



Neutral Citation Number: [2019] EWHC 147 (Admin)

Case No: CO/1239/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2019

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

Between :

THE QUEEN
on the Application of
ABDUL HANNAN SHEIKH

Claimant

- and -

SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendant

Shahadoth Karim (instructed by **Hafiz & Haque Solicitors**) for the **Claimant**
Zane Malik (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 6 November 2018

Approved Judgment

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

.....
MR ANDREW HENSHAW QC

Mr Andrew Henshaw QC:

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(A) INTRODUCTION

1. The Claimant challenges:
 - i) a decision by the Defendant on 7 February 2017 that the Claimant is liable to administrative removal as an overstayer, and
 - ii) his detention pending removal from 28 February 2017 to 9 August 2017 when he was released on immigration bail.
2. The issues can conveniently be summarised as follows:
 - i) whether the Defendant’s decision of 4 December 2015 rejecting the Claimant’s application for further leave to remain, made on 27 August 2013, was validly served on the Claimant on or about 10 January 2016 (as the Defendant says) or only on or shortly after 16 February 2017 (as Claimant says);
 - ii) whether the Defendant has acted unfairly or irrationally, including by not issuing a “60-day letter” giving the Claimant the opportunity to find a new sponsor before refusing his further leave application;
 - iii) whether the Defendant had the power to detain the Claimant on 28 February 2017;
 - iv) whether the Claimant’s detention was unlawful as being contrary to public law as expressed, in particular, by the *Hardial Singh* principles; and

- v) if the Defendant did act unlawfully in any respect, whether no relief should be granted on the basis that it is highly likely that the outcome for the Claimant would not have been substantially different (section 31(2A) of the Senior Courts Act 1981).

(B) BACKGROUND FACTS

3. The Claimant was born in September 1976 and is a national of Bangladesh. He arrived in the United Kingdom on 29 April 2007, with an entry clearance as a student, valid from 1 April 2007 to 1 April 2009. The Claimant was subsequently granted successive extensions in his leave to remain as a student until 28 February 2014. However, on 10 April 2014 his leave to remain was curtailed so to expire on 27 August 2013.
4. The Claimant applied on the same date, 27 August 2013, for further leave to remain as a Tier 4 (General) Student. He enrolled with Barking and Dagenham College and obtained a Certificate of Acceptance for Studies. However, shortly therefore the College was removed from the register of sponsors register, and informed the Claimant of this. The Claimant says he was advised by the college to wait for a ‘60 day’ letter, i.e. a notification from the Defendant giving him 60 days to find an alternative college place or to arrange his departure from the UK.
5. The Claimant’s evidence is that on 8 August 2014 he changed his address through the Defendant’s online system and, having received no confirmatory email, on 15 August 2014 he telephoned the Defendant to confirm the change of address. The reason for the change was his move from 38 West Road, London to a flat in Siege House, Sydney Street, London.
6. Over a year later, on 16 November 2015 the Claimant’s then legal representatives, UK Legal and Immigration Experts Limited (“**UKLIE**”), wrote to the Defendant enclosing a letter of authority from the Claimant and requesting a 60-day letter. The letter stated that the College had in December 2013 advised the Claimant to complete certain forms and send them to the Defendant, which the Claimant had done; and that the College advised the Claimant to away a 60-day letter from the Defendant. UKLIE’s letter further stated:

“On 08/08/2014 our Client states that he updated his correspondence/home address (last known address) through online using Home Office change of address guidance. On 15/08/2015 [sic] he called Home Office and took confirmation from them regarding his change of address. He confirms that till date he has not received any correspondence from Home Office.”
7. The Defendant’s evidence is that the Claimant’s August 2013 application for further leave to remain was refused on 4 December 2015. A decision letter bearing that date (“**the Refusal Letter**”) gives three reasons for the refusal:
 - i) that the Claimant relied on a fraudulent TOEIC English language test certificate in support of his application, which therefore fell to be refused under Paragraph 322(1A) of the Immigration Rules;

- ii) that the Claimant's educational institution, Barking and Dagenham College, as at the date of the decision was not on the Tier 4 register of licenced sponsors, so that the Claimant was not entitled to any points under Appendix A to the Immigration Rules; and
 - iii) that the Claimant was not entitled to any points for maintenance under Appendix C to the Immigration Rules.
8. The Refusal Letter also stated that a decision had been made to remove the Claimant from the UK by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006, to which I refer further in § 72 below.
9. The Defendant's evidence is that the Refusal Letter was sent by recorded delivery (reference number 6511 6608 0GB) to Fairah and Co Solicitors, PO Box 572, Brentford, Middlesex, TW8 1AF in December 2015; that it was returned undelivered, marked "*no such address*" on 8 January 2016; and that it was the same day re-sent by recorded delivery (reference number 6511 6619 5GB) to the Claimant's last known residential address, namely, 38 West Road, London, E15 3PY.
10. On 29 April 2016 the Defendant replied to UKLIE's letter of 16 November 2014 stating:

"Unfortunately, we cannot issue a curtailment notice to your migrant, as the leave the migrant submitted an application for on 27 August 2013 to study at Barking and Dagenham College has never been granted. Therefore, no[] curtailment letter will be issued as there is no leave to be curtailed."
11. The Claimant's new solicitors, Hafiz & Haque, wrote to the Defendant on 25 May 2016 requesting her to reconsider her position and issue the Claimant with a 60-day letter in order to "*regularise his immigration status*". Hafiz & Haque wrote to the Defendant again on 22 June 2016 to similar effect.
12. The Defendant on 18 July 2016 issued a "*Notice of Removal*", stating *inter alia*:

"You are a person with no leave to enter or remain in the United Kingdom (UK). You have not given any reasons as to why you should be granted leave to remain or why you should not require leave to remain. Therefore you are liable for removal.

...

A decision has been made to curtail/revoke your leave so that it expires with immediate effect. The following reasons are given:

...

You entered the United Kingdom on 29/04/2007 with a multi entry student visa valid until 01/04/2009. You applied and was granted a further five student visas with the last expiry of 28/02/2014. On 28/06/2013 your leave was curtailed and given a new expiry date of 27/08/2013. You have not made any

successful further applications to the Home office to regularise your stay in the United Kingdom. On 18/07/2016 you were encountered working illegally at Love 2 Laundry ... You have therefore breached Section 10(1)(a) of the Immigration and Asylum Act 1999. (As amended by the Immigration Act 2014.)”

The notice gave a removal window of 3 months from 21 July 2016.

13. Hafiz & Haque responded to this notice (and to a letter from the Defendant dated 18 July 2017, presumably serving the notice) on 21 July 2017, inviting the Defendant to withdraw it. Their letter included the following:

“The documents which have been given by Mr Sheikh show that his previous application is still pending. Home Office did not make any decision regarding his previous matter. He states that he has been in touch with Home Office regularly and made up to date his correspondence and till date he did not receive any correspondence from you.

We refer to your letter of 18 July 2016. On that day he was encountered by Home Office alleging that he was working illegally ... Our client denies all alleged allegations made by HO as he states that he was there to visit his friend Mr ... who is the owner of that shop. ...”

14. On 7 February 2017 the Defendant issued a “*Notice of Removal Window*” referring to the July 2016 notice, providing fresh notice of a new removal window, and including a One Stop Notice under section 120 of the Nationality, Immigration and Asylum Act 2002. The Claimant states in his witness statement (and his pre-action protocol letter) that this was given to him by hand.
15. On 11 February 2017 the Defendant wrote to the Claimant notifying him that he was to be removed from the United Kingdom to Bangladesh on 28 February 2017.
16. The Claimant’s solicitors sent a pre-action protocol letter to the Defendant on 13 February 2017, to which the Defendant responded on 16 February 2017 maintaining his position and setting out the Defendant’s account of events. It is common ground that, on the same day or very shortly thereafter, the Defendant provided to the Claimant’s solicitors a copy (or further copy) of the decision of 4 December 2015.
17. On 28th February 2017 the Defendant detained the claimant with a view to removing him to Bangladesh on that date. However, the Claimant claimed asylum the same day and removal action was deferred.
18. The Claimant’s case was referred to Harmondsworth Detained Asylum Casework on 1 March 2017. His screening interview took place on 10 March 2017 and his substantive asylum interview took place on 10 April 2017. The Defendant on 25 April 2017 refused the asylum claim, with a right of appeal to the First Tier Tribunal.
19. The First Tier Tribunal dismissed the Claimant’s appeal on 13 June 2017. The Defendant’s skeleton argument indicates that the Claimant’s appeal rights were

exhausted on 24 July 2017. However, the Claimant in his witness statement dated 4 November 2017 stated that he had a pending appeal to the Upper Tribunal, and attached a copy of an application to that tribunal dated 24 July 2017 for permission to appeal.

