



Neutral Citation Number: [2019] EWHC 230 (Admin)

Case No: CO/5099/2016

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 8 February 2019

**Before :**

**ANDREW HENSHAW QC**  
**(sitting as a Judge of the High Court)**

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**Between :**

**THE QUEEN**  
**on the Application of**  
**PONNIAH YOGARAJA**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR**  
**THE HOME DEPARTMENT**

**Defendant**

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**Shivani Jegarajah** (instructed by **Jein Solicitors**) for the **Claimant**  
**Christopher Staker** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 27 November 2018  
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**Approved Judgment**

**Mr Andrew Henshaw QC:**

**(A) INTRODUCTION**

1. The Claimant challenges:
  - i) the decision of the Defendant on or about 5 October 2016 to refuse to consent to the grant of bail to the Claimant by the First-tier Tribunal (“*FTT*”), pursuant to Immigration Act 1971 Schedule 2 § 22(4) (as then in force);
  - ii) the Claimant’s immigration detention from 18 March 2016 to 24 October 2016, on the basis that it was contrary to Article 3 of the European Convention on Human Rights (“*ECHR*”); and
  - iii) the decisions of the Defendant dated 8 and 9 October 2016 that further representations made on behalf of the Claimant did not amount to a fresh claim under paragraph 353 of the Immigration Rules.
2. Permission to proceed on these points was granted on 14 August 2018. Permission was refused for a challenge to the lawfulness of the Claimant’s detention on *Hardial Singh* grounds.

**(B) FACTS**

**(1) Events prior to 2016**

3. The Claimant has a long immigration history. He is a national of Sri Lanka, born on 7 July 1973. He arrived in the UK on or about 10 October 2000 and claimed asylum the same day. The basis of the asylum claim was that he had been arrested and tortured by the Sri Lankan army on suspicion of having been a member of the People’s Liberation Organisation of Tamil Eelam (“*PLOTE*”), and had also been interrogated and tortured by the PLOTE.
4. On 17 February 2001 the Defendant refused the asylum claim. The adjudicator dismissed the Claimant’s appeal from that decision on 22 April 2003, finding that he was not credible, and not believing his account of being detained and mistreated. Permission to appeal to the Immigration Appeals Tribunal was refused, and the Claimant was appeal rights exhausted on 1 July 2003. The Claimant was granted temporary admission with reporting restrictions on 13 September 2002, while his appeal was pending.
5. On 27 July 2004 the Defendant issued the Claimant with a notice in form IS.96 requiring him to report on 3 August 2004. The Claimant did not comply with the reporting requirement, and was listed as an absconder on 14 January 2005.
6. The Claimant was encountered on 11 November 2008 during a joint operation by the Home Office and the police, and a passport not in his name was found in his room during a search. He was arrested on suspicion of having committed an offence under the Identity Cards Act 2006 (since repealed).

7. On 26 January 2009 the Claimant was convicted at Isleworth Crown Court, following a guilty plea, of possessing a false passport with intent to use it to establish his identity, and was sentenced to 12 months' imprisonment. The Crown Court made a recommendation for his deportation. The Claimant was notified on 17 April 2009 of his liability to automatic deportation, and invited to give reasons why he should be permitted to stay in the UK.
8. On 8 May 2009 the Claimant submitted further asylum claims, which were followed by additional submissions dated 26 May 2009, 8 June 2009, 12 October 2009, 19 April 2010, 6 July 2010 and 10 September 2010.
9. On 13 May 2009 the custodial part of his sentence came to an end, and he was detained under immigration powers at Dover Immigration Removal Centre.
10. On 26 May 2009, the Sri Lankan High Commission agreed to issue an emergency travel document ("*ETD*") for the Claimant.
11. The Claimant was released from immigration detention, subject to reporting requirements, on 4 August 2009 following a grant of bail the previous day.
12. On 17 November 2010 the Defendant refused the Claimant's further asylum claims, and made a deportation order in respect of the Claimant as being a "*foreign criminal*" within section 32 of the UK Borders Act 2007. The Defendant considered the Claimant's asylum and human rights claims but concluded that he would not be at risk on return to Sri Lanka and that deportation would not breach his human rights.
13. The Claimant appealed to the FTT from the 17 November 2010 refusal of his further asylum submissions. The FTT dismissed that appeal on 3 February 2011, concluding that the Claimant would not be of interest to the authorities or any other group in Sri Lanka, and that his removal would not be contrary to Article 8 ECHR. Applications for permission to appeal were refused by the FTT on 4 March 2011 and by the Upper Tribunal on 27 May 2011.
14. On 14 June 2011 the Claimant's reporting was reduced from weekly to fortnightly.
15. On 30 August 2011, the Claimant was re-detained under immigration powers, apparently with a view to including him in a forthcoming charter flight exercise.
16. At the end of August 2011 it came to the Defendant's attention that the Claimant had again applied for judicial review; but the court office subsequently informed the Defendant on 13 September 2011 that the application had been refused.
17. On 27 October 2011 the Claimant was interviewed for an ETD application. The Defendant's records indicate that the Claimant refused to sign the forms on the ground that he did not want to return to Sri Lanka, and claimed that his driving licence was a forgery.
18. The Claimant applied to the FTT for bail on 11 November 2011, which was refused on 15 November 2011. The Claimant submitted a second bail application on 24 November 2011, which the FTT refused on 29 November 2011.

19. Directions were set on 6 December 2011 for the Claimant's removal on 15 December 2011. However, it appears on that on 13 December 2011 the Defendant was informed that the Claimant's identity could not be verified in Sri Lanka without a National Identity Card number, and the Claimant was asked to provide this. The removal directions were cancelled on 16 December 2011 because the Claimant did not yet have an ETD.
20. The Claimant submitted further bail applications in December 2011 and January 2012 which were refused.
21. On 31 January 2012, the Claimant's case was referred for inclusion in a forthcoming charter flight. He was interviewed for an ETD on 8 February 2012 by the Sri Lankan High Commission. The Commission requested further evidence on 14 February 2012. A further bail application was refused on 21 February 2012, but on 28 February 2012 the removal directions were cancelled as no ETD had been secured.
22. The Claimant then, apparently in early March 2012, issued judicial review claim CO/9103/2011, in an out of time attempt to challenge the Upper Tribunal's May 2011 refusal of permission to appeal. Wilkie J refused permission on the papers on 9 May 2011, finding the claim to be an abuse of the process of the court. Permission was refused again on 9 October 2012 at an oral hearing which the Claimant did not attend.
23. In the meantime, however, the FTT in March 2012 granted the Claimant bail and he was released from detention.
24. By a letter of 29 May 2012, the Claimant's representatives submitted an application to the Defendant to revoke the deportation order. The application was made on ECHR grounds, with submissions being made as to the Claimant's good conduct since the previous unsuccessful appeal against the decision to deport him. It was submitted that he had only one conviction arising from his conduct in 2008 and had not offended since then.
25. In addition, the Claimant's representatives on 27 September 2012 submitted an application for further leave to remain under Article 8 ECHR, on the basis of the Claimant's private life ties based upon his length of residence in the UK.
26. On 15 November 2012 the Claimant was re-detained under immigration powers, with a view to including him in a forthcoming charter flight exercise. He was interviewed by the Sri Lankan High Commission at Colnbrook Immigration Removal Centre (IRC) on 20 November 2012. The Commission subsequently requested further evidence in support of the ETD application, then on 27 December 2012 agreed to issue an ETD.
27. In the meantime, the FTT in mid December 2012 granted the Claimant bail and he was released. On 1 March 2013 his reporting was reduced to monthly due to his carer finding it difficult to take time to bring the Claimant to reporting.
28. On 11 June 2013 the Claimant made further representations in support of his September 2012 application for leave to remain, notifying the Defendant of his marriage on 6 June 2013 to a British citizen. On a subsequent appeal, the Claimant said his wife had arrived in the UK in 2000 and had been lawfully resident for 14 years; she was well settled,

had worked since she arrived in the UK and owned a property; and she had no family in Sri Lanka.

