



Neutral Citation Number: [2020] EWCA Civ 146

Case No: C4/2018/0630

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE,**  
**(ADMINISTRATIVE COURT)**  
**Mr Michael Kent QC (sitting as a judge of the High Court)**  
**CO/1003/2016**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/02/2020

**Before:**

**LORD JUSTICE McCOMBE**  
**LORD JUSTICE LEGGATT**  
and  
**LORD JUSTICE DINGEMANS**

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**Between:**

**R (on the application of ZA (Pakistan))**  
**- and -**  
**THE SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Appellant**

**Respondent**

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**Sonali Naik QC and Michelle Brewer** (instructed by Duncan Lewis) for the Appellant  
**Tom Brown and Saara Idelbi** (instructed by the Government Legal Department) for the  
Respondent

Hearing dates: 22 and 23 January 2020  
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**Approved Judgment**



**Lord Justice McCombe:**

1. This is the appeal of Mr ZA (“the Appellant”), a Pakistani national, now aged 37, from the order of 20 February 2018 of Mr Michael Kent QC (sitting as a Deputy Judge of the High Court) (“the judge”). By his order the judge declared that the Appellant’s detention by the Secretary of State (“the Respondent”) between 24 January and 24 February 2016 (inclusive) was unlawful. He awarded the Appellant £1 nominal damages and otherwise dismissed the claim. It was ordered that the Respondent should pay 50% of the costs of the claim to be assessed (if not agreed). The judge refused permission to appeal. Permission was granted, however, by Singh LJ by his order of 13 May 2019.
2. The principal issues on the appeal are whether the judge ought to have declared that the period of unlawful detention was somewhat longer than he found (in that it is argued that the detention was unlawful from its inception on 19 January 2016) and whether the judge should have ordered payment of compensatory (as opposed to nominal damages). Those issues arise under five grounds of appeal (see below).
3. The essential background facts are succinctly stated by the judge in paragraphs 1 and 2 of his judgment ([2018] EWHC 183 (Admin)) as follows:

“1. ...[T]he Claimant came to the United Kingdom on 29 March 2011 and was admitted on a Tier 4 student visa valid until 27 August 2012. He did not leave the United Kingdom after his visa expired and on 19 January 2016 he was encountered at Belfast docks having travelled on a ferry from Scotland with the apparent aim of continuing to the Republic of Ireland. He had a photocopy of his passport on which the date of expiry of his visa had been altered so as to make it appear it was still in force. He was however identified as an overstayer and was taken into immigration detention under paragraph 17(1) of and schedule 2 to the Immigration Act 1971 on the same day. He was detained initially in Larne House, which is a short term holding facility (STHF). On 23 January he was transferred to Brook House, an immigration removal centre at Gatwick airport. He claimed asylum (the date when he first made that claim is in dispute) and on 4 February he was moved to Harmondsworth Immigration Removal Centre. On 5 February an asylum screening interview was carried out.

2. On arrival at each of these three detention centres the Claimant was seen by a staff nurse but not by a doctor though he did later see a doctor at his own request on 11 February at Harmondsworth. His full asylum interview had been initially fixed for 16 February but it was deferred at his own request to 24 February. On 22 February the Claimant's current solicitors Duncan Lewis wrote to the Defendant and, among other things, requested a further postponement of the full asylum interview. This request was declined but, these proceedings having been started on 23 February, Ouseley J made an interim without notice order that the Defendant be restrained from conducting

the substantive asylum interview until at least 9 March. On the 24 February the Claimant was released from detention. His asylum interview took place on 5 July. He was given notice that the claim to asylum had been refused on 26 July 2016. He appealed to the First-tier Tribunal and his appeal was allowed in September 2017 following which he was given leave to remain for five years.”

4. Before the judge the Appellant claimed a declaration and damages for false imprisonment on four grounds:

“1) a failure to follow the Defendant's own guidance and policy on the detention of a person applying for asylum on grounds of his sexual orientation;

2) a failure to comply with Rule 34 of the Detention Centre Rules 2001 (2001 SI No 238) and/or policy, namely arranging for a physical and mental health examination by a medical practitioner within 24 hours of the Claimant's arrival at each of three detention centres;

3) unlawful delay in arranging a requested medical assessment for the purpose of Rule 35 of the Detention Centre Rules; and

4) maintaining detention contrary to the principles laid down in *R v. Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 (the *Hardial Singh* principles).”

5. The judge found that the Respondent had failed to comply with Rule 34 of the 2001 Rules and that, therefore, the Appellant's detention, from 24 January 2016 (24 hours after his arrival at Brook House) until his release from Harmondsworth on 24 February 2016, was unlawful. There is no cross-appeal by the Respondent against that finding.

6. The judge dismissed the claim in respect of the Appellant's short period of detention at Larne House (a Short-Term Holding Facility (“STHF”)) between 19 and 23 January 2016, since Rule 34 did not apply and, as he found, there had been no breach by the Respondent of her policy on medical assessments within the STHF. However, the judge found that even if the Respondent had complied with Rule 34 in the later periods at Brook House and Harmondsworth, the Appellant would still have been detained. He found further that there was nothing arising under the Respondent's detention policy, in cases where asylum is claimed on sexual orientation grounds, that would have engaged an obligation to release the Appellant from detention earlier than he was. The judge also held that there was no basis for finding that the Respondent's detention had infringed the *Hardial Singh* principles (*R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704). In view of the finding that the Appellant would have been detained in any event, even if there had been full

compliance with Rule 34, the judge awarded nominal damages only for the wrongful detention that had occurred.

7. Against those findings, the Appellant now appeals on five grounds as follows: (1) that the judge's approach to the issue of nominal/compensatory damages was flawed; (2) the Respondent had unlawfully delayed in arranging an examination of the Appellant by a medical practitioner after his specific request on 19 February 2016, 5 days before his release; (3) the detention of the Appellant in the STHF at Larne House required compliance with the Respondent's own policy requirements, equivalent to those under Rule 34 of the 2001 Rules, and that, in the absence of such compliance, the detention in the first period from 19 to 23 January 2013 was also unlawful; (4) the judge wrongly found that the alleged failure, following the making of the Appellant's asylum claim, to consider whether the nature of the claim did not render the Appellant's continued detention unlawful; and (5) the judge was wrong to conclude that there had been no breach of the *Hardial Singh* principles.
8. The parties addressed ground 3 first and so I turn to that ground.