20. The Claimant issued his claim for judicial review on 10 March 2017 and the Defendant filed an Acknowledgment of Service on 12 April 2017. Roger Ter Haar QC, sitting as a Deputy High Court Judge, granted permission to apply for judicial review on 10 May 2017 and gave standard case management directions. The claim was, however, struck out shortly thereafter because of an issue with the court's continuation fee. The claim was reinstated on 16 June 2017. The Defendant filed Detailed Grounds of Defence on 30 June 2017.
21. The Claimant was released from immigration detention on 9 August 2017.
22. The judicial review claim was listed for a substantive hearing on 29 November 2017. However, the Claimant's trial bundle contained fresh evidence and he sought to make a number of new points in his skeleton argument. The Claimant applied on 21 November 2017 to amend his Grounds and to rely on fresh evidence. The substantive hearing on 29 November 2017 was adjourned by a consent order including further case management directions.
23. Walker J on 17 September 2018 granted the Claimant permission to amend his Grounds and to rely on fresh evidence, and gave certain further case management directions. The Claimant filed amended Grounds on 21 September 2018.

(C) ISSUE 1: SERVICE OF DECEMBER 2015 REFUSAL

24. The Claimant contends that the December 2015 Refusal Letter was not validly served on him, and came to his attention only following the pre-action protocol correspondence referred to above. As a result, he says, he was not liable to removal or to detention because his pending August 2013 application resulted in continued leave to remain under section 3C of the Immigration Act 1971:

“3C Continuation of leave pending variation decision

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

- (a) the application for variation is neither decided nor withdrawn,
- (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),
- (c) an appeal under that section against that decision [, brought while the appellant is in the United Kingdom,] is pending (within the meaning of section 104 of that Act) ... ”

(1) Service of Refusal Letter: facts

25. As noted earlier, the Claimant’s case is that on 8 August 2014, having moved house, he changed his address via the Defendant’s online system; and then on 15 August 2014 telephoned the Defendant to confirm the change of address. In his witness statement dated 4 November 2017 he states:
- “On 8th August 2014 I updated correspondence/home address, using online Home Office change of address guidance. On 8 August 2014 I moved out from my old address, 38 West Road, London E15 3PY and on the same day I moved in my address, Flat ... Siege House, Sydney Street, London E1 2HP. On 15th August 2014 in about 4pm I called Home Office (Mr Brian) and took confirmation from them regarding change of address.”
26. The Claimant did not keep or provide any record of these contacts. However, he says his account is corroborated by the facts that:
- i) the letter sent the following year, on 16 November 2015, to the Defendant’s agents by the Claimant’s then legal representatives UKLIE included the statement quoted in § 6 above; and
 - ii) (as is common ground) when interviewed on 7 February 2017, the Claimant indicated that he believed that he had an outstanding Tier 4 application – in other words, that he believed that his August 2013 application for further leave to remain remained undetermined.
27. In the hearing before me, the Claimant was cross-examined by counsel for the Defendant on this and other matters. Part of the cross-examination was to the effect that the Claimant had not in fact shown that by December 2015 he had moved from West Road to Siege House. However, I am satisfied that letters and statements from banks (Halifax and TSB) dated 28 November 2014, 9 December 2014, 24 March 2015 and June 2015 show that he had done so.
28. On the topic of the provision of his updated address to the Defendant, the Claimant gave oral evidence broadly confirming the contents of his witness statement. He said at one point that he had forgotten to keep a copy of the confirmation of change of address on 8 August 2014. The Claimant also mentioned that he had called the Defendant on that date, just before updating his details online, in order to check how to

do so. He did not recall the name of the person he spoke to on that occasion, and did not mention the call in his witness statement, but explained that that was because the call was merely to check how to proceed (i.e. it was not in his view a significant call).

29. The Claimant stated that he called the Defendant again on 15 August 2014 because he had expected but not received an email acknowledgment after updating his details online on 8 August. The Claimant said in oral evidence that after providing basic details of his pending application, he asked the Defendant's representative what address was held, to which the latter replied giving the Claimant's Siege House address. The Claimant's evidence was specifically that the Defendant's representative already had a record of the Claimant's new address before the Claimant confirmed it.
30. The Claimant accepted that following a letter from the Defendant to his legal representatives of 29 April 2016 (which stated that his application for further leave to remain "*has never been granted*"), he understood his application to have been refused, but "*not officially*" since no refusal letter was provided, and that he no longer had leave to remain. In his witness statement, he stated:

“On 16 February 2017 HO refused the above PAP [pre-action protocol letter]. First time I came to know that from the response to PAP that my last application was refused with Right of Appeal. That refusal letter was dated 04 December 2015 and was never served me. It was only served to my current solicitor, Hafiz & Haque Solicitors with response to PAP.”
31. In his oral evidence, the Claimant suggested that he personally did not know about the refusal of his further leave application until his solicitors told him about it some time towards the end of his period of detention, and that he personally was not given the Refusal Letter itself until August 2017.
32. The Claimant's oral evidence on some matters was inaccurate. When asked when his college had notified him about revocation of his Tier 4 licence, he at first said April or May 2013 whereas (as he accepted) his witness statement indicated that it was a few months after August 2013. Asked about the date of his TOEIC test, he said it was around the end of 2012 or early 2013, whereas the recorded date of the TOEIC test purportedly taken by the Claimant test was in fact 28 March 2012.
33. The Defendant provided a witness statement from Colin Hubbard, an Executive Officer within UK Visas & Immigration (UKVI) at the Home Office, who from May 2014 to 2 October 2015 was assigned to the taskforce set up to tackle abuse in relation to Educational Testing Services and TOEIC certificates, and since 25 April 2016 has been assigned to the Tier 4 Sponsor Assessment Unit. Mr Hubbard had examined, and exhibited copies from, the Defendant's main records system, the Case Information Database (CID). As part of his evidence, Mr Hubbard stated that:
 - i) the Refusal Letter was posted on 3 December 2015 to Farrah & Co Solicitors, who had been recorded as the Claimant's solicitors in February 2013;
 - ii) a new legal representative (UK Legal & Immigration Experts Ltd) was added to the system on 18 November 2015;

- iii) on 8 January 2016 the Refusal Letter was sent by recorded delivery (quoting the reference) to the Claimant at 38 West Road;
 - iv) that address had first been submitted to the Defendant with the Claimant's application for leave to remain in May 2010;
 - v) if the Claimant had contacted the Home Office in August 2014 to tell it that 38 West Road was no longer his residential address, then the 'Maintain Address' and 'Notes' screens in CID would have been updated, but that there was in fact no record of a change of address on CID during or prior to 2014; and
 - vi) changes of address can be notified by email, fax or letter but not over the phone.
34. The trial bundle includes a copy of a UKVI webpage printed in October 2018 indicating that, at least on that date, it was possible to update one's home address by submitting details online and uploading digital copies of documents including a passport or other identity document and recent documents showing the new address.

(2) Service of refusal decision: law

35. The Claimant makes the point that an immigration decision is lawfully made only once it is validly and properly served, citing *R (Mehmood & Anor) v Secretary of State for the Home Department* [2015] EWCA Civ 744 at § 42:

“The short answer to these submissions is that section 4 of the 1971 Act explicitly provides that the power to give leave to remain or to vary any leave *"shall be exercised by notice in writing given to the person affected"*. Accordingly, the fact that internally the Secretary of State may have decided to refuse Mr Ali's application to vary his leave on 7 July is legally irrelevant. What is legally relevant is the date and time of the service of notice in writing to the person affected. Until then there is legally no decision.”

36. Section 4(1) of the 1971 Act, referred to in the passage quoted above, states:

“The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under s3(3)(a) (whether as regards duration or conditions)... shall be exercised by the Secretary of State; and... those powers shall be exercised by notice in writing given to the person affected....”

