a. Section 29(7)(b), which provides that "[a] duty to make reasonable adjustments applies to… a person who exercises a public function that is not the provision of a service to the public or a section of the public".
    b. Section 20(3), which provides that the duty to make reasonable adjustments includes "a requirement, where a provision, criterion or practice of [the body exercising the public function] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".
        i. Under section 6(1) "a disabled person" includes a person with a "mental impairment" where "the impairment has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities".
        ii. Under section 212(1) "substantial" means "more than minor or trivial".

iii. Under schedule 2 paragraph 2(5) "Being placed at a substantial disadvantage in relation to the exercise of a function means… if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment".

c. Section 21(1) and (2) which respectively provide: "[a] failure to comply with [the duty in section 20(3)] is a failure to comply with a duty to make reasonable adjustments" and, "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

The Equality Act's Statutory Code of Practice provides that the duty is anticipatory and continuous, and only requires the body exercising a public function to take such steps as is reasonable, which will depend on all the circumstances of the case: see the extracts from §§7.20 - 7.21 and from §7.30 on the factors to be taken account in determining what is reasonable at [157] and [162] below.

14. ***(b) The Secretary of State's policy:*** The power to detain under the 1971 Act must be exercised by the Secretary of State in accordance with the policy that applies to the person who is to be detained. I have referred to the change in the policy on 12 September 2016 and to the fact that it is the previous policy, in chapter 55 of her Enforcement Instructions and Guidance, entitled "Detention and Temporary Release" that applies in this case. Chapter 55 sets out the policy on immigration detention and temporary release.

15. It is important that §55.10, the provision at the heart of this appeal, which is concerned with persons unsuitable for detention, is read in the wider context of the policy as a whole. For that reason, the judge was correct to set out extensive sections of the policy at [11] and [13] of his judgment. For present purposes, however, a summary suffices. The policy states that the purpose of the power to detain is to ensure effective immigration control, but that there is in general a presumption in favour of temporary admission or release, and wherever possible alternatives to detention should be used.[7] In the case of foreign national offenders (a category into which the appellant falls), however, the protection of the public is a key consideration.[8] Where a detainee has a conviction for one of a defined list of "serious offences", including possession of drugs with intent to supply,[9] that is taken to be strongly indicative of the greatest risk of harm to the public, and a high risk of absconding.[10] It is stated that when assessing whether continuing detention is reasonably necessary and proportionate, such a person should only be released where there are "exceptional circumstances" which "clearly outweigh the risk of public harm and which mean detention is not appropriate".[11] The fact that one of the appellant's convictions was for possession of drugs with intent to supply is therefore of some importance.

16. The Operating Standards Manual for IRCs provides that IRCs must employ experienced professional qualified medical personnel for the care of detainees. Rule 34 of the Detention Centre Rules 2001 SI 2001, No. 238 requires IRCs to ensure that

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7 §55.1
8 §55.1.2
9 Two of the appellant's convictions were for this offence: see [23] below.
10 §55.3A, para. 2
11 Ibid

arrangements are in place for detainees to have a physical and mental examination by the medical practitioner within 24 hours of their arrival to identify *inter alia* any immediate and significant mental or physical health needs.[12]

17. §55.8A of the policy is concerned with those with special illnesses and conditions. It states that health care staff are required by Rule 35 of the Detention Centre Rules 2001 to bring to the attention of those with direct responsibility for authorising, maintaining and reviewing detention without delay the cases of particularly vulnerable detainees including those whose health is likely to be injuriously affected by continued detention or any conditions of detention.[13] On receipt of a Rule 35 report, the Secretary of State's case workers must review the continued detention of the individual in the light of the information in the report and respond within two weeks.

18. §55.10 of the policy provides:

> "**Persons considered unsuitable for detention.**
>
> Certain persons are considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. …
>
> In criminal casework cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are considered suitable for detention in <u>*only very exceptional circumstances*</u>, whether in dedicated immigration accommodation or prisons:
>
> > those suffering from <u>*serious mental illness which cannot be satisfactorily managed within detention*</u> (in criminal casework cases, please contact the specialist mentally disordered offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act.
>
> If a decision is made to detain a person in any of the above categories, the caseworker must set out the very exceptional circumstances for doing so on file." (emphasis added)

19. Whether the appellant's serious mental illness could "satisfactorily be managed in detention", and, if so, whether "very exceptional circumstances" applied, are the main issues for consideration in Part V below. I have referred to the new policy, *Adults at risk in immigration detention,* that replaced the material parts of chapter 55, including §55.10. The new policy has replaced the concept of "satisfactory management" of

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12 See J, [44].
13 See J, [44].

those with mental illness with a balancing process for individuals who have one of a number of indicators of risk, including a mental health condition. There is a presumption that those at risk should not be detained but the policy states that indicators of risk need to be balanced against immigration control factors, including public protection issues that arise because of the individual's criminal history. Detention should occur only where the immigration control factors outweigh the risk factors so as to displace the presumption. [14]

20. ***(c) The Hardial Singh principles:*** I have referred to the principles derived from the decision of Woolf J in *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704. Those principles, which mark out the boundaries of lawful immigration detention, have been affirmed many times. The most widely cited formulation of them is that by Dyson LJ, as he then was, in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ. 888, [2003] INLR 196 at [46], repeated by him in the Supreme Court in *Lumba and Mighty v Secretary of State for the Home Department (Justice intervening)* [2011] UKSC 12, [2012] 1 AC 245 at [22] ("*Lumba's* case"), with the agreement of a majority of the court. It was also endorsed by Lord Wilson in *R (O) v Secretary of State for the Home Department* [2016] UKSC 19, [2016] 1 WLR 1717 at [46], decided since the judge's decision in this case. In *Lumba's* case Lord Dyson JSC encapsulated the *Hardial Singh* principles thus:

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.

21. *Lumba's* case also discussed the requirements for a claim for compensatory damages where detention has been found to be unlawful. I consider that aspect of the case and the helpful summary of the principles derived from Lord Dyson's judgment in it by Singh J (as he then was) in *R(HA) (Nigeria) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) at [143] at [46] ff. below.

III. The facts

22. The questions in these proceedings turn on the severity of the appellant's mental illness, the capacity of the respondent to manage it within immigration detention, her decisions to keep him detained in IRCs, and the treatment to which he was subject whilst in the IRCs. This means a detailed consideration of the factual background is necessary. The judge recognised this and provided one in his judgment, which is available on BAILII.[15] He summarised the appellant's past immigration history at [20]; the appellant's first Rule 35 report and the Secretary of State's response at [25]

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[14] See §§11, 13 and 15 of the current version of the policy, published on 6 December 2016, which can be accessed at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574970/adults-at-risk-policy-guidance_v2_0.pdf.

[15] http://www.bailii.org/ew/cases/EWHC/Admin/2016/273.html

and [29], and, after giving "a snapshot of deterioration" between June 2014 and March 2015 at [27] - [29], summarised the entries in the appellant's records showing the detail of his mental condition in that period in the twenty sub-paragraphs of [30] and the comments in the monthly detention reviews in the eleven sub-paragraphs of [35]. The determination of this appeal has also involved examination of the factual matters during the appellant's detention in considerable detail. The material in the medical reports, detention reviews and other reports by detention officers, and in the two Rule 35 reports and the Secretary of State's response to them that is of importance to the issues before this court is summarised at [27] below.

23. The appellant lawfully entered the United Kingdom in 2004 as the spouse of a Finnish national entitled to reside in the United Kingdom. In April 2005, he was granted residence for five years as a dependant of a wife entitled to EEA residence. Between 2007 and 2014 his life was marked by serious mental illness and repeated criminal convictions. In this period, he was admitted to hospital for treatment under the MHA 1983 on approximately ten occasions and had sixteen convictions for 27 offences, including in 2010 two offences of possessing a controlled drug with intent to supply.[16] Those two offences are relevant because the policy (see [15] above) identifies possession with intent to supply as a "more serious" offence. Ms Harrison QC described his offences as relating "primarily to cannabis use and shoplifting".

24. In January 2014, the Secretary of State refused the appellant's application for permanent residence in the United Kingdom on the basis of a right to residence which survived the break-up of his marriage. On 22 April 2014, she served him with a notice of liability to detention and removal from the United Kingdom. On 6 May 2014, he appealed against the decision to refuse him a permanent residence permit,[17] and on 12 May 2014 he appealed against the detention and removal notice.

25. Between 11 June and early October 2014, the appellant was detained at Morton Hall IRC. Following a medical request, he was transferred to Haslar IRC "due to his vulnerability",[18] and, in early December to Dover IRC, from where, on 23 December 2014, he was transferred to Brook House IRC, where he remained until he was transferred to a psychiatric hospital on 5 May 2015. In that time there were two Rule 35 reports. The first, on 30 June 2014 and summarised at [27(3)] below, was prepared by healthcare staff at Morton Hall IRC. The second, on 25 March 2015 and summarised at [27(10)] below, was prepared by healthcare staff at Brook House IRC. The Secretary of State's responses to these reports, the monthly detention reviews, and the circumstances of the six occasions on which the appellant was removed from association with other detainees under Rule 40 of the Detention Centre Rules 2001 in the interests of security or safety are also summarised at [27] below. Like the judge, I refer to this as segregation below. The judge recorded that although the appellant would have had a formal medical examination within 24 hours of arrival at Haslar, Dover and Brook House, there were no Rule 35 reports at that stage.[19] The appellant's detention under the 1971 Act formally ended on 28 September 2015, although he remained detained under section 3 of the 1983 Act until April 2016.

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16 J, [7] – [8].

17 On 4 June 2014, the FtT extended time for the filing of the notice of this appeal.

18 J, [30(ii)], [69]. The request stated: "Bi-polar, well managed, compliant with medication. Transfer request due to vulnerability… Just needs a break from this environment".

19 J, [48], [68] and [122].

26. The determination of the appellant's immigration appeals was delayed in part because he was unable to participate in the process as a result of his mental health condition. His appeal to the First-tier Tribunal against the decision to make a deportation order was allowed on 1 May 2015. Ms Harrison informed the court that an appeal to the Upper Tribunal by the Secretary of State was dismissed on 12 April 2017 and in December 2017 the appellant was granted indefinite leave to remain in the United Kingdom.

27. I now summarise the material in the medical and other reports and reviews during the appellant's immigration detention that are of importance to the issues before this court:

(1) **5 June 2014:** The minute of the Secretary of State's decision to detain the appellant recorded "subject claims to be bipolar however no evidence has been provided to support this. This condition would be manageable in detention".[20] The judge was satisfied that consultation of the Secretary of State's own records would have revealed a history of serious mental illness.[21]

(2) **27 June 2014:** Morton Hall IRC informed the Home Office that the appellant "is subject to a Community Compulsory Treatment Order and under CPA for aftercare" and recorded that Glasgow Immigration Enforcement was informed and "Dungavel IRC [in Scotland] informed of potential transfer".

(3) **30 June 2014, the first Rule 35 report:** This stated that "[t]his detainee's health is likely to be injuriously affected by continued detention or any conditions of detention". It also stated:

> "Mr [C] has been diagnosed with bipolar effective disorder with psychotic features. He has had multiple hospital admissions under section and a compulsory treatment order in the community. Mr [C] has little insight into his mental illness and does not therefore comply with medication. Mr [C] is very unstable currently and the stress of detention is impacting negatively on his mental illness. I have significant concerns that should he continue to deteriorate he will be unfit for detention and will pose a risk to himself or others."[22]

(4) **2 July 2014, the Secretary of State's caseworkers' review in the light of the Rule 35 report:** In a letter to the appellant's solicitors it was stated:

> "The decision has been taken to maintain your detention. The report is of the opinion that should you continue to deteriorate you will be unfit for detention. This suggests that you are currently fit for detention. The case worker dealing with your case will contact the relevant mental health authorities for further advice on your case. In the meantime your detention will be reviewed on a regular basis and any changes in your condition will be taken into account.
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> Furthermore, it is considered that there are very exceptional circumstances to justify maintaining your detention. It is considered

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20 J, [19].
21 J, [20].
22 J, [25], and see also [61] – [62] and [66].

> that there is an unacceptably high risk of you absconding. You have been convicted of a total of 27 offences in the United Kingdom. On 19 September 2013 you were issued with a warning that should you continue to offend, your behaviour may make you liable to deportation. You chose to ignore this and continue to offend".[23]

The judge stated that there was no evidence that the case worker dealing with the appellant's case in fact contacted the relevant mental health authorities for further advice.

(5) **31 October 2014:** The appellant attended a hearing in his immigration appeal without representation. The judge was concerned by his mental health. He personally telephoned the medical centre at the IRC, adjourned the hearing because of the appellant's health, and directed that medical information be provided.[24] The information was not provided.

(6) **Detention Reviews between July 2014 and May 2015:** As required by the Detention Rules 2001, reviews took place on a monthly basis to consider whether detention should be continued. The reviews are entered on pro-forma review forms.

a. Paragraph 13 of the pro-forma review form is entitled "[c]onditions rendering person suitable for detention only in very exceptional circumstances (see section 55.10 of Enforcement Instructions and Guidance)". In each of the appellant's reviews between July 2014 and March 2015 this section was completed as follows: "None – unless his condition deteriorates to the extent that he is hospitalised". What §55.10 in fact states (see [18] above) is that "those suffering from serious mental illness which cannot be satisfactorily managed within detention" are considered suitable for detention "in only very exceptional cases".
b. Each of the detention reviews in this period also recorded that "[t]he risk of absconding is considered to be greater than the norm"; "[s]ubject is considered to be a high risk of reoffending"; "[s]ubject is considered to pose a high risk of harm to the public", and each of the summary front sheets assessed the risks of absconding, reoffending and harm each as "high".
c. As to individual detention reviews:
   - 18 December 2014: "The subject has a current legal barrier to removal though we have engaged to have all current hearings amalgamated. The hearing has been postponed *due to the subject's own behaviour*. I am content that removal can be said to be achievable in a reasonable timescale" (emphasis added).[25]
   - 3 February 2015: "The subject is a prolific criminal whose offending has continued despite numerous warnings of deportation. This blatant disregard for the law indicates that he is not likely to comply with any terms of release. *He has shown non compliance with the appeal process which has resulted in him prolonging his own detention*. I am content that the appeal is being satisfactorily monitored and progressed…." (emphasis added).[26]

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23 J, [39]. Save for the last two sentences, these two paragraphs of the report are set out at J, [25].
24 J, [30(v)]. He had been refused bail on 7 October, in part because of his mental condition.
25 J, [30(xii)].
26 In part, J, [35(viii)].

- 18 March 2015: "He is currently being non-cooperative with the appeals process even though that may be to his benefit".

The remaining reviews occurred after the second Rule 35 report, see (10) below, dated 25 March 2015)

- 27 March 2015: "Subject's mental health has be [sic] treated in detention. If he is moved to a secure unit after assessment he will be managed effectively. Detention pending this assessment considering the risk and exception [sic] circumstances is appropriate".
- 10 April 2015: "Detention remains appropriate and proportionate; the barrier to removal is the outstanding appeal the hearing is set for 21/04/15. I note the risk assessments for [the appellant] and that his mental health is being managed whilst in detention".
- See (15) and (17) below for the reviews dated 9 June and 2 September 2015.

(7) **Material in medical and other records: Morton Hall IRC, June to October 2014, Brook House IRC, between December 2014 and March 2015:**[27] On various dates the following are recorded: persecutory thoughts; meaningless speech; elation, hypo mania, psychosis, lack of insight, refusing to take his medication (throughout October 2014, and also recorded on dates in December 2014, and between January and March 2015); inability to engage rationally or answer questions; delusions of grandeur; having erratic sleep patterns and conducting tangential and pressured speech (at Brook House in February and March 2015) "in every conversation" with detention and health care staff; drinking dirty water and unable to meet his daily needs; deluded, seeing visual hallucinations and messages from angels; unkempt delusional and thought disordered; and strange and challenging behaviour including asking for the telephone number of the Royal Navy and demanding to go to his palace.[28] On 10 February, the appellant was placed in "medical single occupancy … with a review [a month later] due to worsening mental health concerns by health care".[29] On 17 and 20 February 2015, soon after he was segregated on 15 February, see (8) below, the GP and a psychiatrist were more positive, respectively stating "no thought disorder or evidence of psychosis or hallucinations. Currently has capacity", and "no formal thought disorder or psychotic symptoms".[30] But see (9) below for deterioration in March.