*Ground 3*

9. Rules 33, 34 and 35 of the Detention Centre Rules 2001 (2001 SI No. 238) provide as follows:

**“33.—Medical practitioner and health care team**

(1) Every detention centre shall have a medical practitioner, who shall be vocationally trained as a general practitioner and a fully registered person within the meaning of the Medical Act 1983 [who holds a licence to practise]. ...

**34.—Medical examination upon admission and thereafter**

(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

**35.—Special illnesses and conditions (including torture claims)**

(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to

be injuriously affected by continued detention or any conditions of detention.

(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.

(3) The medical practitioner shall report to the manager on the case of any detained person who is concerned may have been the victim of torture.

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.”

10. It has been common ground throughout that these rules applied at the material times to Brook House and to Harmondsworth, which were immigration removal centres (IRCs), but not to Larne House which was a STHF. However, the Appellant’s case before the judge and before us was/is that the Respondent’s policy and internal instructions, relating to medical assessments of detainees, required that a detainee at an STHF should be examined by a medical practitioner within 24 hours of arrival at the facility. Reliance was placed upon the Detention Centre Services Order 06/2013 (“the DSO”) which, it is argued, provided for essentially the same requirements for medical examinations at STHFs as those prevailing at IRCs to which the 2001 Rules applied.
11. It is now common ground that the relevant version of the DSO, which was in force at the time, was the one implemented on 12 November 2013. Both parties were (or should have been) well aware of this. Unfortunately, the version that was placed before the judge was one bearing the “Implementation Date” of “November 2013 (reissued July 2016)”, even though it is clear, if only from the Appellant’s Replacement Detailed Grounds (paragraph 42), that the Appellant and (by necessary inference as it was the Respondent’s document) the Respondent should have realised that the judge was seeing the wrong version of the DSO. While the two versions bear broad similarity in their focus in many respects, there are important differences in the wording and structure of the two documents.
12. The parties agreed that, for the purposes of the appeal, we should have regard to the version that was actually in force (that of November 2013), rather than that presented to the judge and on which he based his judgment on this point (the July 2016 reissue).

I will not, therefore, dwell in detail on the differences in the two documents to which our attention was drawn.

13. The material parts of this DSO, as relied upon by the Appellant, were as follows.
14. The document has the sub-title “Reception and Induction Checklist and Supplementary Guidance”. There follows, on page 1 against the title “Process”, this:

“To provide operators with a checklist and additional guidance on specific areas to be covered during the process of admitting and individual to an IRC [Immigration Removal Centre], RSTHF [Residential Short -Term Holding Facility] or the PDA [Pre-Deportation Accommodation] and providing an induction programme”

There is at the foot of the first page a Note:

“Operating Standards for IRCs and the PDA already exist covering admission/reception requirements. This DSO provides additional guidance on requirements to ensure standardisation.”

On the second page one finds:

#### **“Introduction**

1. This instruction provides a mandatory checklist and supplementary guidance on specific areas (not exhaustive) which must be addressed by reception and induction officers when admitting a new arrival to an IRC, RSTHF or the PDA...

#### **Purpose**

2. The purpose of this instruction is to standardise the information **sought from** detainees and **provided to** detainees by centre operators and the way they cover key areas of the reception and induction process when admitting an individual to an IRC, RSTHF or the PDA...

#### **Procedures**

3. This DSO provides guidance in the area of admission and induction to an IRC, RSTHF and the PDA supplementary to that which is already provided in the Detention Services Operating Standards (issued in February 2004), the PDA Operating Standards (published in September 2011, the Detention Centre Rules 2001 and any contractual or service level agreement (SLA) requirements...

5. Attached at Annex A is a checklist detailing necessary actions to be undertaken at the point of admission ...

6. At Annex B, explanatory notes have been prepared to provide the necessary detail which is expected to be covered relative to each associated key point...” [Emphasis in the original document.]

15. Annex A includes the following: under the heading “Healthcare Staff”

“1. Has the detainee been seen within 2 hours of arrival for an initial health screening?...

“10. Has an appointment been made with the doctor (to take place within 24 hours)? ...”

Annex B includes the following:

“2 Hour Health Screening

All detainees must receive an initial healthcare screening within 2 hours of their arrival at an IRC. Healthcare staff must note the time that the screening took place. ...

Healthcare Entitlements

Healthcare staff must advise detainees that it is their medical right to have an appointment with a medical professional of the same sex and that, if they require an examination by a doctor, that they are entitled to request to be seen by their own doctor (if their own doctor is amenable to such a request). ...

Appointment with Doctor

The healthcare professional responsible for the initial screening appointment must make an assessment of whether the detainee requires an immediate appointment with a doctor and where this is not required must offer the detainee a doctor’s appointment which must take place within 24 hours of the detainee’s arrival at the centre. Where a detainee refuses or declines such as appointment this must be noted along with the reasons for the refusal.”

