Neutral Citation Number: [2019] EWHC 1969 (Admin)

Case No: CO/820/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 July 2019

Before :

Dan Squires QC sitting as a Deputy High Court Judge

- -

Between :

The Queen on the application of AB	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**
-and -	
National Probation Service	**Interested Party**

- -

- -

Ronan Toal (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Jennifer Gray (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 18 June 2019

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Approved Judgment

Dan Squires QC sitting as a Deputy High Court Judge:

Introduction

1. The Claimant is a foreign national who has been in immigration detention since 4 February 2018. The Defendant is the Secretary of State for the Home Department ("the Secretary of State").

2. This claim for judicial review concerns the legality of the Claimant's detention for the period from 27 March 2019 and currently ongoing. On 1 May 2019 Laing J granted permission to the Claimant to challenge: (i) the lawfulness of his detention from 27 March 2019 and (ii) the lawfulness of the decision to maintain the Claimant's detention after a place in Approved Premises ("AP") became available for him on 30 April 2019. As to (i), the Claimant contends that, in breach of Home Office Guidance, insufficient weight was given to recommendations of the Secretary of State's Case Progression Panel that he be released and/or insufficient reasons were given for disagreeing with the Panel's recommendations, and that had the recommendations been followed he would have been released on 27 March 2019. As to (ii), the Claimant contends that his detention, in any event, became unlawful on 30 April 2019 when the AP place became available as he then satisfied the conditions for immigration bail, granted by the First Tier Tribunal on 2 April 2019. The Secretary of State maintains that the Claimant's detention was at all times lawful, but that if any errors were made in the detention process they did not alter the outcome, which is that the Claimant would have been properly detained throughout the material time in any event.

3. As will become clear below, a number of matters arose shortly before and during the hearing on 18 June 2019 and new material provided to me at the hearing. I gave the parties the opportunity to make written submissions on those matters after the hearing was complete. I am grateful to the parties for those submissions and grateful to counsel for the clear and helpful way the rival cases were put orally and in writing.

Factual background

The Claimant's immigration history

4. The Claimant is a Somali national who was born on 1 March 1996.

5. On 30 March 2014 the Claimant arrived in the UK and claimed asylum at port. In his asylum interview he gave an account of having been abducted in 2013 from his home in Somalia by Al-Shabaab (the armed group that had, at various times, controlled substantial portions of Somalia). Prior to the abduction the Claimant lived with his family at a camp for Internally Displaced Persons in Elasha Biyaha (a town on the outskirts of Mogadishu). After he was abducted the Claimant claimed to have then been detained for several months and forced to work for Al-Shabaab in their camp - cooking, cleaning and doing agricultural work. He claimed that he managed to escape from the camp when there was fighting between Al-Shabaab and another armed group. About two months later, he left Somalia and travelled to the UK.

6. The thrust of the Claimant's asylum claim on arrival in the UK was that he feared a return to Somalia because he would be targeted by Al-Shabaab, in particular as he was a member of a minority clan, the Sheqel.

7. On 14 January 2015 the Claimant was refused asylum. The Secretary of State accepted that he had "incidents with Al-Shabaab" in Somalia, but concluded that he would not be at real risk of harm from them if he returned.

8. The Claimant appealed the Secretary of State's decision to the First Tier Tribunal ("the FTT"). On 19 March 2015 his appeal was dismissed. The judge found that although he had suffered serious harm from his capture and subsequent treatment by Al-Shabaab, he did not have a well-founded fear of further harm from the group. The judge found that the Claimant was not at risk of harm falling within Articles 2 or 3 of the European Convention of Human Right ("ECHR") and his Article 8 claim also failed. Permission to appeal to the Upper Tribunal was refused on 3 August 2015.

9. On 27 November 2015 the Claimant was convicted of a sexual assault by Doncaster Magistrates. On 29 January 2016 he was convicted of battery by the same Magistrates. On 25 July 2016, at Bradford Crown Court, the Claimant was convicted of wounding with intent to do grievous bodily harm, assault by beating and breach of a bail order for failing to surrender to custody at an appointed time. He was sentenced to 3 years and 8 months imprisonment. The grievous bodily harm conviction followed the Claimant stabbing his partner in the head with a steak knife. According to the judge's sentencing remarks, the Claimant initially did not call the emergency services believing it would lead to his apprehension. Subsequently the Claimant called the police claiming he had been attacked by the victim.

10. On 6 August 2016 the Secretary of State determined that the Claimant was liable for deportation and on 29 November 2016 a deportation order was made against him. On receipt of the deportation order the Claimant stated he feared returning to Somalia. That was taken to be a further asylum claim.

11. On 11 January 2017 the Claimant underwent an asylum screening interview. He again claimed that his life was in danger from Al-Shabaab. He explained that his claim was now different, as his mother had been killed by Al-Shabaab in early 2015. On 3 February 2017 the Claimant presented further submissions in support of his asylum claim in the form of a handwritten letter stating that Al-Shabaab had been looking for him and when they could not find him had killed his mother and taken his sister. He claimed it was too dangerous for him to return to Somalia given the threat from Al-Shabaab.

12. On 18 September 2017 the Secretary of State decided that the further submissions did not constitute a fresh claim within the meaning of paragraph 353 of the Immigration Rules. The Secretary of State noted the claim regarding the Claimant's mother's death but stated that he had provided no indication of how that made him more likely to face persecution or other threats if he returned to Somalia. In the Secretary of State's view it therefore did not constitute a new ground which might cause an immigration judge to arrive at a different conclusion to that already reached.

13. On 4 February 2018, at the end of his sentence, the Claimant was not released but detained under Immigration Act powers as a person against whom a deportation order had been made. It was stated in the minute of the decision to detain that the Claimant's risk of absconding was "low" but that his risk of reoffending was "high". It was said that if he was not in detention he would pose a high risk of re-offending and a high risk of harm to the public, and that this risk outweighed any presumption in favour of release.

14. On 31 July 2018 the Secretary of State made a further decision refusing to accept the Claimant had made a fresh asylum claim within the meaning of paragraph 353 of the Immigration Rules and on 21 August 2018 issued a "notice of removal window" indicating that the Claimant would not be removed for five days, but thereafter could be removed without further notice within three months of the notice.

The Claimant's further submissions and October 2018 judicial review

15. On 6 September 2018 the Claimant's solicitors sent further submissions in support of the Claimant's asylum claim. They enclosed a photocopy of a document purporting to be a "death certificate" signed by Colonel Omar Abdi Ilmi of the Somalia Police Force. The certificate stated that the Claimant's mother ("FA") had been shot in October 2015. It continued:

> "As a result, the son of [FA], [the Claimant] received death threats from individuals claiming to be Al-Shabaab. Stating the death of his mother was direct result of him leaving the country and evading Al-Shabaab recruitment. These suspected Al-Shabaab members claimed that they were also on the hunt for [the Claimant] as they cannot afford to be seen lenient towards him."

16. On 15 October 2018, the Claimant's solicitors sent a pre-action protocol letter. They enclosed a statement from the Claimant on how he had found out about his mother's death. The letter also submitted that the further evidence, taken together with that of 6 September 2018, constituted a fresh human rights and protection claim. Also on 15 October 2018 the Claimant issued judicial review proceedings challenging the decision to maintain the "notice of removal window". On the same day Upper Tribunal Judge Kopieczek ordered a stay on the Claimant's removal in the light of "what appear to be further submissions made to the respondent which have not, apparently, been dealt with".

17. On 5 November 2018, the Secretary of State filed an Acknowledgment of Service. He agreed to withdraw the decision to remove the Claimant and to consider his further submissions. A consent order was sealed to that effect on 4 December 2018. The recital stated that the claim was being withdrawn upon the Secretary of State "agreeing to reconsider the [Claimant's] further submissions dated 6 September 2018." The Secretary of State also agreed to allow the Claimant 28 days to provide further evidence and to issue a decision on the fresh claim within three months of any further evidence.

Assessment of Claimant as victims of trafficking

18. On 6 November 2018 the detention centre medical practitioner issued a report in accordance with Rule 35 of the Detention Centre Rules 2001 indicating that the Claimant "may be a victim of torture". On 19 November 2018 the Secretary of State decided that, although the Claimant was an "adult at risk level 2 on the basis of Torture Claim" and notwithstanding the Rule 35 report, his detention was to be maintained.

19. On 19 December 2018 the Claimant's solicitors wrote to the Secretary of State stating that the Claimant was a potential victim of human trafficking ("PVOT") and should be referred to the National Referral Mechanism ("NRM"). On 16 January 2019 Gemma Kingett, the assigned caseworker for the Claimant at the Home Office Criminal Casework team, completed a NRM referral and sent it to the Claimant to sign. He did so the next day.

20. On 29 January 2019 the Secretary of State concluded that there were reasonable grounds to suspect that the Claimant was the victim of trafficking. That meant he would not be removed for 45 days.

21. On 14 March 2019 the Secretary of State decided that there were conclusive grounds that the Claimant was the victim of trafficking. That did not, however, result in a grant of discretionary leave to remain. The letter concluded that there was no realistic risk of the Claimant being re-trafficked or becoming a victim of modern slavery again if he were returned to Somalia and that his Article 3 and Article 8 rights would not be breached by deportation.

Claimant's detention from 15 January to 29 April 2019

22. On 15 January 2019 the Secretary of State's Case Progression Panel ("CPP") met. It may be helpful at this stage to set out the role played by the CPP. I have been provided with a copy of the Home Office guidance on "Detention Case Progression Panels". It was published on 18 April 2019 but I am told that, for present purposes, it is not materially different to that in place in January 2019. The guidance explains at page 5 that CPPs provide "internal independent assurance" in immigration cases where detention has reached three months and are intended to be a "safeguard" providing "additional scrutiny to further minimize the likelihood of inappropriate or unduly prolonged detention". The panel consists of a "chair, CPP members and CPP experts" who review the appropriateness of continued detention on a minimum three-monthly basis (ibid). The guidance states that CPPs review each case and may recommend the granting of bail or maintenance of detention (p 17-18). The CPP's recommendations are not binding on the Secretary of State. Decisions on release are made on the Secretary of State's behalf following a Detention and Case Progression Review ("DCPR").

23. It appears from the notes of the CPP's meeting of 15 January 2019 that the CPP believed that there was, at the time, a "JR outstanding" and "Court injunction outstanding". It considered those were "factors in favour of release". In fact, by 15 January 2019 neither the Claimant's judicial review nor the injunction of 15 October 2018 were "outstanding". On 4 December 2018 the judicial review had ended on the Secretary of State agreeing to withdraw the decision to remove the Claimant and

consider his further submissions. The CPP listed factors in favour of maintaining detention which included that the Claimant had been "continuously disruptive while in detention" and noted that his "violence has not decreased in detention". This was referring to a number of incidents in detention in which the Claimant had, among other things, assaulted detainees and staff. The CPP nevertheless recommended the Claimant's release as there was "no prospect of imminent removal", in particular noting that the "outstanding" judicial review claim needed to be determined. The CPP also noted that the Claimant's risk was "high" and recommended that "appropriate measures be in place to restrict the risk factors such as reporting, curfews, approved accommodation or tagging."

24. A DCPR was held on 16 January 2019. The CPP decision of 15 January 2019 was only recorded in the Secretary of State's General Case Information Database "GCID" in relation to the Claimant on 17 January 2019. It thus appears that those who conducted the DCPR on 16 January were not aware of the CPP release recommendation and it was not referred to in the DCPR decision. Following the DCPR the authorising officer, Jane Sutton, authorised the Claimant's continued detention on behalf of the Secretary of State on the following basis:

> "[The Claimant] has been convicted of a serious offence and the risk posed to the public of absconding and of re-offending have all been considered when reviewing his on-going detention. His disruptive and violent behaviour whilst in detention all give grounds to suggest the risk of re-offending remains high.
>
> A last minute JR was submitted to halt the deportation planned for 21st October. This is currently in the process of being resolved and a PVOT [Potential Victim of Trafficking] claim has also now been submitted. I note this is also under consideration. Once these barriers have been resolved removal will be imminent.
>
> On this basis, having considered the risks, I am satisfied that detention remains proportionate and I authorise detention for 28 days."