29. By a decision dated 4 July 2013, the Defendant refused the Claimant's May 2012 representations in support of revocation of the deportation order and his September 2012 application for leave to remain. The Defendant accepted that the Claimant was in a genuine and subsisting relationship with a British citizen, but noted that he had been living in the United Kingdom without valid leave for 15 years and considered that there were no insurmountable obstacles to his family life continuing in Sri Lanka. The Defendant did not accept that paragraph 399A of the Immigration Rules applied as it was considered that the Claimant had retained ties to Sri Lanka. The Defendant also did not accept that there were exceptional circumstances such that the Claimant's right to family and/or private life outweighed the public interest in his deportation. The Defendant accordingly concluded that the Claimant's deportation would not breach Article 8.
30. The Claimant appealed against that decision, and on 17 January 2014 the FTT allowed his appeal on Article 8 grounds, having regard amongst other matters to the fact that the Claimant had been in the UK for 13 years and was now married to a British citizen. The FTT gave the Defendant permission to appeal against its decision, and on 12 March 2014 the Upper Tribunal allowed the Defendant's appeal, retaking the decision itself and dismissing the Claimant's appeal in its entirety on all grounds. The Upper Tribunal found amongst other matters that the Claimant and his wife could relocate together to Sri Lanka, and there were no insurmountable obstacles to family life continuing outside the UK.
31. The Claimant appealed against the Upper Tribunal's decision to the Court of Appeal, which dismissed the appeal on 8 December 2015 (*YP (Sri Lanka)* [2015] EWCA Civ 1565). The Court of Appeal considered that the FTT had erred in allowing the Claimant's appeal because its findings as to whether there were insurmountable obstacles to the Claimant relocating had not been sufficiently reasoned.
32. The Claimant became appeal rights exhausted on 5 January 2016.

## **(2) The events of January to October 2016**

33. On 19 January 2016 the Defendant suspended reporting for the Claimant following receipt of a letter from his then solicitors indicating that he had suffered a nervous breakdown and was feeling extremely distressed.
34. By a letter dated 9 March 2016 the Claimant's representatives submitted further representations in support of asylum and Article 8 claims, enclosing additional material including medical reports to the effect that the Claimant was suffering from depression and PTSD.
35. On 16 March 2016 the Claimant's detention under immigration powers was authorised; he was detained on 18 March 2016 and taken to The Verne IRC. The Defendant's GCID (General Case Information Database) notes indicate that the Claimant's representatives appear to have learnt of this in advance, and that when the Claimant was detained he arrived with a bag of medication and advised that he and his wife had started

- IVF treatment. The medication which the Claimant brought was for various conditions including high blood pressure, underactive thyroid, heartburn and depression.
36. The FTT refused a bail application on 12 April 2016, and the Defendant on 21 April 2016 refused an application by the Claimant for temporary admission.
  37. By a decision dated 16 May 2016, the Defendant rejected the Claimant's further representations, and found that they did not constitute a fresh claim under paragraph 353 of the Immigration Rules.
  38. On 19 May 2016 the medical practitioner at the IRC produced a Rule 35 report expressing concerns that the Claimant may have been a victim of torture. The Defendant's response, dated 23 May 2016, concluded that detention should be maintained.
  39. By a letter dated 2 June 2016 the Claimant's representatives submitted further representations in support of asylum and Article 8 claims. The Defendant rejected these in a decision dated 23 June 2016, finding that they did not constitute a fresh claim under paragraph 353 of the Immigration Rules. A GCID entry dated 15 June 2016 noted that escorts would be required for the Claimant's removal.
  40. Removal directions were served on Claimant on 24 June 2016. On the same date, however, the Claimant's representatives sent a pre-action protocol letter to the Defendant and then issued a judicial review claim several hours later (claim JR/7053/2016).
  41. In addition, by letters dated 30 June and 1 July 2016 the Claimant's representatives submitted further representations in support of asylum and Article 8 claims.
  42. On 20 June 2016 the police forced entry to the Claimant's wife's home on the ground that they had welfare concerns for her.
  43. Removal directions were set on 23 June 2016 for the Claimant's removal to Sri Lanka on 15 July 2016. These were, however, deferred on 7 July 2016 in the light of the pending judicial review proceedings.
  44. On 13 July 2016 the Defendant received a copy of an application made by the Claimant to the European Court of Human Rights.
  45. On 14 July 2016 the Upper Tribunal refused permission to apply for judicial review (without an acknowledgement of service having been filed by the Defendant) and refused the Claimant's application for a stay.
  46. On 22 July 2016, the Claimant applied for an oral permission hearing in his judicial review claim (JR/7053/2016).
  47. The Claimant on 15 August 2016 submitted a bail application, which was refused on 18 August 2016. A GCID entry dated 18 August 2016 indicates that a telephone call was made to The Verne IRC healthcare team to ascertain whether the Claimant was fit enough to remain in detention. Reference was made to a report prepared by Shonna Coleman, the Claimant's mental health worker within the healthcare team at The Verne (who "*would therefore have knowledge of the subject*"), which had been placed before

the judge hearing the bail application. The entry records that unsuccessful attempts had been made to contact Ms Coleman, and that *“This office needs immediate sight of this information as we have not been advised at any time that subject is not fit to be detained”*.

48. Ms Coleman’s report, dated 17 August 2016, referred to earlier reports of the Claimant’s mental health and to his presentation to her, including:
- i) a nurse’s report that the Claimant had taken an overdose approximately 2 months before entering detention;
  - ii) a psychiatric report from January 2016 diagnosing the Claimant as suffering from PTSD and possibly also psychosis in the form of auditory hallucinations, possibly flashbacks from being tortured in Sri Lanka;
  - iii) a pre-detention report dated 14 March 2016 from Ealing IAPT (Improving Access to Psychological Therapies) of the Claimant presenting with severe symptoms of depression and anxiety, apparently triggered by the rejection of an asylum claim, and of the Claimant reporting having been tortured in Sri Lanka and being terrified of being returned there;
  - iv) the Claimant appearing very low in mood and tearful at the start of his current detention;
  - v) a report dating from 15 April 2016 of the Claimant being in a very distressed state (*“visibly upset, tearful and shaking”*), talking about a crime for which he had been imprisoned in Sri Lanka and to being beaten while in prison, and stating that he had thoughts of ending his life;
  - vi) the Claimant’s safety having been a concern during his current detention due to thoughts of self harming and suicidal ideation, and the Claimant presenting with several symptoms of PTSD, anxiety and depressive disorder;
  - vii) the Claimant’s current presentation: *“He continues to present with signs and symptoms of depression, anxiety and trauma, nightmares, poor sleep and appetite. He experiences fleeting thoughts of self-harming and suicidal ideation”*;
  - viii) his current diagnosis: symptoms consistent with mixed anxiety and depressive disorder and PTSD; and
  - ix) the medication the Claimant was taking, along with weekly/fortnightly appointments with a mental health worker.

