



Neutral Citation Number: [2019] EWHC 3567 (Admin)

Case No: CO/2701/2018
& CO/4233/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between :

THE QUEEN
(on the application of (1) MR (PAKISTAN)
(2) AO (NIGERIA))

Claimants

- and -

(1) SECRETARY OF STATE FOR JUSTICE
(2) SECRETARY OF STATE FOR
THE HOME DEPARTMENT
(3) NATIONAL PROBATION SERVICE

Defendants

Hugh Southey QC and Raza Halim (instructed by Duncan Lewis) for the Claimants
Robin Tam QC and Julie Anderson (instructed by GLD) for the Defendants

Hearing dates: 16-19 July and 22 November 2019

Approved Judgment

Mr Justice Supperstone :

Introduction

1. The principal issue in this claim is whether the scheme governing the detention of immigration detainees held in the prison estate is unlawful because it fails to provide equivalent protection or mechanism to that contained in Rules 34 and 35 of the Detention Centre Rules 2001 (“the 2001 Rules”) that are a part of the scheme that applies in Immigration Removal Centres (“IRCs”) governing the detention of immigration detainees (“**The principal issue**”).
2. In short, rule 34 provides for an initial health assessment of a detainee on induction to an IRC. Rule 35 is a mechanism for the IRC general practitioner to report to the Secretary of State for the Home Department (“SSHD”) certain matters that may mean that detention is injurious to the detainee’s health, or to give a medical opinion in relation to claims made by a detainee to be a victim of torture.
3. In addition AO makes a discrete complaint that his detention was unlawful for other reasons, and a further discrete complaint about the time that it took to find him bail accommodation when he was seeking release from detention on bail (“**AO’s claims of unlawful detention**”).
4. MR is a Pakistani national born on 17 February 1982. He claims to have been the victim of ill treatment by a “notorious gang” in Pakistan and a victim of torture. He has made an asylum claim which remains outstanding.
5. AO was born in Nigeria on 1 November 1989. He claims to have been ill treated by members of Boko Haram in Nigeria and to be a victim of torture. He too made an asylum claim. That claim was dismissed on 29 March 2017. On 27 March 2019 his appeal against that decision was dismissed by the First Tier Tribunal. On 9 May 2019 he was refused permission to appeal by the First Tier Tribunal, and on 19 June 2019 he was refused permission to appeal by the Upper Tribunal.
6. The Secretary of State for Justice (“SSJ”) is responsible for the prison estate. The SSJ is also responsible for the National Probation Service, the named Third Defendant, and for the National Offender Management Service (“NOMS”). Accordingly, in so far as the Claimants’ claim is brought against the Third Defendant or complains about NOMS, it will be treated as a claim brought against the SSJ. The SSHD is responsible for IRCs.

(A) The Principal Issue

The Statutory Framework

Detainees held in prison

7. Prisons are governed by the Prison Act 1952 (“the 1952 Act”), and by the Prison Rules 1999 (“the 1999 Rules”) made under the 1952 Act. The 1999 Rules govern the detention of immigration detainees held in the prison estate.
8. Rules 20-22 of the 1999 Rules are in a section of the rules headed “MEDICAL ATTENTION”. Rules 20 and 21, so far as is relevant, provide as follows:

“Medical Attendance

20-(1) The governor must work in partnership with local health care providers to secure the provision to prisoners to access to the same quality and range of services as the general public receives from the National Health Service.

(2) Every request by a prisoner to see the medical officer shall be recorded by the officer to whom it is made and promptly passed on to the medical officer.

(3) The medical officer may consult a medical practitioner who is a fully registered person within the meaning of the Medical Act 1983. Such a practitioner may work within the prison under the general supervision of the medical officer. ...

Special Illnesses and Conditions

21-(1) The medical officer or a medical practitioner such as is mentioned in rule 20(3) shall report to the governor on the case of any prisoner whose health is likely to be injuriously affected by continued imprisonment or any condition of imprisonment. The governor shall send the report to the Secretary of State without delay, together with his own recommendations.

(2) The medical officer or a medical practitioner such as is mentioned in rule 20(3) shall pay special attention to any prisoner whose mental condition appears to require it, and make any special arrangements which appear necessary for his supervision or care...”

Detainees held in IRCs

9. Rules 33-37 of the 2001 Rules, made under the Immigration and Asylum Act 1999 (“the 1999 Act”), are in a section of the Rules headed “Health Care”, the material parts of which provide:

“Medical practitioner and health care team

33-(1) Every detention centre shall have a medical practitioner, who shall be vocationally trained as a general practitioner and a fully registered person within the meaning of the Medical Act 1983.

(2) Every detention centre shall have a health care team (of which the medical practitioner will be a member), which shall be responsible for the care of the physical and mental health of the detained persons at that centre.

(3) Each member of the health care team shall (as far as they are qualified to do so) pay special attention to the need to recognise medical conditions which might be found among a

diverse population and the cultural sensitivity appropriate when performing his duties.

...

(5) Every request by a detained person to see the medical practitioner shall be recorded by the officer to whom it is made and forthwith passed to the medical practitioner or nursing staff at the detention centre.

Medical examination upon admission and thereafter

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

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

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

Special illnesses and conditions (including torture claims)

35-(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.

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

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

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

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling

arrangements) which appear necessary for his supervision or care.”