25. As set out above, on 16 January 2019 Gemma Kingett, the Claimant's Home Office caseworker, completed a NRM referral for the Claimant. As part of that she asked the Claimant for his preferred release address in the UK. He gave his grandparents' home. Between 17 January and 24 January 2019 there was correspondence between Ms Kingett and the Offender Manager assigned to the Claimant by Her Majesty's Prison and Probation Service ("HMPPS") concerning possible release addresses. In the course of that correspondence the Offender Manager stated he would look into the UK address proposed by the Claimant on 16 January 2019, but that it was unlikely to be suitable.

26. On 28 January 2019 there is recorded in the Claimant's GCID case record the outcome of a further "panel discussion". It is stated that the "panel" were told that "as a result of the JR the [Claimant's] case was to be reconsidered". It appears that this was a reference to the compromise reached on 4 December 2018 in the judicial review

requiring consideration of the Claimant's further submissions. It was stated "action required: expedite decision." It was decided to "maintain detention pending service of decision: review if appeal lodged".

27. Ms Gray for the Secretary of State invites me to find that the "panel" referred to in the GCID case record of 28 January 2019 was the CPP, and that this was an ad hoc meeting of the CPP. She submitted that it can be inferred that at some point between its meeting on 15 January and the 28 January 2019, the CPP was told that the judicial review was not, in fact, ongoing, as had been believed on 15 January, and that the Secretary of State had agreed to consider the Claimant's further submissions. Ms Gray submits that this led to the CPP reconvening. She submits that in the light of the new information about the judicial review having ended, the CPP considered that the Claimant's removal could, in fact, be more imminent than had been thought on 15 January. That led to the CPP changing its mind on the appropriateness of release. While the documents are not entirely clear, I consider, on balance, that Ms Gray's interpretation is probably correct. As set out further below, that is relevant to Ground 1 of the Claimant's challenge.

28. Despite the CPP having changed its release recommendation, Ms Kingett continued to seek potential accommodation for the Claimant. On 30 January 2019 she inquired of the Salvation Army if they could provide accommodation. The Salvation Army refused on 31 January 2019 as they considered accommodating the Claimant would place their staff and other residents at too high a risk. On the same day Ms Kingett asked if the National Probation Service ("NPS") could provide approved accommodation for the Claimant and how long that might take to obtain.

29. On 31 January 2019 the Head of NPS, Northamptonshire wrote to Ms Kingett stating that in her "firm professional view" the risks presented by the Claimant were "extensive and imminent and that a release into the community placed the public at risk". She stated that there were currently no beds in an AP in any event, and that the Claimant would be unlikely to be offered one given the risk he posed.

30. On 13 February 2019 the Claimant's detention was considered at a DCPR. It concluded that the Claimant should remain in detention on public protection grounds while options for potential release were considered.

31. On 27 February 2019 the Claimant's Offender Manager emailed Ms Kingett indicating that "based on the current information we do not feel that the risk [the Claimant poses] can be managed within the community however if his release is directed he will have to reside in Approved Premises with a robust risk management plan tailored to meet his risks and needs". It was stated that Northampton AP "will have a bed available from 27 March [2019]" for the Claimant.

32. Having sent pre-action protocol letters challenging the Claimant's continued detention and failure to release him to suitable accommodation on 13 February 2019 and 25 February 2019, the Claimant issued the current judicial review proceedings on 1 March 2019.

33. On 18 March 2019 Murray J refused the Claimant permission to apply for judicial review on the papers. The Claimant renewed the application and sought an oral hearing.

34. On 22 March 2019 the Claimant's solicitors made further submissions in support of his challenge to his deportation. They also stated that, in addition to the Claimant being targeted by Al-Shabaab if he returned to Somalia, there was a real risk that the conditions to which he would return would breach Article 3 of the ECHR. In particular they relied on the poor conditions in which the Claimant and his family were living in a camp for internally displaced persons ("IDP") in Elasha Biyaha prior to his capture by Al-Shabaab in 2013. It was said there was a real risk that he would again find himself forced to live in such conditions if he was returned to Somalia.

35. On 27 March 2019 a call was received from NPS by a member of the Home Office staff, J Salisbury. It is not stated in the Claimant's GCID case notes why the call was made but it can be inferred that it was to discuss the place at the AP which, as had been indicated, was to become available for the Claimant on 27 March. The GCID notes record that J Salisbury "provided [the NPS officer] with an update and advised her to call back in 2 weeks as at present the [further representations] still needs to be dealt with which appears to be the only barrier to removal". It appears, therefore, that, as it was not planned to release the Claimant at that stage, NPS was not asked to keep the place at the AP for him and it appears the place was allocated to someone else.

36. Also on 27 March 2019 there was a further CPP meeting (though the notes of the meeting were not recorded in the GCID until 28 March). The CPP again recommended the Claimant's release. It stated:

> "After considering the evidence from all the information presented … the panel consider there are factors which suggest that removal within a reasonable timeframe … may not be possible.
>
> Factors in favour of maintain detention : removal can take place on an EUL [EU letter].
>
> Factors in favour of release : [the Claimant] … has further representations outstanding since September 2018. [He] is an "adult at risk" due to a Rule 35 torture allegations Positive reasonable ground decision has been made on his PVOT claim.
>
> Reason for balance : the Panel has recommended release in this case as there is no prospect of imminent removal…. The Panel has noted the ... risk [posed by the Claimant] being high and to mitigate any risk upon release the panel have recommended appropriate measures be in place to restrict the risk factors, such as reporting, curfews, approved accommodation or tagging….
>
> The case should be re-referred … if additional case progression is to be undertaken which will minimise the barriers to allow a realistic prospect of removal within a reasonable timeframe."

37. On 28 March 2019 the Claimant submitted a bail application to the FTT. It was opposed by the Secretary of State.

38. The next DCPR was on 1 April 2019. The Authorising Officer, Helen Scott, authorised the Claimant's continued detention notwithstanding the CPP recommendation of 27 March 2019. She stated:

> "[The Claimant] has continued to demonstrate violence during detention and has little incentive to comply with any restrictions given the knowledge that HO is pursuing deportation. In progressing release contingency, the proposed address has not been accepted by the probation officer and the Salvation Army have declined to provide accommodation given the risks associated with [the Claimant]. It is noted that this review is sixteen days late however this has not materially affected the decision. The CPP on the 27 March 2019 has recommended release. This is the 14th [Detention Review] and without significant progress to removal in this next period arrangements for release are to be confirmed in the next two-week period, including victim liaison/mitigation as required."

39. On 2 April 2019, and despite the Secretary of State's opposition, the Claimant was granted conditional bail by the FTT. The condition was that the Secretary of State "identify a suitable bed for the [Claimant] in Approved Premises."

40. Following the FTT's grant of bail, Ms Kingett sought to obtain a place at AP for the Claimant. She was told that was a matter for the "HMPPS to sort out." Accordingly Ms Kingett emailed the Claimant's Offender Manager on 3 and 11 April 2019. Ms Kingett sent a further email on 23 April 2019 asking for an update. There was however, no suitable place at AP available and the Claimant's Offender Manager was unable to provide a timetable for when they would become available. As set out below, a place at AP did not become available until 30 April.

Claimant's detention from 29 April 2019

41. As set out above, following the compromise of the Claimant's judicial review on 4 December 2018, the Secretary of State had undertaken to consider the Claimant's further submissions of 6 September 2018 challenging his deportation. Additional submissions had also been made on 22 March 2019. On 29 April 2019 a decision was taken by the Secretary of State to reject the further submissions. The Secretary of State refused to accept the Claimant's further claim that his deportation would breach the Refugee Convention or the ECHR. He also declined to treat the Claimant's further submissions as a fresh claim pursuant to paragraph 353 of the Immigration Rules. The Secretary of State concluded that the Claimant had not raised any "new material", and that any claim he had did not have a reasonable prospect of success. The details of the decision, and its legality, is considered further below at [116]-[120].

42. On 30 April 2019 the further submissions refusal was served on the Claimant. On the same day, though it is unclear whether it was before or after the service of the further submission refusal on the Claimant, a place at AP became available for the Claimant. Consequently the conditions for bail set by the FTT were met. The Claimant's detention was, however, maintained by the Secretary of State. The reason was that the Secretary of State considered that his decision of 29 April 2019 rejecting the further submissions was a material change of circumstances since the

FTT bail decision. He considered that entitled him to continue to detain the Claimant.

43. The reasons for maintaining the Claimant's detention on 30 April 2019 were recorded in the entry for the Claimant on the GCID as follows:

> "Having reviewed this case following AP being sourced, I have confirmed that detention would be maintained on the basis that the asylum representations have been considered and refused with no right of appeal. We are now referring the case for inclusion on the Somalian Priority list. Two prior attempts to remove were made and deferred due to representation, as such this should be escalated for urgent removal directions given the time that [the Claimant] has spent within immigration detention.
>
> I note that previous consideration of release following the reasonable grounds decision was made. Ordinarily release would be expected during the recovery and reflection period, however HMPPS noted that there were grounds of Public Order which would justify ongoing detention in-line with the policy and the AAR [Adults at Risk] policy was compliant given he was assessed at level 2 and following the conclusive grounds decision the asylum claim could be expedited with referral for removal if certified. Progression to conclude the barriers was indeed expedited resulting in him being barrier free at this time.
>
> We will be liaising very closely with our Country Specialist Team to prioritise the removal on an EU letter."

44. On 14 May 2019 there was a further DCPR. The Claimant's detention was authorised for another 28 days. The authorising officer, Jane Sutton, gave the following reasons:

> "[The Claimant] has been convicted of a number of serious and violent offences resulting in him being assessed as posing a high risk of harm to the public and a high risk of re-offending. I note the recommendation from the CPP on 27th March to consider release but note that there has been significant progress with the case since that date.
>
> Further reps have been cleared and the decision served, a date of 18th June has been set to hear the JR and [the Claimant] has been placed on the priority returns list and a date for removal post 18th June is in the process of being obtained.
>
> In light of this I consider removal can be achieved within a reasonable timescale and having balanced this against the risk to the public upon release I authorise detention for a further 28 days."

Material provided at hearing of 18 June 2019

45. At the judicial review hearing on 18 June 2019 a number of further documents were handed up. These included a report of a further DCPR on 24 May 2019. This time the authorising officer, Richard Faulkner, determined that the Claimant should be released once appropriate accommodation could be found. He stated:

> "I note that there is ongoing litigation in this case against detention and in light of the Bail grant, which was open ended we should proceed to release upon securing appropriate accommodation. It is confirmed that such accommodation will be in place from 4 June 2019 and as such we would proceed to release at that time in-line with the bail grant.
>
> Pending the accommodation there are risks [that] would not make release to no fixed abode appropriate and we will continue to expedite the remaining barriers to removal via service of the supplementary letter, if this does not attract a right of appeal then we can refer for removal on the Somalia priority list and retain with removal directions in place. [The Claimant] has continued to demonstrate aggressive behaviours within detention and must be managed with robust contact management in place."

46. In the event the Claimant was not released on 4 June 2019. Instead his case was considered again at a DCPR on 6 June 2019. This time the authorising officer, Jackie Salisbury, declined to authorise the Claimant's release. She stated:

> "On 30 April 2019 having reviewed the case following AP being sourced, the Claimant's detention was maintained, his further asylum representations having been considered and refused on 29 April 2019. Following the renewed hearing on 1 May 2019, for the avoidance of doubt [the Claimant] will now be served with further detention forms (not strictly necessary given the change of circumstances but done for the avoidance of doubt) relating to his continued detention following the grant of bail in principle being satisfied.
>
> The JR hearing is due to take place on 18 June 2019 and if the case is dismissed we will set [Removal Directions] immediately.
>
> However, in the event that the JR is allowed counsel have requested an AP address is in place so that release can be facilitated without delay.
>
> Further detention is therefore warranted given the assessment of high harm to the public given the violent nature of [the Claimant's] offences and his ongoing disruption and violent tendencies whilst detained and also the high probability of re-offending."