16. The passage in issue in the version before the judge was the equivalent of that appearing in Annex B, quoted above, (“Appointment with Doctor”). That version read as follows:

**“Healthcare**

All detainees must receive an initial healthcare screening within 2 hours of their arrival at an IRC. An assessment of whether the detainee requires an immediate appointment with a doctor and where this is not required, a doctor’s appointment to take place within 24 hours of the detainee’s arrival at the centre must be offered.” [sic]



17. The Appellant was seen for initial health screening by a nurse at each of the three centres within 2 hours of arrival. However, it has been accepted throughout that he was not seen by a doctor within 24 hours of arrival at any of the centres. It was and is accepted by the Respondent that the failure to provide a doctor's examination within 24 hours at Brook House and Harmondsworth constituted a breach of Rule 34(1) of the 2001 Rules. The issue remains on the appeal as to whether there was a breach of the DSO in force at the time and whether that rendered the detention period at Larne House unlawful also.
18. The judge found that there was no breach of the DSO policy, on the basis of the version presented to him. At paragraph 44 of the judgment he said:

“44. ...As for Larne House the policy guidance is for a medical examination only if the detainee requests it. There is therefore no equivalent breach giving rise to the automatic invalidity of continued detention.”
19. With regard to the correct document, Mr Brown for the Respondent argues that it is clear that some parts of the DSO apply to one type of centre (IRC or STHF) and not to another. For example, there are references in some provisions to detainees who have previously been in prison; there is a paragraph dealing with a possible requirement to see a welfare officer about missing property or property outside the IRC.
20. In a similar way, Mr Brown argues that, when one reads the paragraphs of Annex B to the DSO (quoted above), relating to health screening and doctors' appointments as quoted above, they are intended to apply to IRCs only. The initial reference in the section on “2 Hour Health Screening” is to “arrival at a IRC ...” (not at an RSTHF). The subsequent reference to “Appointment with Doctor” flows from that, and refers to the assessment of need for a doctor's appointment and/or the offer of such an appointment by the healthcare professional responsible for the initial screening, i.e. at an IRC. There is then reference to Rule 35 which would only apply at an IRC and not to an STHF. Accordingly, it is argued, these provisions of the policy did not apply to Larne House.
21. Ms Naik QC for the Appellant argues Mr Brown's approach is an over-rigid interpretation of the DSO, which is not a statute or statutory instrument, but merely a statement of broad policy. She submits that the DSO is designed to provide for basic standards applicable to all forms of immigration detention. To find otherwise, would mean that there was no policy in force about health assessment at STHFs at all, which it should not be assumed was what the Respondent intended. Therefore, the document's provisions as to healthcare should be treated as applicable to all the identified types of institution.
22. This argument has arisen very late in the course of these proceedings. In view of my conclusions in paragraphs 31 to 45 below as to the consequences of any formally unlawful detention in this case for purposes of an award of damages and the unfortunate confusion as to the version of the policy that was applicable, I do not consider it necessary, or desirable, that we should express a conclusion as to the correct ambit of this DSO. It was, in any event, overtaken by the further version of the document in July 2016 and also by the Short-Term Holding Facility Rules 2018. Whatever the correct interpretation and application of the DSO, I would leave the

point as to the lawfulness of the five days' detention at Larne House undecided because even if the detention was unlawful any award of damages would also be nominal, for the same reasons which apply to ground 1. It is academic in the present case.

23. I would, therefore, decline to allow the appeal on Ground 3.

*Ground 2*

24. I think it logical to look next, as the judge did, at the issue arising on ground 2 of the Grounds of Appeal which asserts that the Respondent unlawfully detained the Appellant after 19 February 2016 when, on solicitors' advice, he asked to have a medical examination with a view to a "Rule 35 Report".
25. The judge's factual findings on this issue appear at paragraphs 47 and 48 of the judgment. Beginning with the Appellant's request made on the initiative of his solicitors, the judge said this:

"47. ...In a witness statement Shalini Patel of Duncan Lewis [the Appellant's solicitors] says that a caseworker at that firm, Lauren Mayer, advised the Claimant on 19 February to visit the healthcare department and request a Rule 35 report. She stressed to him that it was important to mention that he was feeling depressed.

48. Entries in the computerised record disclosed by the Defendant include a request on 19 February to see a nurse timed at 10.45 with, in the box for "Details", the words "Rule 35". At the foot of this entry also dated 19 February and timed at 16.32 there is "Request completed". It is unclear what that means and there is nothing in the clinical notes to suggest that he was actually seen on that day by a nurse or a doctor. The Defendant does not suggest that he was. Curiously Ms Maher in her witness statement says that her first attendance on the client was on 22 February and she does not refer to otherwise communicating with him on 19 February, that he reported that he felt depressed or that she told him to request a Rule 35 assessment. The Claimant himself in his witness statement does not say anything more than that he requested a Rule 35 assessment. In particular he does not say that he explained why he wanted the assessment namely that he was depressed. The computerised record also has an entry which states that the Claimant requested to see a doctor at 14.38 on 20 February and this is noted as "request completed" at 14.47 on 22 February. Again however there is nothing in the clinical notes to correspond to this entry. It is difficult to know what to make of these apparent discrepancies between different parts of the disclosed records. It seems likely that he was seen by someone in the healthcare department on 22 February but for some reason the relevant clinical note has not been located or disclosed otherwise it is difficult to see what the entry on that

day could mean. On the other hand in relation to the request for a Rule 35 assessment it seems unlikely that the Claimant was seen on the very same day. In his witness statement he says in relation to his request made on 19 February:

*“I was told I would be put on the waiting list and that it can take up to two weeks for the assessment to take place”.*”

26. On that state of the evidence the judge found that no examination by a medical practitioner (or by a nurse), for the purpose of considering a report under rule 35, was carried out. The judge noted that rule 35 merely places an obligation on the medical practitioner to report to the manager of the centre on the case of any detainee whose health is likely to be injuriously affected by continued detention or any conditions of detention; it does not give the detainee a right to have a report under rule 35 made until a doctor considers that that is necessary.
27. There followed a letter before claim from the solicitors protesting that the Appellant had been told that it could take up to two weeks for an assessment to take place. The Respondent’s reply to the letter was described by the judge as clearly inadequate. However, the judge’s conclusion on this point (at paragraph 54) was this:

“54. ...In my judgment the absence of evidence upon which I can act to show that healthcare staff were given any reason why an assessment for the purposes of a possible Rule 35 report should be expedited means I do not have the material to come to a conclusion that the delay between 19 and 22 February without such an assessment having been carried out disclosed negligence or a failure amounting to a public law error on the part of the Defendant material to the continued detention of the Claimant for those three days so as to render that part of his detention unlawful. The position is different following receipt of the letter from Duncan Lewis on 22 February because reasons were given but as he was released only two days later I do not have the basis for saying that that period of delay disclosed public law error material to the continued detention. It might well have been arguable that requiring the Claimants to wait for two weeks (as he says he was told he might have to) would amount to such error but that became academic as he was released five days after the initial request was made.”
28. Ms Naik QC’s argument is that, on the facts of this case, the Appellant should have been released within 48 hours of his request for a medical assessment on 19 February. Mr Brown pointed out that 19 February 2016 was a Friday and even if a doctor had seen the Appellant on the following day (Saturday) and had made an immediate report, the Detention Services Order 17/2012, dealing with the application of rule 35, then required the responsible officers to respond within two working days (paragraph 34). The Appellant was released on the Wednesday (24 February).
29. In view of the judge’s findings of fact and the provisions of DSO 17/2012, I cannot see that the failure to procure a medical assessment for the Appellant after the request

made on 19 February and before his release on 24 February 2016 can have any bearing upon the lawfulness of his detention in those last five days.