37. As regards methods of service, the Immigration (Leave to Enter and Remain) Order 2000 (as amended) provides:

“Grant, refusal or variation of leave by notice in writing

8ZA.—(1) A notice in writing—

- (a) giving leave to enter or remain in the United Kingdom;

- (b) refusing leave to enter or remain in the United Kingdom;
 - (c) refusing to vary a person's leave to enter or remain in the United Kingdom; or
 - (d) varying a person's leave to enter or remain in the United Kingdom,
- may be given to the person affected as required by section 4(1) of the Act as follows.
- (2) The notice may be—
 - (a) given by hand;
 - (b) sent by fax;
 - (c) sent by postal service to a postal address provided for correspondence by the person or the person's representative;
 - (d) sent electronically to an e-mail address provided for correspondence by the person or the person's representative;
 - (e) sent by document exchange to a document exchange number or address; or
 - (f) sent by courier.
 - (3) Where no postal or e-mail address for correspondence has been provided, the notice may be sent—
 - (a) by postal service to—
 - (i) the last-known or usual place of abode, place of study or place of business of the person; or
 - (ii) the last-known or usual place of business of the person's representative; or
 - (b) electronically to—
 - (i) the last-known e-mail address for the person (including at the person's last-known place of study or place of business); or
 - (ii) the last-known e-mail address of the person's representative.
 - (4) Where attempts to give notice in accordance with paragraphs (2) and (3) are not possible or have failed, when the decision-maker records the reasons for this and places the notice on file the notice shall be deemed to have been given.

(5) Where a notice is deemed to have been given in accordance with paragraph (4) and then subsequently the person is located, the person shall as soon as is practicable be given a copy of the notice and details of when and how it was given.

...

Presumptions about receipt of notice

8ZB.—(1) Where a notice is sent in accordance with article 8ZA, it shall be deemed to have been given to the person affected, unless the contrary is proved—

(a) where the notice is sent by postal service—

(i) on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom;

...”

38. The Claimant submits that burden of proving valid and lawful service falls on the Defendant, on the basis that the principles stated in *Uddin (2000 Order - notice to file : Bangladesh)* [2017] UKUT 408 (IAC) apply by extension. It was held in that case that where the Defendant relies on a curtailment notice as having been deemed to have been given by being placed ‘on file’ in accordance with article 8ZA(4) quoted above, it is for the Defendant to establish that that article applied. Moreover and in any event, the Claimant submits that a person is able to rebut any presumption of service, under article 8ZB.
39. In *R (McVey) v Secretary of State for Health* [2010] EWHC 437 (Admin) Silber J had to resolve a factual dispute about the date on which the Secretary of State had made a decision. After reviewing the case law, Silber J concluded at § 35:

“In my view, the proper approach to disputed evidence is that:-

i) The basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct;

ii) An exception to this rule arises where the documents show that the defendant's evidence cannot be correct; and that

iii) The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies.”

(3) Discussion

40. In the present case, Mr Hubbard's witness statement, which is supported by the CID records he exhibits, indicates that as at January 2016 the Defendant had no record of the Claimant's new address at Siege House. No application was made to cross-examine Mr Hubbard. I was not referred to any other documents showing that that evidence could not be correct. It was not contradicted by any of the documents produced by the Defendant, and the Claimant did not produce any documentary record of the upload he states that he made on 8 August 2014 or of the contents of the telephone call he says he made on 15 August 2014.
41. The Defendant had by January 2016 received a letter from UKLIE indicating that the Claimant said he had updated his address details in August 2014, and indicating that UKLIE were now the Claimant's representatives. As a result, the Defendant was, as the Claimant points out, incorrect to make the first attempt to serve the Refusal Letter by posting it to the Claimant's former representatives, Fairah & Co. However, UKLIE's letter did not itself state either the old address or the new address for the Claimant himself. It is therefore plausible that the Defendant did not, on the strength of that letter, update the address details it held for the Claimant.
42. The Claimant has also highlighted certain matters in relation to the Defendant's case which he says amount to significant inconsistencies giving rise to concerns about the Defendant's evidence:
 - i) The Defendant's pre-action protocol response and Summary Grounds stated that the refusal decision was made on 3 December 2015, whereas the Detailed Grounds and the Refusal Letter itself give the date of 4 December 2015. I see no reason to believe that that was anything other than an error in case preparation as opposed to an inconsistency of any significance.
 - ii) The Claimant makes the point that the Refusal Letter which the Defendant has produced is addressed to the Claimant at 38 West Road but dated 4 December 2015. There is no evidence of a re-dated letter of 8 January 2016. The Claimant says it is "*inexplicable why a decision which was returned on 8th January 2016 as undelivered did not lead the defendant to changing the date on the letter bearing in mind it was being sent out on 8th January 2016. Moreover, it is also not explained or evidence[d] whether a covering letter dated 8th January 2016 was sent with the decision letter when it was 'apparently' re-sent.*" I do not accept this. The Defendant's records indicate that the Refusal Letter was re-sent on 8 January 2016, and the tracking number is provided. It is unsurprising in my view that the case handler may have changed the address field but not re-dated the letter.
 - iii) The pre-action response and Summary Grounds stated that the re-sent Refusal Letter went to 8 West Road, whereas the Detailed Grounds and the letter itself refer to 38 West Road. Since both the Defendant's records and the letter itself give the latter address, I do not consider this point to have any significance.
 - iv) The Claimant says there was, on the Defendant's case, inordinate delay in making the refusal decision, with no explanation for the apparent lack of action or contact between August 2013 and December 2015. I agree this was a long

delay. Regrettably, long delays are not uncommon in some of the Defendant's decision-making processes. It was not contended that the delay rendered the decision unlawful, and I do not consider that it undermines the veracity of the Defendant's account of events.

43. In all the circumstances, I conclude that the Defendant's records as at January 2016 most likely still showed 38 West Road as the Claimant's address and that the Defendant did not have the Siege House address.
44. It is possible that the Claimant did on 8 August 2014 attempt to upload a new address but was unsuccessful. However, I doubt that the Claimant's oral evidence about his conversation on 15 August 2014 can be accurate. As noted earlier, the Claimant was specific in saying that the Defendant's representative was able to read out to the Claimant the Siege House address before the Claimant confirmed it. However, that could not have occurred unless the Claimant's upload on 8 August 2014 had already altered the address which the Defendant held for him, which is inconsistent with the records the Defendant has produced.
45. I take account of the fact that the Claimant's subsequent statements, via his solicitors and in person, made in 2015 and 2017 (see § 26 above) are consistent with his present evidence. However, weighing this evidence up against the available documentary evidence and Mr Hubbard's evidence, I conclude on the balance of probabilities that the Defendant had not by January 2016 received the Claimant's Siege House address.
46. In these circumstances, I conclude that the Refusal Letter was validly served on the Claimant pursuant to article 8ZA of the 2000 Order in January 2016, having been sent by post to a postal address (38 West Road) provided by the Claimant for correspondence (article 8ZA(2)(c)) alternatively to his last-known place of abode (38 West Road) (article 8Z(3)(i)).
47. I do not consider that the Claimant's evidence that he had in fact moved from 38 West Road by that date amounts to contrary proof under article 8ZB(1) with the result that the refusal decision has not been validly served or made. Article 8ZB is concerned with the time at which service validly made under article 8ZA is deemed to be made, for example the date in which a letter is deemed to have arrived. It is open to an applicant to prove, for example, that the letter in fact arrived on a later date. I do not, however, consider that an applicant is entitled in reliance on article 8ZB to assert that because he had moved house, a decision validly served under article 8ZA never in fact reached him with the result that it was never validly made.
48. In case I am wrong in any of the conclusions set out above, I consider whether the Claimant received notice of the December 2015 refusal decision at any later date. It is arguable that the Defendant's letter of 29 April 2016, and its letter and removal notice of 18 July 2016, in substance informed the Claimant that this application had been refused. As noted above, the Claimant accepted in cross-examination that he understood from the 29 April letter that his application had been refused, though "*not officially*" and not so as to grant him a right of appeal. However, I am not persuaded that either of these communications was sufficiently clear or specific to amount to notification of the December 2015 refusal decision.

49. It is accepted that notice of refusal of the application was provided to the Claimant at latest on or about 16 February 2017, the date of the Defendant’s pre-action protocol response. If notice was given to the Claimant on that date but not previously, then it would follow that:
- i) he was (by reason of section 3C of the 1971 Act) not liable for removal on 7 February 2017 but was so liable from 16 February 2017; and
 - ii) whether there was a power to detain the Claimant on 28 February 2017 depends on the Claimant’s contention, which I consider in section (E) below, about the effect of the right which the Claimant may have had to appeal from the refusal or to make a further application under Immigration Rule 39E.