(8) **Removal from association on 15-16 and 21-25 February, and 3, 18 and 24-27 March 2015:**

a. The appellant was forcibly removed from association and segregated for a period of approximately 25 hours on 15 February. One of the officers recorded: "I've had several dealings with [him] over the past 2 weeks and noticed that his mental state seems to be diminishing over time. … [H]e made threats of violence to me and other detainees on the wing. His

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27 J, [30(i), (iv), (vii), (x), (xii), (xiv) and (xvi)].
28 J, [30(ix)].
29 J, [28] and [30(xi)].
30 J, [58].

capability for mental reasoning has now got to the point of he doesn't see reality [sic]. [He] has been acting in very strange ways".[31] Other officers recorded that he was behaving erratically and strangely, and rambling incoherently. It is stated that he aggressively refused to move to the segregation block. There is a detailed account of the team entering his room in arrow formation and striking him with a shield, how he resisted when they were trying to get handcuffs on him, and how an officer "took control of" his hands and legs. One officer stated that a mental health nurse suggested that he should be sectioned due to his behaviour.

b. On 21 February, after removing a metal postbox from the wall, saying that he had done so as he was sure he was sent mail that he did not receive, he was placed in segregation for four nights.
c. On 22 and 23 February detention officers noted that he was displaying random outbursts of aggression, incoherent, and refusing his medication on the basis that it was illegal. He is recorded as rambling incoherently, unpredictable and unable to understand why he had been removed from association, but on 27 February the psychiatrist who saw him recorded "an improvement from last week".
d. On 3 March, the appellant was placed in segregation for just under 24 hours, and on 18 March for two and a half hours (see (9) below for concerns raised in March).
e. The appellant was segregated for seven days between 24 March and 31 March because of threats of violence by him to officers.

(9) **Concerns raised in March 2015:** It is clear that the appellant's condition deteriorated in March. On 10 March, it was decided to keep him in a single room because of his worsening mental health.[32] On 20 March, the mental health nurse recorded deterioration in his mental state and his refusal to accept anti-psychotic medications, and stated that the continued deterioration "is now having a negative impact on his active daily living, [and] it is becoming difficult for his needs to be met here at Brook House".[33] On 21 March detention officers were warned by health care to be aware of the appellant's presentation. On 23 March, a detention officer recorded that he was "very confused" and "very out of touch with reality … he seems to have lost contact with reality"; and the mental health nurse concluded that he lacked capacity and needed to be in hospital.[34] He was also recorded as having pressured and tangential speech, and believing that he was a member of the royal family and going to parties at Buckingham Palace. On 25 March, he was recorded as being "very confused", appearing to have "lost all contact with reality", [35] and as drinking tea with dirty water and buttons in it.

(10) **25 March 2015: The second Rule 35 report stated**:

"This detainee has serious mental health issues. These are long standing mental health issues and historically he has been non compliant with antipsychotic medication issued. … He has been reviewed regularly by the Mental Health Nurse and the Psychiatrist from the 20/02/2015. There has

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31 J, [30(xii)].
32 J, [30(xv)].
33 J, [29].
34 J, [30(xvi) - (xviii)].
35 J, [30(xix)].

been a real but gradual deterioration in his mental state. It has been observed that his behaviour is more erratic and labile. …

Observed deterioration in mental health state exacerbated with environment, as well as failure to comply with medication advised. He does not seem to have capacity to make decision and poses a risk to staff, other detainees and himself (through neglect). …

The current environment is not conducive with the management of his mental health condition. He is not receiving any medication which will likely improve his condition and is not surrounded by professionals equipped to deal with difficult and severe mental health conditions.

He needs to be transferred to a secure mental health facility for assessment and treatment. He will see a his (sic) psychiatrist in two days for assessment (and sectioning)". [36]

On 26 March 2015, detention officers recorded the appellant to be "acutely mentally unwell/psychotic and mania" and attempting to pass on messages to the Prime Minister. A GP who had not met him before recorded that he needed to be sectioned as soon as possible.

(11) **27 March 2015: The response in the light of the second Rule 35 report stated**:

"You have not been complying with your medication and are currently unstable, with the stress of detention impacting negatively on your mental health. The medical practitioner has stated that there are significant concerns that, should you continue to deteriorate, you will be unfit for detention and will pose a risk to yourself or others. The medical practitioner also states that you will be seen by a psychiatrist some time today (27 March 2015) who will assess your condition in more detail.

As a result, a decision has been made to maintain your detention.

The report is of the opinion that should you continue to deteriorate you will be unfit for detention[37]. This suggests that you are currently fit for detention. If your psychiatric assessment suggests otherwise then your continued detention in an immigration removals centre will be reassessed.

Furthermore, it is considered that there are very exceptional circumstances to justify maintaining your detention. It is considered that you present an unacceptable high risk of you absconding …."

(see (6c) above for the detention reviews dated 27 March and 10 April 2015).

(12) **27 March - 6 April 2015:** The appellant is recorded by the GP as being "delusional and hallucinatory", "unkempt, thought disordered between periods of

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[36] J, [83].

[37] While the first Rule 35 report contained such wording, the second report did not.

lucidity" saying that messages from fallen angels were being related to him and having visual hallucinations of these angels. On 30 March, the GP recorded that the appellant "has demonstrated signs of relapse of his Bipolar affective disorder". At the request of the medical staff in the IRC, the appellant was assessed by Dr Kassia Lowe, a forensic psychiatrist. Dr Lowe's report, dated 13 April 2015, concluded:

> "His mental state is deteriorating due to his lack of compliance with treatment and possibility [sic] exacerbated by his current stressful environment …. I agree that this man is not currently in the best environment to treat his mental health and he would benefit from treatment in hospital." [38]

(13) **25 - 27 April 2015:** The appellant was removed from association and segregated for two days because of his aggressive and disruptive behaviour. On 27 April, it was determined that he met the criteria for compulsory treatment in a mental hospital and a direction was given under section 48 of the 1983 Act for him to be removed to a hospital.

(14) **5 May 2015:** The appellant was "sectioned" under the 1983 Act and transferred to a psychiatric unit.

(15) **9 June 2015**: The detention review recorded at section 13 "Whilst in immigration detention, [VC] has been diagnosed as suffering from a bipolar disorder with psychotic features. He has now been transferred to a secure unit and it is considered that he is appropriately sectioned and being assessed/treated in hospital. His circumstances are considered very exceptional, thus warranting his detention". The review and the subsequent reviews assessed the appellant's risk of absconding as medium, risk of reoffending as high, and risk of harm as low.

(16) **28 August 2015**: The appellant was made subject to a civil section under section 3 of the 1983 Act.

(17) **2 September 2015:** The final detention review described the appellant as a "habitual low-level criminal" and noted "serious administrative blunders" in the appeals process with the result that "removal cannot said to be imminent or even to be a prospect on a reasonable timescale". It stated that "the responsible clinician has given their opinion that [his] treatment … is likely to be a long and slow process. If that is the case we cannot justify holding him under immigration powers … Recommended that detention be maintained, but only so that an orderly transition to Section 3 [civil section] can be managed".

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[38] Dr Lowe's report was provided to the judge after the hearing, and after the judgment had been drafted (see J, [188]). We were informed by Ms Harrison that this was because the Secretary of State had originally refused to produce it to the appellant's lawyers. At J, [190] [191], the judge stated that he considered the report *de bene esse*, but that as its content was not inconsistent with the conclusion he had reached, he did not propose to alter or revise the draft judgment. Ms Anderson did not object to us considering Dr Lowe's report. We did so cautiously, noting that it appears not to have been properly adduced and that we have an unsigned copy only. Whilst I record Dr Lowe's assessments I have not relied on them in any of the conclusions which I have reached.

IV. Evidential matters

28. The only evidence before the judge was the raw medical data, produced by the appellant, the various detention reviews, other documents by detention officers, and a statement of Mr Albosh, a Senior Executive Officer in the Home Office with responsibility for the Mentally Disordered Offenders Team. Mr Albosh's statement deals only with events after 27 April 2015, that is after it had been decided to transfer the appellant to a psychiatric hospital. The Secretary of State decided not to submit any evidence in respect of the period during which the appellant was detained in IRCs. I refer to the consequences of this decision at a number of points, in particular at [64] – [68], 97- [100]], and [168] – [169] below. At this stage, I note that this approach rendered the task of the judge below and of this court, more difficult. It is an approach that carried risks for the Secretary of State, in particular because of her obligation, as a public authority meeting a challenge to its decision, to make candid disclosure to the court of the relevant facts and the reasoning behind the challenged decision.

29. I turn to the ground of appeal based on the refusal to admit the evidence of the appellant's treating clinician, Dr Meganty, on the question of whether his mental illness could be satisfactorily managed in detention. After reading, hearing, and considering Ms Harrison's submissions on this issue, we gave our decision rejecting them at the hearing. Before giving my reasons for doing so, I summarise the way the matter arose, what was done and not done to prepare this as a viable ground of appeal, and the resulting difficulty for this court.

30. The Secretary of State's summary grounds of defence filed on 6 June 2015 put the appellant's mental condition in issue. Her detailed grounds of defence were served out of time on 14 October 2015. Dr Meganty's report was dated 10 October 2015, served on 28 October, and the application to rely on it was filed on 2 November, some three weeks after the completion of the report. The application was considered by Mr Philip Mott QC at a case management hearing on 19 November 2015, a few days before the final hearing and refused.

31. There is no written record of Mr Mott's reasons for his decision, for instance a transcript or a note by counsel before us. Ms Anderson, who appeared below on behalf of the Secretary of State, informed us that to the best of her recollection, detailed reasons were given for the refusal. Her skeleton argument stated they "included its lack of relevance to the legal issues for determination", but she was unable to give us any further information. The other counsel before us had not appeared below and were unable to provide information about the reasons.

32. We were informed that after Mr Mott's decision, a new skeleton argument was filed on behalf of the appellant without the references to Dr Meganty's evidence. We were also informed that Mr Mott indicated that the application could be renewed at the final hearing on 24 November, and that it was so renewed, although Ms Anderson stated this was done "very faintly" and that after the judge refused the application, the appellant's counsel did not say that it was not possible to have a fair hearing without the report in evidence.

33. The outcome of the renewed application is recorded in paragraph 1 of the order of HHJ Seys Llewellyn QC dated 8 April 2016. That states that "[t]he Claimant's

application to adduce further evidence (namely the report of Dr Meganty) is dismissed". In the judgment handed down on 16 February 2016, there is no reference to the application to admit the evidence or to Dr Meganty. Nor is there any other record of the reasons for which the application was refused. Ms Anderson indicated that the matter was handled without great formality and that the judge essentially agreed with the reasons given by Mr Mott (whatever those were, and however the judge came to be aware of them).

34. It is not surprising that by the time of the hearing before us, two years later, the memories of the legal teams involved at the hearings before Mr Mott and the judge had faded. What is surprising is that in a case where the judgment handed down on 16 February 2016 did not refer to the application to adduce the evidence or to the reasons for rejecting it and both parties were represented by experienced solicitors and counsel they had to rely on memory.

35. One of the grounds of appeal in the appellant's notice filed on 16 May 2016 was that the judge erred in refusing to admit Dr Meganty's evidence, so the appellant must have been conscious of the point before the notice was filed. Despite this, it appears that steps were not taken to ascertain those reasons, either by seeking a transcript of the relevant part of the hearings before Mr Mott or the judge, or by asking the judge to provide reasons in accordance with the procedure set out in *English v Emery Reimbold* [2002] EWCA Civ. 605, [2002] 1 WLR 2409. These failures made our task considerably more difficult.

36. Mr Mott's original decision was not appealed at the time and it is too late to appeal it now. That Dr Meganty's report was served less than a month before the final hearing is also problematic. This is because, although it is true that the Secretary of State's detailed grounds of defence were produced late, the summary grounds of defence filed in June had indicated that issues on the appellant's medical condition would be contested, and the report dated 10 October 2015 was completed before the detailed grounds were served. Thirdly, the fact that the parties were unable to give us the reasons for the decisions by Mr Mott and the judge and had not taken appropriate steps to ascertain those reasons and put them before this court has disabled us from being able to scrutinize their decisions.

37. I conclude by observing that the way in which this issue appears to have been dealt with is unsatisfactory. It appears to me, as I indicate at paragraphs [64] - [65] below, that the judge (and this court) would have been assisted by medical evidence (though I recognise that fairness would have required that both sides be afforded the opportunity to produce such evidence which may have delayed the hearing of the claim).

V. The public law duties and errors and their consequences

38. ***(a) Introduction:*** In this appeal, it is common ground that the judge did not err in finding that the Secretary of State misinterpreted chapter 55 of her policy on the detention of those with mental illness. It also appeared to be common ground that he did not err in finding that she was in breach of her public law duty to make enquiries into the appellant's known mental illness and whether it could be satisfactorily managed within detention within the meaning of chapter 55.10. The issue is whether, as the judge held, the breaches only rendered the detention unlawful for the period 3

to 27 April 2015 and that damages were payable only in respect of that period or whether, as it is submitted on behalf of the appellant, the entire period of detention prior to 3 April was also rendered unlawful by these errors and damages are due in respect of the entire period of detention up to 27 April 2015.

39. I first deal with the public law errors and summarise the legal consequences of such errors. I then consider whether the judge erred in concluding that the appellant's detention between 11 June 2014 and 2 April 2015 was lawful notwithstanding those errors. For the reasons given at [49] – [56] below, I have concluded that he did err, and that the detention of the appellant was unlawful between the receipt of the first Rule 35 report on 30 June 2014 and 5 May 2015. The question is then whether there is a right to compensatory damages for that period or whether the right is only to nominal damages. I conclude that the right is to compensatory damages for the period up to 27 April 2017 and would remit the quantification of any compensatory damages that are due to a Master of the Queen's Bench Division. At [101] – [105] below I consider whether, had the Secretary of State decided not to detain the appellant in an IRC detention centre, he would have been released or would have been detained elsewhere.

40. ***(b) Misinterpretation of the policy:*** Throughout the appellant's detention the Secretary of State interpreted the reference in §55.10 of her policy to "those suffering from serious mental illness which cannot be satisfactorily managed within detention" as not applying "unless and until the Claimant's condition deteriorated to the extent that he was hospitalised". The judge stated that interpretation was "authoritatively refuted" by this court in *Das's* case.[39] Paragraph 2 of the judge's order declared that "… the Defendant misinterpreted her published detention policy as to those suffering from serious mental illness which cannot be satisfactorily managed within detention, insofar as she directed herself that there were no 'very exceptional circumstances' 'unless his condition deteriorates to the extent he is hospitalised'", which elides the basic misinterpretation with the "very exceptional circumstances" exception. The Secretary of State accepts that the policy was misinterpreted.

41. The judge stated that this error did not render the appellant's detention unlawful because from 8 July 2014 "… further or alternatively [the Secretary of State] considered detention justified because his condition could be satisfactorily managed" and that conclusion "was rationally open to her" until she received the Rule 35 report dated 25 March 2015. He stated that "consideration of whether there were 'very exceptional' circumstances does not arise until then"[40] and concluded that "[t]he policy claim fails up to that point".[41] Since he found the detention prior to the receipt of the second Rule 35 report was lawful, it followed that compensatory damages were not due in respect of that period.

42. The judge held that, after receipt of the second Rule 35 report and the Secretary of State's review of it on 27 March, it was no longer rationally open to her to conclude that the appellant could be satisfactorily managed in detention. He concluded that the appellant's claim for compensatory damages succeeded only for the twenty-four day

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39 J, [73].
40 J, [96].
41 J, [104].

period between 3 and 27 April 2015. I consider his reasons for so concluding at [89] ff. below.

43. ***(c) Breach of the public duty of inquiry:*** The judge found that the Secretary of State breached the duty of enquiry into the appellant's known illness and whether it could be satisfactorily managed within detention within the meaning of §55.10. The breach arose from her caseworker's letter of 2 July 2014, written in response to the first Rule 35 report, which included the sentence "The case worker dealing with your case will contact the relevant mental health authorities for further advice on your case". The judge stated:

> "63. There is no evidence before me that the case worker dealing with the case contacted the mental health authorities for further advice, as the letter of 2 July 2014 to the Claimant and his solicitors said he would. I consider that the Rule 35 report, in addition to his known history of mental health, engaged a public law duty of fairness so to enquire. In default of witness evidence to explain the omission, in my judgment this was a breach of the duty in the immediate aftermath of 2 July 2014.
>
> 64. However I do not consider that the decisions to detain thereafter were unlawful by breach of the public law duty of enquiry. This overlaps with whether the Defendant could rationally conclude that his mental illness could be satisfactorily managed within detention …."

44. After setting out his reasons in some detail, the judge concluded that, before the serious deterioration after 20 March 2015, the scope of the duty to enquire was not greater or different than the monthly reviews which were required in any event.[42] Since he found that the breach did not make the detention unlawful, he also found that there was no claim for damages.

