CO/6872/2011

Neutral Citation Number: [2012] EWHC 2501 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 20 August 2012

B e f o r e:

CHARLES GEORGE QC
(Sitting as a Deputy High Court Judge)
- - - - - - - - - - - - - -

Between:
THE QUEEN ON THE APPLICATION OF D

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- - - - - - - - - - - - - -
Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
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(Official Shorthand Writers to the Court)
- - - - - - - - - - - - - -
Miss Leonie Hirst (instructed by Deighton Pierce Glynn) appeared on behalf of the **Claimant**

Miss Holly Stout (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**
- - - - - - - - - - - - - -
J U D G M E N T

1. DEPUTY JUDGE: This case highlights the problems faced by the United Kingdom Borders Agency ("UKBA") in returning illegal immigrants to their country of origin, where the illegal immigrant is uncooperative and where liaison with the immigration authorities in that country are difficult, problems which are exacerbated when UKBA are dealing with an illegal immigrant who suffers from mental illness.

2. Following partial grant of permission by Blair J on 22 February 2012, and on appeal an expanded grant of permission by Sir Richard Buxton on 26 March 2012, the Claimant seeks the following relief against the Secretary of State for the Home Department:

   1) A declaration that his detention from 23 February 2011 to 25 April 2012 was unlawful because:

   (i) his removal is not, and has not been, imminent or likely to take place within a reasonable time;

   (ii) the Defendant has failed to act with reasonable diligence and expedition to effect his removal.

   2) A declaration that his detention during the same period was unlawful because, under the Defendant's policy in Chapter 55.10 of the Enforcement Instructions, the Claimant should have been considered unsuitable for detention except in exceptional circumstances. No such circumstances apply in his case.

   3) A declaration that his detention during that period breached his rights under Article 3 and/or 8 of the European Convention on Human Rights ("ECHR")

   4) A declaration that the Secretary of State has breached the duty set out in section 149 of the Equality Act 2010 ("the Equality Act")

   5) Damages.

3. There is some overlap between the grounds. Although before me the argument on 1) preceded that on 2), 3) and 4), I consider it more logical to consider first 2), 3) and 4) which primarily concern the Claimant's mental state and the treatment he received before returning to 1), the decision on which can then take into account the matters arising on the other issues.

4. The factual background requires to be set out at what may seem inordinate length, covering as it does a period of ten years, and a wide variety of sources of documentation, some of which were only made available just before or during the hearing. This background can be divided into three parts.

(1) The period before 23 February 2011

5. The Claimant is a national of Congo-Brazzaville who has been in the United Kingdom since 2002. He was first served with notice of liability to administrative removal in October 2002. On 20 October 2004 he was sentenced to six months' imprisonment for using false documents and three months for gaining a pecuniary advantage (trying to open a bank account). He was released from prison on 17 December 2004 and granted temporary admission, subject to the requirement to report regularly to immigration officers.

6. He was detained under immigration powers between 26 October 2005 and 14 February 2008. Between November 2005 and February 2007 the Defendant made nine attempts to remove the Claimant. Of these attempts, four were cancelled because of disruptive behaviour by the Claimant at the time of the attempt, and four because of lack of escorts or refusals of pilots to carry the Claimant. The ninth and last attempt failed when a charter removal flight was cancelled after the Congolese authorities refused to agree travel, apparently due to a change in their policy regarding travel documents.

7. Within a few months of his detention, the Claimant displayed disturbed behaviour, and his detainee medical notes recorded symptoms of mental illness. He was recorded as saying that he had psychosis and, as early as 22 June 2006, that he kept hearing voices in his head. Eventually on 10 October 2006 he was prescribed an anti-psychotic drug, Risperidone. When the Claimant stopped taking his medication, his mental conditions worsened to such an extent that his condition on 15 November 2006 was described as "floridly psychotic and thought disordered". At a bail hearing on 23 April 2007 a consultant psychiatrist concluded that he could not recommend bail except to a psychiatric unit.

8. The Claimant was released from detention on 14 February 2008 and was subject to reporting requirements from then until his further immigration detention in February 2011.

9. His mental condition complicated his compliance with the reporting restrictions. On 14 April 2008, his UKBA Case Record Sheet ("CRS") records that he was accompanied to report by two social workers, but on the same occasion threatened to stab a member of the security staff at Dallas Court Reporting Centre. On 9 May 2008 UKBA was informed by the Community Mental Health Team that the Claimant was receiving support in the community as he suffered from paranoid schizophrenia. He was detained in hospital under section 2 of the Mental Health Act 1983 between 22 May and 3 June 2008. On 19 August 2010 D was charged with a public order offence (making homophobic remarks to another black male in a bank) and was ordered to do 150 hours of unpaid work. At some stage following release the Claimant appears to have stopped taking Risperidone (or any other medication), which then exacerbated his psychosis. On 17 January 2011 he was sent a letter from UKBA informing him that his various submissions for leave to remain had been refused. On 25 January 2011 UKBA received a letter from the Claimant asking for the return of the passport he had sent them in November in relation to his legacy application and threatening violence against members of its staff, if it was not returned:

> " Ask people in detention center or prison they know me very well if you need a bloodshit in your center I will make it be ready for a big violence ... someone will die soon."

10. As a result of this, his reporting conditions were changed, and he was ordered to report to the local police station rather than to Dallas Court.

11. On 8 February 2011 the Claimant wrote back that he would not report to any police station as this was a breach of his human rights, to which the UKBA response was that he

should report to Pendleton Police Station as previously advised. On 21 February 2011 the Claimant reported to Dallas Court, and when he was not allowed into the building, he smashed a window and was arrested by the police. He was charged with criminal damage and harassment. The CRS shows that on 21 February, shortly after his arrest, someone "authorized Subject's detention". The only copy before the court of UKBA's Form IS.91R (only made available on the day the hearing began) is unsigned. This justified detention because "Your removal from the United Kingdom is imminent", and because "You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK" and "You have previously failed or refused to leave the UK when required to do so". Amongst the Risk Factors identified on the standard form of the related IS91, the following items were ticked: Violence toward or assault on others; Suicide/Self Harm Risk; Disruptive behaviour; Psychiatric Illness. The related form IS91RA additionally recorded that there were "Medical problems/concerns" and that D's known associates were at risk. There was a comment in the IS91A:

> "Subject is an **exceptional risk** he has been known to be non-complaint [sic] through violence, disruption and physical assault ... Subject has dirty protested in the past. Aug 09 - GP states that applicant does have a history of paranoid schizophrenia and was sectioned in May 2008. Currently not on any regular medication but has been on Risperidone tablets in the past."

12. An UKBA Minute Sheet, also on 21 February 2011, advised that "HMP may be more appropriate [presumably than an Immigration Removal Centre] given subject's previously special conditions".

13. On 22 February he received a twelve month conditional discharge. The sentence suggests that his case was regarded as exceptional. Following sentence, the Claimant spent the night of 22 February in HMP Manchester whilst what was described in the CRS of the same date as "a special requirements bed" was found for him. In these proceedings no claim is made in respect of that night's detention.

14. Since February 2007 there had been no attempt to remove the Claimant from the UK. In October 2009 his detention was authorized for when he reported on 19 October, but it was then decided that because he had been "sectioned" in 2008 he "is potentially NOT suitable for Detention on Rep[orting] with Detention at D[etention] C[entre]". Consideration was to be given to a possible "Special Op[eration]" in his case. There then followed an application by D supported by a Member of Parliament that he be allowed to remain under the Legacy Programme. His CRS for 10 December 2010 noted that:

> " Removal is looking difficult without a charter due to [D]'s violent and disruptive behaviour in previous removal attempts. However we should not look to concede case at this stage ... still looking at options to remove."

15. Following refusal of the Claimant's submissions in January 2011, the Claimant's CRS shows that his case was reviewed by UKBA on 20 February 2011, when it was recorded that "it is not believed that the case has a 'high' prospect of removal before 31 March 2011", but that the Claimant did not "fall for a grant of leave [to remain] due to various issues including criminality and compliance".

(2) The period from 23 February 2011

(a) Brook House IRC 23 February 2011 to 5 August 2011

16. The Claimant was admitted to Brook House Immigration Removal Centre on the evening of 23 February 2011. On admission he was seen by a Clinic Nurse. The Claimant explained that he had previously been treated for mental health issues and had been "sectioned" in 2009 (actually the date was 2008). The medical record continued:

> " Detainee says he is currently on medication says was on Mirtazapine dispersal and Risperidone says unable to remebe [sic] doses have informed Detainee that he will be reviewed in morning by M[edical]/O[fficer] with regard to correct plan of care."

17. When he saw Dr Sherpao the next morning he is recorded as "wanting his prescribed meds but unaware of names/dose".

18. On 25 February 2011 D was reported as stating that unless he was released in two weeks he would start a dirty protest.

19. On 27 February D was seen by a Mental Health Nurse, whom he told that he was starting to hear voices, and was being commanded by his father to take off his clothes and to kill himself. He again mentioned that he had previously been "sectioned", and that he needed his medication to control the voices. He told the nurse that he was having medication until he was transferred to Brook House. The nurse noted:

> " In view of past history of disturbed Psychosis consider starting on Risperidone on low dosage till full history obtained. Booked to see MO."

20. On the Claimant's several visits to various Medical Officers at Brook House it was recorded under the heading "Review procedure" that there were either "no health concerns" or "no medical concerns". On his subsequent transfer to Harmondsworth IRC, a medical note on 6 August referred to him as "Currently on medication"; on 23 August 2011 it was recorded that "appears that he was on Risperidone prior to his admission to Harmondsworth"; and another note on 26 September 2011 records that the Claimant had stated that "he was on Risperidone 3mg. He used to take one tablet in Brook House, Gatwick. He like to start Risperidone once a day". However, his Brook House medical notes do not record any such prescription, and a letter from the Deputy Nurse Manager at Brook House, dated 20 July 2012 (the second day of this hearing) states:

> "... [O]n 27/02/2011 [he] was recommended to consider commencing on respiredone [sic] and an appt was made to see the doctor on 28/02/2011 but did not attend and a further appt was made on 17/03/2011 and again did not attend.
>
> On checking the medical records the above named Detainee was never commenced on Respiradone [sic]."

21. I conclude therefore that the reference in the notes of 26 September should have read "before Brook House" rather than "in Brook House". I find that throughout the five and a half months that the Claimant was in Brook House he was never given any anti-psychotic drugs. He also (and this also is now agreed) never saw a psychiatrist.

22. Meanwhile, removal directions were set for 11 March 2011 on a charter flight via Kenya, but these were then cancelled because the charter flight was to the Democratic Republic of the Congo rather than to Congo-Brazzaville. This was the only attempt at removal which got to the stage of removal directions between February 2011 and April 2012. UKBA's next plan was to remove D by another charter flight direct to Brazzaville, but it was discovered on 12 April that this flight was not going to Brazzaville. In any event he could not have gone on a flight at that time because (as only became apparent from an UKBA witness statement dated 23 July, late in the hearing) on 8 March 2011 the British Embassy in Kinshasa advised UKBA that the immigration authorities in Congo-Brazzaville had asked that D's nationality be verified with the Congo-Brazzaville authorities in Paris. There is no evidence of any attempt to follow this up until December 2011. Part of the difficulty lay in the fact that there was no embassy of Congo-Brazzaville in the UK, but only in Paris.

23. On 20 April 2011, despite the information from the British Embassy in Kinshasa, the Claimant was told that there was to be a charter flight via Nigeria and that the Congolese authorities would come to meet him, but nothing came of this. It was recorded on 10 May that UKBA were "attempt[ing] to progress his removal". On 22 June discussions were recorded as "still ongoing with other parties regarding this subject's [sic] possible removal". In June, according to the Claimant, he was told that there was a charter flight to Ethiopia, but again nothing happened.

24. Throughout his detention at Brook House the Claimant was the subject of regular entries in his CRS, commencing on 25 February. An early record on 28 February 2011 records a letter received by UKBA from D. It was described as "Similar to others letters he has wrote this in red pen", and as stating:

> "If you use force on me I [sic] will use force on you ... I will never be removed from the UK. I am ready for everything come get me. Ask people in detention center ad [sic] prison they know me very well."

25. Beneath this the compiler wrote that:

> "As detailed on previous CID notes the sub writes similar letter often".

26. These records, from as early as 11 March 2011, refer to D's earlier diagnosis with paranoid schizophrenia in 2008 and to his history of threats of violence towards UKBA and escort staff, but do not draw any connection between the two. The record on 6 April optimistically expressed the hope that the Claimant would cooperate with the removal process, thus "hopefully avoiding any behavioural issues which have occurred previously". In June he was disciplined for threatening to kill Aramark shop staff, which led to the Claimant staging a dirty protest, which he had done in the past. In the CRS

from April to August the Claimant's mental state was never mentioned.

27. On 14 July 2010, acting in person, the Claimant issued an application for judicial review challenging the decision of UKBA to detain and continue to detain him and claiming that his mental health had not been taken into account. The claim also challenged the refusal to accept his representations as a fresh claim and the refusal of his case under the legacy programme. Until the refusal of permission by Blake J on 27 September 2011, UKBA did not make further arrangements for his removal. A record made on 26 July indicated that "the case requires further detailed assessment/supplementary work, and the final decision as to whether or not the case is suitable for expedition will be made by the allocated JR worker."

28. On 27 July the Claimant was involved in an incident in the Brook House Centre kitchen, as a result of which he was charged with assaulting a detention centre officer, whereas, according to the Claimant, who had twice already reported the matter to the police on his mobile telephone, the officer had punched him in the mouth. In April 2012 the CPS eventually dropped the charges against the Claimant.

29. This incident appears to have triggered a belated realisation that the Claimant needed psychiatric assessment, and on 4 August he was transferred to Harmondsworth Immigration Removal Centre. There is nothing in his CRS which explains or comments upon the transfer.