(D) ISSUE 2: UNFAIRNESS/IRRATIONALITY

50. The Claimant submits that he was entitled to a 60-day letter prior to any refusal of his further leave application, referring to the Defendant’s policy and common law fairness, and citing *Naved (Student - fairness - notice of points) Pakistan* [2012] UKUT 14 (IAC); *Thakur (PBS decision – ‘common law fairness’) Bangladesh* [2011] UKUT 151 (IAC); *R (Q and others) v Secretary of State for the Home Department* [2003] EWCA Civ 364; and *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC).
51. The Defendant contended in his Detailed Grounds that the Claimant became an overstayer with the refusal of his further leave application and was therefore not entitled to a 60-day letter. However, the Claimant makes the point that he was not an overstayer at the relevant time, having made a valid and in-time application for further leave on 27 August 2013 within the currency of his existing leave. As a result, by reason of section 3C of the 1971 Act he did not become an overstayer until there was valid service of the Refusal Letter and he became appeal rights exhausted.
52. The Upper Tribunal in *Patel* stated:

“[2] Where a sponsor licence has been revoked by the Secretary of state during an application for variation of leave and the applicant is both unaware of the revocation and not party to any reason why the licence has been revoked, the Secretary of State should afford an applicant a reasonable opportunity to vary the application by identifying a new sponsor before the application is determined.

[3] It would be unfair to refuse an application without opportunity being given to vary it ...”

...

“[25] None of this applies where the applicant has not been a *bona fide* student at the college where he is seeking to extend his stay, or where he has participated in the practices that may have led the college to lose its sponsorship status, or where he has had actual knowledge of the cessation that the termination of the

college's status as a sponsor either before the application for an extension of stay was made or shortly thereafter and when he had adequate opportunity to amend the application by seeking to substitute an approved college for an unapproved one." (my emphasis)

53. In the present case, the Claimant makes clear in his witness statement that he was aware of the revocation of the licence of his college. He states: "*After studying with them for a couple of months my college lost their Tier 4 license while I was studying. The college notified me about revocation of Tier 4 license with the advice that I should wait for 60 days letter in order to allow me either to change college or make alternative arrangement to leave for my country of origin or otherwise*". As a result, under the guidance from *Patel* referred to above does not mean the Claimant was entitled to a 60-day letter.
54. Further, unlike in *Patel*, the Claimant was not refused further leave solely on the basis that the college's licence had been revoked. He was also (the Defendant says primarily) refused under paragraph 322(1A) of the Immigration Rules on the ground that he had relied on a fraudulent TOEIC certificate in his application. The Claimant has not sought to appeal from that decision. I agree with the Defendant that the Court of Appeal in *Raza v Secretary of State for the Home Department* [2016] EWCA Civ 36, who considered the proper ambit of *Patel*, made clear at §§ 16-17 that the ambit of the duty to act fairly in this context is always fact-specific. The Claimant's application was very likely to fail anyway, and in all the circumstances there was no unfairness in not issuing a 60-day letter.
55. Singh LJ (with whom Sir Andrew MacFarlane and Coulson LJ agreed) stated in *Pathan v Secretary of State for the Home Department* [2018] EWCA Civ 2103 at § 58 that he had "*considerable reservations about the correctness of the reasoning of the UT in Patel*". Singh LJ indicated at §§ 67-69 that the Supreme Court's recent judgment in *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25 "*undermines to a significant extent the reasoning of the UT in Patel, which [] relied on the principle of equal treatment in the same breath as the principles of procedural fairness*", and that it was "*very doubtful that any freestanding doctrine of substantive fairness has survived the decision of the Supreme Court in that case*". However, I do not consider it necessary to decide in the present whether or not *Patel* has, as the Defendant contends, ceased to be good law. For the reasons given above, the application of *Patel* to the present case does not lead to the conclusion that the Claimant was entitled to a 60-day letter.
56. The Claimant also contends that the failure by the Secretary of State properly to serve the Refusal Letter meant that he was unable to challenge it by way of an appeal to the First Tier Tribunal. However, quite apart from the findings I have made earlier about service of the decision, it is common ground that the Refusal Letter was at latest provided to the Claimant's representatives on 16 February 2017. On the Claimant's case, the decision was first served on that day, and the time for exercise of any right to appeal to the First Tier Tribunal would have started on the date of with the service of the immigration decision: (see, e.g., *OI (Notice of decision: time calculations) Nigeria* [2006] UKAIT 00042; *BO and Others (Extension of time for appealing) Nigeria* [2006] UKAIT 00035; *FO and Others (Service of notice of decision) Nigeria* [2007] UKAIT

00093; and *R (Khan) v Secretary of State for the Home Department (right of appeal - alternative remedy) IJR* [2015] UKUT 353 (IAC)).

57. However, the Claimant made no attempt to appeal against the refusal decision even after 16 February 2017. Nor has he identified any basis on which any such appeal could have been brought or would have been likely to succeed. The Claimant was no longer sponsored by a licenced college, so there was no basis for further leave to remain as a Tier 4 (General) Student. Further, there is no evidence that he could successfully have impugned the decision to refuse his application under paragraph 322(1A) of the Immigration Rules.
58. As a result, I do not accept the Claimant's contentions on this issue.

(E) ISSUE 3: POWER TO DETAIN

59. The Claimant contends that without a refusal decision having been lawfully and validly served on him, his detention was unlawful, citing *R (Aslam) v SSHD* [2018] EWHC 2123 (Admin). The claimant in that case made a number of unsuccessful applications for an EEA residence card based on his claim to have married a French national. Following the Secretary of State's decision on the last such application, the claimant was detained and served with removal directions under section 10 of the Immigration and Asylum Act 1999 on the ground that his leave to remain as a student had expired. Since, however, the claimant was not served with the refusal decision until some days after he had been detained, his detention up to the date of service was held to be unlawful.
60. In the present case, it is common ground that the refusal decision was served, at latest, on 16 February 2017 and hence before the Claimant was detained on 28 February 2017. However, the Claimant makes the points that:
- i) following service of the refusal decision on 16 February 2017, the Claimant had 14 days in which to bring an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002, expiring on 2 March 2017;
 - ii) during that period, the Claimant could not lawfully be detained because:
 - a) removal cannot take place when an appeal is pending (see section 78 of the 2002 Act), and
 - b) by reason of section 3C of the 1971 Act, quoted in § 24 above, the Claimant's leave to remain continued to exist during the 14 day period within which an in-country appeal could be brought, against the refusal decision;
 - iii) in addition, after the time limit for appealing expired on 2 March 2017, the Claimant could have made a further application to the Defendant under Immigration Rule 39E. The rule allows an application to be made, following the refusal of an in-time application for leave, within 14 days of *inter alia* the expiry of any leave extended by section 3C of the 1971 or the expiry of the time-limit for an appeal where applicable. The Claimant says that, as a result, he

could not be removed “*not least by virtue of 353A of the [Immigration] rules for example*”; and

- iv) the Claimant had made an Article 8 claim in his judicial review claim, issued on 10 March 2017, and could not properly be detained thereafter.
61. On the basis of the conclusion I have reached earlier that the Refusal Letter was validly served in January 2016, it is not strictly necessary to consider these issues. In case I am wrong in those earlier findings, I consider these further issues briefly below.
62. As to point (i) in § 60 above, the basis on which the Claimant might have been entitled to appeal was not explored in the parties’ submissions. However, the Refusal Letter stated that the Claimant had a right of appeal under section 82 of the 2002 Act as it stood prior to the amendments made by the Immigration Act 2014 (essentially restricting appeals to asylum and human rights claims). The transitional provisions provided that the old provisions would continue to apply to, *inter alia*, decisions made on or after 6 April 2015 refusing leave to remain to a person who applied before 20 October 2014 for leave to remain as a Tier 4 Migrant (SI 2014/2771 as amended by SI 2015/371). I therefore proceed on the basis that the Claimant had a right of appeal.
63. As to point (ii) in § 60 above, it is necessary to consider the Claimant’s alternative contentions (a) and (b) separately, i.e. the effect of (a) section 78 of the 2002 Act and (b) section 3C of the 1971 Act.
64. Section 78 of the 2002 Act provides:

“78 No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be—

- (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
- (b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section “pending” has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending—

- (a) the giving of a direction for the appellant's removal from the United Kingdom,
- (b) the making of a deportation order in respect of the appellant (subject to section 79), or
- (c) the taking of any other interim or preparatory action.

(4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92.”

65. Thus section 78(3)(a) has the effect that even a pending appeal (meaning, under section 104, one that has been instituted) does not prevent removal directions from being given.

66. The power to detain pending administrative removal derives from Schedule 2 to the 1971 Act read with section 10(9)(b) of the Immigration and Asylum Act 1999 and section 62 of the 2002 Act. Section 10 of the 1999 Act provides *inter alia* as follows:

“(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it.

...