45. Ms Harrison accepted the suggestion that she could, alternatively or additionally, have advanced a case based on the Secretary of State's failure to take into account a relevant consideration, i.e. the outcome of the enquiries which, in her letter of 2 July 2014, she had decided needed to be made, because a decision-maker who fails to enquire will not be able to take into account the information which the enquiries would have produced.

46. ***(d) Consequences of the public law errors:*** If the immigration detention is unlawful, the question is whether there is a claim in tort for damages for false imprisonment. The relationship between public law errors and the tort of false imprisonment was considered by the Supreme Court in *Lumba's* case. In *R(HA) (Nigeria) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin), Singh J (as he then was) helpfully summarised the principles derived from Lord Dyson's judgment in *Lumba's* case in the following way at [143]:

> "(1) The tort of false imprisonment requires proof that the Claimant was detained directly and intentionally.

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[42] J, [65] – [71].

> (2) The Defendant must then be able to show that there was lawful authority for that detention.
>
> (3) If the Defendant had the power to detain but exercised that power in a way which is vitiated by an error of public law, the apparent authority will fall away and the Defendant will not in truth have the lawful authority she needs in order to justify the detention.
>
> (4) Not all public law errors will vitiate the authority to detain, only those which bear upon and are relevant to the decision to detain.
>
> (5) Since the tort is actionable per se and does not require proof of damage, the Defendant will have committed that tort even if, had she not made the relevant error of law, she could and would have detained the Claimant. There is no requirement for 'causation' in that sense.
>
> (6) However, the question of whether the Claimant would have been detained in any event will be relevant to quantum of compensatory damages."

47. In the present case, the judge's reason for finding that the appellant's detention was not rendered unlawful by either of the public law errors until receipt of the second Rule 35 report was his finding that up until that point the Secretary of State could have rationally concluded that the appellant's mental illness could be satisfactorily managed within detention, meaning that she could have detained him in any event. However, it is seen from Singh J's summary that this causation test goes to the question of damages, and not to the question of lawfulness. Accordingly, it can be seen that the judge erred in his approach to the determination of whether the detention was lawful.

48. At the beginning of the hearing it appeared to be common ground that the judge had erred in concluding that the entire period of immigration detention was not rendered unlawful by the two public law errors and that the disagreement between the parties was limited to the question of whether a right to damages arose. On the second day of the hearing, however, it became clear this was not so. At the beginning of her oral submissions, Ms Anderson handed up a "speaking note" in which it was suggested, for the first time, that the public law errors did not "bear on" the decisions to detain until receipt of the second Rule 35 report. This would mean (see (4) at [46] above) that the detention was not, until that point, unlawful. In the light of this new argument, I first consider whether the judge was correct, albeit for the wrong reason, to find that the detention was lawful notwithstanding the public law errors.

49. ***(e) Was the appellant's detention lawful notwithstanding the public law errors?*** In *Lumba's* case, Lord Dyson stated at [68] that "[i]t is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain". Ms Anderson described this is a "linkage test". She submitted that the judge had been "entitled to find" that the public errors did not bear on the decisions.

50. The judgment, however, makes it clear that this was not the judge's reason for finding that the detention was lawful. He did not use the language of "bearing on" at any point in his reasoning process, or in the passages quoted above. The judgment as a whole makes it clear that his approach was to consider that during the periods that it was rationally open to the Secretary of State to conclude that she could lawfully detain the appellant, her decisions to do so were thereby rendered lawful. That was an error. This "causation" approach was specifically rejected by Lord Dyson in *Lumba's* case. He stated at [62] that "[t]he causation test entails the surprising proposition that the detention of a person pursuant to a decision which is vitiated by a public law error is nevertheless to be regarded as being lawfully authorised because a decision to detain could have been made which was not so vitiated. In my view, the law of false imprisonment does not permit history to be rewritten in this way".

51. In relation to the misinterpretation of the policy, Ms Anderson argued that, on the facts of this case the policy did not apply because the appellant's condition could be satisfactorily managed in detention and that the misinterpretation of a policy that does not apply to a particular decision does not sufficiently "bear on" that decision. She relied on the decision in *LE (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 597 (referred to by the judge, J, [60]) for the (uncontroversial) proposition that having a serious mental illness is not in itself sufficient to engage the policy; for the policy to be engaged there must be a serious mental illness which cannot be managed in detention. She asked whether, in every case where a detainee presents as suffering from a mental illness, the Secretary of State is required to consider whether that mental illness can be satisfactorily managed in detention, i.e. whether the policy is engaged. She submitted that the Secretary of State should not be required to do this. As to when the duty to consider whether the policy applies arises, she submitted that in in this case the duty only arose at the point when the policy was engaged, which the judge determined was on receipt of the second Rule 35 report.

52. This question was considered by Elizabeth Laing QC in *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) where she stated:

> "183. The other issue of construction is what is meant by the phrase, "those suffering from serious mental illnesses which cannot be satisfactorily managed in detention". The issue concerns the stage at which this part of the policy is engaged. Mr Kellar's submission is that the policy is only engaged if the detainee is currently, and obviously, suffering from a condition which cannot be managed in detention. This part of the policy was not engaged in the initial stages of BA's detention, because when he was discharged from hospital, he was stable, and, indeed, euthymic. Mr Buley submits that this part of the policy is engaged when the Secretary of State is deciding whether or not to detain a person who is suffering from a mental illness which may mean that his illness cannot be managed satisfactorily in detention, even if he is well at the time his case is considered. Here, on the information available to UKBA, there was a clear risk that BA, though initially stable, could quite quickly deteriorate, and as a result of detention, to a point where his illness would not be manageable in detention."

> 184. I prefer Mr Buley's submission. It seems to me that Mr Kellar's interpretation of the policy is likely to lead to the very problems which occurred here. The laissez faire approach entailed in this construction would permit the Secretary of State to detain someone who is potentially unsuitable for detention, and to forget about him, leading to risks that the detainee's condition will not be monitored, and of deterioration to a point where the illness cannot be managed. Mr Buley's construction, on the other hand, is likely to lead to a more conscious approach to the identification, and care and custody, of those with serious mental illnesses, because it requires the Secretary of State to confront this issue at the outset, to make plans for the detainee's welfare if the decision is to detain, and to be alert, in detention reviews, for signs of deterioration which may tilt the balance of factors against detention."

Ms Anderson submitted that this decision was made "without an understanding of the systems in place". I consider that submission to be entirely unfounded.

53. It is clear from Richards LJ's judgment in *LE's* case and the cases referred to in it (see [2012] EWCA Civ. 597 at [33] and [35]) that there is a "seriousness threshold" before the policy is engaged. I also accept that there may be cases where a detailed consideration of whether the policy applies may be unnecessary. The case of a detainee suffering mild depression which is being treated by medication may be such a case. The circumstances of this appellant, however, are fundamentally different. Subject to that, however, I agree with the approach of the Deputy Judge in the paragraphs of her judgment in *BA's* case set out above. I reject the submission that a duty to consider whether the policy is engaged only arises once the policy is actually engaged. The argument has an element of circularity and takes no account of the fact that the monthly detention review form requires such consideration. Paragraph 13 of the pro-forma review form (summarised at [27(6(a)] above) is headed "Conditions rendering person suitable for detention only in very exceptional circumstances". Referring to §55.10, this directs the person conducting each monthly review of detention to consider whether §55.10 applies.

54. In respect of the duty of enquiry into the appellant's known illness, Ms Anderson submitted that the failure to follow up for further advice (see [27](4)] above) did not "bear on" the decision to detain because the evidence already available to the Secretary of State on 2 July 2014 showed that the policy did not apply, and, if there was a material adverse change relevant to fitness to be detained, there was a legal obligation on the health care staff in the IRC to make a further Rule 35 report. Even if Ms Anderson is correct that the information available at that date showed that the policy did not apply (which, for the reasons given below, I do not accept), her submission would be problematic because of the circularity to which I have referred. In particular, it was not known what information the enquiries would produce, so that it could not be ruled out that they may have revealed information indicating that the appellant's condition could not be satisfactorily managed in detention or that the "very exceptional circumstances" proviso did not apply. Moreover, in the light of the misinterpretation of the policy throughout the period of detention, even if a further

Rule 35 report had been made, it may not have led to an appropriate decision being made as to whether to continue to detain.

55. Standing back from the specific arguments put by Ms Anderson, in my judgment by any normal use of language the errors which were made in the appellant's case "bear on" the decisions to detain him. The example given by Lord Dyson in *Lumba's* case of an error not bearing on the decision was where "a decision to detain [was] made by an official of a different grade from that specified in a detention policy". Neither counsel was able to identify a case where a more substantive error has been found not to bear on a decision. Ms Harrison also noted, correctly, that to follow the approach proposed on behalf of the Secretary of State would be inconsistent with *Das's* case where the same categories of error led to a finding that the detention was unlawful.

56. For these reasons, I consider that, subject to one qualification, the detention of the appellant was in principle unlawful between the receipt of the first Rule 35 report on 30 June 2014 and 5 May 2015, and that the judge erred in this regard. The qualification is that, on receipt of the report, the Secretary of State was entitled to take further advice on the appellant's case from the relevant mental health authorities, as the response to the report in the letter dated 2 July 2014 stated would be done. Had she done so, a reasonable time for the relevant mental health authorities to assess the appellant would have been allowed. There was no discussion at the hearing of what would have been a reasonable time, but doing the best that I can, I consider that at that early stage an assessment might have taken longer than the week the judge allowed after the second Rule 35 report. There was, however, no evidence that the Secretary of State's caseworker in fact contacted the relevant mental health authorities for such advice so the question does not arise.

57. ***(f) Nominal or compensatory damages?*** If the appellant was unlawfully detained, the question is whether he is entitled to be compensated in damages. The judge held that compensatory damages were payable for the twenty-four day period from 3 April 2015 to 27 April 2015. There is no appeal against this by the Secretary of State and (see ground (v)) the appellant does not seek damages in respect of the period of detention after 27 April 2015. The period for consideration is therefore the approximately ten months from 11 June 2014 to 27 April 2015.

58. The judge correctly directed himself that, following *Lumba's* case, breach of a public law duty does not automatically give rise to right to compensatory damages.[43] He set out Lord Dyson's statement at [71] that "[i]f the power [to detain] could and would have lawfully been exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages". There was some debate before us as to the appropriate tests, standard of proof and burden of evidence to be used in determining whether the power to detain "could and would have been lawfully exercised". The judgment below addressed only the "could" element, and not the "would" element. In respect of the "could" element the judge asked himself whether it was "rationally open" to the Secretary of State to detain the appellant.[44] He was thus applying a *Wednesbury* test.

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43 J, [179].

44 J, [31] and [183], set out at [90] below.

59. Ms Harrison's written submissions maintained that the judge misdirected himself in asking whether it was rationally open to the Secretary of State to detain the appellant. She argued that it is for the Secretary of State to demonstrate, on the balance of probabilities, that she could and would have lawfully detained the appellant in any event. She relied on *R (OM) (by her litigation friend the Official Solicitor) v Secretary of State for the Home Department* [2011] EWCA Civ. 909. In that case the Secretary of State conceded in the light of the decisions in *Lumba's* case and *R* (*Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 129 that OM's detention was unlawful because the Secretary of State had failed to take into account §55.10 of the policy relating to mental illness but argued that OM was entitled only to nominal damages. This was because OM could and would have been detained in any event on the lawful application of the policy. Richards LJ stated that argument:

> "22. … has thrown up an issue as to the test to be applied when determining what, if any, loss was caused by the unlawful detention….
>
> 23. …. Lord Hope stated in *Kambadzi* at [56] that "an award of damages for false imprisonment is based on normal compensatory principles". It seems to me that on normal compensatory principles it would be for a claimant to prove his loss on the balance of probabilities. It well may be that in circumstances such as these the burden shifts to the defendant to prove that the claimant would and could have been detained if the power of detention had been exercised lawfully, but again I see no reason why the standard of proof should be anything other than the balance of probabilities.
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> 24. In reality, however, the debate is academic in this case. Irrespective of where the burden of proof lies and whether the standard of proof is balance of probabilities or inevitability, I am satisfied that the appellant *would* in fact have been detained during the first period if account had been taken of the paragraph of the policy relating to mental illness. That is clear from what happened in practice in the second period, from 29 April 2010, when the Secretary of State did take the relevant paragraph of the policy into account … The question whether the appellant *could* lawfully have been detained is a matter of legal assessment in relation to which the burden and standard of proof are of no materiality. The assessment has two separate strands to it. The first, concerning the policy itself, depends on normal *Wednesbury* principles: would it have been open to a reasonable decision-maker, directing himself correctly in relation to the policy, to detain the appellant in the circumstances of the case? The second requires the lawfulness of continued detention to be assessed by reference to *Hardial Singh* principles."

60. Ms Harrison initially submitted that the two strands of the assessment to which Richards LJ referred are "could" and "would". Subsequently, and in my view

correctly, she adopted the suggestion put to her that there are two strands to "could". The first, whether the detention was lawful at all in accordance with the policy, is subject to a *Wednesbury* test. The second is whether the duration of the detention was lawful in accordance with the *Hardial Singh* principles. The question to which the balance of probabilities applies is whether, *if* the Secretary of State could lawfully detain a person, she *would* have done so. *OM's* case is therefore not authority for the proposition that the question of whether it was open to the Secretary of State to detain the appellant under the terms of her policy is a matter to be proven by her on the balance of the probabilities. It in fact supports the judge's approach of considering whether the Secretary of State could rationally have decided to detain the appellant under the terms of the policy and Ms Harrison accepted that the rationality test was the appropriate test for determining this.

61. Although Richards LJ stated that the burden and standard of proof are of "no materiality" to the "could" test, in relation to the "would" test, he considered the burden "may well be" on the Secretary of State. *OM's* case on this point was considered further by Burnett J (as he then was) in *R (EO & others) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin). I respectfully agree with his approach set out as follows:

> "71. In my judgment it is implicit in the judgments in both *Lumba* and *Kambadzi* that their Lordships were not contemplating that a claimant would be required to prove a negative should the question of damages arise. It is not for him to prove that he would not have been detained, but rather for the Secretary of State to establish positively that she would have detained the claimant anyway, to avoid having to pay compensatory damages. …
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> 72. Lord Dyson dealt with the matter at paragraph 95 in *Lumba*:
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> > "The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused."
>
> 73. He went on to conclude that it was inevitable that the appellants in that case would have been detained anyway. "… It would to my mind produce a strange outcome if the claimant were to prove the detention and the defendant then failed show it was lawful, but the claimant was then obliged to establish that the defendant would not have detained him if the policy had been correctly applied. …."

62. The questions which fall to be determined in this case are therefore:

(a) Could the Secretary of State have lawfully detained the appellant, i.e.

(i) Was it rationally open to the Secretary of State to conclude that the appellant's mental illness could be satisfactorily managed in detention? (considered at [69] – [85] below.)

(ii) If not, was it rationally open to the Secretary of State to conclude that "very exceptional circumstances" applied so as to justify the appellant's detention in any event? (considered at [86] – [97] below.)

(b) Can the Secretary of State demonstrate, on the balance of probabilities, that she would have detained the appellant in any event? (considered at [98] – [100] below.)

The judge considered (a)(i) and found that it was rationally open to the Secretary of State so to conclude until the second Rule 35 report, although he did so in the course of his incorrect approach that the determination of these questions went to the question of lawfulness. He stated that in view of that finding, consideration of (a)(ii), the "very exceptional circumstances" point, did not arise until the second Rule 35 report. For the reason I give at [89] – [90] below it appears that he did not implicitly consider that there were such circumstances after that report between 27 March and 3 April, and between 27 April and 5 May, when he found the detention lawful even though the appellant's condition could not be satisfactorily managed in detention, and he cannot have considered that such circumstances existed between 3 April and 27 April as he found the detention to be unlawful during that period.

63. Ms Harrison submitted that in respect of the "could" test, the judge wrongly placed the burden of proof on the appellant. This, she argued, is demonstrated by the following paragraph of his judgment:

> "183. For the avoidance of doubt, I consider that from June 2014 detention was not unlawful, notwithstanding the error of interpretation of whether his mental condition could be "satisfactorily managed", since further or alternatively the Defendant considered and exercised her power to detain on the basis that "exceptional circumstances" existed; and the Claimant has not established that this was a conclusion rationally not open to her."

To the extent that the judge did consider that it was for the appellant to establish that he could not have been lawfully detained by the Secretary of State, he fell into error. As stated by Richards LJ in *OM's* case, this is a question of legal assessment to which the burden of proof does not apply.