(b) Harmondsworth IRC 4 August 2011 to 29 November 2011

30. It now transpires that there was a visiting psychiatrist at Harmondsworth, Dr Burrun, who visited the clinic every two weeks and was on call for emergency sessions. Before October 2011 there was a mental health nurse on duty on site Mondays to Friday, and from October there were two full-time Registered Mental Health Nurses there. According to a letter of 8 December 2011 from Primecare (presumably a private company charged with the provision of medical services at Harmondsworth), sent to the Claimant's solicitors as a result of a formal request under CPR Part 18, "[D] was under [Dr Burrun's] care". There is, however, no suggestion in the medical records that the Claimant was ever seen by Dr Burrun. I find that throughout his period at Harmondsworth the Claimant never saw any psychiatrist.

31. The Claimant was, however, seen by various nurses at Harmondsworth, and from the outset they knew something of his medical history. Thus a medical note on 6 August 2011, the day after his arrival, recorded "History of contact with mental Health Services. Currently on medication". Medical staff at Harmondsworth also knew from 23 August that D had lodged a judicial review application regarding his mental health issues. On the same date the nurse recorded that an appointment with a General Practitioner had been made "to review and have medication prescribed", but there is no evidence that the Claimant was ever seen by any doctor at Harmondsworth for the purposes of mental health review.

32. On 22 August 2011 a Detention Review on D stated "His character and behaviour deem him unsuitable for release and as there are no medical or compassionate issues highlighted to date, his detention will be continued until his removal date is confirmed". The previous paragraph contained a reference to D's past diagnosis with Paranoid Schizophrenia in 2008, and said that the immigration removal centre were "aware and continue to monitor". UKBA were still awaiting the confirmed date of a charter flight which could return D to Brazzaville, apparently in ignorance of the requirement that his nationality be verified by the Congolese authorities.

33. Also on 22 August UKBA wrote to the Claimant accepting that his judicial review application was "a barrier to your removal" for the time being, but explaining that following review of his case he was to remain in detention. The reasons given were:

> " because there is reason to believe that you will fail to cooperate with any conditions attached to the grant of temporary admission or release,"

and,

> " To effect your removal from the United Kingdom."

34. The lengthy letter made frequent mention of D's disruptive behaviour, but none at all of his mental condition.

35. His medical notes of 27 August record him as suffering from schizophrenia, and on 13 September he was recorded as "Agitated [but not] ill physically".

36. On 31 August the Claimant was seen by an independent psychiatrist, Dr Tracy, instructed by the Claimant's solicitors in connection with his judicial review application. Dr Tracy's first Report ("Tracy 1") is dated 4 September 2011. The Claimant showed Dr Tracy numerous cuts in his trousers made in a planned ritualistic manner to allow spirits to enter and leave his body easily. He spoke of a dozen different voices, including his sister, his dead father and the Pope, who because D was a Catholic told him to pray naked with soap and paper on his face to remove bad luck. He said he was in receipt of instructions from benign spirits to make the ritualistic cuts in his clothes, not to self-harm, and not to eat (which behaviour D said had been misinterpreted as going on a hunger strike). He described the voices as coming from Mars. He told Dr Tracy that if his judicial review was unsuccessful, he would take his own life by drinking liquid soap or some other chemical substance. Dr Tracy recorded that staff present on the day of his visit were not able to provide any information of significance regarding D's mental behaviour because they did not know him very well. Dr Tracy recommended immediate taking of anti-psychotic medication, the type and dose to be evaluated, and that Harmondsworth could not be considered conducive to optimal mental health. I return to this report below.

37. On 2 September 2011 D, who had already been removed from association under rule 40(1) of the Detention Centre Rules 2001 (rule 40), began a dirty protest, having given advance warning. He smeared faeces on the door wicket to his cell and urinated through the side of the door because he wanted to be moved to Dover IRC, which, it was recorded, would not accept him. The Duty Manager commented that D was "an extremely volatile young man". He was confined temporarily in special accommodation

under rule 42(1) of the Detention Centre Rules 2001 (rule 42), but began a further dirty protest.

38. As a result of Tracy 1, the Claimant's solicitors wrote to Healthcare Management at Harmondsworth on 9 September, requesting an urgent psychiatric assessment on D, and complaining of the lack of any adequate health assessment or treatment at Brook House and the apparent lack of a psychiatrist at Harmondsworth. Reference was made to the fact that D had been told that he could not have medication until he had been seen by a psychiatrist. By a letter of the same date to the Treasury Solicitor, the Defendant was asked to review her decision to detain D at a detention centre where there was no adequate psychiatric provision. Attention was drawn to the guidance in Chapter 55.10 of the Defendant's Enforcement Instructions, which provided that those suffering from serious mental illnesses which cannot be satisfactorily managed within detention are not suitable for detention, something to be balanced against the low risk of harm or re-offending. On 13 September 2011 Tracy 1 was copied to the Centre Manager at Harmondsworth and to the Treasury Solicitor.

39. On 14 September the Claimant says that he went to the healthcare unit and told them that he was hearing voices and wanted medication. He asked to be transferred to a different detention centre which had a psychiatrist and was told this was not possible. He was then put in segregation for two days. When he saw a doctor on 20 September he was told not to trouble them, that he had already been told that they did not have a psychiatrist and would not have one until the following year. He was told to go away and wait to be contacted by a psychiatrist. This was reported to the Treasury Solicitor by D's solicitors on 22 September.

40. UKBA's response on 22 September 2011 to the solicitors' letter of 9 September said that Tracy 1's recommendations had been passed to Harmondsworth to progress. Details of D's previous mental illness had been known at the time of his detention and notified to the medical teams at the immigration removal centres. The letter stated:

> " At the time of writing, we have not been made aware of any medical or mental issues which might affect [D's] continued detention, and indeed, it has been open to him to seek medical intervention at any time during the period of his detention."

41. On 26 September an Acute Assessment Sheet compiled by a mental health nurse recorded him as paranoid and schizophrenic, confused, hearing voices "like people live in a moon" and believing that "he live in other planets". He was feeling like taking off his clothes. He was recorded as saying that he "feels like kill someone, if anyone present". The note mentions a complaint by the Claimant that he had not seen any doctor since coming to Harmondsworth and wanted to start taking Risperidone daily. The standard printed sheet used for the Acute Assessment contained a reference to "subsequent action and care planning documentation", and I have found a marked absence of the latter in this case. A "Mental health assessment" carried out by a mental health nurse on the same day, records that the Claimant was not sleeping at nights and was "talking with spirits in night time he believe he live in other planets". When this was reported to the General

Practitioner the following day, he prescribed Risperidone. The General Practitioner's note of 27 September ends "Then to be review with psychiatrist next week", it being unclear whether the note referred to a general review of the Claimant's condition or to a review of the prescribed dose. There is no suggestion in the evidence that there was any review by any psychiatrist the following week or at any time thereafter, and I find that there was none.

42. On 27 September, his medical notes record that he was prescribed Risperidone at 3mg once per day for 28 days. The Claimant has given evidence that he received no medication at all until he was transferred to Colnbrook, and this is what he told his solicitors whilst he was still at Harmondsworth, and an independent psychiatrist, Dr Tracy, later on 13 December 2011. That is also consistent with his letter of 31 October 2011 to UKBA (below). The position has been belatedly clarified by a letter of 20 July 2012 from the Healthcare Manager at Harmondsworth, which reads:

> " All detainees who have medication prescribed, which is not in Possession, are advised to attend Healthcare to receive the prescribed medication.
>
> If [D] had attended the clinic in accordance with his prescriptions of 27/09/11 and 11/11/11, Risperidone would have been administered. If the Risperidone had been administered the nurse responsible would have initialled the box for that day on the chart for that day. The nurse would then have observed [D] taking and swallowing the medication before leaving the clinic. ...
>
> The fact that the majority of the boxes [on the record sheet] are not marked suggests that [D] did not attend for medication on those days.
>
> The chart shows that [D] attended on 13 November 2011 but refused to take the prescribed medication."

43. Following the 28 day period, the prescription appears to have lapsed. On 11 November the Claimant's medical notes record him as saying that "he wants to get back onto his medication (Respiredone [sic])" and the prescription was repeated on 11 November. The note on the reception admission assessment at Colnbrook on 29 November records that he was taking Risperidone, which reflects a misunderstanding of the true position.

44. Also on 27 September there took place what was intended to be a bail hearing before Blake J. The Defendant indicated that removal to Congo-Brazzaville was possible by charters on 26 October or 4 November via Nigeria and Ghana respectively (by which time it was hoped that permission would have been refused on the judicial review application). In the light of this, D's application for bail was withdrawn. The Defendant gave an undertaking "to use best endeavours to ensure that the process of assessing and treating the Claimant for his mental health (including medication if appropriate) is carried out as swiftly as possible". It seems that the information about the prospect of removal that was given to Blake J was materially misleading, since no progress whatever had been made towards resolving the problem, reported to UKBA as long ago as 8 March 2011,

concerning verification of nationality.

45. On the same day, Blake J on paper refused the judicial review application on the fresh claim and legacy applications (leaving the unlawful detention claim to be considered later). Blake J observed that (absent application to renew), his refusal would "remove a potential obstacle to removal that may result in the claimant's detention being unnecessarily prolonged".

46. From 28 September 2011 until D's renewal application on 15 November, the judicial review no longer presented a problem to removal. The Defendant's Further Summary Grounds of Defence of 4 October referred to the two charter flights to Congo-Brazzaville which were being arranged for either 26 October or 4 November, and stated that "barring any unforeseen developments, it is therefore expected that removal directions will soon be set for the Claimant in respect of one of those flights". Despite the legal opinion expressed by the Defendant's legal team in London, another view at UKBA prevailed, namely that because of D's extant judicial review proceedings for unlawful detention, together with the outstanding criminal prosecution, it was premature to make removal directions. Later evidence shows that charter flights to Nigeria and to Ghana did depart on 26 October and 4 November respectively. There was, however, no progress on verification of nationality. As disclosed in the recent UKBA witness statement:

> " Those flights were not routed onward to Congo-Brazzaville as the Defendant was unable to obtain documents for the Claimant and four others who were to be removed on the flight ... The four individuals have not yet been removed."

A note in D's medical records for 28 October 2011, made by Dr Saroj, records:

> " Known to have mental health issues. Was under care of psychiatrist in Manchester. Hearing voices. Fleeting suicidal ...
>
> ...
>
> Plan
>
> Refer to mental health team for further assessment."

47. On 22 October 2011 a monthly Detention Review recorded that directions could not be set until the outcome of the judicial review, but UKBA were liaising with Gatwick Police to see if the assault charges could be dropped if UKBA could effect D's removal. It was recorded that "We continue to await the confirmed date of the charter flight that can accommodate his return to Brazzaville", and that "His character and behaviour deem him unsuitable for release and [as] there are no medical or compassionate issues highlighted to date, his detention will be continued until his removal date is confirmed". This was more than a month after Tracy 1 had been sent to UKBA. Further, the problem concerning verification of nationality was either unknown to or ignored by the person compiling the Detention Review.

48. A monthly progress report from UKBA to the Claimant of 22 October reiterated the reasons given him on 22 August, and was again silent about his medical condition.

49. His medical notes of 28 October record him as hearing voices and fleetingly suicidal, and that he should be referred to mental health team "for further assessment". But no such further assessment took place.

50. On 31 October 2011 the Claimant wrote a handwritten letter to UKBA seeking transfer to a detention centre in Scotland or Lincoln. He said:

> "... [L]et me tell you I am not getting a proper treatment or medication from your centre for this reason I need to be transfer [sic] ... since I have been here I never see any psychiatric doctor I am down in my heart ... I don't want any problem I only need to be move [sic]."

51. This was followed by a formal Transfer Request the following day, which repeated that "I am not getting a proper treatment in your center [sic]".

52. On 4 November 2011 the Claimant's solicitors wrote to the Administrative Court, referring to the Defendant's undertaking to the Court of 27 September:

> " Despite a number of requests by our client at the Harmondsworth IRC healthcare unit and our correspondence with the Defendant's solicitor and with the healthcare unit, our client remains without medication or psychiatric treatment since his admission to detention on 22 February 2011. We are concerned about his deteriorating health.
>
> We are copying this to the Treasury Solicitor in the hope that they will urge their client to ensure that the Claimant accesses medical treatment as soon as possible."

53. On the same day they requested from the Treasury Solicitor details of the medical establishment at Harmondsworth (a letter which was not responded to by Primecare at Harmondsworth until 8 February 2012, when the existence of Dr Burrun was first revealed).

54. On 5 November UKBA tersely refused D's transfer request on the ground that "You do not meet the criteria for any of these centres".

55. On 10 November, Wilkie J on paper refused permission on the unlawful detention matter, but on 15 November 2011 D renewed his application for permission for judicial review in the fresh claim matter, which had the effect of further postponing any attempt to remove D to Brazzaville.

56. By 11 November 2011 the Claimant's condition had further worsened. Another mental health nurse saw D for a mental health assessment (presumably that planned by Dr Saroj on 28 October) and recorded that the Claimant:

> " Complained of experiencing auditory hallucinations that cause him to

become agitated & confused. He says he at times feels like taking all his clothes off in public areas. Says he screams out at night sometimes ... Says he wants to get back onto his medication (Respiradone [sic])."

57. Another note of the same day records D as saying that he had stopped taking Risperidone "because of no review by psychiatrist". This was then followed by the re-prescription.

58. On 12 November he initiated a dirty protest, smearing excrement over his observation panel and floor, and was dealt with under rule 42.

59. On 13 November, D (having been disturbed by his room-mate) made threats as to what would happen if he was not given a single room. He then assaulted two members of staff. There was reference in the documentation to "the requirement of a Prison Transfer Request".

60. On 15 November 2011, D complained about one of the officer's conduct and, following threats, pushed another officer. The Duty Manager commented that this was the third occasion that D had laid hands on staff and pushed them. He was placed on rule 40.

61. The Duty Manager's notes of 16 November referred to the need to find a prison bed for D and to obtain approval for this.