30. I would, therefore, reject ground 2.
31. I turn to ground 1 and the challenge to the judge's decision to award nominal damages only for the period of detention between 24 January and 24 February 2016 which he found to have been unlawful.

*Ground 1*

32. The judge expressed his conclusion as to what would have happened if a medical examination by a doctor as required by Rule 34 had been carried out. At paragraph 56 of the judgment, he said this:

“56. The burden of proof on this causation question is on the Claimant but even if the burden rested on the Defendant I would have no hesitation in coming to the conclusion that I do namely that nothing would have appeared following any such examination by a medical practitioner that would have led to a report whether under Rule 35 or by way of more informal disclosure to the DAC casework staff to the effect that for medical reasons the continued detention should be reconsidered.”

33. He expanded upon that in the following paragraphs. He referred to the notes made by the nurses at all three establishments on the initial health screening and the fact that none of them reported any mental health or other medical issues. At paragraph 60 of the judgment, the judge said:

“60. Given that these three staff nurses were employed at separate establishments in healthcare departments devoted to the initial screening of immigration detainees amongst whom can be expected to be many who go on to claim asylum it is reasonable to conclude that their examinations of the Claimant, brief though in each case they were, will have matched closely the examination that would be expected of a medical practitioner under Rule 34 and there is no reason to conclude that he or she would have been given any different answers to questions about mental health issues or discovered any matters of concern..”

34. In dealing with an assertion by the Appellant in his witness statement that he had said to the nurses at each place that he felt depressed, the judge said this:

“61. ...It is simply not credible that three nurses could all have failed to note such a report and then to make an entry to the effect that there were no mental health issues. It is also significant in my view that when he saw a nurse on 10 February and a doctor on 11 February with a complaint of flu-like symptoms he did not mention feeling depressed. It is clear to

me that no mental health issues were reported even when he was asked about them by the nurses.”

35. Before the judge, the Appellant relied upon reports of 5 and 14 July 2017 from a consultant psychiatrist, Dr Rob Tandy, prepared for the Appellant’s subsequent statutory appeal against the Respondent’s initial refusal of the asylum claim. Dr Tandy diagnosed a “moderate depressive episode” as the cause of “a long standing (at least two years) history of sustained low mood, loss of interest and enjoyment and reduced energy in addition to having an impact on the [Appellant’s] self-esteem and self-confidence”. The doctor wrote that this amounted to a “serious medical condition”.

36. The report was relied upon as covering the period in detention and as showing that the Appellant should have been considered as unsuitable for detention in that period except “in very exceptional circumstances”, applying the Respondent’s Enforcement Instructions and Guidance (“EIG”) paragraph 55.10. So far as relevant this paragraph provided as follows:

“Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control. ...

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

- Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
- Those suffering from serious mental illness which cannot be satisfactorily managed within detention... .”

37. The judge noted that the report did not engage with the question posed by the EIG as to whether the condition or illness could be satisfactorily managed within detention; nor did he use the expression “mental illness”.

38. Having considered that evidence, the judge concluded that there was no basis to find that a doctor examining the Appellant under Rule 34 in January/ February 2016 would have felt it necessary to make a report under rule 35. The judge said this in paragraphs 65 to 67:

“65. ...Dr Tandy saw the Claimant twice for interviews which lasted in total for some 4 ½ hours. By the time he saw him the Claimant’s asylum interview had taken place, he had legal representation and his appeal to the First-tier Tribunal was being progressed. Clearly the issues surrounding the effect on the Claimant’s mood and functioning resulting from his recent history of exploring his sexual identity and orientation (assisted, from November 2016, by regular attendance at an

LGBT Centre in Leicester) had by then been thoroughly explored and ventilated.

66. In contrast a medical examination under Rule 34 would have been very much shorter and, if it lasted longer than the 10 minutes or so allowed for the screening examination by nurses (and I do not hold that it should necessarily have done so in a case where the examination and interview does not raise anything of apparent concern whether prompted by the doctor or volunteered by the detainee), it would have been a very different type of examination from that conducted by Dr Tandy specifically for the purpose of medic-olegal reports [sic]. Dr Tandy is a consultant psychiatrist. The medical practitioner at an Immigration Removal Centre is someone with the qualifications of a general practitioner, understandably as the health problems that may be encountered amongst detainees will be many and various.

67. In addition in a case where, as is not disputed, the Claimant had never received any treatment for depression, even if the Claimant had volunteered that he suffered from low mood or anxiety such that the medical practitioner might have concluded that this was a case of clinical depression such a finding would no doubt be nothing out of the ordinary in the setting of a detention centre and would at most have resulted in the doctor considering whether to prescribe some antidepressants. There is simply no basis for concluding that the doctor would have felt obliged to make a Rule 35 report or to have volunteered that this was a case of serious mental illness let alone one that could not be satisfactorily managed within detention.”

The judge recorded that after circulation of the draft of his judgment, he had been referred to a further passage in Dr Tandy’s second report. On this, the judge said:

“68. ...That however is his retrospective assessment of how the continued detention may have affected the Claimant and not of what would or should have been apparent to a general practitioner conducting a Rule 34 examination. In light of what he told others the Claimant would probably not have volunteered anything beyond feeling a bit low while also stating that he had not been receiving any form of treatment for depression. Such treatment could of course have been given in detention and Dr Tandy's reference to "support in the community" is presumably, given that the Claimant had no family ties in the UK, to the type of support the Claimant later received from the LGBT Centre. In my view this opinion cannot alter my assessment that the Rule 34 examinations if carried out at Brook House or Harmondsworth would not have led indirectly to the Claimant's earlier release.”