47. Further detention forms were served on the Claimant on 6 June 2019. The reason the forms were served, as set out further below, appears to be a concern arising from the present proceedings that, given the Claimant had satisfied the conditions for bail on 30 April 2019 when the AP became available, it might have been necessary formally to re-detain him and therefore serve fresh detention forms upon him.

48. On 10 June 2019 the Secretary of State produced a "supplementary letter to refuse a protection claim". The 10 June letter sought to supplement the letter dated 29 April 2019. It sought to deal with a number of matters that had not been dealt with, or were not dealt with in detail, by the 29 April letter and which the Claimant had criticised in the present judicial review proceedings. The Secretary of State again concluded that the further submissions that had been made by the Claimant did not indicate that his deportation would breach the Refugee Convention or the ECHR. It also concluded that the Claimant had not made a fresh claim within the meaning of paragraph 353 of the Immigration Rules. Details of the decision are set out further below at [134]-[135] and [145]-[146].

49. On 17 June 2019 the Claimant issued judicial review proceedings in the Upper Tribunal. He sought to challenge the decision of 29 April 2019 that he had not made a fresh protection and human rights claim. He contended that on 29 April (i) the Secretary of State had failed properly to consider his representations of 6 September 2018 relating to the death of his mother and (ii) the Secretary of State failed properly to consider the representations of 22 March 2019 that there was a real risk that, if returned to Somalia, he would find himself in\an IDP camp in conditions which breached ECHR Art 3. He also contended that those matters had not been properly considered in the supplementary letter of 10 June 2019. I consider further below the relationship between the present proceedings and the proceedings in the Upper Tribunal.

Material legislation and policy

Primary Legislation

50. The Claimant is a "foreign criminal" as defined by section 32(1) of the United Kingdom Borders Act 2007. By reason of s 32(4), his removal is deemed "conducive to the public good" for the purposes of section 3(5)(a) of the Immigration Act 1971. Pursuant to s 32(5) of the 2007 Act the Secretary of State must make a deportation order in respect of a "foreign criminal" unless one of the exceptions in s 33 applies. The exceptions include that removal would breach ECHR rights or the UK's obligations under the Refugee Convention.

51. Authority to detain an individual subject to a deportation order is contained in paragraph 2(3) of Schedule 3 of the Immigration Act 1971 which provides:

> "Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be

detained unless he is released on immigration bail under Schedule 10 to the Immigration Act 2016."

52. Those detained under Immigration Act 1971 powers can be granted bail. The provisions on immigration bail are contained in Schedule 10 of the Immigration Act 2016. It provides where material in paragraph 1:

> "(1) The Secretary of State may grant a person bail if—
>
> …
>
> (b) the person is being detained under paragraph 2(1), (2) or (3) of Schedule 3 to [the Immigration Act 1971] (detention pending deportation),
>
> …
>
> (3) The First-tier Tribunal may, on an application made to the Tribunal for the grant of bail to a person, grant that person bail if—
>
> …
>
> (b) the person is being detained under paragraph 2(1), (2) or (3) of Schedule 3 to [the Immigration Act 1971],
>
> …
>
> (4) In this Schedule references to the grant of immigration bail, in relation to a person, are to the grant of bail to that person under any of sub-paragraphs (1) to (3) …
>
> (5) A person may be granted and remain on immigration bail even if the person can no longer be detained, if—
>
> (a) the person is liable to detention under a provision mentioned in sub-paragraph (1), or
>
> (b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1) of the Immigration Act 1971.
>
> (6) A grant of immigration bail to a person does not prevent the person's subsequent detention under a provision mentioned in sub-paragraph (1).
>
> (7) For the purposes of this Schedule a person is on immigration bail from when a grant of immigration bail to the person commences to when it ends.
>
> (8) A grant of immigration bail to a person ends when—

> (a) in a case where sub-paragraph (5) applied to the person, that sub-paragraph no longer applies to the person,
>
> (b) the person is granted leave to enter or remain in the United Kingdom,
>
> (c) the person is detained under a provision mentioned in sub-paragraph (1), or
>
> (d) the person is removed from or otherwise leaves the United Kingdom.
>
> (9) This paragraph is subject to paragraph 3 (exercise of power to grant immigration bail)."

53. By paragraph 2(1) of Schedule 10, a grant of immigration bail must be subject to at least one of a number of listed conditions. One of the potential conditions is a condition about the person's residence: para 2(1)(c).

54. Paragraph 3 of Schedule 10 provides:

> "(1) The Secretary of State or the First-tier Tribunal must have regard to the matters listed in sub-paragraph (2) in determining—
>
> (a) whether to grant immigration bail to a person, and
>
> (b) the conditions to which a person's immigration bail is to be subject.
>
> (2) Those matters are—
>
> (a) the likelihood of the person failing to comply with a bail condition,
>
> (b) whether the person has been convicted of an offence (whether in or outside the United Kingdom or before or after the coming into force of this paragraph),
>
> (c) the likelihood of a person committing an offence while on immigration bail,
>
> (d) the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order,
>
> (e) whether the person's detention is necessary in that person's interests or for the protection of any other person, and

> (f) such other matters as the Secretary of State or the First-tier Tribunal thinks relevant.
>
> …
>
> (5) If the Secretary of State or the First-tier Tribunal decides to grant, or to refuse to grant, immigration bail to a person, the Secretary of State or the Tribunal must give the person notice of the decision.
>
> (6) Where the First-tier Tribunal is required under sub-paragraph (5) to a give a person notice of a decision, it must also give the Secretary of State notice of the decision.
>
> (7) Where the decision is to grant immigration bail, a notice under sub-paragraph (5) or (6) must state—
>
> (a) when the grant of immigration bail commences, and
>
> (b) the bail conditions.
>
> (8) The commencement of a grant of immigration bail may be specified to be conditional on arrangements specified in the notice being in place to ensure that the person is able to comply with the bail conditions."

Material Immigration Rules and policies

Immigration Rules

55. Pursuant to section 3(2) of the Immigration Act 1971, the Secretary of State is empowered to make Immigration Rules. Paragraph 353 and 353A of the Rules deal with fresh claims. They provide:

> "353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the

> Secretary of State has considered the submissions under paragraph 353 or otherwise."

Chapter 55 : immigration detention policy

56. The Secretary of State's policy on immigration detention is set out in Chapter 55 of the "Enforcement Instructions and Guidance" (EIG). Paragraph 55.1.2 provides in relation to "Criminal Casework cases":

> "Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of immigration bail is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding."

57. Paragraph 55.1.3 provides:

> "… due to the clear imperative to protect the public from harm, the risk of re-offending or absconding should be weighed against the presumption in favour of immigration bail in cases where the deportation criteria are met. In criminal casework cases concerning foreign national offenders (FNOs), if detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale.
>
> If detention is appropriate, an FNO will be detained until either deportation occurs, the FNO wins their appeal against deportation …, bail is granted by the Immigration and Asylum Chamber, or it is considered that Secretary of State immigration bail is appropriate because there are relevant factors which mean further detention would be unlawful…
>
> Substantial weight should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does re- offend, must be considered. Where the offence which has triggered deportation is more serious, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of granting immigration bail."

58. Paragraph 55.6 of Chapter 55 sets out the forms that must be completed and served when individuals are subject to immigration detention. It provides: "written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals (in this context, every 28 days)". Paragraph 55.6.2 makes provision for service of a "Form IS91" which gives "authority to detain". It is served by an Immigration Officer or person acting on behalf of the Secretary of State "on the detaining agent." It continues "This allows for the subject to be detained in the detaining agent's custody under Immigration Act powers". Paragraph 55.6.2 continues: "Form IS91 is issued once and only once for any continuous period of detention, irrespective of how many detaining agents there are during the course of a person's detention." Paragraph 55.6.3 makes provision for service of "Form IS91R" which provides "reasons for detention" and "must be served on every detained person … at the time of their initial detention." The form "must specify the power under which a person has been detained, the reasons for detention and the basis on which the decision to detain was made." Paragraph 55.6.3 continues: "In addition there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases."

Adults at risk and victims of modern slavery

59. Immigration Act 2016 section 59 requires the Secretary of State to give guidance specifying matters to be taken into account in determining whether a person who is particularly vulnerable to harm should be released or remain in detention. The Secretary of State's policy "Adults at risk in detention" provides:

> "Who is an adult at risk?
>
> 7. For the purposes of this guidance, an individual will be regarded as being an adult at risk if:
>
> • they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention
>
> • those considering or reviewing detention are aware of medical or other professional evidence, or observational evidence, which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves.
>
> 8. On the basis of the available evidence, the Home Office will reach a view on whether a particular individual should be regarded as being "at risk" in the terms of this guidance. If, on this basis, the individual is considered to be an adult at risk, the presumption will be that the individual will not be detained."

60. In respect of the detention of individuals identified as being "at risk" the Guidance says:

> "13. The presumption will be that, once an individual is regarded as being at risk in the terms of this guidance, they should not be detained. However, any risk factors identified and evidence in support will then need to be balanced against any immigration control factors in deciding whether they should be detained.
>
> 14. The immigration factors that will be taken into account are:
>
> - Length of time in detention – there must be a realistic prospect of removal within a reasonable period. What is a 'reasonable period' will vary according to the type of case but in all cases, every effort should be made to ensure that the length of time for which an individual is detained is as short as possible. In any given case it should be possible to estimate the likely duration of detention required to effect removal. This will assist in determining the risk of harm to the individual. Because of their normally inherently short turnaround time, individuals who arrive at the border with no right to enter the UK are likely to be detainable notwithstanding the other elements of this guidance;
>
> - Public protection issues – consideration will be given to whether the individual raises public protection concerns by virtue of, for example, criminal history, security risk, decision to deport for the public good;
>
> - Compliance issues – an assessment will be made of the individual's risk of abscond, based on the previous compliance record
>
> 15. An individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained. This will be a highly case specific consideration."

61. In respect of victims of trafficking the guidance says:

> "18. Any decision made on the immigration detention of an individual who has received a positive reasonable grounds decision under the National Referral Mechanism (NRM), and who has not yet received their conclusive grounds decision or otherwise left the NRM, will be made on the basis of the modern slavery policy set out in separate guidance."

62. Further policy concerning the detention of victims of modern slavery is set out in "*Victims of modern slavery - Competent Authority Guidance"* (version 5.0,

21.1.2019). It states at p. 56 in relation to "immigration detention" that "If the potential victim of modern slavery is in immigration detention they will normally need to be granted immigration bail by the Home Office unless in the particular circumstances their detention can be justified on grounds of public order."

Detention Case Progression Panels

63. The Home Office Guidance on Detention Case Progression Panels for immigration detention states at p 5:

> "Case Progression Panels (CPP) have been in operation since February 2017 providing internal independent assurance of all cases where detention has reached three months (and every three months thereafter). Each CPP consists of a chair, CPP members and CPP experts, who review the appropriateness of continued detention, adherence to the Adults at Risk in Immigration Detention policy, case progression actions and provide recommendations to the team responsible for the ownership of the cases concerned.
>
> The CPP review detention on a minimum of a three-monthly basis. However, cases can also be referred by units such as Detention Gatekeeper, Detention Operations, Detention Engagement Teams and the Adults at Risk Returns Assurance Team when it is felt that additional scrutiny might be useful outside of the three-monthly cycle. Cases from all detained commands are reviewed together with the aim of ensuring consistency of use of detention powers across different case types, increasing the speed of case progression and reducing the length of time any individual spends in detention."