62. His medical notes of 17 November record "No issues. Declined to see Dr", and similarly on 18 November "Refused to see the doctor". A note on 19 November records:

> "[Patient] walking around. Informs he does not need to see the doctor. No concerns raised by staff. Not on any medication."

63. These last two notes were signed by Dr Aschar, who seems to have been a visiting General Practitioner. It is striking that he does not seem to have been made aware of the Claimant's recent mental health history or that he was meant to be taking Risperadone.

64. On 18 November 2011, D was reported as aggressive and making threats to dirty protest if he was not taken off removal from association under rule 40. It appears therefore that some further action had been taken against D under rule 40.

65. D's UKBA monthly review of 22 November said that his detention would be maintained to facilitate his scheduled criminal court appearance on 12 December, since otherwise he would immediately abscond if released. Reference was made to D's refusal to disclose any medical details to UKBA (though not to the fact that as long ago as 13 September both the Treasury Solicitor and Harmondsworth had been provided with copies of Tracy 1). The review concluded:

> " His character and behaviour deem him unsuitable for release and there are no medical or compassionate issues highlighted that precludes his continued detention. He will remain in detention whilst his JR is concluded and removal can be progressed."

66. The monthly progress report sent to D on 24 November was in identical terms to those of 22 August and 22 October.

67. There appears to be no document explaining why during the night of 28/29 November, D was eventually transferred, not to one of the detention centres he had mentioned, but to nearby Colnbrook.

(c) Colnbrook IRC 29 November 2011 to 25 April 2012

68. Following arrival at Colnbrook at 00.35, D's Healthcare Reception Admission Note shows that he was initially assessed at 00.51 on 29 November, where under the heading "Comments" it was recorded:

> "No medical concerns. Known mental health patient. Requesting to see psychiatrist."

69. To the standard question, "Do you take any prescribed medication", D is recorded as replying "Risperidone 3mg", which is one of the reasons the Defendant claims that D did receive medication at Harmondsworth.

70. On 29 November he was seen by Dr Vane, requesting to keep medication himself with a mention of Risperidone 3mg., a request repeated on 30 November when it was recorded as being "OKy [sic] to have meds IP when on wing", and that he was asking for a single cell. The note was signed by Dr Allen, the psychiatrist responsible for detainees at Colnbrook with mental health problems. Dr Allen saw him again on 5 December when it was noted "Meds written up i/p", which presumably means that medicines were prescribed for D and he was allowed responsibility for taking them himself.

71. On 13 December D was seen again by Dr Tracy, who prepared a Supplementary Psychiatric Report ("Tracy 2") on 14 December. D was reported as remaining mentally unwell, his condition having deteriorated since Dr Tracy's assessment at the end of August. The Report described D's account of his "voices", including:

> " Commands issued were frequently bizarre, including ordering him to defaecate [sic] and urinate strategically in his room, as well as painting religious crosses on his body, to protect him from 'evil spirits'. [D] described feeling frustrated that such actions were continuously misinterpreted by staff as a 'dirty protest'. "

72. The summary of Dr Tracy's conclusions ended:

> " If his condition does not improve with treatment at the IRC, then I would recommend consideration is given to his transfer to a psychiatric unit under the terms of section 48 of the Mental Health Act 1983 (amended 2007); I therefore respectfully suggest a copy of this report be dispatched to the health care unit at Harmondsworth IRC for their consideration.
>
> Due to the current severity of [D]'s illness, I am of the view that he is currently unable to instruct his legal team and therefore he cannot effectively

participate in any tribunal process. I would expect at least six weeks of effective treatment to have taken place before his illness may have abated to a level where he may have regained his faculties sufficiently to facilitate any tribunal process."

73. I shall return to the contents of the report.

74. The Treasury Solicitor was informed of the conclusions in Tracy 2 on 19 December, and an appropriate psychiatric assessment of D was requested urgently. Meanwhile (as has only just been disclosed by the Defendant) on 16 December 2011 the British Embassy in Paris at last took up the question of verification of nationality (a problem not confined to D's case) by sending a Note Verbale to the Congolese Embassy in Paris. According to UKBA's witness statement of 23 July 2012 this is still awaiting a response.

75. On 5 December 2011 a bail hearing was held. Bail was refused, the immigration judge stating:

" The appellant has a very violent history ... He has absconded in the past. He has not demonstrated that he would comply with bail conditions ... It is recognized that he is mentally ill and needs proper and sustained medical treatment. If the authorities at Colnbrook are not able or willing to provide a full assessment and medication he may have to be released but to a secure medical unit. So the burden is on the Respondent to arrange the ETD and charter flight imminently or he will have to be released and in the meantime get the medical treatment organized."

76. The December monthly review of 22 December was in similar terms to previous ones, save that it said that continued detention until the criminal trial on 17 February 2012 was not necessary. The monthly progress report to D on the same date was in the standard form.

77. In the light of Tracy 2, on 23 December, D's solicitors wrote to Colnbrook formally requesting an urgent assessment of whether D should be transferred to a psychiatric unit under section 48 of the Mental Health Act.

78. A note signed by Dr Allen on 28 December records:

" Sometimes hears voices inside & inside his head telling him to remove his clothes & that he is not from this planet."

79. D's CRS for the same date recorded that:

"[Redacted, but presumably the Treasury Solicitor] requested that we urgently get the subject assessed by the Psychiatric Team at Hillingdon Hospital ... Further discussion held with Danny Allen the psychiatrist who stated he would look into the matter but before doing so would like a copy of the psychiatrist's report [i.e. Tracy 2] whereby it recommends that the subject should be sectioned. Once we have obtained a copy of the report it needs to

be faxed to him."

80. D's CRS of 9 January 2012 recorded a telephone conversation with Dr Allen to the effect that, having received Tracy 2 on 5 January, Dr Allen was not going to refer D to the Hillingdon Psychiatric Team as D's solicitors had requested:

> " Dr Allen has confirmed that the subject is currently on a course of prescribed medication and is responding to treatment. The medication which the subject is on at present is the medication the report recommended. He has also seen the subject recently and has no great concerns that merit him being referred for an independent assessment. However [Dr Allen] did state that if the subject's condition were to deteriorate then he would make the necessary arrangements to have him assessed."

81. A note signed by a nurse on 10 January 2012 records that there had been a telephone conversation with a Mr Dodson [of D's solicitors] about "sectioning" D. The note continues:

> " Informed that [D] does not need hospital admission as per Doctor's assessment on 05/01/2012."

82. No notes of any assessment on 5 January 2012 are before the Court.

83. By 11 January the Official Solicitor had consented to act as litigation friend. The same day the Claimant was once again in trouble for assaulting staff and confined under rule 42. There is a reference in his notes to urinating through the door and being very uncooperative.

84. On 13 January he was moved to another room after a dirty protest so that the room could be cleaned. Because D resisted the move, handcuffs were used.

85. On 14 January the medical note read for 09.45:

> " Pt [patient] has [history] of mental health problems on dirty protest. Spyhole covered in faecal matter & so is patient - unable to assess further due to poor compliance ... encourage patient to engage."

86. A later note the same day recorded that he had been relocated to another room after a wash and change of clothes, after being offered food and one to one support. He was described as appearing very remorseful and ready to take medication. His mental state was said to appear stable. A note at 21.50 recorded that "night medication [was] given with no problems". This is the only express reference to D being given (as opposed to taking) medication. He was then kept in isolation for nine days under rule 40.

87. On 15 January he told the nurse that he was fine and taking his medications, and it was recorded that "no problems or issues".

88. By 16 January D was again on dirty protest. The note, signed by Dr Allen, records D as

saying that this was the result of voices speaking to him. D mentioned that in hospital previously (presumably back in 2008) he had had a dose of 300mg or 400mg of Quetiapine and that he would like to go back onto this. Dr Allen agreed to change D's medicine, and explained that if he responded well it was not likely he would need to go to hospital. Under a heading "Plan", a dose of 200mg Quetiapine was recorded.

89. On 16 January Dr Allen is recorded as telling D's solicitor that he thought D currently had capacity.

90. On 16, 17, 18, 19 and 23 January, D was recorded as refusing to see the General Practitioner, and on some days resisting a move and refusing meals. On 19 and 20 January he was recorded as continuing on a dirty protest for which the Detention Centre Rules 2001 were invoked.

91. D refused to take his medicines on 21 January, and again at night-time on 22 January. He was back on protest by 23 January and refusing meals. He was told by Dr Allen that he would have to reiterate and could not take his own medicines until he showed a pattern of cooperation.

92. D's monthly progress report of 22 January 2012 was in the by now standard form.

93. On or around 26 January D was placed under suicide watch, but by 9 February Dr Allen allowed him to take his own medicine again, because he was well and taking medicine regularly.

94. On 20 February D was seen for a third time by Dr Tracy, leading to a third report on 21 February 2012 ("Tracy 3"). In his opinion D remained unable to instruct his legal team and could not effectively participate in an appearance before a tribunal. Though he was found to be "slightly less thought disordered", he remained paranoid and delusional with on-going hallucinations. Dr Tracy was critical of the management regime at Colnbrook:

> "[D]is generally given a week's supply of medication at a time to self-dispense although he says he adheres to treatment, and there is no clear reason to disbelieve him, it would not be usual, particularly given his limited insight, in a clinical environment to give such a level of responsibility to so unwell a patient."

95. I shall return to the detail of the report later.

By letter of 21 February 2012 D's solicitors requested the Treasury Solicitor to agree to conduct a section 48 assessment within 7 days with a view to transferring D to a secure psychiatric unit. The response of Dr Allen in an email to UKBA of 21 February 2012 was in blunt terms:

> " Actually I don't think we should just respond in a knee jerk fashion to this. The answer is:
>
> Section 48 is not an assessment. It is an application to the MOJ which is only done after someone has been accepted for a bed somewhere. They would

only be accepted if they had been assessed and they would only be assessed if they had been referred.

I don't have to justify not referring people as I only refer people whom I believe need to be referred. They [i.e the Treasury Solicitor] are therefore free to conclude that I do not feel that he needs to be referred. Again if they wish to counter this properly they need their own expert report."

96. On 22 February 2012, Blair J refused permission on the renewal application, save in respect of whether by reason of the Claimant's medical condition his detention for some or all of the period in question is, or was, unlawful. This once again removed the bar to removal. Blair J noted "that the material before the court suggests that the claimant's mental health does require a further assessment in the near future".

97. On 29 February 2012, D's CRS referred to still awaiting the confirmed date of the charter for return of D to Brazzaville and continued:

" The subject was diagnosed with Paranoid Schizophrenia in 2008. Healthcare at the IRC are aware and continue to monitor, if RD's were set there are [sic] no medical reason as to why subject could not fly. His Legal Representatives haveinsisted that a referral to Hillingdon is made in relation to his mental health, however Dr Allen at Healthcare has assessed the subject and confirmed that a referral is not required. [Redacted: but presumably referring to a request from the Treasury Solicitor] a further mental health assessment is arranged for a second opinion however healthcare at Colnbrook IRC are being obstructive and refusing to assist in arranging this due to a conflict of interest. AD Wray has sent a request to AD of Operations at DEPMU to seek assistance in arranging a referral to Hillingdon Hospital as this needs to be done by a medical professional.

He has been deemed a 'dirty protester' and refused meals whilst in detention, however none of these are considered to warrant his release from detention."

98. The CRS ended with the by now familiar statement that D's character and behaviour made him unsuitable for release, and the absence of medical or compassionate issues highlighted to date.

99. Around 5 March, D started refusing food and medication. On that day Dr Allen recorded that D's "voice" had come back. It had made him more aggressive. The voice told him to take off his clothes. He said that men from Mars had come to help him. D also told Dr Allen that his medicines had stopped three days ago and Dr Allen seems to have prescribed more Quetiapine, at the same 200mg dose. D was informed that it would take months for him to be transferred to hospital and that it would be better if he applied for bail and sought voluntary hospital treatment.

100. On 9 March 2012, D had a criminal court appearance. A Colnbrook "Discharge Letter" of the same date, presumably prepared before D left for the court hearing, referred to his

history of schizophrenia and recorded "mental illness" under the heading "current medical history", and that he was seeing doctor and psychiatrist on a regular basis. D was taken ill with food-poisoning while waiting for the hearing. This required temporary admission to a hospital in Brighton. During treatment, his medical notes recorded:

> " Suddenly became very verbally aggressive, shouting loudly & not listening to us ... disturbing other patients. Police had to be called."

101. On return to Hillingdon he made a speedy recovery from the food poisoning.

102. The monthly review of 22 March 2012 referred to awaiting the confirmed date of the charter flight that could accommodate D's return to Brazzaville, following conclusion of the judicial review. This was presumably (once again) made in ignorance of the fact that the problem of verification of nationality remained outstanding. The recent UKBA witness statement states that:

> " Attempts to contact the relevant Congolese authorities [in Paris] were made on 2 March 2012, 19 April 2012, 23 April 2012, 7 May 2012, 22 May and 8 June. However this has proved somewhat difficult."

103. Reference was made in the monthly review to the Treasury Solicitor having instructed that an independent psychiatric assessment be arranged (presumably as a result of Dr Allen's email of 21 February).

> " Dr Allen has assessed the subject and confirmed that a referral is not required. [Redacted] a further mental health assessment [redacted] for a second opinion however healthcare at Colnbrook IRC are being obstructive and refusing to assist in arranging this due to a conflict of interest."

104. The review concluded that D had been 'deemed a dirty protester' and refused meals whilst in detention, however none of these are considered to warrant his release from detention. The final sentence of the review was in unaltered form:

> " His character and behaviour deem him unsuitable for release and as there are no medical or compassionate issues highlighted to date, his detention will be continued until his JR is concluded and removal date is confirmed."

105. In granting permission on 26 March 2012 on an appeal from the decision of Blair J to limit the scope of the judicial review, Sir Richard Buxton directed that:

> " It is imperative that the JR court has an up-to-date, authoritative, and hopefully agreed assessment of the applicant's mental health. The parties must urgently co- operate to bring that about."