39. The judgment below was handed down some four days before the publication of this court's decision in *R (VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57. In the light of that decision, Mr Brown for the Respondent accepts that the judge's statement as to the burden of proof (in paragraph 56) was wrong. He submits, however, that the judge was clear that, wherever the burden of proof lay, the result in the present case would have been the same and that we should affirm that decision.
40. Ms Naik QC argues that, as the burden of proof lay upon the Respondent on this issue, it was impossible to conclude what the Respondent's decision would have been, if Rule 34 had been complied with, in the absence of direct evidence from the Respondent addressing that point. Mr Brown's retort is that specific evidence to address a hypothetical situation is unnecessary if the facts speak for themselves (as he says they do here) and the court can draw the necessary inferences from those facts. Mr Brown also took us to several passages in the judgment of Beatson LJ in the *VC* case to show that, on its facts, that case was very different from the case before us.
41. Ms Naik QC added that the judge's assessment "downplayed" the qualitative difference between a nurse's initial health screening and an examination by a qualified medical practitioner carried out pursuant to Rule 34. She submitted that the judge could not have assumed that a doctor would not have flushed out more of the Appellant's underlying state which Dr Tandy had detected some 17 months later.
42. Mr Brown referred us to the extensive medical notes about the Appellant made at Brook House from 4 February 2016 onwards (after he had made his asylum claim), including notes of his consultation with a Dr Sayed when he was suffering from throat pain and a blocked nose. The notes include extensive negative answers to questions relating to mental health at the earlier health screenings; no mental health problems are there recorded. On the other hand, the Appellant had been saying in his evidence that he had reported that he was depressed and wanted to see a doctor for that reason.
43. In my judgment, the judge was fully entitled to reach the conclusion that he did about this issue. Here was a detainee who did receive three, albeit brief, medical screenings. He was asked on each occasion several questions about his mental health resulting in negative replies. His notes reflect no such issues being raised by the Appellant on any occasion, even with the nurse and doctor who examined him after he had made his asylum claim. This was so, even though the Appellant was asserting that he reported feeling depressed more than once. The inference that he would have raised no such issue with a doctor, any more than with a nurse, was open to the judge on the facts here and he cannot be criticised for drawing it. In the circumstances, in my judgment, the judge was correct in finding that Dr Tandy's evidence, prepared nearly 1 ½ years later could provide little, if anything, about the situation facing the Respondent in January/February 2016.
44. In the circumstances, I consider that the judge was right to hold that the Appellant was not entitled to compensatory damages for his wrongful detention because of the breaches of Rule 34 at Brook House and Harmondsworth.
45. I would, therefore, reject ground 1.

*Ground 4*

46. This ground raises the question whether the judge wrongly failed to find that the Respondent was in breach of her detention policies in failing to consider the nature of the Appellant's asylum claim and the probable time required to resolve it. This failure, it is argued, rendered the detention unlawful from shortly after the claim was made on or about 29 January 2016.
47. Before the judge, Ms Naik QC relied upon a number of provisions of the EIG, paragraph 55. They were these:

“55.1.1 General

The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used (see 55.20 and chapter 57). Detention is most usually appropriate:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

[...]

55.1.3 Use of detention

General

Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted if that is likely to be protracted and/or there are no other factors present arguing more strongly in favour of detention. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who does not and is removable.

[...]

55.3 Decision to detain (excluding criminal casework cases)

1. There is a presumption in favour of temporary admission or temporary release - there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.



2. All reasonable alternatives to detention must be considered before detention is authorised.
3. Each case must be considered on its individual merits...

#### 55.3.1 Factors influencing a decision to detain

All relevant factors must be taken into account when considering the need for initial or continued detention, including:

- What is the likelihood of the person being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry).
- Is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave etc).
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?

[...]

Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified”.

The judge also noted that paragraph 55.1.4.1 effectively set out the *Hardial Singh* principles (infra), and further paragraph 55.8 stated:

“At each review, robust and formally documented consideration should be given to the removability of the detainee. Furthermore, robust and formally documented consideration should be given to all other information relevant

to the decision to detain. Additional reviews may also be necessary on an ad hoc basis, for example, where there is a change in circumstances relevant to the reasons for detention.”

48. Reliance was also placed by Ms Naik QC upon a document called the “Interim Process Map” which stated that it had to be read in conjunction with an “Asylum Policy Instruction” entitled “Sexual Identity Issues in the Asylum Claim”. This instruction dealt with the conduct of asylum interviews rather than with questions of detention. It included the following:

“89. ...some individuals may hold a completely different perception of their own sexual identity from those implied by the term LGB or may be unaware of labels used in Western cultures. They may be unwilling to use the labels used in their language.

Some LGB people may originate from countries in which they are made to feel ashamed, humiliated and/or stigmatised by their sexual identification. In response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions, many LGB claimants will have kept aspects of and, sometimes large parts of their lives secret some will have, in addition to hiding their identity, evaded detection by engaging in a lifestyle which conforms to normative cultural heterosexual stereotypes... Discussing matters such as sexual identity may be unfamiliar to some people and in an official context such as the asylum interview, may prove additionally daunting. Some LBG [sic] asylum seekers may struggle to talk openly about their sexual identification due to feelings of shame, painful memories or cultural implications, and may find it difficult to establish trust with an interviewing officer—this may help to explain why they may appear to be evasive.”

90. ... “when the claimant is in the process of coming to terms with his or her identity, or when they fear openly expressing their sexual identity, they may be reluctant to identify the true extent of the persecution suffered or feared”.”