Ms Coleman’s report concluded *“I am of the opinion [the Claimant’s] mental state is not improving whilst in detention.”* However, this report did not lead the FTT to grant bail.

49. A GCID entry dated 19 August 2016 refers to an ACDT (Assessment Care in Detention and Teamwork) being opened after concerns about the Claimant’s mental health and a decline in his behaviour over the previous couple of weeks. Mental health staff were due to see him the following Monday. A further entry the same day, made before the

text of Ms Coleman's report had been obtained and reproduced on GCID, records a telephone conversation with Ms Coleman including the following:

"I advised [Ms Coleman] that [the Claimant's] bail hearing was adjourned mid-hearing because of a report presented by [the Claimant] advising the Immigration Judge that his mental Health worker had stated that in her opinion, he was not fit to remain in detention.

Shonna Coleman corrected me and stated that the report said that by being in detention is not making his condition any better and therefore not improving his state of mind."

50. Plans were made for the Claimant's removal, and it was noted on 25 August 2016 that escorts and a medic would be required. Removal directions were recorded on 6 September 2016 as having been set for removal on 10 October 2016.
51. On 22 September 2016 the Upper Tribunal in claim no JR/7053/2016 refused an application by the Claimant for permission to amend his grounds and for an order for disclosure, but directed the Claimant within 7 days to notify the Tribunal if his claim included a challenge to the lawfulness of detention.
52. A GCID entry dated 29 September 2016 indicated that a medical disclaimer had been sent to The Verne IRC for provision to the Claimant, and if it was returned signed then a Medical Health Form was to be issued to The Verne "*for full up to date medication/treatment being received/fitness to remain in detention*". It was recorded on 3 October 2016 that the signed medical consent form had been received and forwarded to The Verne IRC with a Health Care Enquiry Form "*for immediate referral to the Healthcare Team*". It was further recorded that an email of 30 September 2016 had advised that The Verne had since referred this form to the healthcare team.
53. However, with these arrangements still in train and removal directions set for 10 October 2016, the FTT on 3 October 2016 granted the Claimant bail. The FTT was aware that removal directions had been set, and considered a detailed bail summary dated 30 September 2016 submitted on behalf of the Defendant. I consider in section (C) below the FTT's reasons for granting bail.
54. A GCID entry dated 4 October 2016 noted that the response from The Verne healthcare was still awaited. An entry for the same date indicated that the response had been emailed, stating the name of Shaun Heals of The Verne. An entry for 5 October 2016 states "*Medical Enquiry form received – and gave the response to my questions as follows*", and then set out the questions asked and answers received. The Defendant has now disclosed a copy of the form itself, which is headed "*Home Office Healthcare Enquiries*" and bears Ms Coleman's name (though not her signature) at the end. As to long term prognosis and/or treatment, the response was:

"[The Claimant] would benefit from formal psychological interventions for his diagnosis of Post-Traumatic Stress Disorder in the community. He has a diagnosis of depression and will need to continue treatment as long as he is experiencing signs and symptoms of depression and PTSD."



The response also included the following:

“Can [the Claimant] be managed via medication?

Yes

Is [the Claimant] fit to remain in detention until his removal is effected on 10.10.16?

Yes

Fitness for maintained detention and fitness to fly

Fit for detention, detention causing psychological and depressive symptoms as unable to return to the care of his wife and potential deportation.

Is [the Claimant’s] condition life threatening?

No, however, he has reported feeling what is the point in living. May increase risk of him self harming as deportation date nears.

If left untreated does [the Claimant’s] contention constitute an imminent threat to his life?

No

How is [the Claimant] managing his condition?

Trying to keep self-occupied and distracted from situation, in contact with his wife and solicitor, regularly attends his health appointments.”

55. On 5 October 2016 the Defendant decided to refuse pursuant to paragraph 22(4) of Schedule 2 to the Immigration Act 1971 (as then in force) to consent to the grant of bail to the Claimant. I consider the reasons given for the decision in section (C) below. GCID entries for 5 October 2016 record that an ongoing action point remained “*To await any update from Healthcare Team at IRC The Verne regarding [the Claimant’s] fitness to remain in detention*”. Also on 5 October 2016, the Claimant’s ETD was collected from the Sri Lankan High Commission.
56. In a letter of the same date, the Claimant’s representatives indicated that because the judicial review proceedings had not been transferred to the Administrative Court, the Claimant would withdraw the judicial review proceedings in the Upper Tribunal and issue new judicial review proceedings in the Administrative Court.
57. By a letter dated 7 October 2016 the Claimant’s representatives submitted further representations in support of asylum and Article 8 claims, and claimed that the Claimant should be released from detention on the ground of his mental health.
58. On the same day, the Claimant issued the present claim for judicial review, including an application for a stay of the Claimant’s removal set for 10 October 2016.

59. The Defendant on Saturday 8 October 2016 responded to the Claimant's unsealed judicial review claim form, and the Claimants' representatives' further representations dated 5 and 7 October 2016, concluding that the decision to remove the Claimant would not be reversed and that his removal would proceed. The same evening, the Claimant's representatives filed further materials, to which the Defendant responded by letter on Sunday 9 October 2016, concluding that the representations did not amount to a fresh claim under paragraph 353 of the Immigration Rules.
60. On 10 October 2016 Nicol J indicated that he would be granting a stay on removal, and the removal directions were cancelled. A GCID entry later the same day recorded that the Claimant had come off constant supervision and was now on hourly observation.
61. An order of Nicol J dated 20 October 2016 recorded the Defendant's agreement that the Claimant be released on Chief Immigration Officer bail. The Defendant indicated that 48 to 72 hours would be required to process the Claimant's release. On 21 October 2016 Holroyde J refused an application by the Claimant for an order requiring the Defendant to explain the reason for the delay. The Claimant was released from detention on 24 October 2016.