(7) For the purposes of removing a person from the United Kingdom under subsection (1) or (2), the Secretary of State or an immigration officer may give any such direction for the removal of the person as may be given under paragraphs 8 to 10 of Schedule 2 to the 1971 Act.

...

(9) The following paragraphs of Schedule 2 to the 1971 Act apply in relation to directions under subsection (7) (and the persons subject to those directions) as they apply in relation to directions under paragraphs 8 to 10 of Schedule 2 (and the persons subject to those directions)—

...

(b) paragraph 16(2) to (4) (detention of person where reasonable grounds for suspecting removal directions may be given or pending removal in pursuance of directions)”

67. Schedule 2 §16(2) of the Immigration Act 1971 provides:

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

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

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

68. Section 62 of the 2002 Act includes these provisions:

“(1) A person may be detained under the authority of the Secretary of State pending—

(a) a decision by the Secretary of State whether to give directions in respect of the person under section 10 of the Immigration and Asylum Act 1999 (removal of persons unlawfully in the United Kingdom) ..., or

(b) removal of the person from the United Kingdom in pursuance of directions given by the Secretary of State under any of those provisions.

...

(3) A provision of Schedule 2 to that Act about a person who is detained or liable to detention under that Schedule shall apply to a person who is detained or liable to detention under this section: and for that purpose—

(a) a reference to paragraph 16 of that Schedule shall be taken to include a reference to this section,

...

(c) a reference to detention under that Schedule or under a provision or Part of that Schedule shall be taken to include a reference to detention under this section.

...

(7) A power under this section which is exercisable pending a decision of a particular kind by the Secretary of State is exercisable where the Secretary of State has reasonable grounds to suspect that he may make a decision of that kind.”

69. Thus the power to detain depends on there being reasonable grounds for suspecting that the detainee is a person in respect of whom removal directions may be given.

70. Since under section 78(3) a person with a pending appeal may be the subject of removal directions, such a person may also be detained. That view is confirmed by Macdonald’s *Immigration Law & Practice* (9th ed.) which states in § 19.37:

“Where the appeal suspends removal, the ban on removal pending appeal does not however prevent detention under the administrative provisions of Schedules 2 and 3 to IA 1971. The powers to give directions for a person’s removal or to make a deportation order against him or her while an appeal is pending enable those powers of detention to be exercised [footnote: NIAA 2002, s 78(3)].”

71. However, the Claimant also contends (§ 60(ii)(b) above) that since his August 2013 application for further leave was an application by a person with limited leave to remain

for variation of that leave, his leave was extended by section 3C of the 1971 Act (quoted in § 24 above) during the period in which he could have brought an appeal. The Defendant does not dispute that the Claimant's leave was extended under section 3C until service of the 4 December 2015 decision letter, albeit the Defendant contends (and I have found) that that took place in January 2016.

72. If I had concluded that the decision letter was not served until 16 February 2017, then it would have been necessary to consider the Claimant's detention from 28 February 2017 to 2 March 2017 was unlawful by reason of section 3C. This issue is considered by *Macdonald* in the context of the power under section 47 of the Immigration, Asylum and Nationality Act 2006 (since repealed) to give 'pre-removal directions' in relation to a migrant whose leave has been statutorily extended. As noted earlier, the Refusal Letter in the present case stated that a decision had been made under section 47. Section 47(1) and (1A) provided:

“47 Removal: persons with statutorily extended leave

(1) Where the Secretary of State gives written notice of a pre-removal decision to the person affected, the Secretary of State may—

(a) in the document containing that notice,

...

also give the person written notice that the person is to be removed from the United Kingdom under this section in accordance with directions given by an immigration officer if and when the person's leave to enter or remain in the United Kingdom expires.

(1A) In subsection (1) “pre-removal decision” means—

(a) a decision on an application—

(i) for variation of limited leave to enter or remain in the United Kingdom, and

(ii) made before the leave expires ...”

Section 47 had been repealed by the date of the Refusal Decision, subject however to its preservation (applicable in the present case) by Article 9 of SI 2014/2771 for *inter alia* decisions made on or after 6 April 2015 to refuse an application to vary leave to enter or remain as a Tier 4 Migrant made before 20 October 2014 where the result of that decision was that the applicant had no leave to enter or remain.

73. *Macdonald* states:

“The administrative provisions of the IA 1971, Schedule 2, including the power to detain under paragraph 16 apply in relation to the directions given by an immigration officer under section 47. However, this does not mean that an immigration

officer can detain a person as soon as a section 47 decision is made against him or her, a decision which may be made at the same time as, eg a decision refusing to extend the person's leave to remain. That is because an immigration officer will only be able to detain if there are 'reasonable grounds for suspecting that a person is someone in respect of whom' removal directions may be given. The immigration officer will only be able to give removal directions 'if and when' the statutory leave ends; whilst an appeal might be brought or an appeal is pending, the immigration officer has no power to give removal directions and so will be unable to have reasonable grounds for suspecting that removal directions may be given." (Macdonald, *Immigration Law & Practice* § 18.9)

The last footnote to this passage reads:

"The Minister (Tony McNulty) gave an assurance in Parliament that s 47 (as originally drafted) did not create any new power to impose restrictions on a person, eg to detain him or her, whilst the person has statutory leave: *Hansard*, 29.3.06, col 906."

74. It may appear anomalous that whilst a pending appeal will not generally prevent detention in an appropriate case, the same is not true where leave to remain is extended under section 3C as a result of an in-time application to vary existing leave. However, it is notable that section 3C contains no provision comparable to section 78(3) to the effect that removal directions can be given, and it is understandable that different considerations might apply to migrants who have taken steps to regularise their immigration situation before their leave expired.
75. Conversely, this court in *R (SW) v SSHD* [2018] EWHC 2684 (Admin) § 50 concluded that there can be reasonable grounds to suspect removability for section 10(9)/paragraph 16(2) purposes even before a notice of curtailment of leave has been given. I agree with the judge in that case that the phrase "*reasonable grounds for suspecting that a person is someone in respect of whom directions may be given*" is capable of referring to a person who is reasonably expected to be the subject of removal directions in the near future, following service of a decision. On the other hand, another feasible construction of the phrase is that it refers to a person who the detaining officer reasonable suspects to be someone in respect of whom removal directions could properly be given *as at the date of the decision to detain*. There is, moreover, some force in the submission made in that case that as a power to restrict liberty, the provision should be strictly construed.
76. On balance, I would be inclined respectfully to agree with the passage from *Macdonald* quoted above. However, given that the point is not decisive in the present case and has not been the subject of detailed argument as to the correct construction of the statutory provisions as a whole, I consider it preferable not to express a concluded view on this issue.
77. As to the Claimant's point (iii) referred to in § 60 above, the Claimant did not make a further application under rule 39E, and has been unable to cite any provision that would prevent the issue of removal directions, or detention, during the period in which such

an application could still be made. I do not consider that Immigration Rule 353A, which the Claimant does cite, has that effect. It applies where a fresh claim is made after a human rights or protection claim has been refused or withdrawn, or treated as withdrawn, and any appeal relating to that claim is no longer pending, and provides that:

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.

78. At the time of the Claimant's detention, he was not a person who had made a fresh asylum or human rights claim in the circumstances identified above.
79. Turning finally to the Claimant's point (iv) referred to in § 60 above, he submits that:
- i) an Article 8 claim need not be made by way of a formal application (see . *Ahsan v The Secretary of State for the Home Department (Rev 1)* [2017] EWCA Civ 2009 § 14);
 - ii) the human rights issues are clearly raised at section G of the his judicial review grounds;
 - iii) the claim was issued on 10 March 2017 yet he was detained (with a view to removal) until 9 August 2017; and
 - iv) as from 10 March 2017, the Defendant could not reasonably suspect removal directions would be given in relation to the Claimant, as removal would have been contrary to the Defendant's policy in "*Enforcement instructions and guidance*":

“Chapter 60 – Judicial reviews and injunctions

2.1.1 Persons not suitable for removal window

The policy described here in paragraph 2.1 may not be used to give notice of removal to:

- Family cases
- Where the person **has no leave but has made a** protection (asylum or humanitarian protections) or **human rights claim**, or appeal, pending.”

80. However, I do not consider that a policy against actual removal while a human rights claim is pending precludes the exercise of the power of detention pending contemplated removal. Section 78 of the 2002 Act continues to allow removal directions and other preparatory actions to occur pending an appeal under section 82, even though such an appeal can now *only* be based on a human rights or protection claim. I would therefore reject the Claimant's submission on this point.

(F) ISSUE 4: LEGALITY OF CONTINUED DETENTION

81. The Claimant submits that even if the Defendant had power to detain him, his detention was unlawful applying public law principles.