49. The judge found that the Appellant’s asylum claim was effectively made on 29 January 2016. He rejected, on the facts disclosed by the documents, the Appellant’s contention that it had been made on 20 January. While the Appellant’s skeleton argument (31.7.2019, paragraph 5<sup>1</sup>) still refers to 20 January 2016 as the date of claim, no argument is presented contesting the judge’s reasoning on the point.
50. The judge set out the facts for the period from 19 January to 29 January 2016 in paragraphs 91 to 95 of his judgment. When the Appellant was asked on initial detention why he had not applied for further leave to remain in the UK, the note of his answer was:

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<sup>1</sup> Shortly before the hearing, by my order of 15.1.20, I refused an application to rely upon a later skeleton argument.

“I asked why he had not applied for further leave in the UK or returned home. He stated that he had not been supported by his college and that he did not want to return home because life is difficult in Pakistan because there is no work. He prefers to live in the UK. I asked if there was any other reason he did not want to return to box [sic] on and he said 'no nothing'. No HR issues raised when prompt/opportunity provided.”

At a detention review the following day, the following was recorded:

“He speaks and understands English very well. I have explained to him that his student visa expired in August 2012 that he made no application for further leave beyond that. He was served papers yesterday and detained pending his removal UK. He has accepted all of this and appears to be resigned to returning to his home country.”

In the same review and on review on 26 January it was noted that the only barrier to removal was the obtaining of a travel document. Arrangements were made for the Appellant to see someone from the Pakistani Embassy, while at Brook House, for this purpose. Given these features, it was recorded that removal was thought to be possible within a reasonable timescale and that, as an overstayer, compliance by the Appellant with conditions of temporary admission or release was thought to be unlikely.

51. The judge’s conclusion for this period was:

“96. In my view on the facts as they appeared to the Defendant's officers up to 29 January the conclusion that detention was appropriate for the Claimant is unexceptionable and indeed to be expected. There was no failure to apply the relevant policies and guidance.”

52. An asylum screening interview was arranged for 5 February 2016, and on 2 February a further detention review noted that the asylum claim had been made but the Appellant had had ample time in the previous five years to make such a claim. There was reference to the possibility of the asylum claim being certified under section 94 of the Nationality, Immigration and Asylum Act 2002, as being clearly unfounded.

53. The basis of the asylum claim was unknown on 2 February, even in outline (pending the screening interview to be held 3 days later) and detention was continued. The judge said:

“...At that date, although the asylum claim had been intimated, no details had been given. In my view the conclusion reached remains unexceptionable and in line with policy and guidance. The mere fact of a late claim for asylum was understandably given little weight.”

There is no sustained challenge to this conclusion on the appeal.

54. The screening interview duly took place on 5 February 2016, as arranged. The Initial Contact and Asylum Registration Form was completed at that interview. The form asked for brief reasons why return to the home country was not possible and the noted response was:

“Unsure sexuality. Met a few girls tried sex with them. Unable to have sex with them. Tried 2 or 3 times more to make sure. Now having sex with males. If I go back naturally parents want to arrange marriage and I can't tell them about it. I will lose my identity because I do not know if I am a male or female.”

The Appellant said he felt safe in the present accommodation. He asked for a female interpreter and interviewer at the full interview. He replied in the negative as to whether he suffered from any medical conditions and whether he wished to say anything about his physical or mental health. Asked if there was any reason why he should not be detained pending consideration of his claim, the answer was: “...[under] pressure if release me I can feel relaxed and you can interview me in a better way”.

55. In a detention review on the same day conducted by the same officer that carried out the screening interview, the fact of the asylum claim was noted (but without details of its basis). The material extracts are these:

“5. Assessment of removability.

LOW –Applicants ETD is pending at present and this is expected to be issued with a reasonable timescale. However the applicant has since claimed asylum creating a barrier to removal. This will need to be considered before removal can be initiated. Therefore Applicants removal is considered low at present.

6. Assessment of risk of absconding.

HIGH –Applicant is an overstayer and has been working illegally in the UK. The Applicant has not attempted to regularise his stay in the UK since 2012. He is therefore considered unlikely to comply with the conditions of release if he were to be released at this time. ...

14. Recommendation (whether to maintain detention or release, supported by reasons).

Applicant is on Admin Removal Overstayed who failed to leave the UK and has been working illegally after his leave expired in 2012.

He was encountered by Belfast Enforcement Officers by chance on an operation, he would have remained at large had it not been for this encounter.

He only claimed after being detained and served with removal notice (RED1). The timing of his asylum claim is seen as an attempt to frustrate the removal process and get temporary release. He has ample time to claim asylum previously.

Given the immigration history of the applicant, as noted above and in particular his previous failure to leave the UK after his leave expired and his disregard for the immigration rules, I have serious doubts over the likelihood of his complying with any conditions/restrictions attached to a grant of TA and consider him a significant absconder risk.

I therefore recommend continued detention at this time, in-line with the published guidance in Chapter 55 of the EIG.

...

Authorising officer's comments, including response to recommendation

I agree with the above recommendation. In light of the subject's immigration history it is considered he poses an absconder risk; he overstayed for 4 years, was encountered leaving the country and only claimed asylum after his arrest. Detention is considered appropriate and proportionate and in accordance with Chapter 55 of the EIG."

56. The judge's conclusion about the detention decision at this stage was:

"103. In my view, while it may have been better to say something about the nature of the asylum claim put forward at the screening interview, it was not necessary for the officer completing a detention review immediately after it to repeat what he has recorded in the initial registration form. It is clear from the references to this being a late claim for asylum made only after the Claimant had been detained and served with removal directions that his claim was not at that point considered genuine. In my judgment that was a perfectly reasonable view to take on the facts as they then appeared which included of course the completely different explanation given when he was initially interviewed at Larne House as to why he had overstayed. Indeed Parliament in section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 required officers determining whether to believe a statement made by or on behalf of a person making an asylum or human rights claim to take account of the failure to make the claim before being notified of an immigration decision or before being arrested under immigration powers, unless the person had no reasonable opportunity to do so."