### **(3) Subsequent events**

62. The Defendant filed her acknowledgement of service and summary grounds of defence on 8 November 2016.
63. The Claimant's solicitors wrote to the Defendant on 18 November 2016 indicating that the Claimant was currently a hospital inpatient and medically unfit to attend reporting until further notice.
64. On 15 February 2017 HH Judge Jarman QC, sitting as a judge of this court, ordered that the application for permission to apply for judicial review should be resubmitted after publication of the decision in *Roszkowski*.
65. GCID notes from June to September 2017 indicate that the Claimant was said to have been hospitalised "*under Mental Health*" at the Park Royal mental health centre, and enquiries were to be made about whether he was detained under the Mental Health Act or voluntarily in hospital.
66. Following the decision in *R (Roszkowski) v SSHD* [2017] EWCA Civ 1893, [2018] 1 WLR 2848, Master Gidden on 5 January 2018 made directions for the Claimant to file and serve amended grounds and the Defendant to file and serve amended summary grounds. These documents were filed and served in due course.
67. On 18 May 2018 Jon Turner QC, sitting as a judge of this court, refused permission to apply for judicial review on the papers.
68. At an oral permission hearing on 14 August 2018 Richard Clayton QC, sitting as a judge of this court, granted permission on three grounds of challenge corresponding to the issues listed in § 1 above.

**(C) GROUND 1: REFUSAL TO CONSENT TO GRANT OF BAIL**

69. As indicated above, the Defendant on 5 October 2016 refused, pursuant to § 22(4) of Schedule 2 to the Immigration Act 1971 (as then in force), to consent to the FTT’s 3 October 2016 grant of immigration bail to the Claimant. Paragraph 22 of Schedule 2 provided for the release of a person granted bail by the FTT, but § 22(4) stated:

(4) A person must not be released on bail in accordance with this paragraph without the consent of the Secretary of State if—

(a) directions for the removal of the person from the United Kingdom are for the time being in force, and

(b) the directions require the person to be removed from the United Kingdom within the period of 14 days starting with the date of the decision on whether the person should be released on bail.

This provision applied because when the FTT granted bail on 3 October 2016, directions had been set for the Claimant’s removal to Sri Lanka 7 days later.

70. The Court of Appeal in *Roszkowski* held that:

- i) the power of the Defendant to refuse consent under § 22(4) is not confined to cases where there has been a material change of circumstances or a demonstrable flaw in the reasoning of the judge in granting bail, nor is it confined to cases where there are identified “reasonable grounds” for exercising the power (§§ 34, 35 and 58);
- ii) the period shortly before compulsory removal of a person from the country could well be seen as a time when risk of absconding should be minimised, and it is not surprising that Parliament should confer such a power upon the Defendant, which is a limited power available in a very short period (§§ 37 and 58);
- iii) the power may be exercised by the Defendant where the Defendant, after giving full consideration to the conclusions of the FTT judge who granted bail, rationally disagrees with those conclusions (§§ 42-45 and 58);
- iv) in a judicial review of a decision by the Defendant to refuse to agree to a grant of bail under this provision, the test is not whether an appeal against the decision of the FTT judge would have been sustainable, but rather, whether the Defendant could take a rationally different view from the judge on the risk of the applicant absconding for the reasons that were expressed (§§ 45, 46 and 58);
- v) an exercise of the power under § 22(4) to refuse to consent to release will cease to be effective if removal directions are cancelled, such that the prior grant of bail by the FTT will then be effective (§§ 48-52 and 58).

71. It has also been held that the Defendant may withhold consent under § 22(4) “*on any grounds relevant to the particular case which amount to a rational disagreement with the tribunal judge’s conclusions*”, such as “*the detainee’s immigration history, the risk of future failure to surrender to custody, lack of reliable sureties, lack of an appropriate address, and so on*” (*R (Waheed) v Defendant* [2017] EWHC 3080 (Admin), [2018] 4 WLR 10 at § 31).
72. The FTT concluded that bail should be granted because:
- i) the Claimant had on this occasion been detained for more than 6 months;
  - ii) as the Tribunal which refused bail in April 2016 recognised, the Claimant had a good record of compliance since 2010 and had previously been bailed to live with his wife at the same address; he was likely to comply, particularly with the presence of sureties to encourage him, and there were now two significant reasons why his detention was not proportionate;
  - iii) first:

“... I was shown evidence at the hearing that the Upper Tribunal on 22<sup>nd</sup> September invited the applicant to confirm whether the application was in fact a challenge to the lawfulness of the detention in which event it should be transferred to the High Court for consideration. I was informed by Ms Jegarajah at the hearing that this had been confirmed to the Upper Tribunal. The JR application may therefore become a bar to removal before 10<sup>th</sup> October if it is successfully maintained that he should not be removed from the UK for the purpose of frustrating the action against the respondent.”
  - iv) secondly:

“Most significantly, there is now detailed medical evidence in the form of a report from a consultant psychiatrist Dr Dhumad, dated yesterday, 2<sup>nd</sup> October. The relevant points are highlighted in bold throughout the report and together show that the applicant’s mental health has significantly deteriorated since detention and attempts to treat him in detention by healthcare have not been useful: detention is the main detrimental factor” (para 15.3)

This report has been given additional weight by correspondence from a “wing SO” at the Verne who wrote to solicitors acting for the applicant on 22<sup>nd</sup> August 2016 to say that he was very concerned for his wellbeing and “the longer he is in detention the worse he will get””; and
  - v) the effect on the Claimant’s mental health of his continued detention, the length of time he had been there, the low risk of absconding and the presence of sureties all meant that his continued detention was no longer justified.

73. Dr Dhumad's report, dated 2 October 2016, indicated that he had reviewed Ms Coleman's report and the Claimant's medical records, and interviewed the Claimant for two hours on 1 October 2016. Dr Dhumad was of the opinion that (in summary):
- i) the Claimant's presentation was consistent with a diagnosis of severe depressive episode without psychotic symptoms;
  - ii) he presented a significant risk of suicide, mainly due to severe depression, and believed he would be killed if returned to Sri Lanka; the main protective factor was the Claimant's wife; and "*[t]he risk will be greater when he feels that the deportation is close, and any threat of removal, in my opinion will trigger a significant deterioration in his mental suffering and subsequently increases the risk of suicide*";
  - iii) the Claimant was at high risk of self harm, and his mental health had significantly deteriorated since detention, therefore attempts to treat him in detention by health care had not been useful; "*detention is the main detrimental factor, which makes it impossible to feel safe hence his mental health would continue to deteriorate[] couple[d] with significant risk of suicide. I strongly recommend his release from detention to receive the appropriate care in a safe environment. When released, he needs urgent referral to acute mental health services such as crisis team to monitor his mental health at home*";
  - iv) given the Claimant's current unstable mental health, suicide risk PTSD symptoms together with depression, the Claimant was not fit to fly;
  - v) the Claimant was at present "*unable to look after himself unsupported, he needs his wife in the UK for emotional and social support*"; and separation from his wife would make his condition worse and increase the risk of suicide; and
  - vi) the risk of the Claimant reoffending was low.
74. The Wing officer's correspondence to which the FTT referred was an email from Toni Pay of The Verne IRC dated 22 August 2016 to the Claimant's solicitors stating:

"Subject: Your Client: Mr Yogaraja

Good Morning, My name is Toni Pay and I work at IRC The Verne. I am the Wing SO where your client Ponniah Yogaraja resides. Over the last couple of days Ponniah has been very low in mood and upset following his bail refusal, we have opened an ACDT (Self Harm Monitoring) on him as we have been very concerned about his wellbeing. I have asked our Mental Health Team to see urgently and they will see him later today. The reason I am writing is to ascertain what's happening with his Immigration Case. Ponniah knows I am writing to you and is happy for you to email me back. Normally I wouldn't do this but I fear the longer he is in detention the worse he will get, I have asked Mental Health to get him referred for a Rule 35 Letter, reiterating this. I also wanted to reassure you that we are doing

everything we can to support Ponniah whilst he is in Detention.  
If you have any concerns then please contact me.