64. The functions and purpose of CPPs is described as follows at p 6 of the guidance:

> "The functions of the CPP are to:
>
> - ensure a consistency of process and approach to reviewing detention and case progression across the immigration system
>
> - drive case progression and casework diligence to effect departure from the UK, whether by administrative removal or deportation
>
> - provide additional oversight for the identification and management of potentially vulnerable people in detention.
>
> In ensuring consistency of process and approach across the immigration system the CPP will:
>
> - provide a forum to review all cases where individuals have been detained for more than a prescribed period

> - standardise the review methodology: balancing application of Hardial Singh principles and where applicable, any associated risks attached to release
>
> - provide clearly evidenced and fully justified reasoning behind recommendations for continued detention or consideration of release
>
> In placing considerations about an individual detainee's vulnerability at the heart of detention management the CPP will:
>
> - provide established, robust safeguards to prevent detention continuing for longer than is absolutely necessary
>
> - afford an additional opportunity to identify and highlight potential vulnerability in line with the Adults at Risk in Immigration Detention Policy.."

65. Page 17-18 of the guidance states that the CPP will review each case and will "recommend a grant of Secretary of State bail", "recommend maintain detention but with case progression actions", or "recommend to maintain detention."

66. Page 19 of the guidance sets out the following in relation to "post-panel case work actions":

> "Following a recommendation from the Case Progression Panel (CPP), casework teams will be informed of the recommendation by the CPP Team; a note will be placed on the Central Information Database (CID) by the CPP Team. This note will include details of the CPP the case was presented to, casework information such as the Adults at Risk level, any deportation and removal information, factors in favour of maintaining detention or of granting immigration bail, the CPP recommendation and the reasoning behind the recommendation (which is based on the information presented to the CPP on that day) and any casework actions recommended by the CPP. This information will also be sent via email to the casework team that are responsible for the case, including the case owner.
>
> The casework team must give significant weight and consideration to any CPP recommendations, which must not be rejected without careful consideration. If recommendations are rejected there must be clear reasoning for this decision, which must be recorded on CID and in the next Detention and Case Progression Review (DCPR) form."

67. The guidance continues at p 19 under the heading "rejecting a recommendation":

> "When a CPP recommendation is disagreed with or rejected, this must be recorded clearly and fully reasoned. All reasoning

> for the disagreement or rejection must be entered within a note on CID and within the next DCPR. There needs to be a clear and auditable account on CID and within DCPRs setting out the reasons why the recommendation or case progression actions have not been followed (for example, there has been a change in circumstances/new information). This will not only help when the next DCPR is conducted, or when cases return to the CPP, but will also assist in the event that a claim for unlawful detention is made."

Grounds of Challenge

Ground 1 : Failure to release the Claimant on or after 27 March 2019

68. The Claimant claims that the failure to release him on or after 27 March 2019, the date upon which a place at AP had become available, was unlawful.

69. It is no criticism of the way in which the Claimant puts his case, but it is important to note the narrowness of Ground 1. His claim is that his detention breached the Secretary of State's policies in relation to the treatment of CPP recommendations. He does not suggest pursuant to Ground 1 that his detention from 27 March 2019 was unlawful on *Hardial Singh* principles (as set out by Dyson LJ in *R(I) v SSHD* [2003] INLR 196 at [46] and as approved by the Supreme Court in *R(Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245).

70. It is also not said that, where decisions were taken that the Claimant posed too high a risk of harm to the public to be safely released, those were irrational decisions. The Claimant has undoubtedly had a difficult life, and was found to have been a victim of trafficking. That means that he was an "adult at risk" for the purpose of the Secretary of State's "Adults at risk in detention" policy and subject to the presumption that he should not be detained (paragraph 13 of the policy). As the policy states, however, the presumption can be rebutted if there are "public protection issues" (and the Secretary of State's "Victims of Modern Slavery" guidance is in similar terms: see page 56). It is not suggested that the concerns about the high risk the Claimant would pose to the public if released were irrational. They were shared by the NPS, the Salvation Army, as well as, at various times, officers of the Secretary of State.

71. Despite those concerns, given the length of time he had been in immigration detention (commencing as it did on 4 February 2018), as well as his particular vulnerabilities as a victim of trafficking, on a number of occasions recommendations were made by the CPP that the Claimant be released. The claim pursuant to Ground 1 is that the Secretary of State breached his Guidance on Detention Case Progression Panels ("the CPP Guidance") in relation to those recommendations. The Guidance provides that where CPPs recommend a detainee's release those recommendations should be given "significant weight and consideration" by the Secretary of State, and where CPP recommendations are rejected "this must be recorded and fully reasoned". It is well-established that the Secretary of State, unless he has good reason to depart from them, must exercise his powers of immigration detention in accordance with his policies (see *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299). The Claimant contends that the CPP Guidance was not followed in his case

and that there were no good reasons for that failure. The Claimant's argument is, further, that had CPP recommendations not been improperly rejected, he would have been released on 27 March 2019 when a place at AP became available for him.

72. The relevant facts are these:

i) On 15 January 2019 the CPP recommended the Claimant's release with "appropriate measures … to restrict the risk factors such as reporting, curfews, approved accommodation or tagging". It appears, however, that the recommendation was made in the mistaken belief that the Claimant's judicial review, and a court injunction preventing his removal from the UK, were still outstanding. It was these factors that the CPP specifically considered favoured release as they meant "there [was] no prospect of imminent removal".

ii) At some point between 15 January and 28 January 2019 it was brought to the CPP's attention that, in fact, the judicial review was no longer outstanding and that the only bar on removal was the Secretary of State consideration of the Claimant's further representations challenging his deportation. On 28 January the CPP reconsidered its 15 January recommendation and decided to recommend the Claimant's continued detention pending consideration of his further representations.

iii) Had it been requested by the Secretary of State, a bed in AP would have been available for the Claimant on 27 March 2019. At that date, however, given the CPP's decision of 28 January, there was no extant recommendation for the Claimant's release from the CPP. The 15 January 2019 recommendation to release had been superseded by the 28 January decision. The failure to release the Claimant on 27 March, therefore, was not taken in "disagreement" with a CPP decision.

iv) On 27 March 2019 there was a further CPP meeting which recommended the Claimant's release from detention on the basis that his further representations from September 2018 had still not been considered and it therefore seemed that removal within a reasonable timeframe would not occur. The recommendation was considered at the DCPR on 1 April 2019 and a decision was taken not to follow the CPP's recommendation. The disagreement with the CPP was recorded in the notes of the DCPR decision and it was explained by the relevant officer, Ms Scott, why release was not being authorised.

v) Matters moved on after the DCPR of 1 April 2019. The FTT granted the Claimant conditional bail on 2 April, and thereafter the Secretary of State sought a place at AP to which the Claimant could be released. No place was, however, found until 30 April. By that time the Secretary of State had concluded that there had been a material change of circumstance, namely his decision of 29 April to reject the Claimant's further submissions. He therefore did not release the Claimant.

73. There was thus only one occasion on which there was a recommendation from the CPP to release the Claimant which was not followed. That was the CPP recommendation of 27 March which the DCPR declined to follow on 1 April. I do not

consider the failure to follow the recommendation constituted a breach of the CPP Guidance.

74. On 27 March 2019 the CPP had recommended release, notwithstanding the "high" risk the Claimant posed, because it considered that the removal of the Claimant within a reasonable timescale might not be possible. In its decision of 1 April 2019, the DCPR noted the CPP had recommended release. The DCPR explained why it nevertheless decided the Claimant should remain in detention. It stated that the Claimant had "continued to demonstrate violence during detention and has little incentive to comply with any restrictions given knowledge that [the Home Office] is pursuing deportation". The DCPR decided it was appropriate to wait a little longer to see whether removal became possible and stated if there was no "significant progress to removal" by the next review, "arrangements for release are to be confirmed".

75. The fact that the DCPR did not follow the CPP recommendations was not, in itself, unlawful. The DCPR was required only to give the CPP recommendation "significant weight and consideration" and not necessarily to agree with it. The CPP recommendation was specifically referred to in the DCPR decision and I have no reason to believe it was not given sufficient weight. In addition, pursuant to the CPP Guidance, if the DCPR disagrees with a CPP decision that must be "reasoned and fully recorded". I consider the DCPR complied with that requirement. While the DCPR reasons were brief and could perhaps have said more about why it disagreed with the CPP, it is apparent why it took a different view from the CPP. It reached a different conclusion on the balance between the risk the Claimant posed and the likelihood of his being removed imminently, and considered the matter should be revisited at the next DCPR rather than, as the CPP suggested, immediately seek to release the Claimant. That difference of view was set out in the DCPR notes, and I consider that to be a sufficiently reasoned decision to satisfy the CPP Guidance. Accordingly I reject Ground 1 of the Claimant's claim.

76. Furthermore, even if the decision of 1 April 2019 not to follow the CPP recommendation on release was unlawful, it made no difference to the Claimant's detention. It is clear that, even if the CPP recommendation was accepted on 1 April, the Claimant would have needed to be released to AP given the risk he posed. There was, however, no place available at AP for the Claimant as of 1 April. Following the bail decision of the FTT on 2 April 2019, the Secretary of State sought an AP placement for the Claimant so that he could be released. A placement was not, however, found until 30 April. By that time the Secretary of State had decided, following the rejection of the Claimant's further submissions on 29 April 2019, that there had been a material change of circumstances justifying not releasing the Claimant. The Claimant would, therefore, have been in exactly the same position if the DCPR on 1 April had agreed with the CPP recommendation. Even if the DCPR had agreed that because the Claimant's submissions of September 2018 had still not been considered he should be released, it would not have altered the time he spent in detention. A place at AP would still have needed to be found and the only difference would have been that the Secretary of State would have begun looking for the placement on 1 April rather than, as he did, on 2 April. That would not have had any material impact on the Claimant.

Grounds 2 & 3 : Failure to release the Claimant after he satisfied the grant of bail on 30 April 2019

77. On 2 April 2019 the FTT granted the Claimant bail on the condition that a place at AP be found for him. It is not suggested by the Claimant that there was a place available on 2 April or that in the following weeks the Secretary of State failed conscientiously to seek an AP placement for him. It is also common ground that on 30 April an AP place was found, and that the Claimant then satisfied the condition for bail set by the FTT. The Claimant's claim pursuant to Grounds 2 and 3 is that he should have been released on that date.

78. The Secretary of State did not release the Claimant. The reason he did not do so was that on 29 April 2019 he rejected the Claimant's further submissions under paragraph 353 of the Immigration Rules. The Secretary of State believed that he had thus removed the barrier to the Claimant's removal from the UK. On that basis the Secretary of State concluded that there had been a material change of circumstances since the FTT decision granting conditional bail which justified his not releasing the Claimant.

79. Ground 2 of the Claimant's challenge is that it was unlawful to detain him from 30 April. He contends that on 30 April he satisfied the FTT bail conditions, that he should have been released and that the Secretary of State was not entitled to treat the decision of 29 April 2019 as a material change of circumstances. Ground 3 is that the Secretary of State "unreasonably" treated his decision of 29 April 2019 to reject the Claimant's further submissions as removing the barriers to his removal. Grounds 2 and 3 are linked. Whether the decision not to release the Claimant on 30 April was lawful depends on whether the Secretary of State was entitled to conclude that the decision of 29 April had, indeed, removed the barriers to removal. I will therefore consider Grounds 2 and 3 of the claim together.

80. In order to determine the lawfulness of the Claimant's detention from 30 April 2019 I have divided the analysis into three questions:

    i) Is the Secretary of State entitled to detain a person notwithstanding that they have been granted bail by the FTT on the basis of a material change of circumstance?

    ii) Are there any procedural requirements, for the giving of notification and reasons which must be satisfied for the Secretary of State to be able to continue to detain someone if they meet the conditions for bail granted by the FTT?

    iii) If the answers to (i) or (ii) is yes, did the Secretary of State act lawfully in declining to release the Claimant in the present case on 30 April 2019?