57. Ms Naik QC criticises this conclusion on the basis that the review recorded none of the brief details of the asylum claim that had emerged in the screening interview and no acknowledgment of any potential timescale for resolving the claim or the possible complexities that might be inherent in it. Ms Naik QC referred to paragraphs 13, 14 and 21 of the Respondent’s “Detention Interim Instruction”, published in July 2015. These paragraphs state:

“13. Once the asylum screening interview has taken place, a caseworker should be in a better position to decide whether it is likely that the individual can be removed within a reasonable time, bearing in mind the nature of the asylum claim and all the circumstances of that individual. Detention should therefore be reviewed by the Detained Asylum Casework Team in accordance with EIG55.8. Particular attention should be paid to any vulnerabilities that have raised, both in terms of suitability for detention (see Chapter 55 of the EIG).

14. Detention should also be reviewed by Detained Asylum Casework Team in accordance with EIG55.8 at significant stages of asylum case progress where there may be a significant change in circumstance which may impact on the likelihood of removal within a reasonable time frame. Examples include (but are not limited to):

- after the asylum screening interview has been concluded; ...”

21. Detention should be reviewed by the Detained Asylum Casework Team in accordance with EIG55.8 at significant stages of asylum case progress where there may be a significant change in circumstances which may impact on the complexity of the claim and likelihood of removal within a reasonable time frame. ...”

Further, Ms Naik QC submits that, if the lateness of the asylum claim was to be relied upon to justify continued detention, the Appellant should have been asked to explain why it was late.

58. The full asylum interview was scheduled to take place on 16 February 2016 but was postponed at the Appellant’s request. Ms Naik QC argues that the postponement was another reason for the Respondent to reconsider the suitability of detention, as the prospect of immediate removal receded. She also argues that in a case of this sort the possibility of appeals, if the claim was initially rejected, should have been borne in mind and there was no sign of this in the detention records.
59. Mr Brown argues that given the material disclosed at the screening interview there was nothing to require a change in the detention decision. The lateness of the claim and the inconsistency of the claim in outline with what the Appellant had said on initial apprehension gave good cause for scepticism. There were other inconsistencies about what had happened to the Appellant’s passport: was it lost or was locked away at his home in Manchester. The copy of it had also been altered so as to appear to be

showing continuing leave to remain. The high risk of absconding was highly relevant. Further, the grounds for the asylum claim as outlined did not disclose any reasons for fearing persecution on Convention grounds: this was not a claim of state persecution or persecution from non-state agents against whom there was inadequate protection. In this respect, Mr Brown referred to the judgment of Lord Rodger of Earlsferry in the Supreme Court in *R (HJ Iran) v Secretary of State for the Home Department* [2010 UKSC 31 at [82], as follows:

*“The approach to be followed by tribunals*

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution—even if he could avoid the risk by living “discreetly”. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.”

The same approach, said Lord Rodger, had to be followed by the Respondent in considering asylum applications of this type: see [83]. Mr Brown argued that what was disclosed on screening was a concern about social pressures, as described by Lord Rodger, rather than persecution.

60. While recognising that some asylum cases might require lengthy investigations and a need for the applicant to muster his materials before undergoing the full asylum interview, Mr Brown argues that there was nothing in the screening interview (or in the past history since 19 January 2016) to suggest that the decision might take weeks or months. Further, he submits that it would not have been permissible for the officer to scrutinise or question the substantive asylum claim (e.g. by asking why it had been made so late in the day) as that could expose the Appellant to giving answers prejudicial to the claim when he was without the legal representation to which he would be entitled at the full interview.

61. Given the circumstances overall, I do not consider that the judge's approach to this issue or his conclusion upon it can be faulted in finding that there was no breach of any relevant detention policy. This was an exceedingly late claim which, even on its face after screening, disclosed a potentially weak claim to fear of persecution on Convention grounds. In view of a lengthy failure to comply with immigration law requirements, the risk of absconding was real and had to be balanced against an assessment of the time to process the asylum claim. A full asylum interview was planned for 11 February and the judge found (paragraph 105) there was no additional information forthcoming after the screening interview until the "letter before action" of 22 February 2016. The Appellant was then released two days later.

62. I would, therefore, reject ground 4 also.

*Ground 5*

63. There is little further that needs to be said about ground 5, which I would also reject.

64. This ground relies upon the *Hardial Singh* principles (supra). The judge referred to those principles as expressed by Lord Dyson in his judgment in the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [22] as follows:

“(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.”

65. The Appellant argued before the judge that the third principle was infringed here. The judge's answer to that argument appears in paragraphs 113-114 of the judgment, as follows:

“113. I do not accept that this should have been regarded as a particularly complex case. It was slightly more complicated than one where there was no doubt about the fact that the Claimant was gay; however the issues of fact were likely to be dependent simply on the credibility of the Claimant at an interview designed to probe the consistency and reliability of his account while giving him every opportunity to articulate matters in his own way without necessarily using labels familiar to Western ears, on which the Asylum Policy Instruction I have referred to gives valuable guidance to interviewers. I note that Cranston J in *Hossain* held at paras 148-9 that such claims are not so complex as in themselves to create a general presumption against detention.



114. As to the timescale for resolution of the claim the full asylum interview had been arranged for 16 February (2 ½ weeks after what I have found to be the first notification of a claim to asylum) and then deferred at the Claimant's request. He was released before the interview was conducted. It must be inherent in the proper approach that the first step, in following the *Hardial Singh* principles as set out in chapter 55.1.4.1 of the EIG, is to consider the removability of a detained person in the period up to that interview because that will be the time when it will be expected either that the claim is a good one in which case he will be granted asylum and released or it is a bad one and only then, if an appeal is indicated, will it be necessary to consider in the light of this development whether detention should be maintained pending the exhaustion of that process. It seems to me wrong to require the Secretary of State to assume in all cases that the claim will be refused and that an appeal will follow so that in applying the third *Hardial Singh* principle the SSHD must act on the assumption that the earliest the person could be removed was only after whatever should be considered the likely timescale for the exhaustion of all possible avenues of appeal and judicial review (including further appeals from first instance judgments). Indeed there is a tension between on the one hand the Claimant's case that his claim for asylum as a gay man from Pakistan was enough in itself to treat him as irremovable in a reasonable time (which presupposes that the facts asserted are true) and the assumption that the claim will be refused requiring an appeal (which presupposes that following the full interview the Defendant concludes that the facts are untrue or insufficient to justify the claim for asylum)<sup>2</sup>.”