106. A medical note by Dr Allen of 2 April 2012 (only disclosed by the Claimant on the last day of the hearing) reads:

> " Has not collected his medication; in the interim I have heard from Dr J Judge who did a report & thinks he is feigning illness.
>
> He refused to see me; given all of the above I have stopped medication.

To be seen only if he requests it."

107. D's Counsel told me that Dr Judge was a psychiatrist who had been instructed by D's solicitors to prepare a report, but that it had not been disclosed because it was a privileged document.

108. By letter of 5 April 2012 to the Treasury Solicitor, those acting for D put forward the names of two consultant psychiatrists and invited the Treasury Solicitor to indicate whether he was willing to instruct a joint expert and if so whether he agreed either of the names or wished to propose an alternative. Despite follow up letters, there was no agreement forthcoming.

109. In a medical note by a locum consultant psychiatrist, Dr Brow, dated 15 April 2012, reference was made to Dr Tracy's recommendation for an increase in dosage and if necessary a change to clozapine. D was recorded as asking who Dr Brow was, and on hearing that he was a psychiatrist, saying "I don't want to see any psychiatrist" and walking out. D was described as "not on medication".

110. The monthly review of 23 April 2012 recorded that the CPS had dropped the criminal charges against D and that UKBA had been advised that the outstanding judicial review application was not a barrier to removal. It was said that a "joint (UKBA/independent) medical assessment" was being arranged. Reference was made to "looking to arrange subject's removal via the next suitable charter" and to the fact that "a great deal of planning is involved and is currently being progressed". The concluding passage was identical to that in previous monthly reviews.

111. On 25 April the Claimant's bail application succeeded and he was released from detention subject to a condition that he report to Edmonton Police Station.

112. No progress having been made in relation to verification of nationality with the Congolese Embassy in Paris, UKBA changed its approach. Some time during the week in which the hearing began, a decision was made by UKBA to pursue the matter of documentation through the British Embassy in Nairobi as an alternative. Meanwhile, according to the latest UKBA witness statement:

> " The British Embassy will continue to seek engagement with the Congo Brazzaville authorities in Paris."

(3) The period since 25 April 2012

113. There have been no reporting problems during this period.

114. From April till 15 June 2012 the Claimant lived with his surety and her family, with support from the Enfield Community Support and Recovery Team to whom he was referred by the emergency psychiatric unit at Chase Farm Hospital, with visits from a mental health care coordinator. On 22 May a psychiatrist arranged an increased dose of Risperidone. The Claimant accepts that his own behaviour (which included walking

around the house partly clothed and responding to "voices" aloud, which distracted him from considering the reactions of others) caused problems for the family with whom he was then living. On one occasion he was assessed for detention under the Mental Health Act, but no recommendation for such detention was agreed.

115. D's solicitors sent chasing letters on 23 April and 14 May, before the Treasury Solicitor was informed by letter of 30 May that in the absence of any agreement to a joint medical expert, the Claimant's solicitors had instructed their own expert, Dr Larkin and enclosing his Report of 16 May 2012. I return to this below.

116. On 15 June 2012 the Claimant moved to a flat provided by Social Services. Initially he forgot to take his anti-psychotic medication for a few days which led to an increase in "the voices". He receives visits from a social worker twice a week and also support from the Mental Health Team. He continues to receive support from his surety and her family, who make sure he takes his medication and help him go to appointments. The Claimant reports an improvement in his mental health since his release from detention.

117. D was again assessed by Dr Tracy on 25 June 2012, leading to a final report of 26 June (Tracy 4), to the detail of which I shall return. The Claimant was recorded as retaining the delusional belief of coming from "the planet Mars" and as saying that "spirits" and "voices" known and unknown communicate with him most days, particularly at night and when he is alone, often commanding him to perform protective rituals such as bathing his hands and feet in his urine to ward off "bad spirits". Dr Tracy advised that the Claimant had recovered his capacity "to meaningfully instruct his legal counsel in his impending cases".

118. The Official Solicitor was discharged from his appointment as Litigation Friend for the Claimant on 13 July. I noted that D was able to attend court throughout almost the whole of the first day of the hearing, giving no sign of disturbed behaviour.

PSYCHIATRIC REPORTS

119. Curiously, no psychiatric reports on D seem to have been prepared on UKBA's behalf at any time, although I have seen a report by Dr Christie of 23 April 2007, prepared at the request of BID South in connection with a bail application and of which UKBA must have been aware at that time. After a single interview with D, Dr Christie did not make a diagnosis, but plainly regarded D as very disturbed, which was unsurprising since D had come into the interview room with a substantial amount of white cream on his forehead, with a small piece of pink plastic tied to his right hand and several feet of toilet paper wound around his neck, which he told Dr Christie he had done "to protect me from bad spirits". Dr Christie's opinion was that to achieve clarity of diagnosis a period of psychiatric care over a period of some weeks or months would be necessary, that no NHS psychiatric unit would be easily persuaded to take D for such a period and that he could not recommend bail, except to a psychiatric unit.

120. I have already referred to four psychiatric reports prepared on the instructions of the Claimant's solicitors by Dr Tracy (Tracy 1 to 4). It is necessary to set out his findings as the only detailed, contemporaneous analysis of D's mental state at certain key times. All these reports were supplied to the Defendant shortly after their compilation.

121. (1) Tracy 1 (4 September 2011) recorded Dr Tracy's opinion that D "describes classical symptoms of schizophrenia", a diagnosis supported by "the apparent waning in symptoms when on anti-psychotics". Whatever the diagnosis, "the principle remains that he is suffering from a serious and enduring mental illness". Dr Tracy recommended immediate taking of anti-psychotic medication, the type and dose to be evaluated. His opinion was that D might be capable of independent living, provided he had community support and regular out-patient appointments with a psychiatrist, initially fortnightly. He concluded that Harmondsworth could not be considered conducive to optimal mental health and that the appeal process and D's current environment were likely to perpetuate his mental health problems.

122. (2) In Tracy 2 (14 December 2011) D was described as "[c]ognitively ... grossly orientated in person and place", exhibiting "marked derangement in his thinking - a symptom of the severe form of the illness [paranoid schizophrenia]". D was recorded as reporting bizarre commands, "including ordering him to defaecate and urinate strategically in his room", and as being frustrated that such actions were continuously misinterpreted by staff as a dirty protest. In Dr Tracy's Opinion:

> " The evidence to date is that his mental health needs have not been well met, albeit he has only just commenced treatment, and his mental state has deteriorated as a direct result of this. Besides medication, there is no evidence of appropriate mental health nursing care for [D], and such psychological support (e.g. cognitive behavioural therapy ...) will be equally important for him."

123. As already mentioned, Dr Tracy recommended that if D's condition did not improve with treatment at the IRC, then consideration should be given to his transfer to a psychiatric unit under the terms of section 48 of the Mental Health Act 1983. Dr Tracy concluded:

> " Due to the current severity of [D]'s illness, I am of the view that he is currently unable to instruct his legal team and therefore he cannot effectively participate in any tribunal process. I would expect at least six weeks of effective treatment to have taken place before his illness may have abated to a level where he may have regained his faculties sufficiently to facilitate any tribunal process."

124. (3) In Tracy 3 (21 February 2012) Dr Tracy reported an improvement in D's condition. He further discussed D's delusional beliefs and their relationship to dirty protests. As already recorded, Dr Tracy was critical of the way in which medication was being dealt and of the patient care:

> " [D] receives psychiatric reviews approximately fortnightly from the IRC's Consultant Psychiatrist. Written reviews in his notes are quite terse, typically of two to four lines, with few details on [D]'s mental state. There is

no other apparent mental health input, for example from psychiatric nurses. This level of input is insufficient to appropriately monitor or treat his serious mental illness and may be a contributing factor to his failure to make significant improvement in the times I have seen him. [C]ognitive behavioural therapy may be helpful for such individuals, and this does not appear possible at Colnbrook."

125. Dr Tracy's summary of conclusions included that:

> "[D's] mental health requirements are not being suitably managed at Colnbrook IRC. Fortnightly psychiatric reviews, without psychiatric nursing input or suitably trained regular reviews of his mental state are insufficient to adequately and appropriately help him.
>
> ...
>
> He remains unable to instruct his legal team and cannot effectively participate in a tribunal process at this time."

126. Amongst the recommendations in Tracy 3 were increasing the dose of quetiapine, possible commencement of clozapine (though only in an inpatient setting), and "transfer to a psychiatric inpatient unit that might better monitor and treat his mental illness". Dr Tracy's view was that the criteria for transfer to hospital under section 48 of the Mental Health Act were met, and that D's paranoid schizophrenia "is currently of a nature and degree to warrant his detention in hospital for his own health, safety and the protection of others".

127. (4) In Tracy 4 (25 June 2012) the Claimant was recorded as retaining the delusional belief of coming from "the planet Mars" and as saying that "spirits" and "voices" known and unknown communicate with him most days, particularly at night and when he is alone, often commanding him to perform protective rituals such as bathing his hands and feet in his urine to ward off "bad spirits". These occasions increased when he has missed his anti-psychotic medication. Dr Tracy's opinion was that:

> " It is likely that the very process of leaving the undoubtedly stressful environment of the IRC has helped his mental state, especially the paranoia and thought of self- harm, though (largely) continued adherence to medication and engagement with mental health services will also have helped."

128. Dr Tracy referred to the Claimant's continuing "unusual behaviour (stemming from his mental illness)". In his opinion D "will need anti-psychotic medication and secondary mental health care for the foreseeable future". However, the Claimant was no longer "thought disordered" and there was no clear paranoia. As already mentioned, Dr Tracy advised that the Claimant has recovered his capacity "to meaningfully instruct his legal counsel in his impending cases".

129. On the day before the hearing the Defendant produced a witness statement from Mr Wood, a Senior Executive Officer in UKBA's JR and Litigation Team, who admitted that he was

not a medical professional and had not spoken to anyone responsible for the Claimant's health care. He reviewed such documentation as he had seen, including Tracy 1, 2 and 3. He expressed the view that D's dirty protests, and threats of them, did not appear to him to be wholly explained by psychosis. His witness statement concluded:

> " The Defendant maintains that the Claimant's mental health was satisfactorily managed during his time in detention. The Defendant rejects the submission made by the Claimant that his detention amounts to treatment that crosses the threshold to satisfy treatment contrary to Article 3 and/or Article 8 ECHR.
>
> The Claimant's detention was reviewed at least monthly in accordance with usual procedures and it was decided that it was appropriate to maintain detention. Although evidently the Claimant has mental health issues, the Defendant's view at all times, based on the opinions of those responsible for his medical care, was that treatment of the Claimant's mental health issues was being satisfactorily managed."

130. The combative tone of this witness statement, and the fact that it was not from a medical professional, limit the weight that can be attached to it.

131. Mr Wood's witness statement triggered a further short report from Dr Tracy (Tracy 5), dated 22 July 2012. This included observations on the record keeping at Brook House and Harmondsworth as "sub-optimal", since it failed "to explicitly demonstrate that medication was given or indicate by whom". He described this as:

> " ... unacceptable medical and nursing practice ... and is potentially clinically dangerous to individuals taking such treatment. Decisions on whether a treatment is working or not cannot be soundly made upon such documentation and in my experience such a failure would lead to an internal investigation and disciplinary action if indicated."

132. Dr Tracy went on to state that:

> It remains my opinion that [D]'s mental health was sub-optimally maintained whilst in detention. ... [A] diagnosis of paranoid schizophrenia has not been clearly made by the IRC despite the clinical evidence from [D]'s history, mental state and past medical records; and ... the record keeping in the IRC that was available was cursory, infrequent, and below what would be considered minimally acceptable standards in the National Health Service. These facts, together with the apparent decline in [D]'s mental state between my reviews of September and December 2011 are, in my clinical opinion, very clear evidence that his mental state was sub-optimally managed ...
>
> Whilst it is possible that an individual with a serious mental illness might also engage in manipulative behaviour [as suggested by Mr Wood] the records show that all treating medical professionals were minded that [D] was suffering from schizophrenia, an illness defined by hallucinatory experiences and delusional beliefs."

133. It is appropriate at this stage to return to Dr Larkin's report of 16 May 2012, commissioned in response to Sir Richard Buxton's observation when extending the judicial review permission. Dr Larkin's report included the following general observation:

> " There is evidence that immigration detention in the UK is harmful to mental health ... [T]hose with underlying predispositions will be more severely affected. The limited mental health care in such settings greatly exacerbates the difficulties. It is not detention per se which is harmful to mental health, it is detention in UK Immigration Centres (for example [D] deteriorated when detained in Immigration Centres, but improved when detained in psychiatric hospital [22 May to 3 June 2008]) ... [T]he longer the duration of untreated psychosis, the poorer the lifetime prognosis for Schizophrenia and other psychotic illnesses."

134. Specifically Dr Larkin reported that that there was evidence that D was held in detention centres where his psychosis was known, but inadequately treated for several months, and that this had occurred on more than one occasion:

> " In my view, the periods of immigration detention, in facilities with insufficient mental health input, have been a main cause of [D's] prolonged mental health difficulties, and the prolonged periods without adequate treatment being provided will be a major cause of the severity and duration of his illness in the future and will lead to a poorer lifetime outcome for his mental health."

135. Dr Larkin referred to lengthy detention in a UK Immigration Centre (without access to prompt psychiatric assessment and treatment) and repeated long durations of untreated psychoses (again, likely due to inadequate access to prompt psychiatric assessment and treatment). Dr Larkin emphasised that:

> " Being denied treatment can be disastrous for a person with paranoid schizophrenia who may otherwise have had a reasonable prognosis..."

and that:

> " [D's] ability to respond quickly and well appears now to have been lost. The prolonged periods of psychoses, can be viewed as having 'scarred' his brain in a way that, like a scar, does not recover."

136. He described not being provided with adequate treatment early as a "failing documented as having occurred regularly in his case". Dr Larkin's opinion was that:

> "... [T]he absence of adequate treatment had led to longer periods of psychosis, more distress, poorer responses to later treatments and a poorer future prognosis ... a longstanding effect on his future health."