(i) Substantive requirements for detention following an FTT grant of bail

81. The relevant provisions governing immigration bail are contained in Schedule 10 of the Immigration Act 2016 ("Schedule 10"). Pursuant to paragraph 1(3)(b) of Schedule 10, the FTT may grant bail to a person, such as the Claimant, detained under paragraph 2(3) of Schedule 3 of the Immigration Act 1971 ("IA 1971"). Pursuant to

paragraph 3(1) of Schedule 10, in determining whether to grant bail the FTT must have regard to matters listed in paragraph 3(2). They include the likelihood of the person failing to comply with bail conditions, the likelihood of the person committing an offence on bail, whether detention is necessary to protect the person's interest or for the protection of any other person.

82. Paragraph 1(6) of Schedule 10 provides that "a grant of immigration bail to a person does not prevent the person's subsequent detention under a provision mentioned in sub-paragraph 1." Sub-paragraph 1 includes paragraph 2(3) of Schedule 3 of the IA 1971 (see paragraph 1(1)(b) of Schedule 10). The position, therefore, is that pursuant to paragraph 1(6) of Schedule 10, where the FTT grants bail to someone subject to a deportation order such as the Claimant, the Secretary of State can subsequently re-detain them.

83. Schedule 10 came into force on 15 January 2018. Whether the Secretary of State can detain a person, notwithstanding that they have been granted bail by the FTT, was considered under the predecessor bail regime in *R (Mahmood) v Secretary of State for the Home Department* [2006] EWHC 228 (Admin) and *R (Shote) v Secretary of State for the Home Department* [2018] EWHC 87 (Admin). In *Mahmood* and *Shote*, as was the procedure under the pre-Schedule 10 bail scheme, the FTT had granted bail and ordered the claimants' subsequent appearance and surrender to an immigration officer. At a subsequent appearance the claimants were re-detained. They sought to challenge their re-detention. Under the previous regime it had been held that an FTT grant of bail comes to an end on surrender to an immigration officer (see *R (AR (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 807; [2017] 1 WLR 255 at [15]-[17] and [26]). If the immigration officer ordered bail to continue, even if he or she did so on the same terms as the FTT's original grant of bail, the bail is that of the immigration officer not the FTT. Michael Fordham QC, sitting as a Deputy Judge of the High Court, held in *Shote* at [37], that there were, nevertheless, "public law implications of an original grant of tribunal conditional bail [which] could in principle endure, notwithstanding subsequent surrenders of bail to an immigration officer". Those public law implications did not prevent the Secretary of State re-detaining a person who had previously been granted bail by the FTT. They meant, however, that it was necessary for the Secretary of State to establish a "material and genuine change of circumstances [since the FTT bail decision] justifying the use of immigration detention powers" (see *Shote* at [41] applying the principles set out by Underhill J in *Mahmood* at [12]-[14]).

84. The bail regime pursuant to Schedule 10 is different from its predecessor. Pursuant to Schedule 10 paragraph 1(6) an individual granted bail by the FTT can be re-detained by the Secretary of State at any time and irrespective of whether that occurs at an appearance before an Immigration Officer. Indeed in most cases under the new regime there will be no "appearance date" set by the FTT (see Guidance on Immigration Bail for Judges and the FTT paragraph 54). Instead pursuant to paragraph 1(8)(c) of Schedule 10, immigration bail now ends automatically, not when a person surrenders to bail, but where the person is re-detained by the Secretary of State pursuant to paragraph 1(6) of Schedule 10.

85. In my view, despite the differences in the bail regime, the key principles set out in *Mahmood* and *Shote* apply to the Schedule 10 bail regime. Detention by the Secretary of State pursuant to paragraph 1(6) of someone previously granted bail by the FTT

can therefore, in principle, be lawful. It is, however, necessary for there to be a "material and genuine change of circumstances" which provides a proper justification for departing from the FTT decision. Without a change of circumstances the detention would simply reflect the Secretary of State's disagreement with the conclusions of an independent judicial body specifically accorded power to grant bail to those who the Secretary of State has chosen not to release. That would not be a proper exercise of the power to re-detain.

86. In order to constitute a material change of circumstances, the change must significantly alter the assessment of one or more of the considerations relevant to bail, such as the risk of absconding or committing offences on bail. It is clear that a change in the imminence of an individual's removal can, in principle, constitute such a material change. Indeed that was the change of circumstance accepted by the Court to justify re-detention in both *Mahmood* (see para 9) and *Shote* (see para 39). The reason is obvious. A person who is to be imminently removed may be significantly more likely to abscond, or indeed commit offences, and significantly less likely to comply with bail conditions, than one whose removal is some way in the future. In addition the concern about a person being "detained for a further undefined period", which may have justified the grant of bail (see *Mahmood* at [9]), diminishes where removal is imminent.

87. The present case is more factually complex than *Shote* and *Mahmood*. *Shote* and *Mahmood* concerned individuals who had been released following the grant of bail by the FTT and then re-detained some time later. In the present case the Claimant was never, in fact, released. Pursuant to paragraph 3(8) of Schedule 10 "the commencement of a grant of immigration bail may be conditional on arrangements specified in the notice being in place". In the Claimant's case the "condition" was that the Secretary of State "identify a suitable bed space" for him in AP. Pursuant to paragraph 1(7) of Schedule 10, "a person is on immigration bail from when a grant of immigration bail to the person commences". On the Secretary of State's case the material change of circumstances occurred on 29 April 2019 when he rejected the Claimant's further submissions. Subject to the arguments set out in Ground 3 of the Grounds of Claim, that meant that when the further submissions decision was served on the Claimant on 30 April 2019, the barrier to his removal had been lifted. This raises the question of whether the Claimant's bail commenced on 30 April, when the bed in AP was located and he was then immediately re-detained, or whether he never commenced bail. The Secretary of State's position is that "the Claimant <u>was on immigration bail</u> from the date on which the residence condition was met until bail came to an end" (Detailed Grounds of Defence paragraph 69: emphasis here and below added). The Secretary of State thus accepts on the facts that the Claimant commenced immigration bail when the bed in AP was obtained on 30 April 2019, but his bail was immediately brought to an end by his being re-detained, also on 30 April, pursuant to paragraph 1(6) of Schedule 10.

88. The fact that the Claimant was not, in fact, released, may have procedural ramifications considered below. However it does not alter the analysis set out above on the substantive question of when the Secretary of State can decline to follow an FTT bail decision. It is open to the Secretary of State to re-detain someone who has been released following the FTT's grant of bail if there is a genuine and material change of circumstance after the FTT decision. It must be equally open the Secretary

of State not to release an individual if, before or immediately after the conditions for bail set by the FTT are met, there has been a material change of circumstances.

(ii) Procedural requirements for detention following an FTT grant of bail

89. It was suggested by Ms Gray that where a person is granted bail and then re-detained pursuant to paragraph 1(6) of Schedule 10, there is no obligation to give reasons as no such obligation appears in the Schedule. Her position was that that was so even if an individual was, in fact, released and re-detained at some later date. I do not consider that can be the correct position.

90. It is a long-established principle of the common law that "in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed": *Christie v Leachinsky* [1947] AC 573, 587 per Viscount Simon. Viscount Simon continued at p 588:

> "No one, I think, would approve a situation in which when the person arrested asked for the reason, the policeman replied "that has nothing to do with you: come along with me." Such a situation may be tolerated under other systems of law, as for instance in the time of lettres de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an over-riding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty."

91. It is true that those subject to immigration bail can be re-detained by the Secretary of State at any time pursuant to paragraph 1(6) of Schedule 10. It cannot, however, be the case that the person, who may have been on immigration bail for months, can simply be stopped and detained without any explanation. That is, in Viscount Simon's words, "quite contrary to our conceptions of individual liberty". It is also contrary to our conception of individual dignity and the proper relationship between the executive and those present in the UK, whether as citizens or not, to permit individuals to be apprehended and detained without according them any explanation for the state's actions.

92. The requirement for reasons is also reflected in the Secretary of State's published policies. Pursuant to the Secretary of State's Enforcement Instructions and Guidance, Chapter 55, two forms must be served when a person is detained. Paragraph 55.6.3 provides that an IS91R form "must be served on every detained person … at the time of their initial detention". The form must include "the reasons for [the] detention and the basis on which the decision to detain was made" (ibid). In addition another form, IS91, is provided to the person who is the custodian of the detainee giving authority to detain. Chapter 55 paragraph 55.6.2 provides that "form IS91 is issued once and only once for <u>any continuous period of detention</u>." Reading paragraphs 55.6.2 and 55.6.3 together, in my view, indicates that where a person is detained, released and then re-detained, new forms, both an IS91 and IS91R, must be served on their re-detention. A person, in those circumstances, has not been subject to a "continuous period of detention" and a new IS91 would need to be issued. There is no reason why the same

should not be true of the IS91R. The latter must be provided at the time of the "initial detention". I take that to refer, as in relation to the IS91, to the start of any continuous period of detention. That interpretation of Chapter 55 fits the purpose of the notification provisions. It is to enable a person to understand the lawful basis of and reasons for their detention and to protect against its arbitrary imposition. If a person is released and then re-detained, they will not understand why they are in detention unless they understand, not only the reasons for their original detention, but why they have been re-detained after they were released. That explanation will need to be provided in the IS91R.

93. A person, such as the Claimant, who formally commences immigration bail because they have met the conditions of bail, but is then immediately re-detained such that they are never in fact physically released, is not in precisely the same position as someone who is detained after they have been at liberty for some time. In my view someone in the Claimant's position is, nevertheless, entitled to be told the reasons for the Secretary of State's decision that, notwithstanding that they have met the conditions for bail, they are not being released. That is so for two reasons.

94. Firstly, in my view they are entitled to notice and reasons pursuant to Chapter 55. As set out above, a person who formally commences immigration bail following a FTT's grant of bail, and is then immediately re-detained has not had a "continuous period of detention" even if they were not, in fact, released. It is therefore necessary that they be served fresh IS91 and IS91R forms.

95. Secondly, and even if that is not the correct interpretation of Chapter 55, in my view a detainee is entitled at common law to be given reasons explaining why, despite meeting the conditions for bail granted by the FTT, it has been decided not to release them.

96. Lord Steyn held in *R (Anufrijeva) v Home Secretary* [2003] UKHL 36, [2004] 1 AC 604 at [26]:

> "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system."

That applies to a person in the Claimant's position who has been granted conditional bail by the FTT, but the Secretary of State decides not to release them because, it is said, there has been a material change of circumstances since the FTT decision. The detainee is entitled to challenge that decision, whether by returning to the FTT or by issuing judicial review proceedings, and is entitled to notification that it has been decided not to release them.

97. I also consider the detainee is entitled to the reasons for the decision not to release them. There is, at least as yet, no general duty at common law to give reasons for a decision (see *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] 1 WLR 3765 at [29]; *R (CPRE Kent) v Dover District Council* [2017]

UKSC 79, [2018] 1 WLR 108 at [51], and *R (DSD) v Parole Board* [2018] EWHC 694 (Admin), [2019] QB 285 at [183]). Nevertheless, as Elias LJ held in *Oakley* at [30], "the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so". It is also clear that there are categories of case in which the nature of the decision at issue requires reasons to be given on grounds of fairness (see *R v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] WLR 242, 258 and discussion in *Oakley* para 14 and *CPRE Kent* para 51). For example, where a decision is made concerning a detainee's liberty, and where, without adequate reasons a meaningful challenge to detention will not be possible, fairness requires that reasons be given (see discussion in *ex parte Institute of Dental Surgery* p 256 and see *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531, 565). That applies, in my view, to the present case. Fairness requires reasons be given where the Secretary of State has decided, because of a material change of circumstance, not to release an individual who has been granted bail by the FTT. It is a decision that directly impacts on the individual's liberty which they are entitled to challenge. It is also a decision in which the Secretary of State is declining to follow the ruling of an independent judicial tribunal. In those circumstances the individual is entitled to be told why the decision was taken so that they have "an effective means of detecting the kind of error which would entitled the court to intervene" (*ex p Doody* p 565).

(iii) Were the procedural and/or substantive requirements for re-detaining the Claimant met on the facts of this case?