(1) The law

82. The *Hardial Singh* principles were summarised by Dyson LJ in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 [2003] INLR 196 at § 46 as follows:

(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances.

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention.

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

83. Lord Dyson in *Lumba* § 104 cited his statement at § 48 of *R (I)* setting out factors relevant to the determination of how long it is reasonable to detain pending deportation:

“It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.”

84. Determining what is a reasonable period in all the circumstances is a fact-sensitive exercise. There is no tariff or maximum period of detention: each case will depend on its facts: see, e.g., *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at §§ 37-39:

“37 The Secretary of State acting through his officials has to determine whether the period of detention is reasonable when deciding whether or not to continue the detention, subject to the right of any detainee to apply for bail. It is a judgment which has to be made on the evidence and in the circumstances as appear to the officials in each case.

38 There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.

39 McFarlane LJ said in R (JS (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 1378 at paragraphs 50-51 that fixing a temporal yardstick might cause the courts to accept periods of detention that could not be justified on the facts of a particular case. In R (NAB) v Secretary of State for the Home Department [2010] EWHC 3137 (Admin) Irwin J made clear at paragraphs 77-80 that a tariff would be repugnant and wrong. He added:

“It would be wise for those preparing legally for such cases to abandon the attempt to ask the courts to set such a tariff by a review of the different periods established in different cases””

85. As regards risks of absconding and re-offending, in *Lumba* Lord Dyson said at § 121:

“...The risks of absconding and re-offending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place.”

86. The Court of Appeal in *Fardous* also commented on absconion risk (*Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931):

“44 It is self-evident that the risk of absconding is of critical and paramount importance in the assessment of the lawfulness of the detention. That is because if a person absconds it will defeat the primary purpose for which Parliament conferred the power to detain and for which the detention order was made in the particular case. This has been made clear in a number of cases: see for example paragraph 54 of the judgment of Keene LJ in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 and the judgment of Lord Dyson in *Lumba* at paragraph 121.

45 Although the risk of absconding will therefore always be of paramount importance, a very careful assessment of that risk must be made in each case, as the magnitude of that risk will vary according to the circumstances. It may be very great, for example, where the person has, as in this case, a clear track record of dishonesty and a knowledge of how to “work” the controls imposed to regulate immigration in the European Union. Another example where the risk may be high is where the person refuses voluntary repatriation that is immediately available to him. It is important to emphasise that the risk of absconding is distinct from the risk of committing further offences and not dependent on that further risk. The risk of re-offending requires its own distinct assessment.

46 However, as is accepted on behalf of the Secretary of State, the risk of absconding cannot justify detention of any length, as that would sanction indefinite detention. It is therefore not a factor that invariably “trumps” other factors, particularly the length of detention. It is nonetheless a factor that can, depending on the circumstances, be a factor of the highest or paramount importance that may justify a very long period of detention”

87. Jay J in *AXD v Home Office* [2016] EWHC 1133 stated:

“181 The absconding risk is important because a former detainee who absconds will be frustrating the public interest in favour of his deportation. The risk of reoffending is relevant but it must be less important, because the purpose of immigration detention is not to provide indirect facilitation to the separate policies and objects of the criminal law.”

88. As to the relevance to detention of merits of an asylum claim, Lord Dyson in *Lumba* stated:

“120 ... Time taken in the pursuit of hopeless challenges should be given minimal weight in the computation of a reasonable period of detention. Nor do I accept that it is undesirable (or indeed unduly difficult) to identify hopeless or abusive challenges. There exist statutory mechanisms to curb unmeritorious appeals. If a claim is “clearly unfounded”, certification under section 94(2) of the Nationality, Immigration and Asylum Act 2002 precludes an in-country appeal. If a claim relies on a matter which could have been raised earlier in response to an earlier immigration decision or in response to a “one-stop notice”, certification under section 96 of the 2002 Act precludes any appeal at all. In any event, a court considering the legality of a detention will often be able to assess the prima facie merits of an appeal. Where, as in the case of Mr Lumba, there have been orders for reconsideration, or where there has been a grant of permission to appeal to the Court of Appeal, the court will easily recognise that the challenge has some merit. Conversely, there may be one or more determinations from immigration judges dismissing claims as wholly lacking in credibility.

121 To summarise, I would reject the exclusionary rule. If a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his detention during the challenge should be given minimal weight in assessing what is a reasonable period of detention in all the circumstances. On the other hand, the fact that a meritorious appeal is being pursued does not mean that the period of detention during the appeal should necessarily be taken into account in its entirety for the benefit of the detained person. ...The risks of absconding and reoffending are always of

paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one.”

89. As to when there is a sufficient prospect of removal having regard to the circumstances, in the pre-*Lumba* case *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112 the Court of Appeal said:

“64 ... the approach of Toulson LJ in *A (Somalia)* seems to me to be particularly helpful when considering the issues raised here about the prospect of securing the claimant's removal to Somaliland. As Toulson LJ said, there must be a “sufficient prospect” of removal to warrant continued detention, having regard to all the other circumstances of the case (see [32] above). What is sufficient will necessarily depend on the weight of the other factors: it is a question of balance in each case.

65 I do not read the judgment of Mitting J in *R (A and Others) v Secretary of State for the Home Department* as laying down a legal requirement that in order to maintain detention the Secretary of State must be able to identify a finite time by which, or period within which, removal can reasonably be expected to be effected. That would be to add an unwarranted gloss to the established principles. ... Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors. Thus in *A (Somalia)* itself there was “*some prospect of the Home Secretary being able to carry out enforced removal, although there was no way of predicting with confidence when this might be*” (per Toulson LJ at para 58); and that was held to be a sufficient prospect to justify detention for a period of some four years when regard was had to other relevant factors, including in particular

the high risk of absconding and of serious re-offending if A were released.”

90. Following *Lumba*, *MH* was applied by the Court of Appeal in *R (Muqtaar) v Secretary of State* [2012] EWCA Civ 1270, where the claimant contended that it should at least have been clear to the Secretary of State that removal to Somalia was not going to be possible within a reasonable period once the Strasbourg Court had issued a Rule 39 measure prohibiting removal. The court stated:

“36. ... At the time of receipt of the rule 39 indication there was a realistic prospect that the ECtHR proceedings concerning removal to Somalia would be resolved within a reasonable period: it was possible but was not apparent that they would drag on as in practice they did. Nor was it apparent that the ECtHR’s final decision would be such as to prevent the appellant’s removal. I stress “apparent”, because that is the word used in the approved formulation of *Hardial Singh* principle (iii) and in my view it is important not to water it down so as to cover situations where the prospect of removal within a reasonable period is merely uncertain.

37. Mr Husain submitted that for continued detention to be lawful it was necessary for the Secretary of State to identify the timescale within which removal could be effected, whereas in this case the timescale was wholly uncertain. An argument along those lines was rejected in *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112. ...

38. Mr Husain submitted that that reasoning cannot live with the formulation of the *Hardial Singh* principles by the Supreme Court in *Lumba*, in particular at paras 103-104 where Lord Dyson said that a convenient starting point in the application of the principles to Mr Lumba’s appeal was “to determine whether, and if so when, there is a realistic prospect that deportation will take place” and that “if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful”, and where he went on to identify factors relevant to the question of how long it is reasonable to detain a person pending removal. There is nothing to show, however, that Lord Dyson was intending to address the point made in the passage quoted above from *MH*, and there does not seem to me to be any inconsistency between his observations and that passage. I adhere to the view that there can be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. At the time of receipt of the rule 39 indication in the appellant’s case, although it was not possible to say when the ECtHR proceedings would be concluded, there was nonetheless a realistic prospect of their being concluded and of

removal being effected within a period that was reasonable in all the circumstances.”

91. The burden is on the Defendant to prove the legality of detention throughout the period: *Lumba* § 42; see also *R (Santos) v SSHD* [2016] EWHC 609 (Admin) § 125, adding that the tort (of false imprisonment) is actionable per se regardless of whether the claimant suffers any harm. The Defendant must show that the power to detain was validly and lawfully exercised throughout the relevant period. It is for the court to determine the legality of detention, reviewing it as a primary decision-maker; *Lumba* § 66. The Defendant is required to provide “*substantial, fact-based justification*” for the interference with the fundamental right of liberty: *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634 § 94 citing *R (Aguilar Quila) v Secretary of State for the Home Department*; *R (Bibi) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621. The justification must relate to the basis on which the detainer has purported to act, and not on grounds wholly different to the actual reason for detaining: *Lumba* § 242.
92. The issue of whether a detention is unlawful is a matter for the Court to decide, with little or no deference to be given to the views of the Secretary of State. In *A v. Secretary of State for the Home Department* [2007] EWCA Civ 804 Toulson LJ stated at paragraph 60-62:

“60 My conclusion as to the disposal of this appeal would be the same whether it is for the court to decide if A's detention for the period in question was reasonably necessary or whether the court's role is limited to reviewing on a narrower basis the reasonableness of the Home Secretary's decision to exercise his power of detention during that period.