137. For completeness I should also mention again Dr Allen's note of 2 April referring to a medical report by Dr Judge. Since privilege has been claimed for this by the Claimant, it is of no assistance to anything I have to decide.

138. Having set out this material at length, I remind myself of what Miss Stout (for the

Defendant) urged on me, that I am not trying an action for professional negligence.

ALLEGED FAILURE TO APPLY CHAPTER 55.10 OF THE ENFORCEMENT INSTRUCTIONS

Chapter 55.10

139. Chapter 55 of the Defendant's policy guidance contained in the Enforcement Instructions is headed "Detention and Temporary Release". Chapter 55.1.1 states that:

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

140. Chapter 55.10 is headed "Persons considered unsuitable for detention". It goes on to state:

> " Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration centres or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
>
> In CCD cases [i.e. deportation, not removal cases such as D's], the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> ...
>
> those suffering serious mental illness *which cannot be satisfactorily managed within detention* ... In exceptional circumstances 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 (italics added)."

141. R (HA (Nigeria) v Secretary of State for the Home Department [2012] EWHC 979 (Admin), (judgment of Singh J handed down on 17 April 2012) concerned the detention of a paranoid schizophrenic, but (unlike the present case) concerned deportation rather than removal. He held that the reformulated wording of the policy in August 2010, when the italicized phrase was first expressly included in Chapter 55.10, constituted a change which had unlawfully been made without carrying out an equality impact assessment and was thus a breach of the duties in section 71 of the Race Relations Act 1976 and section 49A of the Disability and Discrimination Act 2005, now replaced by the Equality Act 2010 (see para 196 of the judgment). As Lang J said in R (S) v Secretary of State for the Home Department [2012] EWHC 1939 (QB) para 198 (judgment handed down on 16 July 2012), also a deportation case concerning a suicidal depressive who was suffering from post

traumatic stress disorder:

> " *HA (Nigeria)* was not referred to by the Court of Appeal in [*R (LE (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 597], presumably because the judgment was handed down only shortly before the hearing. It is uncertain whether Singh J's conclusion that there was a policy change triggering the statutory equality duty can be reconciled with Richards LJ's conclusion that the reference in the August 2010 policy to mental illness which could 'be satisfactorily managed in detention' was 'implicit' in the policy which preceded it."

142. She also said that HA was under appeal to the Court of Appeal and any conflict between the two cases was more appropriately resolved by the appellate court than by a court of first instance.

143. In the present case, I was expressly requested by Miss Hirst, Counsel for the Claimant, to assume the lawfulness of the relevant part of the guidance in Chapter 55.10.

144. In HA (Nigeria) Singh J also held that, even if the policy was a lawful one, the Defendant acted in breach of that policy in detaining HA on 5 November 2010 because he clearly had a serious mental illness which had not been and could not be satisfactorily managed within the IRC (in that case Harmondsworth IRC). He reached this conclusion applying a Wednesbury irrationality test to the Secretary of State's conclusion that HA could be detained in an IRC in a manner which would be compatible with the policy (para 203). Similarly in S, Lang J found that S's detention had been unlawful in two different periods (one of which was before the italicised phrase was expressly incorporated into the policy) as a result of failure to have regard to Chapter 55.10 (paras 76 and 190-193). The question which therefore arises is whether the Claimant in the present case can similarly demonstrate a breach of Chapter 55.10.

The proper approach to such a claim

145. In Kambadzi v Secretary of State for the Home Department [2011] 1 WLR 1299 Lord Hope said para 41:

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

146. In the present case there is no dispute that Chapter 55.10 directly bears on the discretionary power to detain D, namely para 16(2) of Schedule 2 of the Immigration Act 1971 which provides:

> " If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending -

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions."

147. In considering whether the Defendant has acted in breach of her own policy, the approach is the conventional one, as affirmed by the Court of Appeal in LE (Jamaica) para 29:

> "... [T]he power to detain is discretionary and the decision whether to detain a person in the particular circumstances of the case involves a true exercise of discretion. That discretion is vested by the 1971 Act in the Secretary of State, not in the court. The role of the court is supervisory, not that of a primary decision-maker: the court is required to review the decision in accordance with the ordinary principles of public law, including *Wednesbury* principles, in order to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by statute."

148. It is agreed by both Counsel that there is nothing in the voluminous contemporary documentation to suggest that anyone concerned with the Claimant's detention expressly referred to the Enforcement Instructions, much less to Chapter 55.10. There is nothing from which I can infer that anyone concerned with the Claimant's detention was familiar with the content of Chapter 55.10, although reference was made to Chapter 55.10 in the Claimant's solicitors' letter to the Treasury Solicitor of 9 September 2011. However, to comply with a particular policy, I do not consider that decision-makers need recite the terms of the policy, or even be aware of the policy, so long as what they do is in conformity with the policy. That was the contention of Miss Stout, and I do not think that Miss Hirst eventually disputed it.

149. Chapter 55.10 required those authorising the detention of the Claimant to ask three questions:

> 1) Was the Claimant suffering a serious mental illness? If so,
>
> 2) Could his mental illness be satisfactorily managed in whichever IRC he was to be detained? In this connection the question was not one of could he theoretically be satisfactorily managed in an IRC, but whether, given the circumstances of the particular IRC where it was proposed to detain the Claimant, he could be satisfactorily managed there. On the facts of the present case this distinction is important.
>
> 3) If (but only if) the answer to 2) was no, were there very exceptional circumstances to detain him in a particular IRC where his mental illness could not be satisfactorily managed?

Analysis

150. So far as concerns the first question, I am satisfied from the materials I have already set out, that at all material times the Claimant was "suffering serious mental illness", the words used in Chapter 55.10. This was accepted by Miss Stout for the Defendant. Not only had

the Claimant been "sectioned" in 2008, but the GP's comment on the Form IS91A on 21 February 2011 shows that the history of paranoid schizophrenia was known to those authorising the detention, with no suggestion that the illness was not a continuing and serious one.

151. Was there consideration on or immediately before 21 February 2011, when his detention at Brook House was authorized, of the question whether D's paranoid schizophrenia could be satisfactorily managed there? I can find no evidence that in February 2011 anyone at UKBA considered whether the particular features of D's mental state were satisfactorily manageable at Brook House (or indeed at any other detention centre), apart from the single reference to finding "a special requirements bed" in the CRS. The driving force behind his detention, apart from the intention to facilitate removal, appears to have been D's violent behaviour towards UKBA staff, and the difficulties this presented in enforcing reporting restrictions. So acute were these matters that the UKBA Minute Sheet of that date regarded a prison as more appropriate than a detention centre. Therefore Miss Hirst contends that the policy in Chapter 55.10 was breached when D's detention was authorized.
Since those authorising D's detention at Brook House knew of his mental state, and notwithstanding this, authorized detention, must they have considered that his mental state was satisfactorily manageable within Brook House? I do not think this follows, but if it does, the view taken was plainly irrational. First, there were not even regular visits by a psychiatrist to Brook House (unlike the position at, say, Colnbrook), and it should have been obvious that D's mental state required, as a minimum, access to a psychiatrist. Second, UKBA knew that in the past D's mental condition had required the taking of prescribed drugs and that he was not currently taking medication. They should have known that at Brook House (as with many other, and possibly all, detention centres) there were no procedures to cope with detainees who did not take their prescribed drugs and no procedures to check on a day by day basis whether a detainee to whom drugs had been prescribed was or was not taking them. The regime at Brook House was *laissez-faire*. For example when D failed to attend the GP on 28 February 2011, all that was done was to make a further appointment (which again he did not attend), with the result, as the recent witness statement from the Deputy Nurse Manager at Brook House confirms, the Defendant was never prescribed (much less took) any Risperadone (or any other anti-psychotic drug) whilst at Brook House. When considering the mental state of D in February 2011, as known to UKBA, and the fact that detention was proposed in Brook House, the only conclusion that could rationally have been reached was that his mental state would not be satisfactorily managed there.

152. In R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245 para 88 Lord Dyson SCJ said:

> "... [I]n cases such as these, all that the claimant has to do is to prove he was detained. The Secretary of State must prove that the detention was justified by law. She cannot do this by showing that, although the decision to detain was tainted by a public law error..., a decision to detain free from error could and would have been made."

153. Therefore, even if D would have been detained (whether at Brook House or some other

detention centre), notwithstanding the relevant public law error, D would still have been unlawfully detained. But he would then only be entitled to nominal damages, because he would not have suffered any loss of freedom from the mistaken application of policy. As Lord Dyson SCJ explained in Lumba (para 95):

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

154. Miss Hirst argues in her supplementary written submissions that it is not open to the court to conclude that the Defendant's decision to detain was Wednesbury reasonable under the policy in Chapter 55 at any point during his detention. I do not agree. I consider it likely that if Chapter 55.10 had been properly addressed in February 2011, the view could rationally, and would almost inevitably, have been reached that D's mental state could be satisfactorily managed if he were placed in a detention centre such as Harmondsworth or Colnbrook where there was a visiting psychiatrist who could make arrangements to ensure D's taking of prescribed drugs was carefully monitored. Therefore in respect of the first few months when D was in Brook House, I find that, despite the breach of Chapter 55.10, his entitlement to damages for loss of liberty under the present ground is purely nominal. I am, however, satisfied that, even had D been originally detained in Harmondsworth or Colnbrook rather than at Brook House, it would or should have become obvious after a maximum period of four months (set generously to allow for two successive periods at each IRC) that his mental state was not capable of being satisfactorily managed at either establishment, as what later happened at each IRC demonstrated and as I shall explain below. No submission was addressed to the court to the effect that the Claimant would have been liable to some continued detention in a mental hospital, if he were not detained in an IRC, contrast the position in HA (Nigeria) para 157. However, had D been detained in a secure mental hospital in February 2011, I have no reason to suppose that he would have needed to remain there for more than the four month period of which I have already taken account. No very exceptional circumstances have been put forward on the Defendant's behalf which might have justified D's continued detention in an IRC under Chapter 55.10, even if his mental state could not be satisfactorily managed there. Accordingly I find that D is entitled to damages (i.e. not merely nominal damages) under this ground from 23 June 2011 until his release from detention on 25 April 2012.

155. In reaching this conclusion, I have taken account of the medical regimes at Harmondsworth and at Colnbrook, and the experience of D when he was detained in those IRCs between August 2011 and April 2012. This is highly relevant to the application of Chapter 55.10 in the hypothetical situation I have posited, where D was in fact detained in one or other of these IRCs in the period February to June 2011, rather than at Brook House. What follows will also, I hope, be of assistance if I am wrong in the conclusion I have reached that the policy in Chapter 55.10 was breached from the outset at Brook House.

156. No contemporaneous document has been drawn to my attention authorising the transfer from Brook House to Harmondsworth in August 2011, and the reason for the transfer is unclear, save that D had been acting violently and in his judicial review application was asserting that his mental health was not being properly taken into account. There is no evidence that anyone considered at the time of transfer to Harmondsworth that D's mental state would be satisfactorily managed there. In these circumstances it is impossible to find that the policy in Chapter 55.10 was followed at the time of this transfer. If consideration had been given to Chapter 55.10, whether in August 2011 or at the outset in February 2011, would the transfer to Harmondsworth have been authorized as a place where D's mental state could be satisfactorily managed? I consider that the transfer could rationally, and almost certainly would, have been authorized on the following basis. Harmondsworth did have a visiting psychiatrist, whom UKBA might reasonably have supposed would prescribe appropriate drugs for D and monitor whether or not he was taking them, and if not, devise an alternative care plan for D. The court now knows that in fact D was never seen by any psychiatrist whilst he was in Harmondsworth, because, so it would seem, even detainees with a serious mental illness, such as D, were not provided with regular visits by the visiting psychiatrist. The court also knows that D's taking of Risperadone at Harmondsworth was fleeting. That, however, is with the benefit of hindsight and would not have been known to UKBA in August 2011.

157. On the other hand by the middle of September the Defendant had received the Claimant's solicitor's letter of 9 September complaining of the apparent lack of a psychiatrist at Harmondsworth, and also a copy of Tracy 1 pointing out the need for the immediate taking of anti-psychotic medication. Her attention had also been specifically drawn to Chapter 55. I do not consider that those who thereafter continued to authorize the detention of D at Harmondsworth until 29 November can have had in mind the question whether D's mental state could be satisfactorily managed there. Indeed the view of UKBA at the time seems to have been that there were no "medical or mental issues which might affect [D's] continued detention" (see its letter of 22 September 2011), which Miss Hirst correctly described as "a bizarre assessment". If I am wrong on this, and that question was asked, the only rational answer would have been in the negative. There was simply no evidence at that stage to rebut the view set out in Tracy 1 that Harmondsworth could not be considered conducive to D's optimal mental health and that his current environment was among the factors which were likely to perpetuate his mental health problems. The only conclusion that the Defendant could rationally have reached was that his condition was not being satisfactorily managed, and would not be satisfactorily managed, at Harmondsworth.

158. Had the Defendant properly had regard to Chapter 55.10 in mid-September 2011, the conclusion could rationally, and probably would, have been reached, that he should immediately be transferred to Colnbrook where there was a more effective psychiatric regime under Dr Allen which (so it might reasonably have been supposed) would constitute satisfactory management of D's mental state).

159. I have already referred to the absence of contemporary documentation relating to the transfer of D to Colnbrook late on 28 November 2011. Despite the reference to Chapter 55.10 in the Claimant's solicitors' letter of 9 September 2011, there is nothing to suggest

that Chapter 55.10 was specifically taken into account in relation to the transfer. Nevertheless I am satisfied that the reason for the transfer was to manage more satisfactorily D's mental state, which had figured prominently in D's judicial review application and at the hearing before Blake J on 27 September 2011, and also in the Claimant's solicitors' letters of 9 September 2011 and 4 November 2011 (not to mention Tracy 1 which was sent to the Centre Manager at Harmondsworth on 13 September 2011). That transfer is only explicable on the basis that the opinion was held that D's mental state could be satisfactorily managed at Colnbrook. This is consistent with the view I have already expressed that in February or April 2011 there would have been no breach of Chapter 55.10 had the decision been to detain D in, or transfer D's detention to Colnbrook.