Regards

Toni Pay A1 SO

IRC The Verne”

75. The Defendant’s “*Monthly Progress Report to Detainees*” dated 5 October 2016 set out the Defendant’s reasons for declining to consent to the grant of bail. After setting out the Claimant’s immigration history up and including the FTT’s grant of bail on 3 October 2016, and the effect of Schedule 2 § 22, the report continued:

“Given your current circumstances and the fact that your removal has been set for 10 October 2016 and this was within 14 days of your bail hearing, it is to note that the Secretary of State does not consent to your grant of bail and for the following additional reasons:

- Your mental health issues can be dealt with at IRC The Verne
- Your Judicial Review has been accepted and transferred to an Admin Court
- You absconded in 2005
- You have been here a number of years and had unsuccessful applications.

**Your case has been reviewed. It has been decided that you will remain in detention:**

- to effect your removal from the United Kingdom – Your removal is imminent and set for 10.10.2016. You have been served with these directions. You can safely be returned to Sri Lanka.
- Because there is reason to believe that you will fail to comply with any conditions attached to the grant of temporary admission or release. – It is to be reminded that on 14 January 2005 you were listed as an absconder. You only came to light some 3 years 11 months later when you were encountered ... Had this arrest not have happened, it is certain that you would still have been at large. ...”

76. The report then referred to the Defendant’s refusal to consent to bail on 12 April 2016 and 18 August 2016 and the FTT’s comments on those occasions, which included the

judge's statement on the latter occasion that "*His impending removal creates a high risk of absconding. In light of this, I refuse bail.*" The report continued:

"This decision has been reached on the basis of the following factors: You have exhausted all of your rights of appeal and your removal from the United Kingdom is imminent – ...

- You have previously failed to comply with conditions of your stay, temporary admission or release as detailed above.
- You have previously absconded – you were located during a joint operation by the Home Office ... and the Police at the address of ... Had this arrest not have happened, it is certain that you would still have been at large.
- You have obstructed the removal process by failing to cooperate with the application process to obtain an Emergency Travel Document.
- You have not produced satisfactory evidence of your identity, nationality or lawful basis to remain in the United Kingdom.
- You have previously failed or refused to leave the United Kingdom when required to do so.
- You do not have enough close ties to make it likely that you will stay in one place.
- On initial consideration, it appears that your further representations can be dealt with without delay.

Your case will continue to be reviewed on a regular basis. You should inform the Home Office of any change in your circumstances or any other relevant information you have not provided already. A further letter will be sent to you in one month if your case has not been resolved by then."

77. The decision to refuse consent was also reflected in the detention report of the same date, 5 October 2016, which included a section referring to the Schedule 2 § 22 consent requirement and setting out in substance the same four headline reasons for refusing consent as appear near the beginning of the quotation in § 75 above. This section of the detention review referred to Ms Coleman's report of 17 August 2016, Dr Dhumad's report and the 4 October 2016 response from the healthcare department at The Verne IRC to the Healthcare Enquiry Request (which it quoted in full), before concluding "*It is considered that should [the Claimant] require further and on-going any medical attention, this is and would be fully met by Healthcare staff at the Immigration Removal Centre he is placed in. This office has no reason to believe that he is not fit for maintained detention at this time. He is being looked after in a safe environment and is being treated for his medical condition.*" On the subject of absconsion risk the review referred to the Claimant's 2005 absconsion and added: "*Despite his compliance with*

*reporting before this period of detention when he was released on bail in December 2012, he is Appeal Rights Exhausted and coupled with the fact that his representatives requested a variation in his reporting to report once every 6 months, it is considered that no reliance can be placed on him to continue to comply on a regular basis with the conditions of his release and will most likely go to ground once again, to avoid deportation”.*

78. The Claimant criticises the finding that his mental health issues could be dealt with at IRC The Verne, contending that the report of Ms Coleman dated 17 August 2016, the email from the Wing Officer Toni Pay dated 22 August 2016 and the report of Dr Dhumad dated 2 October 2016 showed that it clearly could not be.
79. Ms Coleman’s report, which I summarise above, had indicated that the Claimant was suffering from significant mental health difficulties, and expressed the opinion that his mental state was not improving while he remained in detention. However, it did not state that the Claimant was unfit to remain in detention, as indeed Ms Coleman appears subsequently to have confirmed by telephone (see § 49 above). (A passage in the 5 October 2016 detention review was incorrect in this regard, stating that the 17 August 2016 report had so indicated albeit the FTT had refused bail the following day despite having been shown the report.) Following the FTT’s bail decision on 3 October 2016, the Healthcare Enquiries response dated 4 October 2016 again made the position clear, indicating that in Ms Coleman’s opinion the Claimant’s condition could be managed via medication, and that he was fit to remain in detention, although detention and potential deportation were causing psychological and depressive symptoms. I do not accept the Claimant’s suggestion that the lack of Ms Coleman’s signature beside her name on that document means that the Defendant could not properly have treated it as representing her opinion. The evidence provides no reason to doubt that Ms Coleman was the author of that response, and I note that according to a GCID entry for 19 August 2016 Ms Coleman’s report of 17 August 2016 had itself been marked as “*dictated but not signed*” by Ms Coleman.
80. The report of Dr Dhumad and the Wing Officer’s email, on which the FTT relied in granting bail, took a different view. Dr Dhumad’s report, summarised above, expressed the view that the risk of the Claimant’s suicide would be greater when he felt that the deportation was close, and any threat of removal would trigger significant deterioration and increased risk of suicide. That particular risk arose not from detention as such but from the threat of deportation. Specifically as to detention, Dr Dhumad’s report expressed the view that as the Claimant’s mental health had significantly deteriorated since detention, attempts to treat him in detention by health care had not been useful, and that detention was “*the main detrimental factor*”. I observe that on the basis that the increasing imminence of deportation would (as Dr Dhumad said) worsen the Claimant’s mental state in any event, a deterioration during detention could not necessarily be attributed to the detention. However, Dr Dhumad’s report also made the points that in detention the Claimant lacked the support of his wife and that he needed acute mental health services.
81. The Wing Officer’s email expressed the fear that the longer the Claimant remained in detention, the worse he would get. In my view, it would not follow, however, that the Claimant’s condition could not be managed in detention for the seven days remaining between the bail decision and the scheduled removal date.