98. The Claimant seeks to challenge the Secretary of State's refusal to release him on 30 April 2019 on three bases:

    i) The Claimant challenges the decision on procedural grounds and contends that the Secretary of State should have given him notice that he was exercising statutory powers to re-detain him and the reasons for the decision.

    ii) The Claimant contends that the Secretary of State was not entitled to treat the rejection of the Claimant's fresh submissions on 29 April 2019 as justifying re-detaining him because it was not a relevant material change of circumstances.

    iii) The Claimant contends that the Secretary of State was not entitled to treat the rejection of his further submissions on 29 April 2019 as justifying re-detaining him because the Secretary of State had not, in fact, properly considered the Claimant's submissions.

(a) Procedural breach

99. As set out above, I consider that the Claimant was entitled to be given reasons for the Secretary of State's decision not to release him notwithstanding that he had met the conditions for FTT bail. That was a requirement of Chapter 55 and the common law.

100. The Secretary of State did not serve fresh IS91 and IS91R forms on the Claimant until 6 June 2019. I consider that to be a breach of Chapter 55. The Claimant formally commenced bail and was re-detained on 30 April 2019. That began a new period of

detention which required new IS91 and IS91R forms. I do not, however, consider that the failure to serve the forms earlier caused any substantive unfairness or had any impact on the Claimant's detention.

101. The Claimant was, in fact, informed on 30 April 2019 that he was not being released and told of the reasons (namely that the Secretary of State considered that the decision of 29 April meant that there was no barrier to his removal and therefore he was not being released). Even if the Claimant was not told that directly, it was, at the very least, set out in the Secretary of State's skeleton argument of 30 April 2019 for the permission hearing in this case. On 1 May Laing J granted permission to challenge the lawfulness of the decision not to release the Claimant in part because it was arguable that the 29 April decision did not constitute a lawful basis for refusing to release him. The Claimant was therefore notified of the decision of 30 April 2019 not to release him and provided with the reasons for the decision. Even if IS91 and IS91R forms were not served on the Claimant, it therefore made no practical difference in this case. I do not therefore consider the failure to serve the relevant forms on 30 April rendered the Claimant's detention unlawful. Even if that is wrong, however, it is clear the Claimant would have been lawfully detained even if the forms has been served, and so would be entitled to only nominal damages (see *Lumba* [95]-[101], [169] and [253]-[256] and discussion below at [129]).

(b) Treating the 29 April 2019 decision as a material change of circumstance

102. Secondly, the Claimant argues that the Secretary of State was not entitled to treat the rejection of his fresh submissions on 29 April 2019, even if that was lawful, as justifying re-detaining him as it did not constitute a material change of circumstances.

103. I do not agree. If the decision of 29 April 2019 had been lawfully taken, which I examine below, I consider that the Secretary of State was entitled to treat it as a material change of circumstances. As set out above, in both *Mahmood* and *Shote* it was held that the fact that an individual's imminent removal had become possible constituted a material change of circumstances which justified their re-detention. I consider the same applies in the present case. The decision of 29 April 2019, if lawful, removed the remaining barrier to the Claimant's removal. A person who has no barriers to removal, and can be removed imminently, has significantly less incentive to comply with bail conditions, and is significantly more likely to abscond, than one whose challenge to deportation is still being considered. A person's application for bail is also significantly stronger where their detention would otherwise be for an undefined period than where removal can be shortly arranged. I consider that the Secretary of State was entitled to conclude that a decision to reject the Claimant's further submissions was, if lawfully made, a material change of circumstances that occurred since the FTT decision of 2 April 2019 and justified not releasing the Claimant even if he met the FTT's bail conditions.

(c) Flaws in 29 April 2019 decision

104. Thirdly, the Claimant argues that, even if in principle the Secretary of State was entitled to treat a rejection of his further submissions as a material change of circumstances, it was not "reasonable" of the Secretary of State to treat the decision of 29 April 2019 as removing barriers to his detention. That is because, the Claimant contends, the decision failed properly to address his further submissions.

105. Mr Toal submits that the Claimant does not need to show that the decision of 29 April 2019 was unlawfully made. He argues that he is challenging the decision to treat the Claimant's submissions as having been properly considered so as to remove the bar to removal contained in paragraph 353A of the Immigration Rules, but that he is not challenging the lawfulness of the decision to reject the submissions itself. Ms Gray argues that that is a distinction without a difference. I agree with her. Paragraph 353A provides that while further submissions are being considered, the Secretary of State cannot remove an individual. If the decision of 29 April 2019 to reject the Claimant's further submissions was lawfully made, that would mean the Secretary of State had properly considered the further submissions. He was then entitled to treat the decision of 29 April as removing the barrier to the Claimant's removal. On the other hand, if the Secretary of State had not lawfully considered the further submissions, he was not entitled to conclude that the barriers to the Claimant's deportation had been removed. That would mean the Claimant could not be removed and the Secretary of State was not entitled to conclude that there had been a material change of circumstances since the FTT decision on 2 April 2019. In my view, therefore, unless the Claimant can show that the decision of 29 April 2019 to reject his further submissions was unlawfully taken, whether because the further submissions had not been properly considered or otherwise, he cannot succeed in his claim that the decision not to release him on 30 April was unlawful.

Legal framework

106. Whether further submissions are rejected or treated as a fresh claim under paragraph 353 of the Immigration Rules is a question for the Secretary of State. He must ask himself whether the further submissions are significantly different to those already considered, and, if so, whether they create a realistic prospect of success in a further asylum claim (see *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 at [6]). If the answer to either question is negative the Secretary of State is entitled not to treat the submissions as a "fresh claim". The Secretary of State's decision in this regard can be impugned on ordinary public law grounds, such as a failure to consider a relevant matter or breach of legitimate expectation or failure to ask to *"*ask himself the right question and take reasonable steps to acquaint [himself] with the relevant information to enable him to answer it correctly*"* (*Secretary of State for Education and Science v. Tameside MBC* [1977] AC 1014, 1065B per Lord Diplock).

107. The decision to refuse a fresh claim can also be challenged on grounds of irrationality. The Court of Appeal explained in *WM(DRC)* at [10]-[11] how irrationality is approached in this context:

> "Whilst, ... the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
>
> First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should

> succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return:…The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

108. In relation to "anxious scrutiny" Lord Carnwath observed as follows in *MN (Somalia) v Secretary of State for the Home Department* [2014] UKSC 30, [2014] 1 WLR 2064 at [31]:

> "The higher courts have emphasised the special responsibility carried by the tribunals in the context of asylum appeals. It is customary in this context to speak of the need for "anxious scrutiny"… As a concept this is not without its difficulties, but I repeat what I said in *R(YH) v Secretary of State for the Home Department* para 24:
>
> > "the expression [anxious scrutiny] in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account. I would add, however, echoing Lord Hope in R (BA (Nigeria)) v Secretary of State for the Home Department [2010] 1 AC 444 , para 32], that there is a balance to be struck. Anxious scrutiny may work both ways. The cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies.""

109. In relation to a claim being having "no realistic prospect of success", the courts have explained that, for all practical purposes, a claim will have no realistic prospect of success before an Immigration Judge if the case is "clearly unfounded" (see *R(YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116 at [8]-[10]).

Application to present case

110. The Claimant contends that the decision of 29 April 2019 to reject his fresh submissions of 6 September 2018 and 22 March 2019 was flawed for two reasons:

i) He argues that the Secretary of State failed properly to consider the risk that if he was returned to Somalia he would be placed in humanitarian conditions similar to those he faced in the Elasha Biyaha IDP camp where he was living before he was abducted by Al-Shabaab in 2013 and which, he claims, would engage ECHR Art 3.

ii) The Claimant also argues that the Secretary of State failed to consider the evidence he provided on 6 September 2018 which, he claimed, showed that his mother was killed by Al-Shabaab as retribution for his leaving Somalia and which established that he was at risk from Al-Shabaab if he returned.

Failure to consider humanitarian conditions claim

111. Up to 22 March 2019 the Claimant's claim for asylum and protection had focussed upon his assertion that he had a well-founded fear of being targeted by Al-Shabaab if he returned to Somalia. Although he had provided some very limited evidence of the conditions in which he was living in Elasha Biyaha before he was abducted by Al-Shabaab in 2013, he had not made any claim challenging his return to Somalia based upon the humanitarian conditions he would face there. That was explained by the Claimant on the basis that he had not had legal representation at the time he made his original asylum and protection claim.

112. On 22 March 2019 the Claimant, through a witness statement and letter from his solicitors, made submissions, for the first time, that if he was returned to Somalia there was a real risk that he would find himself forced to live in an IDP camp where conditions, he claimed, would be so poor as to breach his ECHR Art 3 right to be protected from "inhuman or degrading treatment".

113. In his witness statement of 22 March 2019, the Claimant provided a description of the conditions in which, he said, he and his family had lived in an IDP camp at Elasha Biyaha. He described the nature of the makeshift home in which his family lived (a temporary shelter made out of sticks and plastic sheeting), and the lack of food, medicine and running water or sanitation in the camp. He stated that because of the lack of food and water there was significant levels of violence in the camp and that he had seen people killed in arguments over food and water.

114. Submissions were made in the accompanying letter from the Claimant's solicitors also of 22 March 2019. They explained that the IDP camp at Elasha Biyaha was on the "outskirts of Mogadishu". The letter referred to the very poor humanitarian conditions in the camp and contended that there was a real risk the Claimant would find himself forced to live in such conditions again if he was returned to Somalia. The letter referred to the decision of the Upper Tribunal in *MOJ and others (return to Mogadishu) Somalia GC* [2014] UKUT 00442 which had found that those forced to live in IDP camps in Somalia "will be experiencing adverse living conditions such as to engage the protection of Article 3 of the ECHR."

115. The 22 March 2019 letter stated that the Claimant relied on paragraph 339K of the Immigration Rules which provides that:

> "The fact that a person has already been subject to …serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of [a] …real risk of suffering serious harm, unless there are good reasons to consider that such …serious harm will not be repeated."

The Claimant asserted that there was no "good reason" to consider that he would not find himself again in conditions which engage ECHR Art 3 if returned to Somalia. It was noted in the letter that the Claimant and his family were still living in the IDP camp in Elasha Biyaha when the, so called, "economic boom" in Mogadishu had begun, but that they had not benefited from it. The letter also stated that since he left Somalia the Claimant's mother had been killed and it was said he did not know the whereabouts of his other family members.

116. The Secretary of State sought to deal with the Claimant's 22 March 2019 submissions and evidence in his decision letter of 29 April 2019. The decision letter summarised the description the Claimant gave of the conditions he and his family experienced in Elasha Biyaha, but set out none of the consequences in terms of risk of return it was claimed flowed from that. The Secretary of State stated that the Claimant had provided "no new material when assessed against the previous claims that have already been considered." It was said that the further representations dated 22 March 2019 merely "re-iterated the claims that have already been considered and refused in 2015."

117. Irrationality is a high threshold, but it is difficult to see how that can be a rational conclusion. The suggestion that, if returned, the Claimant might face living conditions which would fall below acceptable humanitarian standards simply was not considered in 2015 when the Claimant applied for asylum. Nor was it considered subsequently. The Claimant's claim had been considered purely on the basis of the risk he would face of persecution from Al-Shabaab. That is no criticism of the relevant decision-maker as the humanitarian claim had not been made. It is difficult to see, however, how it can be said that the 22 March 2019 letter was simply "re-iterating" the previous claim or that the humanitarian standards claim had already been considered where it does not appear in any of the relevant decisions of the Secretary of State or the FTT.