61 Mr Giffin advanced a subtle argument in support of the latter, based on certain passages in *Tan Te Lam* and *Khadir*, although I am not entirely clear what is the suggested scope of the court's power of review. Mr Giffin said that the test would be broader than whether the Home Secretary's decision was *Wednesbury* unreasonable and would involve “strict scrutiny”, but it is less clear what strict scrutiny would connote in this type of case.

62 I intend no disrespect by not going into the refinements of Mr Giffin's argument but dealing with the matter on a broader basis. Where the court is concerned with the legality of administrative detention, I do not consider that the scope of its responsibility should be determined by or involve subtle distinctions. It must be for the court to determine the legal boundaries of administrative detention. There may be incidental questions of fact which the court may recognise that the Home Secretary is better placed to decide than itself, and the court will no doubt take such account of the Home Secretary's views as may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention, and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court

at common law and does not depend on the Human (although Human Rights Act jurisprudence would tend in the same direction).”

93. The court has to make its assessment on the basis of the circumstances as they presented themselves to the Secretary of State at the time, rather than with hindsight: see, e.g., *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 § 42.
94. The *Hardial Singh* principles are not statutory rules, a breach of which gives rise to right to damages: see *R(Krasniqi) v Secretary of State for the Home Department* [2011] EWCA Civ 1549 at [12]:

“The *Hardial Singh* principles, though approved as such by the Supreme Court, are not the equivalent of statutory rules, a breach of which is enough to found a claim in damages. As I understand them, they are no more than applications of two elementary propositions of English law: first, that compulsory detention must be properly justified, and, secondly, that statutory powers must be used for the purposes for which they are given. To found a claim in damages for wrongful detention, it is not enough that, in retrospect, some part of the statutory process is shown to have taken longer than it should have done. There is a dividing-line between mere administrative failing and unreasonableness amounting to illegality. Even if that line has been crossed, it is necessary for the claimant to show a specific period during which, but for the failure, he would no longer have been detained.”

They are not to be applied rigidly or mechanically (*Lumba* § 115). The Court will make allowances for the way in which Government functions: *HXA v The Home Office* [2010] EWHC 1177 QB § 71.

95. The approach the court should take in considering an unlawful detention challenge was summarised by Jay J in *AXD v Home Office* [2016] EWHC 1133 (QB) in this way:

“176 In unlawful detention cases, the court does not conduct a *Wednesbury* review but assumes the role of primary decision maker: see *R(A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 , per Toulson LJ at paragraph 90. The court can take into account any facts that were known to the Defendant at the time, even if they did not feature in the reasons for detention that were furnished: see *R(MS) v Secretary of State for the Home Department* [2011] EWCA Civ 938. Hindsight is no part of the exercise: see *R(Fardous) v Secretary of State for the Home Department* [2015] EWCA Civ 931. The weight to be given to the Defendant's view is a matter for the court, although certain issues are more within the expertise of the executive than the judiciary, for example the progress of diplomatic negotiations and the attitude of other countries to accepting returnees. I would add that in my judgment the Defendant knows

more than judges sitting in this jurisdiction about the absconding risk of immigration detainees.”

96. As indicated in *Lumba* § 30, the *Hardial Singh* principles reflect basic public law duties to act consistently with the statutory purpose (*Padfield*) and reasonably in the *Wednesbury* sense. They are thus an application of general public law principles, and may be regarded as a subset of the public law principles applicable to any decision to detain or to continue a detention. Detention will be unlawful if the decision to detain is made in breach of a principle of public law, if the breach has a bearing on the decision to detain (*Lumba*, at §§ 66, 68 and 95). However, such a breach would result in at most an award of nominal damages if the detainee would inevitably have been detained in any event i.e. despite the breach (*Lumba* § 71).
97. Once the Secretary of State has decided that a person should be released, she is entitled to a short grace period in order to make any necessary arrangements, the length of which will depend on the circumstances: see *FM v Secretary of State for the Home Department* [2011] EWCA Civ 807 § 60:

“60 I have already expressed my opinion that the test for the lawfulness of a period of detention is one of reasonableness. The obligation of the Secretary of State is to cease detention when it becomes clear that detention is no longer required to effect removal but, in my view, common sense demands that a short period of grace is required for the decision-making process to take place which may include a decision as to the management of the detainee on release. First, there is, I think, a distinction between cases in which it is clear that removal directions will not be re-set (e.g. upon grant of ILR) and those in which the decision whether to re-set removal directions depends upon the outcome of proceedings (as in the present case). The Secretary of State will in the latter cases be concerned to ensure that she is kept aware of the whereabouts of the released detainee. That may require administrative arrangements for appropriate accommodation to be made available. I do not think that the Secretary of State is bound to release without regard to a residual risk of absconding (see, for example, *R (Wang) v Secretary of State for the Home Department* [2009] EWHC 1578 (Admin)). Secondly, I do not consider, as Mr Husain argues, that the Secretary of State's assumption of responsibility for the welfare of these two children in detention can lightly be segregated from a responsibility to take reasonable steps to ensure that they are properly accommodated on release. There is no policy of the Secretary of State which requires case workers to turn detainees out of a detention centre without first ensuring that they can survive. On the contrary, it is the policy of the Secretary of State (EIG 55.6.3) that detention may be necessary “whilst alternative arrangements are made” for the detainee's care (provided, of course, that the purpose of detention was to effect removal). It is not difficult to envisage circumstances in which the Secretary of State could be said to be acting in dereliction of the duty

undertaken by the act of detention if she took no action but to release the detained person immediately removal within a reasonable period became, as a matter of fact, not possible.”

In that case a further detention of two days before final release was held to be lawful.

98. The Claimant also refers to relevant sections of the Defendant’s policy on detention set out in Chapter 55 of the Enforcement Instructions and Guidance (EIG):

“55.6.3 Form IS91R Reasons for detention

This form is in three parts and must be served on every detained person, including each child, at the time of their initial detention. The IO or person acting on behalf of the Secretary of State must complete all three sections of the form. The IO or person acting on behalf of the Secretary of State 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.

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. ...

It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are always justified and correctly stated by the IO or person acting on behalf of the Secretary of State who is completing the form. A copy of the form (fully completed and signed on both sides) must be retained on the caseworking file. If any of the reasons for detention given on the form IS91R change it will be necessary to prepare and serve a new version of the form. Again, any such changes must be fully justified and correctly stated by the IO or person acting on behalf of the Secretary of State who is completing the form. ...”

“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.”

“55.8 Detention reviews

Initial detention must be authorised by a CIO/HEO or inspector/SEO (but see section 55.5). In all cases of persons detained solely under Immigration Act powers, continued detention must as a minimum be reviewed at the points specified in the appropriate table below. 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.

Monthly reviews should be conducted using the detention review template (ICD3469 or criminal casework equivalent). 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.

...

Table 1, below, sets out the minimum requirements in respect of the specific stages and levels at which reviews must be conducted

...

| Table 1: Review of detention (non-criminal casework/ non-third country unit (TCU) cases) Review Period | Review Authorised by1: |
|---|-------------------------------|
| 24 hours | Inspector/SEO2 |
| 7 days | CIO/HEO |
| 14 days | Inspector/SEO |
| 1st monthly | Inspector/SEO |
| 2nd monthly | Inspector/SEO |
| 3rd monthly | Inspector/SEO |
| 4th monthly | Inspector/SEO |
| 5th monthly | Inspector/SEO |

“Chapter 60 – Judicial reviews and injunctions

2.1.1 Persons not suitable for removal window

The policy described here in paragraph 2.1 may not be used to give notice of removal to:

- Family cases

- Where the person has no leave but has made a protection (asylum or humanitarian protections) or human rights claim, or appeal, pending.”