82. Faced with these partly conflicting reports, it was not in my view irrational for the Defendant to take the view that the Claimant's condition could continue to be managed in detention for the few remaining days prior to his deportation on 10 October 2016. The most up to date information the Defendant had received from the mental health team looking after the Claimant at The Verne was that although detention and imminent deportation were causing psychological and depressive symptoms, the Claimant's condition could be managed via medication and he was fit to remain in detention until his removal six days later.
83. In addition to the considerations set out in these documents, the Defendant had in her bail summary dated 30 September 2016 explained in considerable detail her reasons for opposing the grant of bail. These set out, among other things, the Claimant's immigration history, the risk that he would abscond, his ability to continue family life with his wife in Sri Lanka, the inadequacy of the proposed surety arrangements, and the Claimant's medical condition. Though not formally part of the reasons for the Schedule 2 § 22 decision, they form part of the underlying basis for the reasons more shortly stated in that decision, including the references to the Claimant's immigration history and risk of absconsion.
84. Like the question of medical treatment in detention, the risk of absconsion, in the light of the Claimant's immigration history as a whole, was a matter on which the Defendant was entitled to take a different view from the FTT for the reasons set out in the Monthly Progress Report to Detainees. It was not irrational to consider that a migrant with such a history, and who had absconded in the past, would be increasingly likely to seek to abscond again as the date of deportation loomed.
85. As to the FTT's view that the Claimant's judicial review application might become a bar to removal, the position at the date of the FTT's decision and the Defendant's refusal to consent to bail was that permission to apply for judicial review had been refused on the papers by the Upper Tribunal on 14 July 2016. The Claimant had sought an oral hearing to renew his application, and the FTT had been told the case would be transferred to this court. However, the fact remained that no permission had yet been granted. In these circumstances the statement in the Monthly Progress Report that "*Your Judicial Review has been accepted and transferred to an Admin Court*" is somewhat perplexing. The claim had not in any substantive sense been "*accepted*" at that stage. Permission had not been granted and (as noted in the Defendant's reasons for opposing bail) the Upper Tribunal when refusing permission in July 2016 had ordered that any renewal of the application would not be a bar to the Claimant's removal. That decision took into account medical reports available at the time, and added that the Claimant had had "*every opportunity over the years to raise matters affecting his removal*" and that "*the balance of convenience lies in his removal*". In view of circumstances as they in fact stood when the Defendant took her decision on 5 October 2016, I do not consider that the inaccurate statement that the judicial review claim had been 'accepted' rendered the Defendant's refusal of consent to bail irrational.
86. In my judgment the Defendant engaged properly with the reasons for which the FTT had decided to grant bail (subject to the Defendant's consent), and reached a rational decision on the evidence before her. Her refusal of consent pursuant to Schedule 2 § 22 was lawful.

**(D) GROUND 2: DETENTION IN BREACH OF ARTICLE 3**

87. The Claimant contends that his detention breached ECHR Article 3 (“*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”). He says the detention was specifically responsible for his extremely poor mental and physical health; the Defendant was aware of his condition and continued to detain him despite the grant of bail on medical grounds, the concerns of the Defendant’s own officers and staff, and the grant of bail by an FTT Judge (who heard extensive argument made with reference to all the relevant medical evidence including evidence from the Defendant’s own staff as to their concerns). The Claimant says post release medical evidence shows that he required long term treatment as a result of detention, including some time detained in hospital under the Mental Health Act.
88. The circumstances in which immigration detention in the UK can constitute a breach of Article 3 by the UK were considered by the Court of Appeal in *R (VC) v SSHD* [2018] EWCA Civ 57 (“*VC*”). The case involved a challenge to the lawfulness of the immigration detention of a claimant who suffered from bipolar affective disorder with psychotic features, and prior to his detention had been admitted to hospital ten times for treatment under the Mental Health Act. After his immigration detention he was compulsorily detained under that Act. He had been convicted for offences including possession of drugs with intent to supply.
89. The Court of Appeal stated the principles relevant to the claimant’s Article 3 claim in *VC* as follows:

“111 The judgment of the ECtHR in *Kudla v Poland* (2000) 35 EHRR 11 is a helpful starting point. In that case, after referring to the absolute terms of the prohibition of inhuman or degrading treatment, the court stated (at para 91) that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3 ” and “The assessment of this minimum is, in the nature of things, relative”. It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

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

enable him to obtain a particular kind of medical treatment. What article 3 requires a state to ensure is, at para 94:

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

113 These principles have been affirmed and expanded upon in many cases. For example, in *Mouisel v France* (2002) 38 EHRR 34 the ECtHR stated at para 37 that the purpose of the treatment is a factor to be taken into account, but the absence of any intention to humiliate or debase the victim does not inevitably lead to a finding that there has been no violation of article 3. At para 40 it stated while article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, it imposes an obligation on the state to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. In *Keenan v United Kingdom* (2001) 33 EHRR 38 the ECtHR stated at para 111 that the lack of appropriate medical care may amount to treatment contrary to article 3 and, in the case of mentally ill persons, the assessment has to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. See also *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52 and, on the positive duty, *Premininy v Russia* (2011) 62 EHRR 18, para 73.

114 The Strasbourg jurisprudence therefore clearly establishes that in addition to the negative duty under article 3 not to take active steps which subject a person to torture or inhuman or degrading treatment, article 3 imposes a positive duty on states to protect the well-being of persons detained by the state and to provide them with the requisite medical assistance. This is reflected in our national decisions, such as that of this court in *R (IM (Nigeria)) v Secretary of State for the Home Department* [2014] 1 WLR 1870 to which the judge referred: see para 109 above.”

“133 Notwithstanding the absence of medical evidence, I am satisfied that the claimant's treatment in detention did cause suffering beyond that inherent in his illness. I note that in *Keenan's case* (2001) 33 EHRR 38 the ECtHR stated that, at para 112:

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

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

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

90. In the present cases, the key sources of information about the Claimant’s medical condition and the impact of detention are:
- i) Ms Coleman’s report of 17 August 2016, which reviewed the evidence of the Claimant’s condition prior to detention and during detention up to that date, including his current presentation (§ 48 above);
  - ii) Ms Coleman’s 4 October 2016 response to the Medical Enquiry form (§ 54 above);
  - iii) Dr Dhumad’s report (§ 73 above), and
  - iv) the comments of the Wing Officer (§ 74 above).
91. These reports indicate that the Claimant had been suffering from significant mental health problems before he was detained in March 2016, including suicidal thoughts which he said arose because he did not want to leave his wife or return to Sri Lanka. He continued to experience such problems in detention, presenting with a series of symptoms of anxiety, depressive disorder and PTSD. He was receiving care from the mental health team at The Verne, and was taking medication for (among other things) these problems.