64. Before turning to the questions set out at [62] above, I comment on the evidence available to the judge. I referred at [28] above to the fact that the Secretary of State decided not to file any evidence in respect of the period during which the appellant was detained in IRCs. The judge was thus left in the position of having to draw his own conclusions as to whether the appellant's complex and serious mental health condition could be satisfactorily managed in detention, and whether very exceptional circumstances existed from the raw medical data, the detention reviews, and the other documents without any evidence from the Secretary of State as to her decision-making process at the relevant time.

65. By way of example, one of the points upon which he relied in reaching his conclusion was his finding that the appellant "presented as a man with a condition which fluctuated throughout the period up to 21 March 2015 or immediately before. There were periods of florid presentation…at other times – and whether he was compliant or not compliant with medication – the Claimant was calm or relatively calm and compliant with detention".[45] There is also no medical evidence before this court, but the fact that conditions such as that which afflicts the appellant can often result, as part of their nature, in fluctuating moods and presentations, such as those described by the judge, means that periods of calm are not necessarily indicative, as it appears he took them to be, of a mental health condition being satisfactorily managed. I make no finding on this, but refer to this point as an example of the nature of the difficulties faced by the judge as a result of the absence of medical evidence to assist him.

66. As explained at [29] ff above, the appellant sought to introduce the evidence of the appellant's treating clinician, Dr Meganty, which dealt with the entire period of detention. I gave the reasons of this court for rejecting Ms Harrison's applications about this evidence at [36] above.

67. As to the lack of evidence by the Secretary of State, the judge stated:

> "38. Counsel for the Defendant in reply drew my attention to *JS (Sudan) -v- SSHD* [2013] EWCA Civ. 1378, where McFarlane LJ said
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> > "I consider that whether or not the burden of proof is strictly engaged on a particular issue is largely dependent upon context…. where however as in the present case, the issue relates to a period of detention, the basic facts relating to the dates upon which an individual was detained and the administrative steps that were undertaken are unlikely to be in issue. The initial burden of proof would be upon the Claimant to establish the fact of detention; thereafter the burden will shift to the Secretary of State to establish lawful authority for detention as a matter of principle. The main focus of the hearing however is likely to be the evaluation of whether or not what had occurred was, in all the circumstances, "reasonable". In that context consideration of the burden of proof seems to me neither apt nor useful".
>
> 39. I note that *JS (Sudan)* was a *Hardial Singh* claim, but I consider that these observations are no less applicable in a policy challenge subject to a *Wednesbury* test of unreasonableness. Thus the Defendant has elected not to introduce witness evidence, but it is not a case in which I should draw adverse inference from the fact that the Defendant has not lodged witness evidence. …"

[45] J, [57] and [85].

68. In *Das*, a case similarly concerned with an immigration detainee suffering from mental illness who alleged that her detention was unlawful, the Secretary of State also chose to submit no evidence to explain her decision making in respect of the decisions to detain. In my judgment in that case at [80] I agreed with the following statement of Sales J, the judge at first instance in that case:

> "Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk. In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party …. The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, [in the words of Lord Walker of Gestingthorpe in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2009] UKPC 6 at [86])] 'to co-operate and to make candid disclosure by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. …' "

I remain of the view that this is the right approach. It follows that the approach of the judge below in this case was over generous to the Secretary of State. I now turn to the questions set out at [62] above.

69. *(i) Satisfactory management:* The judge determined that until the Secretary of State received the second Rule 35 report she could rationally have concluded that it was possible satisfactorily to manage the appellant's mental illness in detention. His reasoning was that the first Rule 35 report "was expressly couched as to concerns '*should* [the Claimant] deteriorate'" and "it was open to the [Secretary of State] rationally to conclude that the clinicians did not consider that he was then unfit for detention, as set out in the reply to that Report".[46]

70. The judge stated that the reference (see [27 (10)] above) in the second Rule 35 report that there had been a gradual deterioration to the point where the appellant's mental condition could not be satisfactorily managed within detention which was exacerbated by his environment, was made with hindsight. He continued: "the court examines the evidence on the basis of the evidence as known to the Secretary of State at each stage when she made the decision, i.e. without hindsight".[47] He referred to the fact that before the second Rule 35 report no clinician had expressed the view that the appellant's mental illness could not be satisfactorily managed, to the fluctuations in the appellant's condition, and to the fact that his mental illness appeared to have been

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46 J, [81].

47 J, [82] – [84], citing *Fardous* v *Secretary of State for the Home Department* [2015] EWCA Civ 931 at [42].

satisfactorily managed when he was in prison. He concluded that certainly up to the end of February 2015 and, guarding against hindsight, up to receipt of the 25 March 2015 Rule 35 report, it was rationally open to the Secretary of State to take the view that she had.[48]

71. Ms Harrison submitted that the judge erred in determining that it was rationally open to the Secretary of State to consider that the appellant's condition could be satisfactorily managed in detention until receipt of the second Rule 35 report and that he ought to have concluded that it was at no stage during the detention rationally open to the Secretary of State to consider that this was the case. She relied (see [63] above) on what she submitted was his error in placing upon the appellant the burden of establishing that the Secretary of State could not lawfully have detained him. She also submitted that the judge erred by concluding that it was only when the appellant's condition had deteriorated to the point that he required hospitalisation that it was no longer rationally open to the Secretary of State to consider that his condition could satisfactorily be managed in detention. She argued that he thus applied the same test as he had found in relation to the Secretary of State's decisions was wrong and had been "authoritatively refuted in *Das*".

72. In view of the judge's conclusion that the application of this test by the Secretary of State was a misconstruction of the policy, there is some force in Ms Anderson's observation that it is "unlikely" that the judge erred in this way. The explanation may lie in the fact that he did not specify which aspect of the second Rule 35 report led him to conclude that the Secretary of State could no longer rationally conclude that the appellant's condition could be satisfactorily managed in detention. Ms Harrison's submission depends on it being the assessment that he "needs to be transferred to a secure mental health facility". It might, however, have been other parts of that report. For example, there were statements that there had been a "real but gradual deterioration" in the appellant's mental state "exacerbated" by his environment, that he posed a risk to staff, other detainees and himself, and/or that "the current environment is not conducive with management of his mental health condition". Because the basis of the judge's decision may have been one or more of those factors, I cannot find that he wrongly applied the test used at first instance in *Das's* case which was rejected by this court on appeal.

73. I turn to Ms Harrison's other submissions. One was that that, in considering whether the appellant's mental illness was being satisfactorily managed in the IRC, the Secretary of State did not take into account that, as the first Rule 35 report stated, the appellant "had little insight into his mental illness and does not therefore comply with medication". Such non-compliance was regularly recorded thereafter, including the whole of October 2014 and on specified dates between December and March 2015.[49] Another is that the judge erred in relying on my statement in *Das's* case at [71] "strongly doubting" that "satisfactory management" involved facilitating the possibility of recovery.[50] That statement was rejected in the Supreme Court's decision in *O's* case, decided since the judge's decision in this case.

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48 J, [85] – [87].

49 This non-compliance is also referred to in Dr Lowe's report, as to which see [27 (12)].

50 J, [52].

74. As to the first, Ms Harrison submitted that a key part of managing the illness of a person who lacks insight is that they can be compulsorily treated, for example, if they refuse to take their medicine by being forced to do so, and that this is not possible when detained in an IRC. Even if a person is stable, if he or she is prone to relapse, then the potential need for compulsory treatment may be a key issue in deciding whether that person's condition can be satisfactorily managed while detained in an IRC. During the hearing, the legal basis upon which it was said that a detainee in an IRC could not be compulsorily treated, and in particular whether a Community Treatment Order would be available in an IRC and would allow forcible treatment, was not clear. We therefore requested further information and, shortly after the hearing, were provided with this. That information made it clear that neither in England, where the appellant was detained, nor in Scotland, where he lived before his detention and had been subject to a community-based Compulsory Treatment Order between 2010 and 2012 under the different Scottish regime,[51] can a person be compulsorily treated other than under detention in a hospital.

75. As to the second submission, in *O's* case Lord Wilson, with whom the other members of the court agreed, stated:

> "30. In formulating policy that, save very exceptionally, management of serious mental illness in an IRC, if not "satisfactory", should precipitate release, the Home Secretary has adopted a word of extreme and appropriate elasticity. It catches a host of different factors to which the circumstances of the individual case may require her to have regard. In *R (Das) v Secretary of State for the Home Department (Mind and another intervening)* [2014] EWCA Civ. 45, [2014] 1 WLR 3538, in a judgment with which Moses and Underhill LJJ agreed, Beatson LJ, at paras 45 to 47 and 65 to 70, offered a valuable discussion of the phrase "satisfactory management". I respectfully disagree with him only in relation to an aside in para 71 of his judgment. Beatson LJ there expressed an inclination to accept the Home Secretary's contention that, if the management of the illness in an IRC was likely to prevent its deterioration, it would be satisfactory even if treatment was available in the community which was likely to secure its improvement. I would not exclude the relevance of treatment, available to the detainee only if released, which would be likely to effect a positive improvement in her (or his) condition. If it was likely that such treatment would actually be made available to the detainee (rather than be no more than on offer in principle to all members of the community in NHS publications), its availability should go into the melting-pot; and the burden would be upon the Home Secretary to inquire into its availability. If, contrary to the Partnership Agreement quoted in para 29 above, the standard of care (expressly aimed at improving health as well, of course, as preventing it from deteriorating) provided to a detainee in an IRC were for some reason not equal to that which would be made available to her

[51] Some consideration was given to transferring him to Scotland: see [27 (2)].

> if released, it would in my view be questionable, subject to the strength of other relevant factors, whether the management of her illness in the IRC was satisfactory. While satisfactory management does not mean optimal management, a narrow construction of the word "management" as meaning no more than "control" of the illness would lack principled foundation, particularly when in very exceptional circumstances the detainee may continue to be detained in the IRC pursuant to the policy notwithstanding the unsatisfactory management of her illness there."

76. Ms Harrison submitted that, in light of *O's* case, the question arising under the policy of whether the appellant's serious mental health condition could be "satisfactorily managed" in detention required the Secretary of State to enquire into, and consider, not only whether management of the appellant's illness in an IRC was likely to prevent its deterioration, but also whether, if the appellant was released, treatment would be available to him which would be likely to effect a positive improvement. She submitted that the Secretary of State plainly did not make such enquiries in this case and that the judge erred in failing to take that into consideration when determining the issue of satisfactory management.

77. Ms Anderson submitted that it was never put to the Secretary of State at the relevant time that the appellant should be released in order to be treated under a CTO (which abbreviation I understand was used to encompass both a Community Treatment Order in England and a Compulsory Treatment Order in Scotland) and that it was not put to the judge below that the appellant could have been released subject to a CTO. I note that in fact paragraph 43 of the appellant's skeleton argument for the hearing below stated "Consideration at that point [31 October 2014] should have been given to releasing the Claimant into the community where he could be managed by conditions such as electronic tagging, a curfew and reporting requirements and where, as envisaged by Dr Meganty, his illness could be treated by the community mental health team either on a voluntary basis or pursuant to terms of a community treatment order".

78. I turn to Ms Anderson's substantive submissions on this point. I agree with her that the availability in the community but not in an IRC of a treatment likely to secure an improvement in the appellant's condition would not necessarily mean that his condition could not be managed satisfactorily in detention, or that he must be released. It would be, as Lord Wilson said in *O's* case, a factor to go into the "melting-pot". In the appellant's case, however, there is no evidence that this factor was considered at all. I also accept her submission that the Supreme Court did not require the decision-maker to search out every possible clinical approach or treatment and assess what is optimal, but I do not accept that, if the detainee has not specifically drawn the Secretary of State's attention to a relevant treatment, she need not consider it. This is particularly so where it is a treatment which the detainee has had in the past, and especially so where it was treatment for a mental health disorder, as (see Part VIII below), it is not clear how the Secretary of State can legitimately anticipate that a mentally ill person, who may well lack capacity, would bring a potential treatment to her attention. The Secretary of State's position is that she is entitled to rely on the clinicians involved to do so, and I consider that at [80] – [81] below.

79. In this case, the first Rule 35 report specifically stated that the appellant had previously been subject to a compulsory treatment order in the community. The Secretary of State can be taken to know that compulsory treatment is not possible in an IRC. Ms Anderson submitted that the appellant had "not been 100% adherent to his medication in the community", but the court was not taken to any evidence showing this. Nor would that necessarily assist the Secretary of State because it shows that the appellant's lack of insight into the need to comply with medication existed before he was detained and could be described as a long-standing issue. I consider that the Secretary of State was required in this case to take into account, as one factor in her decision, that on a return to the community in Scotland the appellant could have been made subject to a community based compulsory treatment order. The possibility of such a transfer was apparently considered before the first Rule 35 report (see [27 (2)] above), and there is no evidence as to what happened as a result of the matters recorded or why he was not transferred.

80. The judge found that the Secretary of State "was entitled to act in the expectation that there is (in default of evidence to the contrary in an individual case) a closely prescribed system of medical care and oversight of any detainee".[52] Ms Harrison submitted this was wrong and Ms Anderson, that the judge approached this issue correctly. She argued that Secretary of State cannot be assumed to have access to all confidential medical records and medical decision making in respect of a detainee given the duties of medical confidentiality. Rather, she said, the Secretary of State is entitled to proceed on the basis that the NHS is committed to providing the same standard of treatment to IRC detainees as in the community, and on the basis that the responsible clinicians may be relied on the discharge their duties to their patient and their legal duty to inform the Secretary of State of any matters that are relevant to the maintenance of detention. Ms Harrison's response was that it is no answer to rely on there being a system in place when this case illustrated that the system was not working. As to medical confidentiality, I note that the pro forma Rule 35 report form includes a section for the detainee to sign giving consent to the disclosure of medical information to the UK Border Agency (UKBA) and to their legal representative. This section was, for reasons which I do not know, not completed in either Rule 35 report in this case.

81. At [70] in *Das's* case I stated that the Secretary of State should "generally be entitled to rely on the responsible clinician" where "the Secretary of State through UKBA officials has conscientiously made reasonable inquiries as to the physical and mental health of the person who is being considered for detention, [and] has obtained reports of clinicians who had previously treated the person as have been made available". That remains my view. It is, however, clear that in this case the Secretary of State did not conscientiously make reasonable enquiries or obtain reports from the appellant's previous clinicians. This was despite stating in her response to the first Rule 35 report in her letter dated 2 July 2014 (see [27 (4)] above) that this would be done. For that reason, I have concluded that on the facts of this case, contrary to the judge's findings, it was not sufficient for the Secretary of State to rely on the medical and reporting systems in place.

82. It is common ground that, under the policy, satisfactory management of a condition at least requires the prevention of deterioration. The first Rule 35 report indicated that

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52 J, [70].

the appellant had been diagnosed with bipolar effective disorder with psychotic features, that he had been sectioned many times, and that he had been subject to a compulsory treatment order in the community. The report also stated that the appellant had little insight into his mental illness and "does not therefore comply with medication". The Secretary of State can be taken to have known that in an IRC the appellant could not be compelled to take his medication. It is plain that if the appellant did not take his prescribed medication his mental health condition would be likely to deteriorate. The first Rule 35 report further indicated that "the stress of detention **is** impacting negatively on [the appellant's] mental illness" (my emphasis) and that "this detainee's health is likely to be injuriously affected by continued detention or any conditions of detention".

83. That report in itself therefore informed the Secretary of State that (i) the appellant's condition was deteriorating as a result of the stress of detention; (ii) it was likely that it would continue to deteriorate as a result of detention, and (iii) he was refusing to take medication and, as she would or should have known, he could not be forcibly medicated in detention. This strongly indicates that his condition was deteriorating and would continue to deteriorate in detention and was therefore not being, and could not be, satisfactorily managed in detention. Had the Secretary of State made the enquiries referred to in her letter of 2 July 2014, she is likely to have received further information bolstering such an assessment.

84. The points made on behalf of the appellant in respect of the significance, in considering the management of the illness of a person who lacks insight, of the unavailability in an IRC of compulsory treatment for a detainee who is refusing to take his or her medication are well made. As I have found above, the Secretary of State ought to have taken into account in assessing whether the appellant's condition could be satisfactorily managed in detention that he could have been made subject to a Compulsory Treatment Order if he were released to the community in Scotland. I have found it was not sufficient for her, in the circumstances of this case, to rely on the existence of "a closely prescribed system of medical care and oversight". For the reason I gave at [63] above I also consider that the judge may have erroneously placed a burden of proof on the appellant.

85. Taking all of the above into account I have concluded that the judge erred in deciding that, following receipt of the first Rule 35 report, it was open to the Secretary of State to consider that the appellant's condition could have been satisfactorily managed in detention. I find that such a conclusion was not rationally open to the Secretary of State, or alternatively that her decision was vitiated because of her failure to take into account relevant considerations including making the inquiries to which I have referred at [45] and [78] above, the first of which she had stated needed to be made but did not.