66. On the facts as summarised in those paragraphs and earlier in this judgment, I cannot fault the judge's conclusion. He added at paragraph 117 this:

“117. In my judgment this case is very far removed from those cases where an overstayer or illegal entrant has been detained for many months ultimately in a sort of limbo because all avenues which might lead to successful removal appear to have closed. The simple making of a claim for asylum which might or might not on investigation prove to be a good one and, if rejected, might (but might not) then prompt an appeal process which might or might not succeed (statistics referred to in *Hossain* show many are not pursued and most fail) cannot in my view, at a time before the expiry of the target of 28 days for making a decision on such a claim and before the full interview has taken place, prevent the Defendant from holding the view that the Claimant may be removed in a reasonable time.”

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<sup>2</sup> The reference to *Hossain* is to *Hossain v SSHD* [2016] EWHC 1331 (Admin)

With those remarks, I agree. The period with which this case is concerned is the very early one after the first intimation of a late asylum claim (in parts inconsistent with earlier information given and possibly without foundation in terms of the Refugee Convention) by a person who had long overstayed his leave to be in the country and who presented a clear risk of absconding. Until 5 February 2016, the only obstacle to removal that was apparent was the need for a travel document. Until very shortly before release there was no ground that would have been apparent to the Respondent for thinking that she would not be able to effect removal within a reasonable time. In my judgment, there was, therefore, no breach of the *Hardial Singh* principles and I would reject ground 5.

67. In the result, I would dismiss this appeal.

**Lord Justice Dingemans:**

68. I agree with the judgment of McCombe LJ and wish to address the fact that this trial for damages for false imprisonment took place in the Administrative Court, as opposed to taking place either in the Queen’s Bench Division or the County Court.

69. By the time of the trial of this claim on 14 and 15 December 2017 the real relief sought by the Appellant was a claim for damages for wrongful detention. Claims for damages alone may not be brought in the Administrative Court, see CPR 54.3(2) “a claim for judicial review may include a claim for damages, restitution or the recovery of a sum but may not seek such a remedy alone”. This procedural rule exists because the Administrative Court seeks to make speedy decisions auditing the legality of decision making by public bodies. The Administrative Court will not be able to do that if its lists are filled with damages claims. Further, the procedures of the Administrative Court are not well suited to determine contested historic events giving rise to claims for damages where disclosure and cross-examination of witnesses will be relevant. These are points which have been made by the Court of Appeal in *R(S) v Secretary of State for the Home Department* [2015] EWCA Civ 652 at paragraph 11, approving *Swaran v Secretary of State for the Home Department* [2014] EWHC 1062 (Admin) at paragraphs 30-34.

70. As a matter of procedural history this judicial review claim commenced on 23 February 2016 with challenges: to the Respondent’s proposal that the substantive asylum interview of the Claimant take place before a report had been obtained pursuant to Rule 35 of the Detention Centre Rules 2001; and to the detention of the Claimant. Challenges to the legality of continuing detention are properly brought in the Administrative Court, and this claim was rightly commenced in the Administrative Court. However, following the grant of urgent interim relief by Ouseley J. which restrained the Respondent from carrying out the substantive asylum interview until a particular date, the appellant was released on 24 February 2016. This was the day after the claim commenced. Thereafter the delayed substantive asylum interview took place and the remaining issue between the parties was the claim for damages for wrongful detention.

71. It is right to record that in this case the Appellant claimed a declaration that his past detention was unlawful and a declaration that the Respondent’s policies had not been applied to him so that his detention was unlawful. However, in reality the claim for declarations added nothing to the claim for damages. This is shown by the fact that at

the conclusion of the trial the judge did not make any declarations even though he found that there was a period of unlawful detention meriting the award of nominal damages.

72. The overriding objective requires that cases are allotted an appropriate share of the court's resources, see CPR Part 1.1(2)(e). Parties are required to help the court to further the overriding objective, see CPR Part 1.3. Therefore, once the appellant had been released from detention both parties should have addressed their minds to the issue of whether the claim should have been transferred either to the Queen's Bench Division or the County Court. There would also have been many advantages in such a transfer for both the Appellant and Respondent. So far as the Appellant is concerned there would have been no need to obtain permission to bring the claim, and there were contested issues about the grant of permission to apply for judicial review in this case, because there would have been unfettered access to the Queen's Bench Division or County Court. There would have been a process for calling witnesses and for cross examination. This would have meant that the Appellant could give oral evidence in support of his case that he had disclosed the fact that he was depressed to the nurse at Larne House Short Term Holding Facility. As it was the judge rejected this evidence contained in a witness statement without hearing the claimant cross-examined because of the inconsistency of the Appellant's evidence with the contemporaneous notes of the examination.
73. From the point of view of the Respondent there would have been statements of case and proper case management of the claim, which would have given clarity to the case being made. There would have been formal disclosure of documents and this might have increased the prospects of identifying the fact that the parties were relying on the wrong version of policy DSO 6/2013 at the trial, see paragraph 11 of the judgment of McCombe LJ. A transfer to the Queen's Bench Division or County Court would also have made matters easier for the trial judge who would have had the benefit of assessing what had happened after hearing live evidence from witnesses. It was apparent from the judgment that the judge was well aware of the difficulties caused by the fact that he had not heard oral evidence, see paragraphs 49 and 61 of the judgment below.
74. In the final event the Respondent did make an application to transfer the case to the Queen's Bench Division or County Court but this was just before the trial was to take place. Granting the application at that late stage would have caused an adjournment of the trial, causing delays for the parties and for other court users, and the application was therefore rightly refused. It is hoped that in the future all parties should give timely consideration to the issue of transfer from the Administrative Court when, as often happens in these cases, issues of continuing detention have been resolved.

**Lord Justice Leggatt:**

75. I agree with both judgments.