160. On the other hand it ought to have become apparent after two months, that is by late January 2012, that the new medical regime was not working. By then, for example, (a) Tracy 2, referring to "the current severity of [D]'s illness and his loss of capacity to instruct lawyers", had been received by the Treasury Solicitor; (b) an immigration judge had recognized that he was not obtaining "proper and sustained medical treatment"; (c) Dr Allen was recording that D was hearing voices which issued strange commands and that D did not believe he was from this planet; and (d) it was plain D was not taking his medication, was not being cooperative, and was behaving aggressively. Yet there is no indication that UKBA itself addressed the question whether D's mental state was still capable of being managed satisfactorily in Colnbrook. Had that question been addressed, there was only one rational answer that could have been given, namely in the negative. If D had been detained in Colnbrook in February 2011, or transferred there in April 2011 (from, say, Harmondsworth) the evidence strongly suggests (and I so find) that by late June 2011 it would have become apparent that his mental state was not capable of being satisfactorily managed there.

161. Miss Stout urges that there was nothing irrational in UKBA continuing the detention of D at Colnbrook so long as Dr Allen remained content that D was responding to treatment (a view attributed to him in D's CRS of 9 January 2012 and, so it would seem maintained thereafter). UKBA never seems to have sought a psychiatric report from Dr Allen, so that it lacked any reasoned basis to contradict the opinion expressed repeatedly by Dr Tracy in Tracy 1 and 2 that the management regime at Colnbrook was simply not treating D's mental illness. Furthermore, UKBA knew in January 2012 that Dr Allen was resisting the commissioning of an independent psychiatric report, conduct later described in the 29 February 2012 CRS as "obstructive".

162. I am also satisfied that if at any stage in the early months of 2012, UKBA had asked itself the further question whether, notwithstanding the inability satisfactorily to manage D's mental state at Colnbrook, there were very exceptional reasons to continue detaining him there, only one answer could rationally have been given, namely that there were no such circumstances.

Conclusion on breach of Chapter 55.10

163. From 23 February 2011 until his release on 25 April 2012, D's detention constituted a

breach of the Defendant's policy in Chapter 55.10, and he is therefore entitled to damages for unlawful imprisonment during that period. However, so far as concerns the first four month period from 23 February until 23 June 2011, although I have found that his detention breached this policy and was therefore unlawful, D is only entitled to nominal damages for the reasons I have already given. In these circumstances it is not necessary for me to address further arguments of Miss Hirst based on claimed breaches of rules 34 and 35 of the Detention Centre Rules.

ALLEGED BREACH OF THE EQUALITY DUTY

The statutory provision

164. Section 149 of the Equality Act 2010 provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in

particular, steps to take account of disabled persons' disabilities.

...

(7) The relevant protected characteristics are—

Age;
Disability;
Gender reassignment;
Pregnancy and maternity;
Race;
Religion or belief;
Sex;
Sexual orientation."

165. Section 149 replaced similarly worded duties in previous discrimination legislation, including section 49A of the Disability Discrimination Act 1995 and section 71 of the Race Relations Act 1976.

Submissions

166. The Claimant contends that the Defendant, in detaining the Claimant, breached the duty set out in section 149 of the Equality Act 2010 by failing to have due regard to the duties set out in section 149(a) and (b) in relation to the detention of, and provision of healthcare for, mentally ill detainees in general and the Claimant in particular. In HA (Nigeria) (para 196) Singh J said that he saw force in a similar submission (which he did not have to consider further given his decision that there was a change of policy) that the public sector equality duties were applicable more generally.

167. Miss Hirst relies strongly on R (BE) v Secretary of State for the Home Department [2011] EWHC 690 (Admin), a case of detention pending deportation, where the detainee (an amputee) suffered from what the Deputy High Court Judge described as "a chronic medical condition"(para 4). In relation to the duty under section 49A of the Disability Discrimination Act 1995, the judge said (para 165):

> "... I conclude, first that the correct question for the Secretary of State was to ask herself was 'can this man's disability be satisfactorily managed in the detention estate?' That question would involve consideration of the broader impact of being disabled upon the Claimant's detention, as regards, facilities, transport and harassment by other detainees. Secondly, there is no evidence, either in contemporaneous documents or in witness statement form, that the Secretary of State did consider that question and certainly not in advance of issues which arose. Thirdly the mere existence of the policy in ch 55.10 [of the Enforcement Instructions] is not of itself sufficient to constitute compliance with the s.49A duty."

168. The judge went on to find a breach of the section 49A duty.

169. On the facts of the present case Miss Hirst submits that the Defendant failed to ask the question identified in BE, namely whether D's disability (in this case mental rather than physical) could be satisfactorily managed within the detention estate. She says that no reasonable decision maker could conclude that D's mental illness could be satisfactorily managed, given Tracy 1-4, the absence of healthcare provision and the lack of assessment or review of D's condition. Furthermore, she submits that the Defendant has failed to put in place a system for assessing the treatment needs of mentally ill detainees and adequate provision of care and treatment for those with serious illnesses. In her view D's experience clearly demonstrates a systemic lack of care for mentally ill detainees, in breach of the duty imposed by section 149.

170. Miss Stout questioned whether the section 149 claim added anything of materiality to the challenge. She also drew attention to what was said by Dyson LJ in R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141 para 31 in relation to section 71(1) of the Race Relations Act 1976:

> " In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have regard to the need to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances ... "

171. Both Counsel accept that there is no need for a public authority (such as the Defendant and UKBA) expressly to refer to section 149. It is enough if the public authority shows that it has had due regard to the matters set out in section 149(1) and (3). That is clear from Baker para 37:

> " The question in every case is whether the decision-maker has in substance had due regard to the relevant statutory need, ... a failure to refer expressly to the statute does not of itself show that the duty has not been performed ... To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning."

Analysis

172. For very much the same reasons I have already given in relation to Chapter 55.10, I can find no indication in this case that any consideration was given to section 149, or to the matters to which due regard had to be had, in the period when D was detained in Brook House and in Harmondsworth. During that period D was disadvantaged by his mental state, and there was a distinct absence of any (much less due) regard being paid to the need

to advance equality of opportunity between persons who suffered from mental ill-health such as D and other detainees or to remove or minimise the disadvantages of those who suffered from mental illness (see the language of section 149(3)(a) and (b)). Therefore there was a breach of section 149, and this is a further reason why the detention was unlawful.

173. Had due regard been paid to the relevant aspects of the duty, the outcome would have been identical to that which I have described above in considering the failure to have regard to Chapter 55.10. In summary, D could reasonably have been detained in both Harmondsworth and Colnbrook, although it would within a short period at either institution have become obvious that he was suffering disadvantages which would not be suffered by a person without his mental condition.

174. The practical consequence is that the Claimant is only entitled to nominal damages in respect of the first four months of detention. It follows that Miss Stout is right to contend that the section 149 claim adds nothing in terms of a damages claim.

ALLEGED BREACH OF ARTICLE 3

175. Article 3 provides:

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

176. The Claimant alleges that he was throughout the period of his detention subjected to "inhuman or degrading treatment" and is therefore entitled to compensation. Miss Hirst draws attention to the wide ambit of Article 3, notwithstanding that the 'treatment' must reach a minimum level of severity, as recognized in Pretty v United Kingdom 35 EHHR 1, 33 para 52, where the European Court of Human Rights said:

> " As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also falls within the prohibition of article 3. Thus suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures for which the authorities can be held responsible."

177. In every case it is necessary to examine the particular circumstances, and in particular the nature and context of the treatment that is in issue. Miss Hirst draws encouragement from HA (Nigeria) which considered the circumstances of a detainee who had serious mental health problems (diagnosed as likely to be a psychotic illness), and who behaved bizarrely. His claim under Article 3 referred to two periods in 2010 when he was detained

respectively at Brook House and Harmondsworth, two of the three detention centres where D was detained in 2011. Singh J held that the acts and omissions of those for whom the Defendant was responsible "crossed the threshold of ill-treatment required by Article 3" and that the Claimant had "suffered degrading treatment within the meaning of that provision" (paras 181 and 207). The factors principally relied on in HA (Nigeria) are set out in para 179 of the judgment. Miss Hirst also drew attention to the remarks of Stanley Burnton J in R (D) v Secretary of State for the Home Department [2005] 1 MHLR 17 para 33, in relation to the (only slightly different) circumstances of a prisoner requiring mental health treatment:

> " Once the prison service have reasonable grounds to believe that a prisoner requires treatment in a mental hospital in which he may be detained, the Home Secretary is under a duty expeditiously to take reasonable steps to obtain appropriate medical advice ...
>
> Inappropriate retention of a prisoner in a prison ... may infringe his rights under Article 8. If the consequences for the prisoner are sufficiently severe, his inappropriate retention in a prison may go so far as to bring about a breach of Article 3, in which case the State is under an absolute duty to prevent or bring to an end his inhumane treatment."

178. In the present case Miss Stout contends that the factors identified in HA (Nigeria) were considerably more severe than the circumstances in D's case. Whilst there were some marked similarities, I accept that there were also important differences. In Kudla v Poland (2002) 35 EHHR 11, the European Court of Human Rights deemed treatment to be 'degrading' where it was such as to arouse in the victim feelings of fear, anguish and inferiority, capable of humiliating and debasing them (para 92). I agree that there was nothing in D's treatment which can properly be categorized as 'degrading', by contrast to the express finding in HA (Nigeria).

179. Was D's treatment nevertheless 'inhuman'? Miss Stout argues that the most Dr Tracy reported was that the treatment was less than optimal, and that, even if this be so, that falls far short of evidence that the treatment was 'inhuman'. There were after all registered mental health nurses at both Brook House and Harmondsworth, as well as visiting General Practitioners by whom D was seen on numerous occasions. At Colnbrook D was regularly seen by Dr Allen and the court should not concern itself with a difference of professional views between Dr Allen and Dr Tracy.

180. I consider the present case to lie at the margins for Article 3. In Kudla the court considered treatment to be 'inhuman' where it was premeditated, applied for hours at a stretch and caused either bodily injury or mental suffering (para 92). Against this standard, it is necessary to look at the periods before and after the transfer to Colnbrook at the end of November 2011.

Alleged breach of Article 3 at Brook House and Harmondsworth

181. The treatment (or rather absence of proper psychiatric treatment) which was provided to D

at Brook House and Harmondsworth lasted for many months and caused, or rather exacerbated, D's mental suffering. It was 'premeditated', not in the sense of any subjective intention to damage D's mental health, but rather in the sense that those with responsibility for the well-being of detainees in the two institutions knew that D had a history of mental illness and persisted in a medical regime for him which involved neglect (particularly in relation to the taking of anti-psychotic medication and denial of access to a psychiatrist) and recourse to what were in effect disciplinary sanctions under rules 40 and 42 which were unsuitable for a person with his condition.

182. What eventually I have found decisive is the fact that, on the uncontradicted evidence of Tracy 2, D's "mental state has deteriorated as a direct result of [his mental health needs not having been well met]"; and more particularly the opinion of Dr Tracy, accepted by the Official Solicitor when he took over the conduct of the present litigation, that the treatment afforded, or not afforded, to D was such as to render him legally incapable, in the sense of being unable to instruct his legal team or effectively to participate in tribunal processes. I note also the confirmation of Dr Tracy's views by Dr Larkin, who wrote:

> " In my view, the periods of immigration detention, in facilities with insufficient mental health input, have been a main cause of [D]'s prolonged mental health difficulties."

183. The acts and omissions at Brook House and Harmondsworth in my view intruded on D's human dignity and constituted inhuman treatment within Article 3.

Alleged breach of Article 3 at Colnbrook

184. D's lack of legal capacity continued for many months, and throughout the period that D was detained in Colnbrook (see in particular Tracy 3), and the medical regime at Colnbrook appears to have been brusque and insensitive to the particular circumstances and mental state of D, and stubbornly resistant to external criticism. It is highly surprising that the Treasury Solicitor's attempts to obtain its own psychiatric reports on D were thwarted. This delayed D's recovery and stymied the opportunity to transfer D to a psychiatric hospital, which was recommended in Tracy 3. Dr Larkin, reporting only in May 2012, did not distinguish between the treatment in the different periods. Miss Hirst drew my attention to the Defendant's response to D's dirty protests, including his segregation in January 2012, which took no account of what was said in Tracy 2 and 3 about the link between the Claimant's hallucinations and dirty protests, behaviour which was linked to and symptomatic of his mental illness.

185. On the other hand, as recognized in Tracy 3, at Colnbrook D did receive "psychiatric reviews approximately fortnightly from the IRC's Consultant Psychiatrist". Deficient as were that individual's written reviews, and what Tracy 3 described as the "mental heath input, for example from psychiatric nurses", I am satisfied that the treatment received at Colnbrook not 'inhuman' and did not any longer fall below the minimum threshold required by Article 3.

Conclusion on Article 3

186. It follows that D's rights under Article 3 were breached during the period from 23 February to 28 November 2011, but not in respect of the period of detention thereafter.

ALLEGED BREACH OF ARTICLE 8

187. Article 8 of the European Convention on Human Rights provides, so far as is relevant:

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

188. It can, paradoxically, be both easier and also more difficult to bring a successful claim under Article 8 in a case such as this than a claim under Article 3. This is because the threshold for interference with 'private ... life' under Article 8.1 is not as high as the "minimum level of severity" equivalent under Article 3, but the availability to public authorities of the justification provided for by Article 8.2 (which has no application in respect of Article 3) may make it difficult to demonstrate breach of Article 8, particularly in the case of detainees.