92. Having regard to Dr Dhumad’s report and the evidence as a whole, I consider it likely that detention exacerbated these problems to a degree, in particular because it meant the Claimant lacked the support of his wife; the evidence also suggests that the approaching date for the Claimant’s deportation date made his problems worse. It may be the case that, as Dr Dhumad said, the Claimant would have benefitted from acute mental health intervention outside of detention. However, the Claimant was receiving close attention from mental health staff at The Verne, and his mental health worker Ms Coleman considered him fit to be detained and his condition to be manageable by medication.
93. In the light of the evidence as a whole, I consider that the Claimant was detained in conditions that were compatible with respect for his human dignity; that he was not subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; and that (given the practical demands of imprisonment) his health and well-being were being adequately secured by provision of the required medical assistance. To the extent that detention was exacerbating the Claimant’s condition, I do not consider that that reached the minimum level of severity required to breach Article 3.
94. The Claimant submits that his detention was significant in the Article 3 context because it preceded removal, and that it was removal and not solely detention which was the aggravating factor. He argues that “*The evidence relating to the [Defendant]’s assertion that he is fit to fly and that there are trained escorts will need to be produced and has not been seen by the [Claimant]. However the essential point is that an extremely vulnerable person will be subject to **enforced** removal which means that he will be restrained. It is unconscionable that a mentally ill person be restrained. It constitutes inhuman and degrading treatment.*” The Claimant cites the following statements by the Upper Tribunal in *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC):

“450. We reminded ourselves of the six elements of the test set out in *J v SSHD* [2005] EWCA Civ 629, which may be summarised thus:

(1) The ill-treatment relied upon must attain a minimum level of severity such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see Ullah paragraphs [38-39];

(2) *The appellant must show a causal link between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicant to Sri Lanka..."*;

.....

(6) The decision maker must have regard to whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that

too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.

451. To those principles, we must also add the observation of Lord Justice Sedley in *Y (Sri Lanka) v SSHD* [2009] EWCA Civ 362, at paragraph [16], that

*"...what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return".*

*454. The evidence is that there are only 25 working psychiatrists in the whole of Sri Lanka. Although there are some mental health facilities in Sri Lanka, at paragraph 4 of the April 2012 UKBA Operational Guidance Note on Sri Lanka, it records an observation by Basic Needs that "money that is spent on mental health only really goes to the large mental health institutions in capital cities, which are inaccessible and do not provide appropriate care for mentally ill people".*

456. We note that the third appellant is considered by his experienced Consultant Psychiatrist to have clear plans to commit suicide if returned and that he is mentally very ill, too ill to give reliable evidence. *We approach assessment of his circumstances on the basis that it would be possible for the respondent to return the third appellant to Sri Lanka without his coming to harm, but once there, he would be in the hands of the Sri Lankan mental health services. The resources in Sri Lanka are sparse and are limited to the cities. In the light of the respondent's own evidence that in her OGN that there are facilities only in the cities and that they "do not provide appropriate care for mentally ill people" and of the severity of this appellant's mental illness, we are not satisfied on the particular facts of this appeal, that returning him to Sri Lanka today complies with the United Kingdom's international obligations under Article 3 ECHR.*

457. The third appellant's appeal is therefore dismissed on asylum and humanitarian protection grounds but allowed under Article 3 ECHR. We do not need to go on to consider Article 8 ECHR. The respondent is directed to grant appropriate leave to the appellant".

(Claimant's emphasis)

95. However, that case concerned claimants who alleged that medical treatment would not be available to them were they to be removed, so that they would be at risk of an earlier death than if they remained in the UK, with the result that deportation would breach their rights under Article 3. The case thus related to what would happen to them after

their removal from the UK, whereas the present case is concerned with actions of the Defendant in the UK which are alleged to have harmed the Claimant.

96. Similarly, in the present there is no claim for which permission has been given challenging the deportation decision on Article 3 grounds. The claim for which permission has been given is whether his detention in the UK breached Article 3, not whether his removal to Sri Lanka, or his circumstances in Sri Lanka following his return there, would be contrary to Article 3. The contention that the deportation of the Claimant would result in a breach of Article 3 does not render his detention a breach of Article 3.
97. Finally on this topic, the Claimant drew attention to the fact that the Court of Appeal in *VC* criticised the Defendant for the limited medical evidence provided, stating *inter alia*:

“[28] The only evidence before the judge was the raw medical data, produced by the claimant, the various detention reviews, other documents by detention officers, and a statement of Mr Albosh, a senior executive officer in the Home Office with responsibility for the mentally disordered offenders team. Mr Albosh's statement deals only with events after 27 April 2015, that is after it had been decided to transfer the claimant to a psychiatric hospital. The Secretary of State decided not to submit any evidence in respect of the period during which the claimant was detained in IRCs. ... this approach rendered the task of the judge below and of this court, more difficult. It is an approach that carried risks for the Secretary of State, in particular because of her obligation, as a public authority meeting a challenge to its decision, to make candid disclosure to the court of the relevant facts and the reasoning behind the challenged decision.”

and:

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

98. The Court of Appeal also affirmed, at § 68, statements in *R (Das) v Secretary of State for the Home Department (Mind intervening)* [2014] 1 WLR 3538 to the effect that where the Secretary of State chooses to put before the court no witness evidence to explain the decision-making process and the reasoning underlying a decision, there is a particularly strong basis for drawing adverse inferences against the Secretary of State given his/her duty of candour.

99. It is relevant to note that the Court of Appeal's observations were made in the context of a challenge to the defendant's decision-making process in *VC*, rather than in relation to the Article 3 claim, though at least in so far as they relate to the underlying facts the observations may be of more general application. In the present case, however, the Defendant has disclosed the information available to her, and the documents relating to and showing her decision-making process, during the time of the Claimant's detention. I refer to these documents in section (C) above. I do not consider this to be an appropriate case in which to draw adverse inferences against the Defendant in relation to the Claimant's Article 3 claim, or other grounds of his claim.
100. For these reasons, the Claimant's Article 3 claim does not succeed.

### **(E) GROUND 3: FRESH CLAIM**

101. The Claimant challenges the Defendant's decisions of 8 and 9 October 2016 rejecting his further representations dated 7 October 2016 in support of his human rights claim, and finding that they did not amount to a fresh claim under paragraph 353 of the Immigration Rules.
102. The question for this court when considering a fresh claim issue is whether, applying anxious scrutiny, the Defendant has erred by (a) asking herself the wrong question, (b) failing herself to apply anxious scrutiny, or (c) making a decision which was unreasonable applying the Wednesday test (*WM (Congo)* [2006] EWCA Civ 1495; *MN (Tanzania)* [2011] EWCA Civ 193).
103. The question for the Defendant was whether the new material the Claimant put forward, taken together with the existing material, meant there was a realistic prospect that an immigration judge (applying anxious scrutiny) would find in the Claimant's favour. That question is distinctly different from the Defendant's own view of the merits, which is only a starting point (*WM (Congo)* § 11).
104. Anxious scrutiny includes the particularly rigorous examination of a decision to ensure it is in no way flawed (*Bugdaycay* [1987] AC 514, 531), and ensuring that decisions show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account (*R (YH) v SSHD* [2010] EWCA Civ 116 § 24).
105. The Claimant alleges in his Amended Grounds that his fresh claim was the part of his letter of 7 October 2016 which stated:

“The medical evidence was considered by the bail Judge FTTJ Ferguson on 30<sup>th</sup> September 2016. He granted bail exceptionally, despite the fact that deportation was set for less than 14 days because of significant concerns as [to] our client's mental health. The medical evidence does itself constitute insurmountable obstacles and if the matter were before a prospective Judge our client would [succeed]. Especially given the fact that a bail Judge has concluded that our client's connection cannot be managed in detention. In these circumstances it can hardly be managed in the more extreme position of enforcement.