118. It appears from reading the 29 April 2019 decision letter as a whole that the Secretary of State had misunderstood the 22 March 2019 submissions as being concerned with the threat of persecution from Al-Shabaab. The decision letter described the Claimant as having "maintained that your fear of returning to Somalia is due to a fear of persecution because of your imputed religious opinion as a result of being in fear of Al-Shabaab". The letter set out in some detail evidence of the waning power of Al-Shabaab in Somalia (paragraphs 25-27) and stated that "it is apparent from the information … that Al-Shabaab's influence on the region is diminishing". While there was some reference to the guidance in *MOJ* on conditions in Somalia generally (see further below at [136]), that was regarded as relevant by the Secretary of State only in relation to the risk of the Claimant being targeted by Al-Shabaab if he returned (paragraphs 29-33). It was not referred to in respect of the general humanitarian

conditions the Claimant would face. The letter also described the experience of individuals who had returned to Somalia from abroad. Again, however, that was in the context of an assessment of whether the Claimant would be targeted because he was seen as "westernised" or because he was an English speaker (paragraphs 34-37). The Secretary of State set out evidence from 2013-2014 about the different elements that made up the "returning diaspora" in Mogadishu (paragraph 36-43). That made some reference to the opportunities for those returning, however the material was relied on by the Secretary of State solely to establish that there was no evidence of Al-Shabaab "targeting returnees" (paragraph 42) and to establish that there was no evidence that "westernised speech and fashion" placed "returnees at risk" (paragraph 43).

119. The fact that the Secretary of State focused exclusively upon the risks the Claimant might face from Al-Shabaab is clear from his "summary of findings of fact", which was that:

> "It is not accepted that you will be persecuted on return to Somalia because of your imputed religious beliefs namely being kidnapped by Al-Shabaab. It is also not accepted that on your return to Somalia you would be at risk because you are westernized."

The letter concluded that the Claimant had not made a fresh claim within the requirements of paragraph 353 of the Immigration Rules.

120. Nowhere in the letter of 29 April 2019 did the Secretary of State consider the risk that if the Claimant was returned to Somalia he would find himself forced to live in an IDP camp where humanitarian conditions engaged the protection of ECHR Art 3. It cannot therefore be said that the Secretary of State treated such a claim with the required anxious scrutiny or rationally concluded that it had no realistic prospect of success before an Immigration Judge. The decision of 29 April to reject the Claimant's further submissions was thus not lawfully taken.

Failure to consider the "death certificate" for the Claimant's mother

121. The Claimant further submits that the Secretary of State failed in his decision of 29 April 2019 to consider, properly or at all, the material provided on 6 September 2018 (namely the "death certificate" for the Claimant's mother suggesting that the Claimant was at risk of being targeted by Al-Shabaab if he returned to Somalia).

122. On 15 October 2018 the Claimant issued judicial review proceedings challenging the failure to consider the 6 September 2018 material, and arguing that without the material being considered the "notice of removal window" then in place was unlawful. The Secretary of State compromised the judicial review and in a consent order sealed on 4 December 2018 agreed to "reconsider the [Claimant's] further submissions dated 6 September 2018."

123. The decision letter of 29 April 2019, however, makes no mention of the Claimant's further submission of 6 September 2018 nor says anything about their contents. It does not refer to the "death certificate" for the Claimant's mother or indicate whether that material altered the assessment of the threat to the Claimant from Al-Shabaab. As set out below at [145], those matters were considered in the supplementary letter of 10

June 2019 but there is no trace of them in the letter of 29 April 2019. Ms Gray submitted that I should infer that those matters were considered by the Secretary of State. I am unable to accept that. If those matters had been considered by the Secretary of State one would have expected some reference to them in the decision letter. Instead the only further submissions referred to were those of 22 March 2019 and there is nothing to suggest that the 6 September 2018 submissions were considered.

124. In my view, the failure to consider the 6 September 2018 submissions meant that the 29 April 2019 decision was not lawfully taken. Given the compromise of the judicial review proceedings, the Claimant had a legitimate expectation that his further submissions of 6 September 2018 would be considered. The Secretary of State gave a specific undertaking to that effect in the consent order in which the judicial review was withdrawn. That legitimate expectation was clearly breached in the decision of 29 April 2019.

Consequence for detention

125. If the 29 April 2019 decision was not properly taken for either of the reasons set out above, it follows that the Secretary of State was not entitled to conclude that he had dealt with all the Claimant's further submissions, and that there was thus no barrier to the Claimant's removal from the UK. It also follows, therefore, that the Secretary of State was not entitled to conclude that there had been a material change of circumstances since the FTT decision of 2 April 2019. The position on 30 April remained, as it had been on 2 April, that the Claimant had extant further submissions that had not been properly considered. Until they were properly considered, the Claimant could not lawfully be removed. Ms Gray accepted that if the Secretary of State's conclusion on 29 April 2019 that the Claimant could now be removed was erroneous, it was an error that could be said to "bear on and be relevant to the decision to detain [him]" (see *Lumba* at [68]). I consider that concession to be correctly made. Subject to the discussion in the following section, that meant the Claimant's continued detention from 30 April 2019, once he had satisfied the bail conditions, was unlawful.

Events after 30 April 2019 and remedy

Secretary of State's decision of 10 June 2019

126. Matters have moved on since 30 April 2019. On 10 June 2019 the Secretary of State served a "supplementary letter" to that of 29 April 2019. It dealt, in some detail, with the material served on 6 September 2018 relating to the death of the Claimant's mother. It also said more about conditions in Elasha Biyaha and the Claimant's risk on return.

127. The possible purposes for, and legal consequences of, the Secretary of State serving "supplementary letters" in immigration proceedings was considered by the Court of Appeal in *Caroopen v Secretary of State for the Home Department* [2016] EWCA Civ 1307. The Court of Appeal held supplementary letters could serve three purposes. Firstly, where a decision was challenged on the basis of inadequate reasons, a supplementary letter could "cure defects in [the] original decision" by supplying "reasons, or fuller reasons, for the original decision" (paragraph 30). Secondly, "a

supplementary letter may be effective not by retrospectively curing the original decision but by prospectively filling the gap which would be held to arise if it should be held to be invalid" (paragraph 31). The supplementary letter is then relevant to remedy. It will not cure the deficiencies in the earlier unlawful decision, but it will mean, if the supplementary decision is lawfully made, that there is no purpose in remitting the matter for reconsideration as the same decision would inevitably be taken. Thirdly, a supplementary letter may be required, not because an original decision was invalid but to deal with further material that came to light after it was made (paragraph 32).

128. In the present case, I do not consider that it can be said that the 10 June 2019 decision was no more than an explanation, or fuller explanation, for the decision on 29 April 2019 (i.e. it does not fall within the first category of case listed in *Caroopen*). If, however, the 10 June decision was lawfully made, and the Claimant's further submissions were properly considered, it is relevant to remedy (i.e. it is capable of falling within the second category of *Caroopen* case).

129. Pursuant to *Lumba*, if an individual was unlawfully detained following a public law error, they are entitled to only nominal damages if they would have been detained in any event and even if the error had not occurred (see *Lumba* [95]-[101], [169], [253]-[256]). There was some suggestion in *Lumba* that it might be necessary for the Secretary of State to show that detention would "inevitably" have occurred absent the public law error. It is now clear that it is sufficient for the Secretary of State to establish, on the balance of probability, that the individual could have been lawfully detained in any event (see *OM (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at [23]). It remains the case, however, that the burden is on the Secretary of State in this regard (see *R (EO) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) at [70]-[74]).

130. The Secretary of State submits in the present case that, even if the decision of 29 April 2019 was erroneous because of the failure to consider the Claimant's further submissions of 6 September 2018 or because of the way in which the risk of the Claimant returning to an IDP camp was considered, that made no difference to his detention. That is apparent, he argues, because those matters were properly considered on 10 June 2019 and were not found to amount to a fresh claim within the meaning of paragraph 353 of the Immigration Rules. Therefore, the Secretary of State contends, even if the Claimant was detained on the basis of an unlawful decision on 29 April, he is entitled to only nominal damages. If that submission is correct, the Secretary of State also contends that I should not order the Claimant's release, as it means that, at least since 10 June 2019, when the Secretary of State submits his further submissions were properly considered, the Claimant has been lawfully detained.

131. One issue that arose before me is whether the above submission means that I can and should determine the legality of the 10 June 2019 decisions to reject the Claimant's further submissions. This was a matter addressed, in particular, in the parties' post-hearing submissions which I received, following requests for short extensions, on 3 July, 8 July and 12 July 2019. The Claimant submits that the legality of the 10 June 2019 is not a matter before me. He submits that the present challenge is only to the legality of his detention and not to the legality, or otherwise, of the decision of 10 June 2019. The latter is being challenged, he submits, in the judicial review lodged before the Upper Tribunal on 17 June 2019 and are not before the court in the present

claim. The Secretary of State disagrees and submits that the legality or otherwise of the 10 June 2019 decision is an issue I should determine.

132. One possibility I canvassed with the parties was staying the present claim pending the determination of the judicial review lodged before the Upper Tribunal. The Secretary of State opposed such a course of action. The Claimant was more receptive during the course of the hearing, but in post-hearing submissions did not suggest that was a course I should take. Instead he submitted that I should consider whether the Secretary of State "correctly concluded, as he did at various times, that the Claimant had no outstanding submissions in support of a putative fresh claim" and whether it was "reasonable" for the Secretary of State to treat the 29 April and 10 June 2019 decisions as removing the basis for the Claimant's removal. He submitted, however, that I should not consider the legality of the decision to reject the Claimant's further submissions.

133. I recognise that the present judicial review is a challenge to the legality of the Claimant's detention. In my view, however, and as set out above at [105], determining the legality of the decision of 29 April 2019 to reject the Claimant's further submissions is necessary for assessing the legality of the Claimant's detention from 30 April. Similarly, the legality of the 10 June 2019 decision is, in my view, also a matter that I need to consider. It is relevant to remedy. I agree with the Secretary of State that if the Claimant's further submissions were properly considered and lawfully rejected on the 10 June 2019, it will indicate that, even if the decision of 29 April 2019 was unlawful, he would have been detained in any event. It will demonstrate that if the fresh submissions had been properly considered on 29 April 2019, they would have been rejected. He is then entitled only to nominal damages. It will also mean that it is not unlawful to continue to detain the Claimant notwithstanding the FTT bail decision. I therefore do consider it necessary to consider the legality of the 10 June 2019 decision.

Did the 10 June 2019 decision, read with that of 29 April, properly consider the Claimant's further submissions?

Humanitarian conditions claim

134. The 10 June 2019 letter dealt with the Claimant's submissions about humanitarian conditions he might face if he was returned to Somalia as follows:

> "Although it has been submitted by your solicitors that the decision letter of 29 April 2019 does not address the risks of you finding yourself living in an IDP camp, the letter of the 29 April 2019 refers to the returning diaspora and to the opportunities in Mogadishu that returnees have been able to take advantage of. The letter of the 29 April 2019 refers to reports of the returning diaspora dating back to 2013 and 2014 and more recent reports that show this trend is continuing and that diaspora communities continue to return to Mogadishu and that through increasing investment and construction projects the city of Mogadishu and its economy have been revived and continue to develop."

The letter referred to a 2018 "Country Policy and Information Note" on Somalia which set out the role of returnees in the development of Somalia, and their role in the "business sector" and politics.

135. The letter of 10 June 2019 continued:

> "It is accepted that there have been reports that the humanitarian conditions within some of the IDP [camps] in Somalia were so poor that a person's protected rights under Article 3 of ECHR would be engaged if returning them to Somalia would result in their return or placement in some of these camps… However it is not accepted that there is a real risk that you will be in the situation of having to reside in an IDP camp, where humanitarian conditions breach Article 3 upon being returned to Somali and we refer back to the situation of the returning diaspora to Mogadishu, the city you will be removed to, and the opportunities that they are able to take advantage of in Mogadishu."

The letter referred to "inconsistencies" between accounts the Claimant had given, and stated that they undermined the credibility of the Claimant's claim that he had resided at Elasha Biyaha camp. In his decision, however, the Secretary of State assumed that the Claimant had resided at Elasha Biyaha as he claimed. The Secretary of State concluded: "even if you had been at Elasha Biyaha camp prior to coming to the UK, as claimed, there is no real risk of you having to return there. The reason for this are… reports of the improved situation in Mogadishu and opportunities for those who return to Somalia and decide to remain in Mogadishu." The letter stated, on the basis of both the 29 April and 10 June 2019 letters, that the Claimant had not made a fresh claim pursuant to paragraph 353 because the grounds he raised "had either been considered already or … when taken together with the previously considered material, would not create a realistic prospect of success before an Immigration Judge."