86. *(ii) "Very exceptional circumstances":* The Secretary of State's decision on this is in the last paragraph of her response to the first Rule 35 report in her letter dated 2 July 2014 set out at [27(4)] above. That stated that the appellant posed an unacceptably high risk of absconding as a result of his criminal record and the fact that he continued to offend after being warned that, should he continue to do so, his behaviour may make him liable to deportation.

87. While the appellant was detained in IRCs, the monthly detention reviews were completed on the basis that §55.10 of the policy did not apply and therefore did not consider whether there were "very exceptional circumstances". After he was moved to hospital on 5 May 2015, the decisions to maintain his immigration detention were made on the ground that very exceptional circumstances existed. In paragraphs 13 – 14 of his statement Mr Albosh explained that while the appellant was in hospital monthly detention reviews were carried out so that in the event that he no longer met the criteria for detention in a psychiatric hospital it would be known whether he should be transferred back to an IRC detention centre or released.

88. Mr Albosh set out the factors in the decision to continue the appellant's immigration detention in paragraph 15 of his statement. After referring to the need to ensure that, if the Secretary of State's pending appeal to the Upper Tribunal was allowed,[53] the appellant was available for deportation, Mr Albosh referred to his persistent offending and a significant risk of him reoffending. He concluded:

> "In the Claimant's case, the offences to date had not been of the highest order of seriousness but the persistent and prolific nature of the offending gave rise to a significant risk of reoffending. The use of immigration powers of detention was necessary since no civil detention powers were in place. At that stage, the Claimant's mental health was being assessed to determine how responsive his condition was to the treatment and his prognosis."

It is thus clear that, although the appellant's history of offending was a factor in the decision to continue detention, so too was the fact that, because no civil detention powers were in place, the use of immigration powers was required to retain him in a psychiatric hospital until 28 August 2015 when he was made subject to a civil section under the 1983 Act.

89. The judgment contains a section on the meaning of "very exceptional circumstances".[54] The judge concluded[55] that because, until the second Rule 35 report was received on 25 March 2015, it was rationally open to the Secretary of State to conclude that the appellant's mental condition could be satisfactorily managed within detention, the question whether there were "very exceptional circumstances" only arose then: see [41] above. He did not reach an explicit conclusion as to whether after the receipt of that report there were "very exceptional circumstances". It is, moreover, not clear on what basis he concluded that detention was not unlawful between 27 March and 3 April, and between 27 April and 5 May, despite his finding that the appellant's condition could not be satisfactorily managed in detention during these periods.

90. The judge's express reference in relation to the period after receipt of the second Rule 35 report to the provision in §55.10 that "in exceptional cases it may be necessary" to continue detention at an IRC while individuals are being assessed or are awaiting

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53 It was ultimately dismissed and the appellant was granted indefinite leave to remain: see [26] above.

54 J, [90] – [95].

55 J, [96].

transfer under the 1983 Act[56] suggests that was the basis for finding that detention was lawful between 27 March and 3 April and between 27 April and 5 May, rather than a general finding that there were "very exceptional circumstances" after 3 April 2015. This also appears to be the case from his later statement:

> "105 … Allowing a week from review on 27/03/2015 for steps and location of a bed I consider the claim succeeds for the period of unexplained delay from 3 April 2015 but only to 27 April 2015. It was on 5 May that he was actually transferred but I can take notice that it may have taken several days to find a placement. During the period from 27 April to 5 May I consider the Defendant could rationally decide not to release the Claimant pending compulsory sectioning for hospital detention and in the light of risk of absconding and re-offending if released."

But, towards the end of his judgment, when considering the recovery of damages, he stated:

> "183. For the avoidance of doubt, I consider that from June 2014 detention was not unlawful, notwithstanding the error of interpretation of whether his mental condition could be 'satisfactorily managed', since further or alternatively the Defendant considered and exercised her power to detain on the basis that 'exceptional circumstances' existed; and claimant has not established that this was a conclusion rationally not open to her."

Several points arise from these two passages.

91. The first is that in the latter, the judge refers to "exceptional circumstances" rather than "very exceptional circumstances". Ms Anderson sought to persuade us that this was because the judge was not referring to §55.10 of the policy, but to §55.3.2.11 where the relevant test is "exceptional circumstances". That, however, seems unlikely because the test in §55.3.2.11 concerns release, not detention. It provides that where a person has committed serious offences, release is likely to be appropriate only in "exceptional cases".

92. Secondly, the judge's statement in the second passage that "exceptional circumstances" justifying detention even if the appellant's mental illness could not have been satisfactorily treated in detention at any time during his detention existed throughout the detention period does not sit comfortably with his earlier statement when explicitly dealing with "very exceptional circumstances" that consideration of whether there were such circumstances did not arise prior to the Secretary of State's receipt of the second Rule 35 report.

93. Thirdly, and as discussed at [63] above, the judge appears wrongly to have put the burden on the appellant to establish that it was not rationally open to the Secretary of State, having misinterpreted her policy and breached her duty of enquiry, to exercise her power to detain him in any event.

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[56] J, [97].

94. In relation to the period after receipt of the second Rule 35 Report, there may be no great difference in practice between justifying detention on the basis that "very exceptional circumstances" exist and doing so on the basis of the statement in the same paragraph of the policy that in "exceptional cases it may be necessary for detention at a removal centre … to continue while individuals … are awaiting transfer" to a hospital under the 1983 Act. But the judge's statement in the second of the two passages set out at [90] above that, even if the appellant's condition could not be satisfactorily managed in detention, it had, nevertheless, been open to the Secretary of State, prior to 3 April 2015, to conclude that very exceptional circumstances applied justifying detention, is problematic. It, and the assumption that he had in fact considered whether "very exceptional circumstances" existed before the receipt of the second report seems inconsistent with his statement that the question did not arise before then. To the extent that the judge did in fact consider the question, his use of the term "exceptional circumstances" rather than "very exceptional circumstances" may have involved the application of the wrong test and wrongly to have put the burden on the appellant to demonstrate that the conclusion the Secretary of State reached was not open to her.

95. I consider that the question whether the conclusion that there were "very exceptional circumstances" in this case was one that was rationally open to the Secretary of State is finely balanced. It was stated in *Das's* case at [68] that where §55.10 applies a high hurdle has to be to overcome to justify detention on this basis. Ms Harrison correctly submitted that the example I gave in that case, of a person who poses a high risk of killing someone else, and the facts in the cases of *OM (Nigeria)* and *Anam*, where the courts found that very exceptional circumstances did exist, the histories of offending were much more serious than in this case, illustrate the height of the hurdle. But Ms Anderson is correct to emphasise the importance of seeing how §55.10 fits into the detention policy as a whole and in particular the other sections of chapter 55, and in particular the importance accorded to the need to protect the public from harm which (see [19] above) survives in the new policy. §55.10 recognises that there are cases where detention is justified even in the case of a person with serious mental illness who would not normally be suitable for detention where that basic position is outweighed by the risk of harm the person poses to the public and the need to protect the public.

96. I accept that the appellant had committed multiple offences two of which are of the type considered by the Secretary of State to be serious and strongly indicative of the greatest risk of harm to the public and a high risk of absconding.[57] However, I also consider that, although in her response to the first Rule 35 report the Secretary of State stated that she considered that there were "very exceptional circumstances" (see [27(4)] and [86] above), her misinterpretation of "satisfactory management" meant that this was likely not to have been considered in the detention reviews. The monthly reviews between July 2014 and March 2015 were completed on the basis that §55.10 of the policy did not apply: see [53] above and [27(6(a)] above). Because of this it was stated in paragraph 13 of the pro-forma review form that the appellant had no conditions making him suitable for detention only in very exceptional circumstances and that he would not "unless his condition deteriorates to the extent that he is hospitalised".

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[57] See §55.3A, para. 2 and [15] above.

97. In this case, the resolution of this issue has been made difficult by the decision of the Secretary of State not to file evidence about the decision-making process in the period before the appellant was transferred to hospital. In relation to the period after his transfer, Mr Albosh's evidence is helpful and, in my judgment, shows that at that stage the decision to maintain immigration detention then was one that was open to the Secretary of State to make. But that evidence does not address the period before transfer to hospital. Since Mr Albosh stated that the decisions after the transfer to hospital in part relied on the need to secure the appellant's detention in the event that he ceased to meet the criteria for detention in hospital it is of limited relevance to the period when he was detained in IRCs. If this point needed to be decided, the absence of evidence about that period may have meant that it would have had to be remitted to the Administrative Court. But, in the light of my conclusion in the next two paragraphs, the question does not need not be determined.

98. *(iii) Would the Secretary of State have detained the Appellant in any event?* As I state at [61] - [62] above, the burden lies on the Secretary of State to demonstrate, on the balance of probabilities, that she "would" in any event have detained the appellant. Ms Harrison submitted that the decision by the Secretary of State not to submit any evidence on this question, particularly in view of the duty of candour on her, is fatal to her case. Ms Anderson submitted that the judge was entitled to consider that this was not one of those rare cases where he was unable to decide whether the appellant would have been detained on all the evidence that was before him. She argued that the Supreme Court had no difficulty deciding *Lumba's* case without reference to the need for any "special evidence".

99. The judgment of Davis J at first instance in the cases of *Lumba* and *Mighty* and three other cases (see *Abdi & Ors v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin) at [156] and [189] – [204]) shows that, although Davis J stated (at [194]) that he "would have appreciated rather more evidence", in those cases there was evidence relevant to this issue before the Court, albeit "relatively limited" and "not very detailed" evidence. It may well be that it is very likely that the Secretary of State would have detained the appellant in any event. But in the light of the seriousness of the appellant's mental condition and her misinterpretation of what "satisfactory management" meant, on the evidence that is before the court on the point I do not consider that she would have done so.

100. I therefore cannot find that the Secretary of State "could and would" have detained the appellant in any event. Accordingly, in my judgment, the appellant is entitled to compensatory damages for the period that he was detained in an IRC after receipt of the first Rule 35 report, save (following the judge's reasoning of allowing one week to arrange a transfer to hospital) for one week (which allowance is not appealed by the appellant in any event, see [57] above). Compensatory damages are therefore due in respect of the period 30 June 2014 to 27 April 2015. It is not part of the appellant's case that compensatory damages are due in respect of the period after he was transferred to a psychiatric hospital but remained, technically, detained under the 1971 Act.

101. ***(g) Quantum:*** The judge ordered that, if not agreed, the damages for the period 3 to 27 April 2015 should be determined by a Master of the Queen's Bench Division. He rejected the Secretary of State's submission in relation to that period that, even if the appellant should have been transferred to hospital, he suffered no loss because he

would in any event have been lawfully detained elsewhere.[58] If my Lady and my Lord agree that damages are due for the period 30 June 2014 to 27 April 2015 they should also be so determined. There is, however, one issue concerning damages which was canvassed before us, and with which I deal. Before us, the Secretary of State maintained that the judge erred in rejecting her submission that the appellant suffered no loss for the period of unlawful detention because he would in any event have been lawfully detained in hospital.

102. In relation to the period of detention that the judge found was unlawful, referring to an entry in the appellant's case record dated 26 September 2014, he stated that "there may have been no viable alternative to hospitalisation at the end of his period of detention but it does not follow that this was so earlier".[59] That entry stated that "[f]ailing a transfer [to a smaller IRC] the only other option would (sic) to release him and have him engaged with the area of mental health and substance misuse services. [He] has a dual diagnosis of Bi-Polar Disorder and Substance Misuse and was being treated in the community in Scotland for this, prior to being transferred to Morton Hall IRC". The judge later gave his reason for rejecting the Secretary of State's submission. He stated that, in a psychiatric hospital the appellant would have had the treatment and medication which he required administered by professionals equipped to deal with difficult and severe mental health conditions.[60]

103. There were two limbs to the submissions on behalf of the Secretary of State. The first was that the appellant suffered no loss for the period of unlawful detention because he would in any event have been lawfully detained in hospital. I reject this for the reason given by the judge.

104. The second limb was that it does not necessarily follow that if detention in an IRC is unsuitable then release is mandated. Ms Anderson relied on *R (IM) (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1561, [2014] 1 WLR 1876 in which Lloyd Jones LJ, with whom Lewison LJ and Sir Stanley Burnton agreed, stated at [37] that the policy applies to detention in an IRC or prison, and that where it applies "the result is not that a detainee must be released unless there are very unusual circumstances but that the detainee must be moved to a suitable place of detention". This court found that the Secretary of State had the power to specify where he should be detained including a hospital. It is, however, important to recognise the different context of that case. IM was an individual with capacity who deliberately made himself ill. As the judge stated,[61] *IM* had the capacity to understand the significance and consequences of his decision to refuse medical treatment. I respectfully agree with him that *IM's* case is clearly distinguishable from the case of a person such as the appellant, with a known pre-existing mental illness.

105. I also consider that on the evidence before him the judge did not err in rejecting the submission that prior to March 2015 the only options were hospital or IRC detention. There was no evidence by the Secretary of State as to where she would have detained the appellant had she determined that he should not be detained in an IRC. There is also no formal challenge by her to the judge's determination that there may have been

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58 J, [182].
59 J, [75].
60 J, [182].
61 J, [185].

no viable alternative to hospitalisation at the end of the appellant's period of detention in an IRC, but that it does not follow that this was so earlier. I have therefore concluded that, in the light of the evidence and the absence of a challenge to the judge's determination, compensatory damages should be assessed on the following basis. That basis is that in the period 30 June 2014 to 2 April 2015 the appellant would have been in the community rather than in detention and in the period 3 to 27 April 2015 he would have been detained in a psychiatric unit rather than in detention.

106. ***(h) The Hardial Singh principles:*** These are summarised at [20] above. The judge concluded that "[t]he period of detention overall in the present case is not of the length which has typically led this court to intervene" and that, in view of the assessment of the appellant's history of offending and of absconding, and his condition from June 2014 to March 2015, no breach of the second or third *Hardial Singh* principles had been established.[62] The ground of appeal is that the judge erred because he applied a rationality test rather than an objective analysis in determining the reasonableness of the period of detention.

107. My conclusion that the appellant's detention was unlawful as a result of the Secretary of State's breach of her public law duties, and that compensatory damages are due in respect of the period between 30 June 2014 and 27 April 2015 means that it is not necessary to determine whether the judge erred in his approach to the *Hardial Singh* claim, and I do not do so. Apart from the undesirability of adding to the *obiter dicta* on this topic, I note that determining whether the principles have been breached is an intensely fact-specific exercise depending on trial judges making "… a judgment taking a range of (often competing) factors into account", and that the jurisprudence indicates that "once a judge has done that, it will be a rare case in which it would be right for this court to interfere".[63] I observe only that the judge's statement he was "required to take an objective view of what period was reasonable for detention under *Hardial Singh* principles"[64] is not a promising foundation for a submission that he applied a rationality test.

VI. Article 3 ECHR

108. ***(a) The claim:*** The appellant's case below was that from January 2015 his detention in IRCs breached article 3. In her written submissions, Ms Harrison submitted that "by at least March 2015" (her emphasis) his circumstances breached article 3. In her oral submissions, she referred to events taking place from January 2015, but submitted that her "focus" was on the period after 27 March 2015.

109. ***(b) The decision below:*** The judge stated that the decisions on article 3 by the European Court of Human Rights ("ECtHR") and United Kingdom courts require (i) a high standard of proof, being "beyond reasonable doubt", and (ii) a minimum intensity of suffering: see *Ocalan v Turkey EC* [2005] ECHR 28, (2005) 41 EHRR 45.[65] He also cited the statement of Lloyd Jones LJ in *R (IM) (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ. 1561, [2014] 1 WLR 1870 at [65]

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62 J, [114].

63 See the summary by Richards LJ in *R (Muqtaar) v Secretary of State for the Home Department* [2012] EWCA Civ 1270, [2013] 1 WLR 649 at [46].