189. In Bensaid v United Kingdom (2001) 33 EHRR 205, the European Court of Human Rights said:

> " 46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.
>
> 47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

190. Lord Bingham considered this passage in para 8 of his speech in R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368. Then at para 9 he said: "

> "This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that 'private life' is a broad term, and the Court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In Pretty v United Kingdom (2002) 35 EHRR 1, paragraph 61, the Court held the expression to cover 'the physical and psychological integrity of a person' and went on to observe that:
>
> > 'Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.'
>
> Elusive though the concept is, I think one must understand 'private life' in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person."

191. The last sentence is particularly pertinent on the facts of the present case.

192. In HA (Nigeria (paras 182 and 187), Singh J held that in the light of his conclusion that the Claimant's Article 3 right had been breached, there was no need to address the alternative submission that there was a breach of Article 8. In the present case, Miss Hirst specifically requested a determination from the court in respect of both Articles. Furthermore, recourse to Article 8 is not academic here, in circumstances where I have rejected the Article 3 claim in respect of the Colnbrook period of detention. Again it is necessary to distinguish between the periods before and after the end of November 2011 when D was transferred to Colnbrook.

Alleged breach of Article 8 at Brook House and Harmondsworth

193. Despite Miss Stout's contention that D's case comes nowhere near the threshold required for breach of Article 8, I consider, for the same reasons which I have already given in respect of Article 3, that D's Article 8.1 right to private life was interfered with during this period. In the terms used by Lord Bingham in Razgar, D's mental stability was not protected or preserved in Brook House or Harmondsworth, but rather was adversely affected by the conditions of his detention. I am also satisfied that the Defendant's treatment of D was not justified or proportionate by reference to Article 8.2, nor was any argument presented to me by Miss Stout to the contrary.

Alleged breach of Article 8 at Colnbrook

194. The medical regime at Colnbrook was markedly superior to that at Brook House and Harmondsworth, enabling D's mental state to improve gradually as a result primarily of more frequent anti-psychotic medication. On the other hand D continued to lack legal capacity throughout this period, whilst the medical treatment and assessment provided to him was insufficient. As concluded in Tracy 3:

> " Fortnightly psychiatric reviews, without psychiatric nursing input or suitably trained regular reviews of his mental state are insufficient to adequately or appropriately help him."

195. When Dr Larkin reported that:

> "...[T]he absence of adequate treatment had led to longer periods of psychosis, more distress, poorer responses to later treatments and a poorer future prognosis ... a longstanding effect on [D]'s future health... "

196. He appears to have been giving his opinion not only on the pre-Colnbrook periods, but also on the time D spent under detention at Colnbrook.

197. Miss Stout recognized the difficulties faced by the Defendant in the absence of any detailed psychiatric reports, other than those from Dr Tracy and Dr Larkin (both of which supported the Claimant's case). Belatedly, and towards the end of the hearing, she sought an adjournment so that the Defendant could obtain her own psychiatric report on D and on the adequacy of the treatment he had received whilst under detention. I refused this application as coming far too late, in circumstances where the Claimant had acted with commendable timeliness in disclosing to the Treasury Solicitor Dr Tracy's reports, and that of Dr Larkin, and when the need for medical reports had been highlighted by Sir Richard Buxton as long ago as 26 March 2012. The court therefore is faced by unchallenged evidence, with no evidential basis for rejecting it. Accordingly I find that D's treatment at Colnbrook also interfered with his private life under Article 8.1.

198. Again it was not argued before me that Article 8.2 trumped the consequence of any finding I might make under Article 8.1.

Conclusion on Article 8

199. The Defendant's right to private life under Article 8 was breached throughout the period of his detention 2011 to 2012.

THE CLAIM UNDER HARDIAL SINGH PRINCIPLES

200. I turn finally to what was argued before me as the Claimant's first ground, namely that D's detention was unlawful throughout the period under the principles first established in R v Governor of Durham Prison ex p. Hardial Singh [1984] 1 WLR 704, because:

1. His removal was not imminent or likely to take place within a reasonable time.
2. The Defendant failed to act with reasonable diligence and expedition to effect his

removal

3. The Defendant failed to consider alternatives to detention.

4. Detention, and the conditions in which he was detained, caused a severe deterioration in his mental health.

201. In Lumba (para 22) Lord Dyson SCJ said:

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

202. The fact that a detained person has refused voluntary repatriation, even where the detainee is not pursuing an appeal against removal, is not a 'trump card' in the Defendant's hand. As explained in R (Sino) v Secretary of State for the Home Department [2011] EWHC 2249 (Admin) (para 56):

> " The Secretary of State may not detain a person pending deportation for more than a reasonable period even in the case of an individual who is deliberately seeking to sabotage any efforts to deport him."

203. In Lumba the Supreme Court re-iterated that the effect of the detention on the detainee was a relevant consideration in considering item (ii), the reasonableness of the period of detention (for example, per Lord Dyson SCJ para 104). Baroness Hale SCJ (para 218) expressly addressed the relevance of the detainee's mental state:

> " When considering what was a reasonable period to detain Mr Lumba in accordance with the Hardial Singh principles, however, I would stress that his psychiatric condition must be among the factors to be taken into account."

204. Given the decision I have reached previously in relation to wrongful detention in breach of policy under Chapter 55.10, and also under section 149 of the Equality Act, it may be that what follows is otiose (see the approach taken in HA (Nigeria) para 158). But if I am wrong that detention was unlawful from the outset by reason of public law errors, the position under *Hardial Singh* principles would need to be examined. An extensive review of the relevant case law is contained in the very recent judgment of Lang J in R (S) v Secretary of State for the Home Department [2012] EWHC 1939 (QB) paras 42-49 and no useful purpose would be served by repeating it here. I shall consider the *Hardial Singh* claim separately in respect to the three places and periods of detention, applying to each period the four principles identified by Lord Dyson in Lumba with two small changes. First, because this is a removal (rather than a deportation) case, I shall substitute references to removal rather than deportation. Second, I shall place his item (iv) before his items (ii)

and (iii), since item (iv) plays a part in the overall consideration under item (ii).

(i) Detention at Brook House to 23 February 2011 to 4 August 2011

(i) In this period did the Secretary of State intend to remove D and only use the power to detain for that purpose?

205. Although it might have been argued that the power to detain was invoked against D in February 2011 not for the purpose of removing him, but because he was causing UKBA problems as a result of his refusal to comply with reporting restrictions, exemplified by his smashing of the window at Dallas Court on 21 February 2011, in her skeleton argument Miss Hirst expressly accepted that there was lawful authority to detain him on 23 February 2011. In her oral submissions, however, she contended that D ought never to have been detained, because from the outset there was not a realistic prospect of removal. This was not, however, her principal complaint under the *Hardial Singh* principles, which was about the failure to release him, together with the failure to consider alternatives to detention, rather than about the initial detention.

206. The statement on the Form IS.91R shows that the person authorising detention considered that D's removal from the United Kingdom was imminent, and that the purpose of detention was to ensure removal in circumstances where D's conduct had made continued reliance on reporting restrictions impossible.

207. D's CRS for 10 December 2010 recognised that removal would require a charter plane, and that a time might come when it had to be conceded that removal could not be achieved. But for the time being options to remove were to be explored. This is what happened in the first few months of 2011. I see no error of law in the decision to detain D, apart from the illegalities I have already addressed in relation to Chapter 55.10 and the section 149 duty under the Equality Act. The decision to detain was made for the proper statutory purpose of removing him, and because the view was taken that detention would facilitate that aim. At that stage I do not agree that removal was not reasonably in prospect.

(ii) Whilst D was at Brook House, did the Secretary of State act with reasonable diligence and expedition to effect removal?

208. The answer must be "no". Virtually nothing was done to effect D's removal during this period. UKBA failed to arrange that the 11 March charter-flight would actually land in Congo-Brazzaville. As became apparent at a late stage during the hearing, the real reason why D was not removed in 2011 was because the immigration authorities in Kinshasa would not allow D's return until his nationality had been verified by their embassy officials, something which was complicated by the fact that there was no Congo-Brazzaville embassy in London and by the request of the Kinshasha authorities that verification be done through their embassy in Paris. This only became known to UKBA on 8 March 2011 and would inevitably take time to overcome. It is now apparent that nothing whatever was done until December 2011 to follow this up by an approach the Congo-Brazzaville embassy in Paris. The 8 March information seems not to have been communicated to those immediately concerned with D's detention. On the other hand, even

had UKBA acted with reasonable diligence and expedition to obtain verification of D's nationality in this way, it is most unlikely (given the evidence of what happened in 2012) that this would have secured D's removal during the time he was detained at Brook House. Thus the breach of this Hardial Singh principle did not cause anything other than nominal damage to D.

(iii) Was D only detained at Brook House for a period that was reasonable in all the circumstances?

209. It is clear from the authorities (and not in dispute) that it is for the court itself to determine whether a reasonable period has been exceeded. The length of D's previous period in detention (from 2005 to 2008) should have been, and was not, taken into account, something relevant to this aspect of the *Hardial Singh* principles, because it meant that D's detention from February 2011 would become unreasonable more quickly than would otherwise have been the case. I also agree with Miss Hirst that alternatives to detention should have been, but do not appear to have been, considered, in particular electronic monitoring. (In this context it is relevant that D was released on bail without even electronic monitoring in April 2012 and has complied with reporting restrictions since his release). On the other hand, the fact that D was not willing to return voluntarily and had physically obstructed previous attempts to return him inevitably meant that the arrangements for his return were likely to take longer to put in place, requiring an escorted charter plane. The fact that Congo-Brazzaville was a relatively remote place further complicated removal. I do not accept Miss Hirst's contention that it was or should have been evident from the outset of his detention that removal was not reasonably or realistically in prospect.

210. Nevertheless I take into account (a) the lack of diligence in following up the information received on 8 March 2011; (b) my finding under ground 3) that detention in this period had an adverse effect on D's largely untreated mental state to such an extent as to constitute a breach of Article 3; (c) my finding under ground 4) that there was a breach of section 149 of the Equality Act; and (d) my finding under ground 2) that D's detention at Brook House was in breach of the policy in Chapter 55.10. (In R (BE) v Secretary of State for the Home Department [2011] EWHC (Admin) para 170 the court held that the application of published policy in relation to the detention of disabled individuals was a relevant factor to be taken into account when considering the legality of detention under the *Hardial Singh* principles, and the same must apply in the case of the mentally ill).

211. Even were I to leave aside for *Hardial Singh* purposes my conclusion that, on other grounds, D should never have been detained at Brook House, I still consider that, given his mental state, D should not have been detained in any IRC for more than a maximum of four months, ending therefore on 23 June 2011. As Laws J said in In re Mahmod (Wasfi Suleman) [1995] Imm AR 311, 314 (in a passage set out by Lord Brown in R (Khadir) v Secretary of State for the Home Department [2006] 1 AC 207 para 22):

> " While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed

and its operation and effect will be supervised by the court according to high standards. In this case I regard it as entirely unacceptable that this man should have been detained for the length of time he had while nothing but fruitless negotiations have been carried on."

212. My finding is the same in the present case where the overriding factor was the untreated and deteriorating mental condition of D. Miss Stout, who rightly described the threshold for the prospect of removal as fairly low, did not advance any arguments that I found at all convincing in relation to the mental state of the Claimant.

(iv) Before the expiry of the reasonable period, did it become apparent that the Secretary of State would not be able to effect removal within a reasonable period, so that he should not have sought to exercise the power of detention?

213. As already indicated the information received on 8 March 2011 inevitably prolonged the time until D could be removed, but it was not information which should have led the Defendant to conclude that removal could or would not be achieved within a reasonable period. Therefore circumstances in which D would be under a duty to reconsider the initial decision to detain D, because of absence of prospect of removal, did not arise whilst D was at Brook House.

(ii) Detention at Harmondsworth 4 August 2011 to 28 November 2011
(i) In this period, did the Secretary of State intend to remove him and only use the power to detain for that purpose?

214. I have seen nothing to suggest otherwise. There were various references in the documentation to intended removal, and at the hearing on 27 September 2011 Blake J was expressly told about two possible charter flights on which D might be placed. Although this information was in fact misleading, because there had still been no verification of D's nationality, I am satisfied that there was no deliberate attempt to mislead the court. On 22 October 2011, D's monthly Detention Review shows that removal was still intended, and the same is true of the monthly review on 22 November. The power to detain was being used for that purpose.

(ii) Did the Secretary of State act with reasonable diligence and expedition to effect removal?

215. As with most of the Brook House period, the answer must be "no". As the recent UKBA witness statement states, no attempt to follow up verification of D's nationality took place until 16 December 2011, some nine months after the Congo-Brazzaville immigration authorities had set out their terms for D's return. Part of the explanation from July 2011 onwards may lie in D's judicial review proceedings and the criminal charge he faced, which had postponed the imminence of removal, but this is a partial and inadequate explanation.

216. Even had verification of nationality been achieved during the summer of 2011 (which, as I

have already indicated, is unlikely given what happened in 2012), D would not have been removed because of his judicial review application and the criminal proceedings.

(iii) Was D only detained for a period that was reasonable in all the circumstances?

217. At this time UKBA felt constrained not to remove D pending the outcome of his judicial review, though there was a window of opportunity to remove him between 28 September and 15 November; and also pending the resolution of the criminal charges D faced (see the monthly Detention Review of 22 October 2011). In fact removal could not have taken place in any event, because of the outstanding need to verify his nationality, so that these matters did not in fact delay his removal nor extend the period of his detention.

218. A further reason for maintaining detention, stated in D's monthly review of 22 November 2011, was a fear that D would immediately abscond if he were released, and then not be able to attend court to face the outstanding criminal charge (nor presumably be available for removal). In Lumba (paras 104-105) "the risk that if he is released from detention he will abscond" was held to be a relevant consideration in determining how long was a reasonable period of detention. I have seen no evidence to suggest that there was in fact any real possibility that D would abscond if released.

219. It was during this period that D's mental state was fast deteriorating, which, as already indicated, is certainly a factor to put into the balance when considering whether the period of detention was excessive, even though at this stage Dr Tracy had not yet concluded that D should be transferred to hospital under section 48 of the Mental Health Act. Balancing all these matters, the reasoning which led to my conclusion that the Brook House period of detention was unreasonably long apply with added emphasis to this longer period.