136. As set out above, the reason the Secretary of State gave in the 29 April 2019 letter for considering evidence of the experience of the "returning diaspora" in Mogadishu was to establish that they did not face a risk from Al-Shabaab or of being targeted because they were "westernised" or spoke English. The 10 June 2019 letter relied upon the same evidence to demonstrate the opportunities for those returning to Somalia, and as an indication the Claimant would not face a real risk of living in conditions which engaged ECHR Art 3. The evidence referred to in the 29 April letter related to the experience of Somalis who had returned to Mogadishu from different Western countries and managed to re-settle successfully. It set out 11 examples of individuals who had had set up businesses or found work on their return. The 29 April letter also referred to newspaper articles from 2013 and 2014 about the role the "returning diaspora" played in Mogadishu's "renaissance" and described the "quirky" characteristics of the returning groups ("Somali-Brits – the serial title collectors", "The Americans – the Tea Party Types" and others).

137. The difficulty with the Secretary of State's analysis is that it is clear that while some returnees to Somalia have, indeed, succeeded in re-establishing themselves in Mogadishu, and have been able to take part in and contribute to the development of the city, others face conditions that are not acceptable in humanitarian protection

terms. That is apparent from the current "country guidance" for Somalia set out by the Upper Tribunal in *MOJ and others (return to Mogadishu) Somalia GC* [2014] UKUT 00442. The following guidance from *MOJ* was cited in the Secretary of State's letter of 29 April 2019:

> "(ii) Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 …
>
> (xi) It will … only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms."

138. The Upper Tribunal had found in *MOJ* at [420] in relation to those returning to Mogadishu that "it is likely that those who … find themselves living in inadequate makeshift accommodation in an IDP camp will be experiencing adverse living conditions such as to engage the protection of Article 3 of the ECHR". It found at [421] that while "the humanitarian position in Mogadishu has continued to improve since … country guidance … was published [in 2011]" that did not apply to "those with no alternative to living in makeshift accommodation in an IDP camp." The Upper Tribunal recognised that generally conditions were improving in Somalia, but again that that did not apply to everyone. It found at [424]-[425]:

> "The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without… facing a real risk of destitution. Large numbers of Somali citizens have moved to Mogadishu where, as we have seen there is now freedom of movement and no clan based discrimination. Such a person seeking to settle in Mogadishu but who has not previously lived there would be able to do so provided he had either some form of social support network, which might be in the form of membership of a majority clan or having relatives living in the city, or having access to funds such as would be required to establish accommodation and a means of on-going support. That might be in terms of continuing remittances or securing a livelihood, based on employment or self employment.
>
> On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real

> possibility of having to live in conditions that will fall below acceptable humanitarian standards."

139. The Upper Tribunal explained in its guidance at (ix) how an assessment should be made of whether a person returning to Mogadishu after some years abroad would be likely to be able to re-establish themselves:

> "If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:
>
> - circumstances in Mogadishu before departure;
> - length of absence from Mogadishu;
> - family or clan associations to call upon in Mogadishu;
> - access to financial resources;
> - prospects of securing a livelihood, whether that be employment or self employment;
> - availability of remittances from abroad;
> - means of support during the time spent in the United Kingdom;
> - why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return"

140. The letter of 10 June 2019 concluded that the Claimant's claim that there was a real risk he would face conditions falling below ECHR Art 3 standards if returned did not have a realistic prospect of success before an Immigration Judge. I do not consider that conclusion was reached on the basis of the Secretary of State asking himself the right question.

141. The applicable country guidance suggests that an "ordinary civilian" returning to Mogadishu will "generally" not face a risk of conditions so poor as to engage ECHR Art 3. As was recognised in *MOJ*, however, where an individual is from a "minority clan" does not have "clan or family support", "remittance from abroad" or a "real prospect of securing access to livelihood" they may face the prospect of living in conditions that are "[un]acceptable in humanitarian protection terms". The Claimant, as the FTT accepted in 2015, is from a "minority clan". If the Claimant was in an IDP camp before he left Somalia in 2014, where the conditions breached ECHR Art 3 (as he now claims), that would suggest a real possibility of an Immigration Judge finding that he did not, at least at that time, have "clan or family support" to protect him from such conditions. It may be that even without that support the Claimant would have a

"real prospect of securing access to livelihood", so as to avoid living in conditions breaching ECHR Art 3 in the future, as other returnees have done. That, however, required the Secretary of State to ask himself about the Claimant's specific prospects on return, having obtained sufficient evidence to enable him to answer it correctly. He failed to do so.

142. It was not sufficient, in my view, for the Secretary of State solely to rely on generic evidence of returnees who had managed to find work or start businesses. It is not understood to be the Secretary of State's view that, given economic growth in Somalia, any adult now returning to Mogadishu, irrespective of their family ties, skills or connections, will be able to obtain work so that there is no real risk of any of them finding themselves living in conditions breaching ECHR Art 3. That would not be consistent with the *MOJ* country guidance. The guidance suggests that there are returnees who face a risk of finding themselves in IDP camps and that deciding whether their prospects of "establishing" themselves successfully on return so as to avoid that require "a careful assessment of all of the circumstances" on the facts of an individual case. In his post-hearing submissions the Claimant refers to the kinds of factors suggesting he may be unable to establish himself successfully in Mogadishu (including that he lacks family or social connections in Mogadishu, that he lacks capital, education, work experience or any links to Mogadishu he could use to establish himself there).

143. The Secretary of State notes that the FTT had found in its decision of 19 March 2015 that the Claimant would be returned not to Elisha Biyaha but to Mogadishu. That is not, however, an answer. The *MOJ* country guidance referred to above concerns those returning to Mogadishu. As the guidance recognises, while ordinarily returnees will not face conditions that breach ECHR Art 3, that is not the case for everyone. The Secretary of State needed to ask if the Claimant's particular circumstances mean he will be a successful returnee, or whether there is a real prospect of an Immigration Judge, considering all the facts and applying the required anxious scrutiny, finding a real risk that the Claimant will be one of those unable to establish themselves and forced to reside in an IDP camp. The Secretary of State did not ask that question and that rendered the decision to reject the Claimant's submissions unlawful.

144. Or to put it another way, the Secretary of State could not rationally conclude that there was no real prospect of an Immigration Judge, applying anxious scrutiny, finding that the Claimant fell within the category of those returnees who would face a real risk of conditions that breached ECHR Art 3 if he considered only generic evidence about returnees who were successful in re-establishing themselves in Mogadishu. It also meant the Secretary of State had not himself given the case the "anxious scrutiny" which, as the Court of Appeal held in *WM (DRC)*, is necessary if it is to be rational. As Lord Carnwath held in *MN*, "anxious scrutiny" refers to the "need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account." Without considering whether there were factors specific to the Claimant that suggest he might not be able to establish himself successfully in Mogadishu, the Secretary of State has not "properly taken into account" every factor that might tell in the Claimant's favour.

Claimant's mother's "death certificate"

145. Unlike the 29 April 2019 decision, the 10 June 2019 decision expressly considered the 6 September 2018 submissions, and it considered in some detail the evidence in the Claimant's mother's "death certificate". The Secretary of State noted in the 10 June 2019 letter that the Immigration Judge in 2015 had found that even though the Claimant had been held by Al-Shabaab for some months and forced to work for them in 2013-2014, he had not established a future risk from Al-Shabaab if he returned to Somalia. The Secretary of State further noted that in order to establish such future risk "you would need to show that a boy abducted by a terrorist group and used as a cook for a period of a few months who managed to escape … would be of such interest that years later his mother would be killed as a result". The Secretary of State analysed the "death certificate", and its authenticity, in some detail to determine whether it suggested such a risk. He set out reasons for doubting the authenticity of the certificate. The certificate stated that the Claimant had received death threats from Al-Shabaab when he was in the UK, but without indicating how the Somali police would be aware of them. The certificate suggested that Al-Shabaab members claimed that they were on the hunt for the Claimant, and the Secretary of State noted that if those threats were made to the police "they would appear to have access to your mother's alleged murderers". The Secretary of State considered that to be implausible. The Secretary of State also noted there have been problems more generally with the authenticity of documents apparently coming from Somalia and noting the ease of procuring fraudulent documents.

146. The Secretary of State concluded that, taken with the earlier findings of the Immigration Judge about the Claimant's credibility, little weight could be attached to the "death certificate". The Secretary of State also concluded that the evidence, as a whole, did not show that the Claimant is of interest to Al-Shabaab or that they would pose a direct threat to him if he returned to Somalia. The Secretary of State concluded that the new submissions, taken with those already made, did not therefore create a realistic prospect of success before an Immigration Judge.

147. In the Claimant's judicial review of 17 June 2019, issued before the Upper Tribunal, he contends that the Secretary of State could not reasonably exclude a "realistic prospect" of a further tribunal accepting the Claimant's evidence about his mother's death. Such a conclusion can be challenged on grounds of rationality. I do not, however, consider it was irrational for the Secretary of State to conclude there was not a realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, concluding that the Claimant faced a real risk of prosecution or mistreatment in breach of the ECHR at the hands of Al-Shabaab.

DCPR decisions on 24 May and 6 June 2019

148. As set above, at the hearing before me on 18 June 2019 I was provided with the DCPR decision of 24 May 2019 in which the Secretary of State's authorising officer determined that the Claimant should be released once appropriate accommodation was in place for him. I was also provided with a further DCPR decision on 6 June 2019 at which a different authorising officer concluded that the Claimant should remain in detention pending this judicial review and should only be released if the judicial review succeeded.

149. Mr Toal took me to those decisions. I do have sympathy with the Claimant's concerns about the decision-making process. It does seem unsatisfactory to have two decisions made by different decision-makers two weeks apart reaching different conclusions. A challenge to the failure to release the Claimant on the basis of the DCPR decision of 24 May 2019 does not, however, fall into the grounds of claim brought. It neither involved a failure to follow CPP recommendations (Ground 1), nor did it relate to the decision of 30 April 2019 not to release the Claimant despite the FTT bail decision (Grounds 2 and 3). It is not clear on what, if any, grounds a failure to release the Claimant following the decision of 24 May 2019 was being brought and no amendment was sought to the Claimant's pleadings. In fairness to Mr Toal, I understood him to be taking me to the decisions to suggest the generally unsatisfactory nature of the Secretary of State's decision-making process rather than as giving rise to a fresh ground of claim.

Conclusion

150. For the reasons given, I consider that the Claimant has been unlawfully detained since 30 April 2019. He has been detained because the Secretary of State believes that on 29 April, or at least on 10 June 2019, he had lawfully considered the Claimant's further submissions, and, having rejected them, that the remaining barrier to the Claimant's removal had been lifted. The Secretary of State considered that to be a material change of circumstances justifying him not releasing the Claimant on 30 April despite his then satisfying the conditions for bail set by the FTT. The decision of 29 April 2019 was, however, in my view flawed because the Secretary of State had failed properly to consider (i) the submissions and material provided on 6 September 2018 and (ii) whether there was a realistic prospect of an Immigration Judge finding a real risk the Claimant would be returned to humanitarian conditions so poor as to engage ECHR Art 3. I consider that the 10 June 2019 decision remedied the first flaw but not the second.

151. It thus remains the case that the Claimant's further submissions have not been properly considered. The Secretary of State is therefore not entitled to conclude that there has been a material change of circumstances since the FTT bail decision. The Claimant has been detained unlawfully since 30 April 2019 and I consider he is entitled to a declaration to that effect. The Claimant invites me to direct that he be released from detention without delay. I do not intend to do so. The FTT granted the Claimant bail subject to the Secretary of State identifying a suitable bed space in AP for him. Unless the Secretary of State can identify some further, and proper, change of circumstance, he is required to seek an appropriate place for the Claimant and release him once one is found as per the grant of bail. As to the Claimant's claim for damages, I would invite the parties' submissions on how to deal with that.