64 J, [55].

65 He considered article 3 at J, [116] – [128].

that "Article 3 requires the state adequately to secure the wellbeing of prisoners (and therefore detainees) by providing the required medical assistance".[66]

110. The judge found that the appellant's symptoms were "acutely distressing, on a number of occasions",[67] but then stated that to engage article 3 the claimant "must show that his treatment caused the relevant intensity of suffering, beyond that inherent in his mental illness and in his being detained".[68] He referred to the fact that the appellant's condition was fluctuating, that a blanket finding that he could not be satisfactorily managed within detention, or that his condition required release was not justified, and that precise circumstances of the wing in which he was held while he was removed from association and segregated were unclear. He then stated that this was not a case where the Secretary of State has "abdicated her statutory and public law responsibilities to the relevant health authorities in the way deprecated by Singh J in *HA*'s case" and concluded:

> "In short, I am not persuaded that in these proceedings the Claimant has discharged the high standard of proof, or shown that intensity of distress caused by the lack of measures complained of, as would establish breach of his rights under Article 3 EHCR before 25 March 2015, and with more hesitation I take the like view in respect of the Article 3 claim for the period after 25 March 2015 to 5 May 2015."[69]

111. ***(c) What does article 3 require?*** The judgment of the ECtHR in *Kudla v Poland* [2000] ECHR 512, (2002) 35 EHRR 198 is a helpful starting point. In that case, after referring to the absolute terms of the prohibition of inhuman or degrading treatment, the Court stated (at [91]) that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3" and "the assessment of that minimum is, in the nature of things, relative". It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

112. The Court also stated (see [92]) that while treatment can be deemed to be degrading because it was "such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them", "the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment". It recognised (at [93]) that measures depriving a person of his liberty may often involve such an element but that detention on remand does not in itself raise an issue under article 3. It also stated that article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment. What article 3 requires a State to ensure is:

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66 See [104] above for another aspect of this decision.
67 J, [120].
68 J, [121].
69 J, [128].

> " … that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance."

113. These principles have been affirmed and expanded upon in many cases. For example, in *Mouisel v France* (2004) 38 EHRR 34 the ECtHR stated at [37] that the purpose of the treatment is a factor to be taken into account, but the absence of any intention to humiliate or debase the victim does not inevitably lead to a finding that there has been no violation of article 3. At [40] it stated while article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, it imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. In *Keenan v United Kingdom* (2001) 33 EHRR 38 the ECtHR stated at [111] that the lack of appropriate medical care may amount to treatment contrary to article 3 and, in the case of mentally ill persons, the assessment has to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. See also, *Pretty v United Kingdom* (2002) 35 EHRR 1 at [52] and, on the positive duty, *Premininy v Russia* (2016) 62 EHRR 18 at [73].

114. The Strasbourg jurisprudence therefore clearly establishes that in addition to the negative duty under article 3 not to take active steps which subject a person to torture or inhuman or degrading treatment, article 3 imposes a positive duty on states to protect the well-being of persons detained by the state and to provide them with the requisite medical assistance. This is reflected in our national decisions, such as that of this court in *R (IM) (Nigeria) v Secretary of State for the Home Department* to which the judge referred: see [109] above.

115. Although no Respondent's Notice was filed seeking to uphold the decision on other grounds, Ms Anderson submitted that the appellant's claim fell outside the ambit of article 3 for two reasons. First, she submitted that article 3 does not impose on the State the impossible obligation to eliminate the risk of suffering, and that inadequate treatment by individual clinicians, even where serious, may give rise to a claim in negligence but does not give rise to a claim under article 3. She argued that to find a breach of article 3 there must be a systemic failure, not a case of individual negligence. She also argued that, in any event, it was the duty of the NHS, not the Secretary of State, to provide the appellant with medical care. The Secretary of State made a similar submission in *HA's* case, which Singh J rejected, at [181] because "[t]he Claimant has not sought to mount a negligence action but submits that, in all the circumstances of his case, the combination of acts and omissions of those for whom the [Secretary of State] is in law responsible crossed the threshold of ill-treatment required by article 3". I agree with that reasoning and reject Ms Anderson's submission on this point.

116. Ms Anderson's second reason, raised in oral submissions and her speaking note, is that the appellant's claim falls outside the paradigm article 3 case as identified by Laws LJ in *GS (India), & Ors v SSHD* [2015] EWCA Civ. 40, [2015] 1 WLR 3312.

Laws LJ stated (at [38] – [39]) that the language of article 3 shows that the paradigm case of a violation is an intentional act which constitutes torture or inhuman or degrading treatment or punishment. Ms Anderson argued that, although article 3 has been widened to cover the effects of a mental or physical illness in some circumstances, this case does not fall within the paradigm because there was no intention to cause harm, and the evidence was not there to show a proper ground for imposing liability on the state. She stated that "it does no service to the Convention to trivialise article 3 ECHR to apply it outside the agreed area, as this is unprincipled and unsustainable".

117. I reject this argument for three reasons. First, *GS's* case concerned foreign nationals liable to deportation who claimed that the fact that medical treatment would not be available to them were they to be deported, with the result that they would be at risk of a very early death, or an earlier death than if they remained in the UK, meant that deportation would breach their rights under article 3. *GS's* case has little or no bearing on this case because it concerned what would happen to someone after that person is removed from the United Kingdom whereas this case is concerned with actions of the United Kingdom authorities in the United Kingdom which are said to have caused harm.

118. Secondly, Laws LJ did not consider and did not need to consider the positive aspect of article 3, because that did not arise on the facts before him. That positive aspect is well established in the case law but would fall outside the paradigm as it was formulated by him in *GS's* case. Great caution must indeed be exercised before expanding the scope of article 3, but the appellant here does not seek to expand it but rather to bring himself within a well-established line of case law.

119. Thirdly, Ms Anderson's formulation of the paradigm as where the treatment "is intended to cause harm" differs from Laws LJ's formulation; "intentional acts which constitute torture or inhuman or degrading treatment or punishment". Laws LJ did not state that an "intention to cause harm" was required for a case to be within the paradigm.

120. ***(d) The appellant's submissions that the judge made errors of law:*** It was submitted that there were errors of law in the judge's approach, and that he reached the wrong conclusion in the balancing exercise required to determine whether the article 3 threshold has been crossed. I first consider what were submitted to be errors of law.

121. *(i) Failure to consider the positive element of article 3:* It was submitted that the judge erred by failing to consider the pre-emptive and protective nature of article 3, a key component of which is the provision of effective medical treatment, and that whilst the judge identified this element he did not explain how he had taken it into account.

122. Although the judge did not separate out his analysis of the positive and negative elements of article 3 and expressly address each separately, I am satisfied that he did have in mind the positive requirements under article 3 in reaching his conclusion. I noted his reference to Lloyd Jones LJ's statement in *IM's* case at [109] above and, in his analysis, he considered the appellant's medical state and whether it could be

satisfactorily managed in detention. He referred to his earlier findings[70] and, in his conclusion, referred to the "distress caused by the lack of measures complained of," which I understand to be a reference to medical care measures.

123. I also keep in mind the observation of Singh J (as he then was) in *HA* at [178], that "the distinction between negative and positive obligations is not always clear-cut when a person with mental health problems is in custody and there may be a combination of factors, both acts and omissions, which leads to the overall conclusion that there has been a breach of Article 3". I agree with this statement, and do not consider that the judge erred in considering the matter in the round, having previously identified the positive obligation.

124. *(ii) The standard of proof:* I set out the judge's conclusion that the appellant had not discharged the high standard of proof at [110] above. Ms Harrison submitted that he misdirected himself in considering that the standard of proof in article 3 cases is "beyond reasonable doubt", and that the case law does not apply any particular standard of proof in these cases. She argued that the question for the court in determining whether there has been a breach of article 3 is one of mixed fact and law, as set out in the judgment of Sir Anthony Clarke MR in *MT (Algeria) & Ors v Secretary of State for the Home Department* [2007] EWCA Civ. 808, [2008] QB at [97]. That case related to a risk of future article 3 treatment, but in essence held that what the treatment would be (or in this case, was) is a question of fact, and whether that treatment falls within article 3 is a question of law.

125. My starting point is what was said about burden of proof in *Ocalan v Turkey.* At [180] the Grand Chamber of the ECtHR stated:

> "In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."

The distinction which was drawn in *MT (Algeria)'s* case is important. It is clear from *Ocalan* that the standard of "beyond reasonable doubt" applies to the factual question of what has taken place. In her oral submissions, Ms Anderson correctly accepted that it does not apply to the legal question.

126. Ms Harrison's submissions on the question of the burden of proof amounted to a contention that the judge wrongly applied the "beyond reasonable doubt" test to the legal question of whether the article 3 threshold was met. I reject this submission. A consideration of the entirety of this section of his judgment demonstrates that the judge considered a number of factual issues in it. In particular, he rejected the appellant's submissions that prior to 27 March 2015 the appellant's condition could not be satisfactorily managed in detention and that his condition required release from detention[71]. In the light of those findings, his reference to the "high standard of proof" in the paragraph set out at [110] above could, and I consider probably did, apply to the

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[70] J, [123-124].
[71] J, [123].

factual question, with the subsequent clause, relating to the intensity of distress, addressing the legal question.

127. *(iii) Did the judge treat HA as setting a minimum threshold?* In his analysis, the judge considered whether the facts of *HA's* case, where article 3 was breached, were distinguishable from this case. Ms Harrison submitted that this amounted to treating *HA's* case as setting a minimum threshold for finding a breach of article 3 in cases of mentally ill persons detained in IRCs. I do not consider that the judge's comparison of the cases and his implicit assessment that the treatment that HA had suffered was more serious than that suffered by the appellant, amounts to treating *HA* as a minimum threshold. It may rather, as Ms Anderson submitted, reflect the fact that this case was put to the judge as being similar to *HA's* case.

128. ***(e) The balancing exercise:*** Ms Harrison submitted that the judge erred in concluding that the threshold for breach of article 3 was not met. Ms Anderson submitted that there was no error and therefore no basis for this court to intervene in his decision.

129. Ms Harrison submitted that in appealing the judge's determination that there was no breach of article 3 she did not seek to challenge his findings of fact. My understanding from her submissions on other aspects of the case is that she does, in my view correctly, challenge the judge's approach in drawing factual conclusions from the raw medical evidence. I therefore understand her case to be that even on the facts as found by the judge the article 3 threshold was breached.

130. Ms Harrison and Ms Anderson each took the court to findings and documents which supported their case; Ms Harrison to those illustrating the appellant's suffering, and Ms Anderson to those describing the appellant's condition as fluctuating and to periods during which the appellant was calmer. There is nothing to suggest that the judge did not take all of the facts to which each referred into account.

131. The judge correctly identified that "to engage article 3 the Claimant must show that his treatment caused the relevant intensity of suffering, beyond that inherent in his mental illness"[72]. The judge did not make an explicit finding as to the extent to which the appellant's suffering was inherent in his mental illness and the extent to which it was caused by his treatment by the Secretary of State. However, when considering the appellant's public law claims he found that the deterioration in the appellant's mental condition was "exacerbated by his environment"[73], reflecting the second Rule 35 report.

132. Ms Anderson submitted that there must be cogent evidence on the issue of the suffering which was inherent in the appellant's mental illness and the suffering which arose from what are said to be the wrongful acts; and that in the absence of such evidence the appellant's case was speculative. She maintained that none of the professional statements were consistent with a breach of article 3 as they did not suggest there was anything over and above the appellant's illness and the hardship inherent in detention. I observe that the extent to which the appellant's suffering was inherent in his illness and the extent to which it resulted from actions of the Secretary of State is one of the issues in respect of which the appellant sought to introduce

[72] J, [121].
[73] J, [83].

evidence from Dr Meganty and that the Secretary of State opposed the admission of that evidence.

133. Notwithstanding the absence of medical evidence, I am satisfied that the appellant's treatment in detention did cause suffering beyond that inherent in his illness. I note that in *Keenan's* case the ECtHR stated at [113] that:

> "[w]hile it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor. For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 … [citations omitted] …. Similarly, treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be able, or capable of, pointing to any specific ill-effects."

The question is then whether the judge, having found that the appellant's mental illness was exacerbated by detention, took this into account when reaching his conclusion that there was no breach of article 3. There is nothing in the judgment to suggest that he did not.

134. It is well-established that for treatment to breach article 3 there must be a "minimum level of severity". It is important to keep in mind, therefore, that it is not any failure to provide the requisite medical assistance, or any exacerbation of a naturally occurring illness by treatment in detention, that will result in a breach of article 3.

135. The judge was required to conduct and did conduct a balancing exercise taking into account all of the circumstances of the case. I have not found that he made any errors of law in his approach, or that he failed to take into account any significant factors. He took into account his conclusion the appellant's mental illness could be satisfactorily managed in detention until 27 March 2015, a conclusion which I have found was wrong, but I do not consider that to have been a weighty factor in his determination of whether a "minimum level of severity" was reached. In particular, that factor related only to the period prior to 27 March 2015, and the judge also found that there was no breach of article 3 after 27 March 2015.

136. The threshold of "a minimum level of severity" is a high one. I consider that whether the appellant's treatment crossed the article 3 threshold is finely balanced in this case. At least in respect of the period after 27 March 2015, so did the judge. Having found no errors of law in his approach, and recognising that the issue is finely balanced, I would dismiss the appellant's appeal on the article 3 ground.

VII. Procedural fairness under the common law and the Equality Act 2010

137. ***(a) The claims:*** The appellant sought declarations that the decisions of the Secretary of State to maintain his detention, to remove him from association and segregate him, and relating to his immigration appeals were procedurally unfair. It was also argued on his behalf that the Secretary of State had discriminated against him by failing to

make reasonable adjustments to the decision-making processes in breach of sections 20 and 29 of the Equality Act, the material parts of which are set out at [13] above. His case is that there is a duty to make anticipatory adjustments to ensure that policies and procedures exist which are capable of avoiding the disadvantages faced by incapacitated detainees, but there were none in place.

138. ***(b) The decision below:*** The judge held that there had been no breach of the Equality Act and no procedural unfairness. The appellant's case is that the judge erred.

139. The judge accepted that the appellant was disabled for the purposes of the Equality Act, and that the Secretary of State, in exercising her functions in respect of detention, as "a person who exercises a public function that is not the provision of a service to the public or a section of the public", was covered by section 29(7) of the Act. He accepted that she was, therefore, under section 20(3), subject to "a requirement, where a provision, criterion or practice of [the Secretary of State in respect of detention] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

140. The judge referred to the systems in place to support those who have been sectioned under the Mental Health Act 1983, including the appointment of an independent mental capacity advocate (hereafter "IMCA"), an advocate available to help a patient obtain information and understand the provisions relating to his compulsory treatment, and to act for the him in relation to decisions being made concerning him such as serious medical treatment or accommodation. He then stated that there was no provision "for IMCA help or representation in respect of matters that do not arise under section under the MHA 1983 and do not concern health or care home accommodation".[74] He could "readily envisage circumstances which would make it important that help is available to make representations on behalf of a detainee otherwise unrepresented, if he is mentally unwell enough to do so himself".[75] It was clear that there can be issues upon which representations might be made by or on behalf of a detainee, but which are not made and not considered for this reason. The judge referred by way of example to the adverse comment made in three detention reviews that the appellant "was not co-operating with his immigration appeals (and thereby prolonging his own detention) whereas his non-attendance or participation was in fact due to his mental illness".[76] He concluded that "[t]here is thus a potential lacuna in the system".[77]

141. The judge stated that he considered that the duty to make adjustments under sections 29(7) and 20(2) of the Equality Act in essence concerned what safeguard or safeguards should be provided against procedural unfairness,[78] and proceeded to determine the procedural fairness claim on the basis that this would resolve both that claim and the claim under the Equality Act. While recognising that mental illness can deny an unrepresented detainee sufficient understanding to seek to challenge his continuing detention",[79] the judge did not seek to define the circumstances in which

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74 J, [156].
75 J, [158].
76 J, [167] and see [27 (6(c))].
77 J, [159].
78 J, [160].
79 J, [167].

fairness requires independent representation by an IMCA or the like. He stated they were not restricted to cases of sustained or formally declared lack of capacity but that "some substantial trigger" is required before the Secretary of State would be required to effect, invite, or secure independent representation:

> " … If there has been only a restricted period of such lack of capacity or detachment from reality, I consider it is for the Claimant to show that it would not be artificial or over-burdensome for the Defendant not so do so." [80]

142. He stated that under the current arrangements there was a risk of procedural unfairness in respect of decisions to detain "in the case of a detainee who **for a long and sustained period** is lacking in capacity or otherwise by mental illness disabled from making effective representations in his own interest" (emphasis added). However, he concluded that, in the light of his findings about the appellant's capacity, in this case there was no breach of the requirements of procedural fairness because it had not been shown that the appellant was disabled from making effective representations for such a period.[81] In relation to segregation, its increasing use was in a period of some five weeks, and on the last occasion the review on 31 March 2015 was followed by his release on that date and was thus "effective in his interests".[82] For that reason he rejected the submission that the fact that the appellant was incapable of understanding the reason for his segregation or making representations about it, meant the review was meaningless and the appellant was subject to detriment.[83] The judge also stated (in the context of considering the appellant's public law claims) that it was "unreal" to suppose that the appellant suffered any real detriment after the date when he was admitted compulsorily to hospital.[84]

143. ***(c) Preliminary points concerning the appeal:*** I have referred to the written submissions in respect of these grounds from Ms Mountfield QC on behalf of the Commission. In relation to the issues pleaded in the case, these were very helpful. Pursuant to the orders of Hickinbottom LJ dated 12 June and 2 October 2017, the court was also provided with an agreed note headed "Procedural safeguards which ensure that detention under the Mental Health Act 1983 is lawful for a person who lacks capacity". This helpful note set out in some detail the procedural safeguards applying in those circumstances. It provided a useful summary of the protections available in other contexts to ensure that the rights of mentally ill detained persons are not breached. I do not consider it either necessary or appropriate to deal with claims raised (primarily, but not exclusively, by the Commission) in respect of the applicable procedures which had either not been pleaded or relied on below.