The determination in 2008 shows that there was no medical evidence in support of our client's torture claim. Now our client relies on the medical evidence of Dr. Persaud, Dr Dhumad and the lead medical charity Medical Justice as well as a positive Rule 35 report. Our client has a fresh asylum claim and should have the opportunity to advance that in country.

Our client's human rights appeal was initially allowed on Article 8 marriage grounds. You appealed and the UT affirmed set aside the determination. The Court of Appeal granted PTA and the on substantive consideration dismissed the appeal. The narrow issue is whether there are insurmountable obstacles to re establishment of family life in Sri Lanka. The medical evidence shows without any doubts that there are. Our client is profoundly mentally ill. So much so that the prison medical staff have expressly stated that his condition cannot improve and they have concerns as to his health."

106. The Claimant's skeleton argument for the present hearing quotes the last paragraph quoted above and states:

"This was the fresh claim. The insurmountable obstacles were that the C would suffer significant mental health collapse in the course of removal which could not be managed by the D. This new evidence gave rise to more than a fanciful prospects of success at a future appeal especially given that he had succeed in his Article 8 appeal previously"

107. However, the paragraph of the 7 October 2016 letter on which the Claimant relies did not refer to a risk of mental health collapse during removal which the Defendant could not manage.

108. I note that the end of the *first* paragraph of the letter quoted in the Claimant's Amended Grounds stated: "*Especially given the fact that a bail Judge has concluded that our client's connection cannot be managed in detention. In these circumstances it can hardly be managed in the more extreme position of enforcement*". That passage might be construed as a contention that the Claimant's mental health problems could not be managed during the process of removal. However, the contention is not elaborated, and the Claimant's letter of 7 October 2016 (which contained a lengthy summary of the medical evidence) did not highlight any parts of that evidence suggesting that the Claimant's mental health could not be managed during the removal process.

109. Dr Dhumad's report expressed the view that given the Claimant's current unstable mental health, with suicide risk PTSD symptoms and depression, the Claimant was not fit to fly. He recommended following the advice of the International Air Transport Association guidelines and a British Airways guide, which stated "*because of safety implications, psychiatric disorders need to be stable and controlled*" and "*medical clearance must be sought well in advance of intended travel*". Dr Dhumad continued "*I therefore believe that currently he is unfit to fly*". Those particular guidelines appear to be addressed primarily to flight safety, and Dr Dhumad does not expressly suggest that the Claimant might suffer damage to his mental health as a result of the removal

process. In any event, the Defendant's letters of 8 and 9 October 2016 made clear that the Claimant had been carefully monitored by the IRC healthcare team throughout his detention, would be accompanied on his flight to Sri Lanka by trained escorts, and that he would not be removed if he were assessed as being not fit to fly. In addition, a report provided by the Claimant from Dr Elizabeth Clark dated 4 October 2016 had expressed the view at § 6.18 that the Claimant was currently fit to fly, albeit she recommended that his mental state should be reassessed should removal become imminent in order to identify any indication of unpredictable, disorganised or disruptive behaviour.

110. In these circumstances, and bearing in mind the absence of any explanation or elaboration of this matter in the Claimant's letter of 7 October 2016 said to have constituted a fresh claim, I do not consider that the Defendant erred in not regarding the letter as amounting to a fresh claim of the kind which the Claimant now contends.
111. More generally, and for completeness, the Claimant's Amended Grounds, after quoting the three paragraphs of the Claimant's 7 October 2016 letter set out in § 105 above (prefaced by the words "*The fresh claim submits that*") continued:

"The C's mental health is arguably a matter relevant to a fresh Article 8 assessment. Accordingly, the primary decisions are irrational."

112. As noted earlier, the Claimant had previously raised medical issues in his representations of 9 March 2016, which included medical reports from Dr Persaud and Dr Kelly to the effect that the Claimant was suffering from depression and PTSD, and having suicidal thoughts. The representations also argued that there would be insurmountable obstacles to the Claimant's family life with his wife continuing in Sri Lanka.
113. Those representations were addressed in the Defendant's 16 May 2016 decision, which concluded that the Claimant's right to family life with his wife would not be disproportionately interfered with by his deportation, since she could practicably relocate with him to Sri Lanka if she so chose. The decision also considered whether the medical evidence meant that the Claimant's deportation to Sri Lanka would be contrary to the ECHR on medical grounds, concluding that it would not because, aside from any other considerations, mental health treatment would be available to the Claimant on his return to Sri Lanka if he required it.
114. Following receipt of the Claimant's letter of 7 October 2016, the Defendant's letter of 8 October 2016 considered the Claimant's unsealed judicial review claim and grounds, including his medical history chronology, his pre-action letter of 5 October and his letter of 7 October 2016 referred to above. The letter considered the information provided about the Claimant's medical situation, but noted that his health issues had been consistently considered by the Defendant and independent appellate authority, who had concluded that the Claimant's removal from the UK would not breach his rights under ECHR Article 3. It was noted that the Claimant would be able to pursue any necessary medical treatment in Sri Lanka. In addition, full consideration had already been given to the Claimant's rights under Article 8 and rejected by the Defendant and the independent appellate authority. The Defendant directed herself to the *WM* test and concluded there was no fresh claim.

115. The Defendant's 9 October 2016 letter reviewed the Claimant's case again following receipt of copies of the full judicial review bundle, including the full text of Ms Coleman's 17 August 2016 report, Dr Dhumad's report and the report of 4 October 2016 by Dr Clark. Among other things, the Defendant's letter considered the Claimant's fitness to fly and the adequacy of available treatment in Sri Lanka. The letter also noted that *"Your client's judicial review application also relies on a claim that there are insurmountable obstacles to his return to Sri Lanka due to his family and private life. You will be aware, however, that your client's rights under Article 8 of the ECHR have been considered previously, as recorded by UTJ King in his order of 14 July 2016"*. I agree with the Defendant that the 7 October 2016 letter did not identify any significant new material in relation to the alleged *"insurmountable obstacles"* that had not already been considered and addressed in the Defendant's 16 May 2016 decision. In her 9 October 2016 letter, the Defendant again directed herself to the *WM* test and concluded there was no fresh claim.
116. As a result, the Claimant has not in my judgment identified any respect in which the Defendant erred in concluding that his 7 October 2016 representations did not constitute a fresh claim.

#### **(F) OVERALL CONCLUSIONS**

117. For these reasons, I conclude that:
- i) the Defendant's decision on 5 October 2016 to refuse to consent to the grant of bail to the Claimant by the FTT, pursuant to Immigration Act 1971 Schedule 2 § 22(4) (as then in force), was lawful;
  - ii) the Claimant's immigration detention from 18 March 2016 to 24 October 2016 was not contrary to ECHR Article 3; and
  - iii) the decisions of the Defendant dated 8 and 9 October 2016 that the further representations made on behalf of the Claimant did not amount to a fresh claim under paragraph 353 of the Immigration Rules were lawful.
118. The claim is therefore dismissed.
119. I am grateful to both parties' counsel for their helpful written and oral submissions.