(iv) Before the expiry of the reasonable period, did it become apparent that the Secretary of State would not be able to effect removal within a reasonable period, so that he should not have sought to exercise the power of detention?

220 As I have already remarked, there seems to have been an internal failure of communications, so that those responsible for D's detention did not for some time appreciate that progress with removal hinged entirely upon obtaining from the Congo-Brazzaville Embassy in Paris verification of D's nationality. In some parts of UKBA the penny seems to have dropped in October 2011, when it was appreciated that not only D, but also four others whom it was proposed to remove, could not be returned to Congo-Brazzaville because of problems with their documentation, hence the decision that the flights booked for 26 October and 4 November 2011 should not go beyond Nigeria and Ghana respectively. But there is nothing to suggest that this percolated through to those responsible for D's detention until December, after D had been moved to Colnbrook.

221. Even if there had been a better appreciation of the need to obtain verification of D's nationality, I do not consider that it would or should have been apparent to the Defendant by the end of November that detention should be abandoned because of problems with removal.

(iii) Detention at Colnbrook 29 November 2011 to 25 April 2012

(i) In this period, did Secretary of State intend to remove D and only use the power to detain for that purpose?

222. D's monthly reviews continued to refer to removal, with that of 22 March 2012 referring to awaiting confirmation of the charter flight to Brazzaville, and that of 23 April referring to planning removal via the next available charter. Therefore I am satisfied that the Defendant did intend removal throughout this period and the power was being used for that purpose.

(ii) Whilst D was detained in Colnbrook, did the Secretary of State act with reasonable diligence and expedition to effect removal?

223. In this period the British Embassy in Paris at last sent a Note Verbale on 16 December 2011 to the Congo-Brazzaville Embassy, following this up without results on 2 March, 19 April and 23 April 2012. The delay of almost three months in the early part of 2012 is unexplained and, as I find, dilatory. On the other hand D would not have been removed in any event, because of (a) his judicial review application (for which permission was granted on 22 February and 26 March 2012) - as Miss Stout explained, the view was taken that it would be wrong to remove D, even if that were practicable, when there was a need for him to be assessed by psychiatrists in connection with these proceedings; and (b) the criminal proceedings, which were not dropped until 23 April 2012.

(iii) Was D only detained at Colnbrook for a period that was reasonable in all the circumstances?

224. The factors identified by Lord Dyson SCJ in Lumba (paras 104-5) in relation to the length of a reasonable period included: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a [removal]; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.

225. Taking these in turn (and once again leaving aside the conclusions I have already expressed), I find as follows:

(a) By the end of November 2011 D had already been detained for over nine months; and by the end of January 2011 for over eleven months.
(b) The need to sort out D's documentation to the satisfaction of the Congo-Brazzaville immigration authorities remained. At the bail hearing on 5 December 2011 the Defendant was put on warning by the Immigration Judge that "the burden is on the Respondent to arrange the [Emergency Travel Document] and charter flight imminently or D will have to be released..." This seems to have triggered the sending of the Note Verbale to the Congo-Brazzaville Embassy on 16 December 2011, but, as mentioned under (ii) above, we

now know from the recent UKBA witness statement that there was no follow up until 2 March 2012.
(c) In January 2012 D was repeatedly refusing food and being dealt with under rules 40 and 42 for dirty protests.
(d) His medical condition had deteriorated to the extent that he no longer had legal capacity, and in the opinion of Dr Tracy he was not obtaining suitable psychiatric care. By 21 February 2012, Tracy 3 was proposing that D be transferred to hospital under the Mental Health Act "for his own health, safety and the protection of others". I take into account Miss Stout's argument that I should respect the view of the doctor responsible for D's care, Dr Allen, that D's mental health was being appropriately managed, but I find this view at odds with the other medical evidence.
(e) Concern about the risk of D absconding if released seems to have diminished, hence the removal of the reference to this in the monthly review of 22 December 2011 and thereafter.
(f) There was no suggestion that he would commit criminal offences if released, though the pattern of aggressive behaviour persisted.
I have already found that the earlier periods of detention were unreasonably long. The same applies to the later period. The length of the period was particularly unreasonable given D's worsening psychiatric state and the inadequacies of his medical treatment.

(iv) Before the expiry of the reasonable period, did it become apparent that the Secretary of State would not be able to effect removal within a reasonable period, so that he should not have sought to exercise the power of detention?

226. If I am wrong in the conclusion I have reached that from the outset detention was not reasonable, and also that the detention was unreasonably long by the end of June 2011 in any event, I would have concluded that by the end of January 2012, when no response had been received to the Note Verbale, it was obvious that removal could not be effected within a reasonable period. What had been contemplated and rejected on 10 December 2010 (namely conceding that removal would not take place within a reasonable period) should have been conceded by the end of January 2012, leading to D's release from detention some three months earlier than an immigration judge ordered his release on bail on 25th April 2012.

Conclusion on Hardial Singh ground

227. D is entitled to damages for unlawful detention from 23 June 2011 to 25 April 2012.

OVERALL RESULT

228. D is entitled to damages for unlawful detention:
(i) from 23 February 2011 to 25 April 2012 because of the Defendant's failure to take into account the policy in Chapter 55.10;
(ii) in the same period because of the Defendant's failure to pay due regard to section 149 of the Equality Act; but
(iii) in respect of both (i) and (ii), such damages are limited to nominal ones in the period 23 February to 23 June 2011 because, had regard been paid to the relevant matters,

he would still have been detained during that period.

229. If I am wrong that the detention was unlawful from the outset, in the alternative D is entitled to damages from 23 June 2011 to 25 April 2012 because of the Defendant's breach of the *Hardial Singh* principles.

230. D's rights under Article 8 were breached throughout the period of his detention from 23 February 2011 to 25 April 2012, but his rights under Article 3 were breached only in the period 23 February 2011 to 28 November 2011.

231. My provisional view is that it is unnecessary for me to make specific declarations and that this judgment speaks for itself.

232. A separate hearing will be needed to assess damages/compensation (where the heads substantially overlap) unless these can be agreed. Directions will be needed in relation to a hearing on quantum.

MISS HURST: My Lord, I am grateful. If I could ask first of all for the claimant's costs and for detailed assessment of public funded costs in the usual terms.

DEPUTY JUDGE: Yes, I will hear whether there is anything Miss Stout wants to say.

MISS HURST: In relation to any hearing on quantum my understanding is that usually the parties are given a period to try and reach agreement and then to come back to the court should they not be able to agree and so my suggestion, my Lord, would be the parties are given 28 days to try and agree.

DEPUTY JUDGE: I think 28 days is a bit short. We are, after all, all in vacation and my feeling is that there probably ought to be 56 days for the parties to attempt to agree costs, failing which presumably the order ought to be for you to file particulars of your claim for damages and then I should have thought probably 21 days for the defendant to file any document they wish to file in contradiction. If there is a need for witness statements, in each case the statement should be accompanied by any evidence in support of it.

MISS HURST: Indeed my Lord.

MISS STOUT: My Lord, obviously there is nothing I can say about the order for costs and detailed assessment of the claimant's costs. There was just one matter that I feel I should raise in that I was somewhat taken by surprise by one element of your judgment which was in relation to the public law challenges, breach of policy and section 149, my understanding was that it was agreed that the question of whether or not damages should be nominal or substantial was going to be a matter for the damages hearing, so I had not addressed you on those points in my submissions at all and nor, as I recall it, did Miss Hirst. It may well be that we will wish to make no application about it, so I wonder if we might just have seven days to notify the court one way or the other about that my Lord.

DEPUTY JUDGE: I am sorry I do not remember any particular submission being made on that matter.

MISS STOUT: In terms of timing--

DEPUTY JUDGE: I am bound to say I think it is more satisfactory for it to be dealt with on the primary hearing because otherwise there is a whole mass of evidence which has to be gone over again on the quantum hearing, so I think it is better for it to have been done at the outset. Anyhow, as I say, I had not understood that submission being made to me but I am content that I will leave it for seven days for any applications to be made.

MISS STOUT: Thank you, my Lord. Subject to that point, in terms of timing for the listing damages hearing, you suggested a delay of 56 days. I was asked to ask for three months, I think that was probably much the same thing, is it not? I am trying to do the math.

DEPUTY JUDGE: Twenty-eight days is one month and 56 is two.

MISS STOUT: In that case we would like an extra month.

DEPUTY JUDGE: I think that 56 days should be plenty of time for you to -- of course what you are going to say is that it rather depends on how prompt Miss Hirst's clients are in attempting to discuss the matter with you because in effect until they put in some sort of document setting out, there is really not much basis for discussion, is there?

MISS STOUT: Yes, and certainly we would need that document and then we do need a longer period of time than might normally be the case because the reality of it, as you will appreciate, is that it does take a long time to take instructions.

DEPUTY JUDGE: Help me on this. Would it be more satisfactory to have directions straight away that within a certain period, whatever it is, let us say 28 days or something, that the claimant should file their document. Until they have filed their document there cannot really be any useful negotiations, can there? You will then try and agree something. But if we start with a prolonged period while the parties try and agree damages and only later require the claimant to actually put down on a bit of paper what it is they are seeking, nothing very useful is likely to come out of the earlier period, is it?

MISS STOUT: I think that is right, my Lord. It would certainly be useful to have the claimant's document as soon as possible and then for there to be a reasonably lengthy period for instructions and negotiations to take place.

DEPUTY JUDGE: Yes. Anything else you want to raise on those matters?

MISS STOUT: No. I am just being asked about the question of an application for permission to appeal. I wonder if we might have seven days to consider that as well, my Lord?

DEPUTY JUDGE: I am just wondering what is going to happen if you -- I am just thinking of

the ramifications for that because I then have to hear any response, but what you are saying is you do not want to make the application now, you want time to consider that in the light of the judgment?

MISS STOUT: Yes.

DEPUTY JUDGE: Very well. Which then means that I have to make an order, have I not, deferring the time for making applications because otherwise there is quite a short period. You have 21 days normally. If you have clarified in that you will still have lots of time for the 21 days.

MISS STOUT: One does quite often have seven days when judgment has been handed down orally. The time for making the appeal to the Court of Appeal would run from the date on which you then give a decision on the question of permission to appeal I think.

DEPUTY JUDGE: That is the matter on which there is, I know there is some doubt but I will clarify that in any order I make. Miss Hirst, do you have any further observations you want to make on the suggestion that you should be required to serve some document?

MISS HURST: My Lord, simply to say that normally the matter is dealt with in a relatively informal fashion. I can assure the court those instructing me will act very promptly to begin negotiations. The matter is slightly complicated for me in that the instructing solicitor with conduct of this case is currently in Colombia and will not be easy to reach, so I certainly have no objection to seven days for the Secretary of State's application, if there is one. The formal order I was going to suggest my Lord would be something like this matter should be stayed for a period of whatever, in order to allow the parties to negotiate a settlement and thereafter any party has liberty to apply to restore the matter before either your Lordship, if available, and if not before a Master.

DEPUTY JUDGE: I think it goes straight to a Master because the chances of my being able is pretty limited. I shall not be the person who will be hearing the claim for damages, so I do not think there is any point in retaining my involvement. You would simply say a stay for 56 days for the parties to seek agreement on damages, failing which either party to be at liberty to make an application to the Master for directions.

MISS STOUT: Yes and if in that time it becomes apparent that we cannot reach agreement, then we would then apply to the court.

DEPUTY JUDGE: Yes, very well. Do either of you have any view on my saying that we do not need specific declarations to be recited?

MISS STOUT: I am content.

DEPUTY JUDGE: The order will recite the matters which are in my conclusions in any event.

MISS HURST: My Lord, yes and in view of that there is no need for declaration.

DEPUTY JUDGE: Right.

MISS STOUT: My Lord did mention about the possibility of there being certain corrections. There are tiny ones but it might be better done by email.

DEPUTY JUDGE: I will gratefully receive -- you have my email address. The shorthand writer will work enormously speedily to produce it, but it is a very long judgment and therefore I may well not get it back from her for two weeks. In other words, provided within seven days I have received from you any corrections and so forth, I will have plenty of time to incorporate them when I get the transcript back.

Then what I formally order is that the defendant is to pay the claimant's costs to be assessed if not agreed. Secondly, there will be a detailed assessment of the claimant's legally funded costs. Thirdly, the defendant will have seven days to consider whether she wishes to apply for permission to appeal and, if so, to notify both the court and the claimant's solicitors. Fourthly, any steps in relation to the assessment of damages will be stayed for 56 days for the parties to seek to agree damages. If at the end of the 56 day period no agreement has been reached the parties shall apply to the Master of the Administrative Court for directions in relation to a hearing of the damages matter. I should also add that the defendant is to have seven days to consider whether it wishes to make any representations to this court in relation to its determination in relation to notional damages. Does that deal with everything?

MISS STOUT: My Lord, yes.

DEPUTY JUDGE: I am very grateful to the two of you for your helpful submissions in what was quite a complicated case in its way. I am very grateful for the way in which particularly your solicitors, Miss Hirst, had put together the various documents and so forth. That was extremely helpful. Miss Stout your schedule was an absolute masterpiece and it was good I had the technology to be able to do a similar schedule. I am very grateful to the court staff and shorthand writer who have been kept rather late on a rather warm summer afternoon for my very long judgment.

It may be sensible that the actual form of the order, i think it would be helpful Miss Hirst if you were to draw up an order, agree it with Miss Stout and then submit it to the associate. Make sure you do include matters which I am not specifically making a declaration in respect of but so that they are listed in the earlier part. I leave it to you to consider whether you want to be listing also the matters on which I made rulings in the course of the trial. I do not know whether you regard that as necessary or not, but you will recall that I did specifically refuse an adjournment and I did specifically refuse an application for discovery and I do not know whether those are recorded at present in any order of the court. If there is any dispute about the order it will be referred back to me.