144. On behalf of the Secretary of State, Ms Anderson submitted that the court should dismiss the appellant's appeal on the Equality Act ground because this is a "dynamic area in which many public bodies and NGOs are involved so it is inapt to seek to draw the court into an impossible general evaluation of all matters relevant to the equality position in the absence of the principal responsible bodies". I reject this

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80 J, [169].
81 J, [172], [174].
82 J, [171].
83 J, [170].
84 J, [107].

argument. As the body exercising the public function of detention it is for the Secretary of State to ensure compliance with the Equality Act in the exercise of that function. If the Secretary of State has breached that duty she cannot expect the court to decline to declare a breach because the context is complex or dynamic. Such an approach would risk exempting a significant proportion of government activity from the requirements of the Equality Act.

145. The claims based on procedural unfairness and the Equality Act relate to the same decision-making processes. They are, however, distinct claims and must be considered separately. The claim under the Equality Act is that a provision, criterion or practice of the Secretary of State puts mentally ill immigration detainees at a substantial disadvantage compared to other detainees, and that reasonable adjustments should have been made, but were not, to avoid that disadvantage. The procedural unfairness claim is that the procedures applied to the appellant were unfair in the circumstances of his case. I have stated that the judge approached the claims on the basis that what was required by the Equality Act "in essence concern[ed] what safeguard or safeguards should be required against procedural unfairness". He thus elided the two claims.

146. I can deal briefly with one aspect of both claims. It is the submission that there was both procedural unfairness and discrimination contrary to the Equality Act in relation to decisions concerning the appellant's immigration appeals to tribunals. The judge rejected this submission on the ground that "no duty can rest on the Secretary of State to facilitate, or support the detainee in, appeals to the Tribunal in proceedings which are in the remit of the Tribunals service (or now, part of Her Majesty's Courts and Tribunals Service)".[85] I consider that he was right to do so. The appellant's difficulties in participating in his immigration appeals resulted from his mental illness rather than from his detention, and procedure and assistance in an appeal are not matters controlled by the Secretary of State (as is the case for the detention and segregation procedures). The decision in *AM (Afghanistan) v Secretary of State for the Home Department, Lord Chancellor Intervening* [2017] EWCA Civ 1123, [2017] INLR 839 shows that the First Tier Tribunal has authority to appoint a litigation friend where an "incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken". Such a power may well have been of assistance to the appellant had it been established in the earlier stages of his immigration appeals process. I say no more about this limb of the claim.

147. ***(d) The claim under the Equality Act:*** On the facts of this case, there are three relevant stages in determining whether there has been a breach of the duty to make reasonable adjustments:

a. Identifying the "provision, criterion or practice" (commonly abbreviated as "PCP") which is said to put the disabled person at a substantial disadvantage.

b. Determining whether the PCP in fact puts disabled persons at a substantial disadvantage.

c. Assessing whether the Secretary of State took such steps as it was reasonable to take to avoid the disadvantage.

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[85] J, [175].

I first consider each stage. I then consider whether there is, additionally, a requirement to show detriment, or that the adjustments proposed would have made a difference on the facts of the appellant's case.

148. *(i) Identifying the PCPs:* The PCPs were not explicitly identified either in the judgment below, or in the appellant's submissions. Whilst the identity of the relevant PCP may be considered obvious, it must be identified in order to ensure clarity and focused argument. Drawing on the appellant's Detailed Statement of Facts and Grounds, the Detention Centre Rules 2001, SI 2001, No. 238, and Ms Anderson's submissions, I summarise the relevant PCPs concerning detention and removal from association, that is, segregation.

149. *(1) Detention:* Written reasons for a detainee's detention must be provided at the time of the initial detention and thereafter on a monthly basis.[86] A detainee who seeks release from immigration detention can make an application for bail to the First Tier Tribunal. Paragraph 17 of Ms Anderson's skeleton argument states that informal representations can be made at any time and all relevant non-abusive representations must be considered. No assistance is provided to mentally ill detainees in understanding the reasons for the decisions to continue their detention or in making representations in respect of the decisions.

150. *(2) Removal from association:* A detainee in an IRC who is removed from association with other detained persons and segregated, must be provided with written reasons for the removal within two hours.[87] The initial segregation can be authorised for only 24 hours.[88] Further segregation of up to 14 days can be authorised by the Secretary of State.[89] An officer must visit the detainee at least once each day during the period of segregation[90]. In *R (Muasa) v Secretary of State for the Home Department* [2017] EWHC 2267 (Admin), Holman J observed at [72] that, "[w]hilst such visits might be thought to afford some opportunity to make representations, the rule makes no express provision for the making of representations". Informal representations can also be made as described above in respect of detention. In this case, it appears that, after the appellant had been segregated for seven days, there was an oral review hearing at which the appellant was present. Mentally ill detainees who have been segregated were, however, not provided with assistance in understanding the reasons for the segregation or in making representations in respect of it.

151. Accordingly, although individuals are not involved in the decisions to detain or to remove them from association and segregate them, and there is no formal process for them to make representations to the Secretary of State, detainees can make informal representations in respect of the decisions after they have been made.

152. *(ii) Substantial disadvantage:* Under section 20(3) of the Equality Act, the duty to make reasonable adjustments arises where the PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". Under section 6(1) of the Act:

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86 SI 2001, No. 238, Rule 9(1)
87 Ibid., Rule 40(6)
88 Ibid., Rule 40(3)
89 Ibid., Rule 40(4)
90 Ibid., Rule 40(9)

> "A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

It is not disputed that the appellant was disabled for the purposes of the Equality Act.

153. Paragraph 2(2) of Schedule 2 to the Equality Act provides that the reference in section 20(3) to "a disabled person is to disabled persons generally". In *Paulley v Firstgroup plc* [2017] UKSC 4; [2017] 1 WLR 423 at [25], a case involving a wheelchair user, this was held to refer to wheelchair users generally, rather than any wider class of disabled persons. It should follow that in the case of the appellant, a person suffering from mental illness, it refers to people disabled in the same way rather than all disabled people. Paragraph 2(5) of Schedule 2 provides that "[b]eing placed at a substantial disadvantage in relation to the exercise of a function means … if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment". The question is therefore whether, as a result of the PCPs identified above, mentally ill detainees suffer unreasonably adverse experiences whilst in immigration detention compared to detainees who are not mentally ill.

154. The judge did not address the question in these terms, but I consider that his finding of a potential lacuna in the system for the reasons which I summarised at [140] above, amounts to a finding that the PCPs do put mentally ill detainees at a substantial disadvantage compared to other detainees. This is because he stated that he could readily envisage circumstances in which issues may arise about their detention about which they would, if they had the ability to do so, want to make representations, but are unable to do so because of their mental illness. I agree with that analysis, and also take into account that, as Ms Harrison submitted, while in other detention contexts there are automatic independent reviews of the detention, in immigration detention a bail application has to be initiated by the detainee to obtain an independent review of detention, meaning that detainees whose mental illness means that they lack the ability to initiate such a process are at a substantial disadvantage.

155. *(iii) Reasonable adjustments:* As I have explained, the judge did not analyse the duty of the Secretary of State under the Equality Act but only under the common law duty of procedural fairness. In my judgment, this led him into error because it meant that he did not analyse the statutory duty to make reasonable adjustments but only considered (as is appropriate in relation to procedural fairness) whether there had been unfairness in the circumstances of the appellant's particular case.

156. The reasonable adjustment upon which the appellant focused was the implementation of a system akin to that of IMCAs (whose role was described by the judge,[91] see [140] above) in which an advocate would assist mentally ill detainees in making representations in respect of decisions to detail or to remove a detainee from association. On behalf of the Commission, Ms Mountfield emphasised the need for a

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91 J, [155].

process at a preliminary stage to assess the ability of mentally ill detainees to represent their own interests. An additional proposed adjustment was that the lawfulness of the detention of a mentally ill detainee be automatically reviewed where the detainee is unable to initiate a challenge to his or her detention by way of a bail application. This proposed adjustment was not addressed by the judge. It was mentioned in paragraph 53 of Ms Harrison's written submissions for this hearing. It was mentioned in slightly more detail in paragraph 76 of the written submissions of Ms Spurrier, who appeared for VC in the Administrative Court, albeit in the context of the procedural fairness claim rather than the Equality Act claim.

157. It is well established that the duty to make reasonable adjustments includes the duty to make anticipatory adjustments for a class of people, as well as the continuing duty to make adjustments in individual cases: see for example Lord Dyson MR in *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ. 1191, [2014] 1 WLR 445 at [32] ff. The Equality Act's Statutory Code of Practice states (at §7.20) that "the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association". At §7.21 it states that "[s]ervice providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them …".

158. Because the judge considered that determining the procedural fairness claim would resolve both that claim and the claim under the Equality Act, he failed to consider whether the lacuna he identified amounted to a failure to make anticipatory adjustments for incapacitated people as a class. Ms Harrison submitted that as the Secretary of State was unable to point to any anticipatory adjustment for incapacitated detainees, having found a lacuna, the judge ought to have found that there had been a breach of the Equality Act.

159. Ms Anderson resisted this on the ground that the appellant had not identified a workable system of representation for the regular monthly detention reviews or for cases of removal from association and segregation. Relying on the judgment of Lord Dyson MR in *Finnigan v Chief Constable of Northumbria Police* at [38], she argued that there is a legal obligation on a claimant in reasonable adjustments case to specify the adjustment sought. In *Finnigan's* case Lord Dyson MR stated that "once a potential reasonable adjustment has been identified by the claimant, the burden of proving that such an adjustment was not a reasonable one to make shifts to the defendants …" and cited *Project Management Institute v Latif* [2007] UKEAT 0028 07 1005, [2007] IRLR 579 at [53]. But what *Project Management Institute v Latif* required at [53] was "that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made". The purpose of this is "to avoid imposing an impossible burden on a respondent to prove a negative" and "once a potentially reasonable amendment has been identified" "the burden is reversed". I therefore do not consider that in *Finnigan's* case Lord Dyson was requiring anything more from claimants than "some indication as to the adjustments it is alleged should have been made".

160. Section 136 of the Equality Act deals with the burden of proof. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

161. In this case, there are facts from which the court could decide that the Secretary of State contravened the duty to make reasonable adjustments. This is because (as is common ground) the duty arose, because no adjustments were in fact made, and because the appellant has outlined adjustments (see [156] above) which could have been made. The burden is therefore on the Secretary of State to show that she complied with her duty to make reasonable adjustments. Ms Mountfield submitted that the Secretary of State's failure even to consider whether adjustments may be needed to mitigate or remove the difficulties of immigration detainees suffering from mental illness in respect of challenging decisions made in respect of them (which is not denied) meant that she could not show that her failure to make adjustments was reasonable. That failure certainly makes her task more difficult.

162. Ms Anderson's written submissions emphasised that the duty on the Secretary of State is only to take such steps as it is "reasonable" to have to take. The Equality Act's Statutory Code of Practice provides that what is reasonable will depend on "all the circumstances of the case" and will be an objective question to determine. It states that the factors which might be taken into account include:

- whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
- the extent to which it is practicable for the service provider to take the steps;
- the financial and other costs of making the adjustment;
- the extent of any disruption which taking the steps would cause;
- the extent of the service provider's financial and other resources;
- the amount of any resources already spent on making adjustments; and
- the availability of financial or other assistance.

Paragraph 2(8) of Schedule 2 to the Equality Act provides that the duty to make reasonable adjustments does not require the exerciser of a public function to take a step which she has no power to take.

163. There were four main reasons advanced by Ms Anderson as to why it would not be reasonable for the Secretary of State to appoint a mental health advocate or other such figure for cases such as the appellant's. She made no submissions about whether it would be reasonable for there to be an automatic independent review of detention for mentally ill detainees.

164. *(1) Absence of power:* Ms Anderson submitted that it would be outside the power of the Secretary of State to appoint an advocate for mentally ill detainees. It was put to

Ms Harrison that the basis for the judge's decision was his finding at [168] that the Secretary of State did not have the power to make the provision the appellant suggests. At [168] the judge held that "[u]nder present legislation there is no discretion or power to enlist the services of an IMCA proper if the decision in question falls outside the statutory remit in the categories I identify above. Unless and until the detainee is sectioned, the present system has no provision to fill the gap even where procedural fairness would require it". Ms Harrison submitted that the judge was making the point that there was nothing in fact in place, rather than that the Secretary of State had no power to put anything in place. I agree with her understanding. Ms Harrison submitted that there were several sources of power for the Secretary of State to make provision for a system of advocates to assist mentally ill detainees. She argued that the Equality Act itself grants her such powers; that there is power under the common law; also, power under statute to make rules for the care of persons in detention and to make policies which apply to persons in detention. For example, section 153 of the Immigration and Asylum Act 1999 provides:

> "(1) The Secretary of State must make rules for the regulation and management of removal centres.
>
> (2) Removal centre rules may, among other things, make provision with respect to the safety, care, activities, discipline and control of detained persons."

I consider this provision is sufficiently wide to give the Secretary of State power to set up a system to provide mentally ill detainees with assistance in making representations. I therefore do not need to consider whether she would also have such power under the common law or the Equality Act.

165. *(2) Conflicts and confidentiality:* Ms Anderson submitted that it was inappropriate for the appellant to make his claims in relation to representation without joining the Lord Chancellor and the NHS to the proceedings. In relation to the Lord Chancellor, she claimed that "[t]here is an obvious conflict of interest in the SSHD involving herself in the affairs of a detainee in relation to instruction of representatives and challenge to detention decisions for which she is responsible". In relation to the NHS, she submitted that mentally ill detainees will have a responsible clinician, and that person would be best placed to assess whether the detainee had the capacity to make effective representations in respect of their detention or segregation. If they are not doing so, then it may be a reasonable adjustment to tell them to do so, and to contact a relative or other person to assist the detainee but, Ms Anderson argued, that would be an adjustment to be made by the NHS, not by the Secretary of State, who has no access to confidential medical records.

166. I observe that these reasons were put forward on behalf of the Secretary of State as matters of submission and not supported by any evidence. Nor is there evidence that it is not practical to create a system which would eliminate the disadvantage faced by mentally ill detainees without creating issues of conflict or breach of confidentiality. The burden of proof is on the Secretary of State to demonstrate that the proposed adjustment is not reasonable, and I am not satisfied that issues of confidentiality or conflict mean that there are no adjustments which the Secretary of State could take to establish a system to provide mentally ill detainees with assistance in making representations in respect of their detention or segregation.

167. As Ms Harrison noted, the Rule 35 process for victims of torture and detainees considered to be at risk of suicide or whose continued detention is likely to be injurious to their health (see [17] above) is the only system in place for responsible clinicians to provide notifications to the Secretary of State. Patient confidentiality is apparently not considered to prevent reports being made under Rule 35. It is not apparent why a similar approach could not practically be taken in respect of reports as to a lack of ability to make effective representations, or why a system facilitating the connection of the detainee to an independent third party could not be created. The real point may be that it appears that no real consideration has been given by the Secretary of State to whether such a system could be created.

168. At one point Ms Anderson appeared to argue that there is a system in place to assist detainees in obtaining assistance, referring in her oral submissions to legal surgeries, leaflets and information posters in IRCs. Again, this submission was advanced although there was no evidence of any such provision, still less of its accessibility to those suffering from mental illness. It may well be that, as Ms Anderson suggested, legal clinics and charities are active in IRCs, and it may be that drawing their attention to mentally ill detainees unable to make effective representations would be a sufficient reasonable adjustment. The court, however, has no evidence of what, if anything, actually exists in this regard, or what capacity such groups have to assist all or at least most such detainees.

169. *(3) Cost:* Ms Anderson submitted that "representation at the public expense cannot be provided on an anticipatory or continuing basis". I do not accept this submission. Representation or assistance could be available on an anticipatory and a continuing basis, to be actually provided as and when required. Although the cost of making an adjustment is clearly a relevant factor, there is no evidence that the Secretary of State has in this case made an assessment of cost and concluded that the proposed adjustment is unaffordable. A general assertion that the cost would be borne by the public, that is the taxpayer, does not discharge the burden of proof on the Secretary of State to show that the proposed adjustment is not reasonable.