(2) Application to the present case

99. The Claimant submits that:
- whilst the Defendant did issue an IS.91R, the form was erroneous in the various conclusions it reached, in particular the statement that the Claimant had not complied with conditions (despite the lengthy correspondence from the Claimant showing that he was awaiting a 60-day decision or some other response from the Defendant);
 - there were no grounds for believing that the Claimant would not comply: he had no history of non-compliance; he had been reporting and was detained on reporting; whatever the legal position on service of the Refusal Letter might be, the Defendant should have realised that the Claimant had not in fact received it until 16 February 2017 at the earliest;
 - the Claimant was not an immigration offender or prolific absconder, and had remained in touch with the authorities;
 - the Claimant was not a danger to the public;
 - all reasonable alternatives to detention appear not to have been considered, and the IS.91R decision did not explain why the Defendant was not satisfied that there was sufficient evidence to grant temporary admission;
 - the Defendant had produced evidence of only a single detention review, dated 25 April 2017 despite the Claimant’s detention for 5 months: in the course of the proceedings, however, the Defendant produced further detention reviews dated 28 February, 2 March, 10 March, 14 March, 28 March, 10 April, 25 April, 23 May, 20 June and 18 July 2017;
 - it became apparent that the Claimant could not be removed within a reasonable time by, at the latest, the date on which he filed his judicial review application and claimed asylum, alternatively the date on which permission to apply for judicial review was granted. Moreover, the significance of the grant of permission was not addressed in the detention reviews; and
 - the Defendant did not act with diligence to effect removal.
100. The Defendant submits that when detaining the Claimant on 28 February 2017, she expressly acknowledged the presumption in favour of his release. The Defendant, however, reasonably took the view, as recorded in the IS91R, that the Claimant was likely to abscond, there was insufficient reliable information to grant him temporary admission, and his removal from the United Kingdom was imminent. The Claimant had no close ties in the United Kingdom, had failed to comply with conditions of his stay, and he had failed to leave the UK when required to do so. The Defendant notes

that at the time of his detention the Claimant had no pending application or claim, and was liable to removal. He had been issued with notice of removal twice and knew that he had no basis to be in the UK. Further, he was a person who had relied on a fraudulent TOEIC certificate to support his application for further leave to remain as a Tier 4 (General) Student.

101. The Defendant further submits that the Claimant's detention was regularly reviewed. The reasons why his detention was maintained are set out in the detention reviews. In addition to the matters referred above, when detained, the Claimant claimed asylum. That was plainly an opportunity attempt to frustrate his removal from the United Kingdom. He was not unsuitable or unfit for detention. The Secretary of State correctly took the view that he would be able to remove the Claimant within a reasonable period of time, despite his last minute asylum claim. The Secretary of State acted with due diligence and the Claimant was detained for a period that was reasonable in all the circumstances.
102. In my judgment it was lawful for the Defendant to have detained the Claimant on 28 February 2017. The Claimant was an overstayer, and had shown no sign of arranging his own departure from the UK. Even if he did not in fact receive the Refusal Letter in January 2016, I have found that the decision was validly served. In any event, he had been served with removal papers in July 2016 and at that stage understood in practice that his 2003 application had been refused. On or about 16 February 2017 his solicitors had been sent the Refusal Letter. The Claimant had also been found to have used deceit in connection with a TOEIC test, and did not proceed to make any attempt to appeal from that decision. It is true that the Claimant had largely remained in contact with the authorities, and had complied with reporting conditions as the detention reviews acknowledged. On the other hand, the Defendant had some grounds to suspect that the Claimant had been working unlawfully, albeit the Defendant had decided that the relevant business owner was not liable for a civil penalty. (Subsequently, both in his asylum interview in March 2017 and in cross-examination before me the Claimant admitted that he had worked in the UK.) The Claimant had no close ties in the UK such as to make it unlikely he would abscond. The Defendant had arranged a flight for the Claimant's removal on 28 February 2017. Although the Claimant had previously complied with reporting restrictions, there was in all the circumstances a risk that faced with imminent removal he would indeed abscond. I conclude that his detention at this stage was lawful.
103. The Claimant then proceeded to claim asylum, upon detention. He had made no such claim at any previous point in the period of nearly ten years since he had arrived in the UK, despite having been in contact with the Defendant on numerous occasions. The Defendant dealt with this very late claim expeditiously, as outlined in §§ 18 and 19 above, resulting in the claim (including the Claimant's Article 8 claim) being refused on 25 April 2017 and the First Tier Tribunal dismissing the Claimant's appeal on 13 June 2017. The Tribunal found a number of aspects of the Claimant's account to be implausible and inconsistent; considered his credibility to be substantially undermined by the timing of his asylum claim; concluded that even if his claim were truthful he had not made out a case for international protection; and (albeit the Claimant had not even sought to advance his appeal on private and family life grounds) was satisfied that there were no grounds on which to grant him leave based on ECHR Article 3 or Article 8.

104. In these circumstances, I do not consider that the Claimant's asylum claim meant that there ceased to be a realistic prospect of his removal within a reasonable time; and that conclusion is not altered by the fact that the Claimant appears to have lodged an application with the Upper Tribunal for permission to appeal. There remained good reason to consider the asylum claim to be opportunistic and unmeritorious, and that in turn was relevant to the consideration of what constitutes a reasonable time.
105. Equally, the mere fact that an application was made for judicial review did not in my view materially alter the position. Unless and until permission were granted, there would be no reason to conclude that the Claimant could not be removed within a reasonable time in all the circumstances. Further, the fact that the Claimant had put forward a claim under Article 8, whilst it meant he should not under the Defendant's policy in EIG Chapter 60 have been removed pending its determination, did not mean he could not lawfully be detained. Otherwise, the mere assertion of an Article 8 claim, even one which (as both the Defendant and the First Tier Tribunal found in the present case) has no merit, would preclude immigration detention.
106. The circumstances changed after permission to apply for judicial review was granted on 10 May 2017. The judge granting permission observed *inter alia* that it was arguable that the decision to remove the Claimant was wrong for the reasons set out in the Claimant's Grounds.
107. The Defendant's Detailed Grounds indicate that the claim was, however, struck out shortly thereafter because of an issue with the court's continuation fee, but reinstated on 16 June 2017. The detention reviews dated 20 June and 18 July 2017 referred to the grant of permission on 16 May 2017 and to a "strikeout letter" received on 16 June 2017, but not to the reinstatement of the claim. At this point, the question of detention should be approached on the basis that the Claimant had an arguable case that the decision to remove him was unlawful. That issue would not be resolved, absent a settlement, until there had been a substantive judicial review, a process which in the ordinary course and in the absence of expedition would take many months. There may of course be cases in which a grant of permission to apply for judicial review would not necessarily lead to release from immigration detention, for example (non-exhaustively) in cases presenting a particularly high risk of reoffending or public harm. In the present case, however, the matter was more finely balanced. Once it became clear that the Claimant could not be removed until the end of a substantive judicial review claim, it was in my judgment no longer realistic to expect that he could be removed in what would (in all the circumstances of his case) be a reasonable time. The risks which the Claimant presented, including risk of absconsion and of illegal working, were insufficient to justify his detention for the duration of a substantive judicial review claim.
108. As a result, I consider that the Claimant ought to have been released from detention after the Defendant had had a short period in which to reassess the situation and make any necessary arrangements for the Claimant's release. I conclude that he should have been released within 7 days of reinstatement of the claim, i.e. by 23 June 2017, and that his detention for the period from 24 June 2017 to 9 August 2017 was unlawful.

(G) ISSUE 5: SENIOR COURTS ACT SECTION 31(2A)

109. The Defendant argued as a fallback that even if the Defendant made a public law error, for the purpose of section 31(2A) of the Senior Courts Act 1981 it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. Further, the Defendant submits, it is plain that the Claimant would have been detained in any event, irrespective of the alleged public law errors on part of the Secretary of State. Accordingly, even if the Claimant succeeds in this claim, he is entitled to no more than nominal damages.
110. I have concluded that the last period of the Claimant's detention was unlawful applying *Hardial Singh* principles. Since, as noted above, the later detention reviews did not address the consequences of the grant of permission and reinstatement of the Claimant's judicial review claim, it is at least arguable that a general public law error also occurred in the form of failure to take account of a relevant consideration. However, my conclusion under the *Hardial Singh* principles – under which it is ultimately for the court to assess the lawfulness of detention – leaves no room for the application of section 31(2A) in the present case.

(H) OVERALL CONCLUSIONS

111. The Claimant's claim succeeds in part. I conclude that:
- i) the Defendant's decision on 7 February 2017 that the Claimant is liable to administrative removal as an overstayer was lawful;
 - ii) the detention of the Claimant from 28 February 2017 to 23 June 2017 was lawful; and
 - iii) the detention of the Claimant from 24 June 2017 to 9 August 2017 was unlawful.
112. I am grateful to both parties' counsel for their helpful written and oral submissions.