170. *(4) A Substantial Trigger:* Ms Anderson submitted that the judge was entitled to consider that a "substantial trigger" was required before the Secretary of State was required to make reasonable adjustments by securing IMCA-type representation and that this would only be a reasonable adjustment in the most serious of cases. While a threshold of some kind is needed (see by analogy the discussion at [53] above), I reject this submission. Considering in each case whether a substantial trigger existed does not take into account the anticipatory nature of the duty owed to those who are disabled for the purposes of the Equality Act. The judge's approach is principally focussed on the question whether the requirements of procedural fairness were met in individual cases, and not on the anticipatory duty. The judge went on to say that if there has been only a restricted period of lack of capacity or detachment from reality "it is for the Claimant to show that it would not be artificial or over-burdensome for the Defendant not to [provide IMCA-type representation]".[92] That approach, however, is not consistent with the allocation of the burden of proof under section 136 of the Equality Act.

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92 J, [169].

171. In the light of the evidence before us and the submissions made in this case, I have concluded that the Secretary of State has not discharged the burden of proof under section 136 of the Equality Act. She has not demonstrated that she complied with her duty to make reasonable adjustments for mentally ill detainees in respect of their ability to make representations on decisions regarding their continued detention and segregation. I therefore find that she has breached this duty.

172. *(iv) Detriment:* Ms Anderson submitted that "if the public body is in breach of its duty to make reasonable adjustments, the Court must be satisfied that the failure caused detriment to the disabled person", and that the judge found that the appellant suffered no detriment and this was a finding that was reasonably open to him. She relied on the decision of this court in *Finnigan v Chief Constable of Northumbria Police,* to which I have referred.

173. *Finnigan's* case concerned police searches at the home of man who was profoundly deaf without the presence of a British Sign Language interpreter. A duty to make reasonable adjustments arose in respect of one incident under the Disability Discrimination Act 1995 and in respect of two later incidents under the Equality Act. It was common ground that the differences between the provisions in the two statutes were not material. At first instance, HHJ Walton concluded that because the police had been able to achieve effective communication with the claimant, there had been no breach of the Chief Constable's duty to make reasonable adjustments. Lord Dyson MR held (at [39]) that, in the light of the anticipatory nature of the duty, there was a breach but (at [41] and [43] – [46]) that, in the light of the approach in *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin), [2010] RTR 38 at [53], a case on the Disability Discrimination Act 1995, a finding that the breach caused no detriment to the disabled person was fatal to the claim.

174. It appears to have been accepted by both parties in *Finnigan's* case that the *Lunt* test survived and applied under the Equality Act. In the present case Ms Harrison did not submit that the test is different. Her argument was that it could not be said that the appellant was not prejudiced by the lack of safeguards in a case where the decisions to detain were fundamentally flawed because of what she described as the *Das* error and the absences of challenges to the contents of the detention reviews, and the repeated segregations. I return to the question of the test below.

175. I have concluded that applying the test in *Finnigan's* case does not mean Ms Anderson succeeds on this point. I reject her submission that the judge found that the appellant suffered no detriment insofar as segregation and detention were concerned, and that it was reasonably open to him so to find. I do not accept that the judge made such a finding. The findings to which I referred at [142] above concerned one occasion of segregation and the period after the appellant was transferred to hospital. His conclusion in the section of his judgment concerning procedural fairness, and in the light of his approach, therefore also concerning the Equality Act was:

> "I do not consider that it has been shown that the Claimant was disabled from making effective representations in his own interest upon, or otherwise challenging the justification for his continued detention, **for the sustained period which I consider necessary to**

> **support a claim that his detention was unlawful for procedural unfairness.**"[93] (emphasis added)

I understand from this passage, and from the judgment as a whole, that the judge did consider that the appellant was disabled from making effective representations for at least a limited period. His reference to the comments made in detention reviews that the appellant was not co-operating with his immigration appeals when his non-attendance or participation was in fact due to his mental illness,[94] albeit in the context of identifying a "potential lacuna", is also indicative of detriment. There was therefore a detriment to him, which would satisfy the *Finnigan* test.

176. Returning to the test, neither party relied on the Supreme Court's decision in *Paulley v Firstgroup plc* [2017] UKSC 4; [2017] 1 WLR 423, referred to at [153] above. It was a claim by a wheelchair user against a bus company for discrimination by reason of failing to make reasonable adjustments. It differed from the present appeal because the reasonable adjustments duty it considered was that of a service provider (under section 29(7)(a) of the Equality Act), rather than that of a person exercising a public function (under section 29(7)(b)). But I see no reason why the requirement as to detriment should apply differently to each of these categories.

177. The Supreme Court allowed in part an appeal by the wheelchair user and reinstated the decision at first instance that the bus company had breached its duty to make reasonable adjustments. However, the reasonable adjustment which the Supreme Court held should have been made was a smaller adjustment to that which the first instance judge found should have been made and a majority of the Supreme Court declined to reinstate the order for damages made at first instance because the judge had made no finding of fact as to whether there was "at least a real prospect that [the reasonable adjustment which the Supreme Court considered should have been made] would have made a difference". Giving the lead judgment, Lord Neuberger stated at [60] that:

> "…. in order for Mr Paulley to succeed in his claim, he must not only establish that FirstGroup should have made an adjustment to its PCP, but also that, had that adjustment been made, there is at least a real prospect that it would have made a difference."

This is a slightly less stringent formulation than that in *Finnigan's* case.

178. ***(e) Procedural fairness:*** My starting point is the six overarching principles Lord Mustill formulated in *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531 at 560, which he stated are derived from often-cited authorities. Reflecting the legitimate needs of context and circumstance, and a balance between certainty and flexibility, they are that:

> "(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

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93 J, [174].
94 J, [167].

> (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type
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> .
>
> (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
>
> (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
>
> (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

179. More recently, in *Osborn v The Parole Board* [2013] UKSC 61, [2014] AC 1115 Lord Reed has provided a valuable reformulation of other aspects of procedural fairness. At [65] he stated that the role of the court in cases of procedural fairness is to determine for itself whether a fair procedure was followed by the decision-maker; it is not a *Wednesbury* review of the procedure. He then identified the reasons for procedural fairness, including better decision making, the avoidance of a sense of injustice that the person who is the subject of the decision will otherwise feel, and the rule of law, in that procedural requirements that require decision-makers to listen to those who have something relevant to say promotes congruence between the actions of decision-makers and the law which should govern their actions.

180. I have referred at [154] above to Ms Harrison's reliance on the fact that immigration detention, unlike other forms of state detention, has no built in automatic independent review. She observed that, by contrast, the Parole Board automatically reviews post-tariff prisoners, the Mental Health Tribunal automatically reviews detention under the 1983 Act, pre-charge police detention cannot be extended beyond 72 hours without court review, and deprivations of liberty under the Mental Capacity Act 2005 must be authorised by a judge. She submitted that the absence of an automatic independent review means that the need for procedural fairness is particularly strong where a detainee is too mentally ill to understand or participate in the processes relating to detention and removal from association. She argued that steps must be taken to safeguard the interests of such a detainee, that the failure to do so in the appellant's case rendered the processes unfair, and that the judge was wrong to find otherwise. Ms Anderson submitted that the appellant had failed to demonstrate a material error of law or fact by the judge in not accepting the appellant's submissions in this regard. There are two limbs to the claim of procedural unfairness. The first concerns removal from association. The second concerns detention. I consider each.

181. *(i) Removal from association:* The appellant was segregated six times between 15 February 2015 and 27 April 2015 for periods ranging from two and a half hours to seven days: see [27(8)] and [27(13)] above.

182. In her written submissions, citing *R (Muasa)* v *Secretary of State for the Home Department* [2017] EWHC 2267 (Admin), Ms Anderson submitted that "a similar challenge to the Rule 40 system", that is removal from association and segregation in immigration detention, "has been rejected as unfounded". Ms Anderson is not assisted by *Muasa's* case which is clearly distinguishable. First, the claimant in that case did not suffer from mental illness or lack of capacity. Her complaint was that the segregation procedure was unfair as there was no formal opportunity to make representations in respect of decisions to continue segregation beyond 24 hours. Secondly, the challenge was not "rejected as unfounded". Holman J expressly stated at [80] that he was not determining the point because he had already held the segregation beyond 24 hours to be unlawful for other reasons. Thirdly, notwithstanding the absence of a formal opportunity to make representations, the claimant in that case had, through her solicitors, made what Holman J (at [83]) described as "cogent representations to the IRC and the Home Office within probably at most 4 hours of her removal from association".

183. While the judge made no explicit finding to this effect, it appears that for much of the time the appellant was removed from association and segregated he lacked the ability to make effective representations on his own behalf. It is not suggested that he was not, as required by the rules, provided with written reasons for his segregation within two hours of such segregation taking place. It is, however, highly doubtful that, at least on 15 and 21 February and 24 March, and perhaps 3 March, when he was recorded to be "rambling", "not to see reality" and "out of touch with reality", he was able to understand the reasons, still less make effective representations in response to them.

184. Despite the absence of a formal route by which representations can be made, informal representations may be made by those detainees who are able to make them. I accept, as the judge stated, that;

> "temporary segregation decisions are often taken for individual operational reasons which will often demand a rapid response. It would be heavy handed and often difficult to require some formal representations in each such case, particularly where segregation may be of short duration".[95]

I do not, however, understand the appellant's case to be that such a formal structure is required or that it should be possible to make representations in advance of the segregation commencing. The thrust of the submissions made on the appellant's behalf is that additional steps should be taken for mentally ill detainees to help safeguard their interests, including assistance in having informal representations made by or for them.

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95 J, [169].

185. The judge gave two reasons for his conclusion that there was no procedural unfairness in respect of the decisions to remove the appellant from association and segregate him. The first (see [141] above) was that a "substantial trigger" was required before the Secretary of State would be required to make some provision for independent representations. While segregation which occurs repeatedly and for a longer duration[96] or during "a long and sustained period" of incapacity[97] may qualify, what occurred in the appellant's case did not. The second reason is that in the case of the longer period of segregation, from 24 to 31 March, the judge stated (see [142] above) that the review which took place on 31 March resulted in the appellant's release, so there was no detriment.[98]

186. As to the first reason, it is clear that the requirements of fairness vary according to the context and thus may vary according to the length of the period of segregation. Each decision to segregate must, however, be procedurally fair. The reminder in Lord Mustill's third principle in *Doody's* case that "the principles of fairness are not to be applied by rote identically in every situation" is apposite here. As Ms Harrison submitted, fairness is rendered illusory if systems are applied mechanistically regardless of individual circumstances. Simply handing written reasons to a person who has just been assessed as being out of touch with reality (see [27(9)] above) exemplifies the point. I consider that the judge erred for those reasons. Given the available information on the appellant's mental state during the periods of segregation commencing on 15 and 21 February and 24 March, I have concluded that decisions concerning these periods of segregation did not meet the requirements of procedural fairness. The applicable procedure did not assist the appellant to understand the reasons for his detention to the best of his ability, whatever that may have been, or to make representations, or have representations made on his behalf, about the decisions. These are essential components of procedural fairness.

187. As to the second reason, I reject Ms Anderson's submission that in this case the judge did not find that there was a breach of procedural fairness but that it made no difference but rather found no procedural unfairness. In the passages summarised at [142] above he clearly indicated that the positive outcome for the appellant on 31 March 2015 informed his decision to reject the claim that there had been procedural unfairness. The judge's decision amounts to a finding that a detainee's segregation review can meet the requirements of procedural fairness despite it being obvious that the detainee is unable to participate in the review in any meaningful way because, as it turned out, the review decision was to release him from segregation. Allowing for the flexibility and context sensitivity of the requirements of procedural fairness, that, in my judgment, as submitted by Ms Harrison, introduces causation to the question of whether there was unfairness. This is contrary to the approach of Lord Reed in *Osborn's* case and of this court in *R (L) v West London Mental Health NHS Trust* 2014] EWCA Civ. 47, [2014] 1 WLR 3103 at [69] – [71] where I stated that the view that, if the absence of an opportunity to make representations does not affect the decision there is no unfairness, "has not taken hold".

188. *(ii) Detention:* Again, there are no formal opportunities for representations to be made in respect of decisions to detain, but reasons for continued detention are provided on a

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96 J, [169].
97 J, [172], [174].
98 J, [170].

monthly basis and informal representations can be made. The judge concluded that there was no breach of procedural fairness in respect of the decisions to continue to detain. He stated:

> "… I do not accept that the Claimant lacked capacity on a sustained basis from January 2015; further I adopt my assessment above as to the period during which there was very serious and plummeting deterioration in his condition. Whilst sustained formal lack of capacity may not be required for a successful challenge…., in light of that assessment I do not consider that it has been shown that the Claimant was disabled from making effective representations in his own interest upon, or otherwise challenging justification for his continued detention, for the sustained period which I consider necessary to support a claim that his detention was unlawful for procedural unfairness".[99]

189. Ms Anderson submitted that "the common law requirement of procedural fairness is a general one as to result (i.e. the reasonable opportunity to make representations), and that the trial judge found as a matter of fact that VC was not prevented from making effective representations". In fact, as I have noted at [175] above, the judge's finding was that the appellant was not prevented from making effective representations for a sustained period, a finding which Ms Anderson does not challenge. The question, then, is whether the judge was right to find that a sustained period of inability to make effective representations is required before decisions to continue to detain will become procedurally unfair. Unfortunately, this is not a question on which detailed submissions were made. I do, however, have reservations about the judge's use of the phrase "long and sustained period" given that important constraints, both in the Secretary of State's policy and in the *Hardial Singh* principles, apply to the use and duration of immigration detention. Additionally, the fact that the mental illness hindering a detainee from making representations may itself render detention inconsistent with the policy and therefore unlawful means that great care is needed in ensuring decisions to detain those suffering from mental illness are procedurally fair. Therefore, whilst a very brief period of inability to make effective representations may not give rise to procedural unfairness, I do not consider a "long and sustained" period to be required.

190. *(iii) Conclusion:* For these reasons, while recognising that the exigencies of the situation and what was practical affected what fairness required in the case of any particular decision about the appellant, I have great concerns about the overall fairness of the procedures for decision-making during his detention at the IRCs. It is however, not possible to focus on each decision so as to be able to determine which individual decisions were affected by such unfairness. I therefore do not consider it possible to go further than to state that a "long and sustained" period of inability to make effective representations is not a prerequisite for a requirement that additional steps be taken for mentally ill detainees to help safeguard their interests, including assistance in having informal representations made by or for them.

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[99] J, [174].

VIII. Outcome

191. I would allow the appeal on the first limb of the public law ground. For the reasons I have given, I have concluded:

(a) The judge erred in deciding that, notwithstanding the Secretary of State's misinterpretation of chapter 55 of her policy, the breaches only rendered the appellant's detention unlawful for the period 3 to 27 April 2015: see [39] above.

(b) The detention of the appellant was unlawful between the Secretary of State's receipt of the first Rule 35 report on him on 30 June 2014 and 27 April 2015: see [49] - [56], [69] – [85] and [91] – [96] above.

(c) The Secretary of State has not discharged the burden of demonstrating, on the balance of probabilities, that she "would" in any event have detained the appellant. Accordingly, the appellant is entitled to compensatory damages in respect of the period 30 June 2014 to 27 April 2015: see [97] – [100] above.

(d) The damages should be assessed on the basis that in the period 30 June 2014 to 2 April 2015 the appellant would have been in the community rather than in detention and that in the period 3 to 27 April 2015 he would have been detained in a psychiatric unit rather than in detention: see [105] above.

(e) The assessment of such damages shall, if not agreed, be determined by a Master of the Queen's Bench Division: see [101] above.

(f) These conclusions mean that it is not necessary to determine the second, *Hardial Singh,* limb of this ground: see [106] – [107] above.

192. I would dismiss the appeal on the ECHR article 3 ground for the reasons given at [115] – [119], [122] – [123], [126] – [127], and [133] – [136] above.

193. I would allow the appeal on the Equality Act ground and grant a declaration that the Secretary of State had discriminated against the appellant by failing to make reasonable adjustments to the decision-making processes in breach of sections 20 and 29 of the Equality Act for the reasons given at [154], [171], and [175].

194. For the reasons given at [190] above, despite my concerns about the overall fairness of the procedures for decisions concerning detainees in IRCs with mental illness, I would not grant a declaration in the terms sought by the appellant and summarised at [137] above.

Lord Justice Lewison :

195. I agree.

Lady Justice Arden :

196. I also agree.