The Immigration Act 2016 (“The 2016 Act”)

10. Section 59(1) of the Immigration Act 2016 provides as follows:

“The Secretary of State must issue guidance specifying matters to be taken into account by a person to whom the guidance is addressed in determining

(a) whether a person (‘P’) would be particularly vulnerable to harm if P were to be detained or to remain in detention, and

(b) if P is identified as being particularly vulnerable to harm in those circumstances, whether P should be detained or remain in detention.”

11. By s.59(2), “detained” and “detention” are essentially defined as meaning detention under immigration legislation.

Immigration Act 2016: Guidance on adults at risk in immigration detention (July 2018 version) (“the Guidance”)

12. The Guidance states, so far as is relevant:

“Purpose and background

1. This guidance specifies the matters to be taken into account in accordance with Section 59 of the Immigration Act 2016 when determining whether a person would be particularly vulnerable to harm if they were detained, or if they remained in detention, and, if they were particularly vulnerable in those circumstances, whether they should be detained or remain in detention. This approach emerges from the Government’s response (in a Written Ministerial Statement of 14 January 2016) to the report by Stephen Shaw of his review of the welfare of vulnerable people in detention. The intention is that the guidance will, in conjunction with other reforms referred to in the Government’s response, lead to a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal...

2. This guidance allows for a case by case evidence-based assessment of the appropriateness of the detention of an individual considered to be at particular risk of harm in the terms of this guidance.

3. The clear presumption is that detention will not be appropriate if a person is considered to be ‘at risk’. However, it will not mean that no-one at risk will ever be detained. Instead, detention will only become appropriate at the point at which

immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them. ...

...

5. The processes set out in this guidance apply to all cases in which consideration is being given to detaining a potentially vulnerable individual in order to remove them. They also apply to cases of individuals who are already in detention, though there are some differences in the way in which these cases are managed.

Principles

6. The main principles underpinning this guidance [include]:

- the intention is that fewer people with a confirmed vulnerability will be detained in fewer instances and that, where detention becomes necessary, it will be for the shortest period necessary.
- for the purposes of a removal, individuals can be detained if there is a realistic prospect of removal within a reasonable timescale and if there is evidence which suggests that the individual would not be likely to be removed without the use of detention.
- detention will not be appropriate if an individual is considered to be at risk in the terms of this guidance unless and until there are overriding immigration considerations.
- consideration will need to be given to the weight of evidence in support of the contention that the individual is at risk, and the level of risk that is supported by the evidence.
- assessment of risk is based on the evidence available, ranging from a self declaration of risk to authoritative professional opinion. The level of evidence available dictates the level of evidence-based risk into which any given individual will fall.
- in each case, the evidence of risk to the individual will be considered against any immigration factors to establish whether these factors outweigh the risk.
- the greater the weight of evidence in support of the contention that the individual is at risk, the weightier the immigration factors need to be in order to justify detention.

Who is an adult at risk?

7. For the purposes of this guidance, an individual will be regarded as being an adult at risk if:

- they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention.
- those considering or reviewing detention are aware of medical or other professional evidence, or observational evidence, which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence) that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves.

Assessment of whether an individual identified as being at risk should be detained

9. Once an individual has been identified as being at risk, consideration should be given to the level of evidence available in support and the weight that should be afforded to the evidence in order to assess the likely risk of harm to the individual if detained for the period identified as necessary to effect their removal:

- a self declaration of being an adult at risk – should be afforded limited weight, even if the issues raised cannot be readily confirmed. Individuals in these circumstances will be regarded as being at evidence level 1.
- professional evidence (e.g. from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that the individual is an adult at risk – should be afforded greater weight. Individuals in these circumstances will be regarded as being at evidence level 2.
- professional evidence (e.g. from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm – for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk – should be afforded significant weight. Individuals in these circumstances will be regarded as being at evidence level 3.

Indicators of risk

11. The following is a list of conditions or experiences which will indicate that a person may be particularly vulnerable to harm in detention.

- suffering from a mental health condition or impairment (this may include more serious learning difficulties, psychiatric illness or clinical depression, depending on the nature and seriousness of the condition).
- having been a victim of torture (individuals with a complete Medico Legal Report from reputable providers will be regarded as meeting level 3 evidence, provided the report meets the required standards). ...
- suffering from post-traumatic stress disorder (which may or may not be related to one of the above experiences). ...
- suffering from other serious physical health conditions or illnesses.

Assessment of immigration factors

13. The presumption will be that, once an individual is regarded as being at risk in the terms of this guidance, they should not be detained. However any risk factors identified and evidence in support, will then need to be balanced against any immigration control factors in deciding whether they should be detained.

14. The immigration factors that will be taken into account are:

- Length of time in detention – there must be a realistic prospect of removal within a reasonable period. What is a ‘reasonable period’ will vary according to the type of case but, in all cases, every effort should be made to ensure that the length of time for which an individual is detained is as short as possible. In any given case it should be possible to estimate the likely duration of detention required to effect removal. This will assist in determining the risk of harm to the individual. ...
- Public protection issues – consideration will be given to whether the individual raises public protection concerns by virtue of, for example, criminal history, security risk, decision to deport for the public good.
- Compliance issues – an assessment will be made of the individual’s risk of abscond, based on the previous compliance record.

15. An individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained. This will be a highly case-specific consideration.”

Detention Services Order 09/2016 (Version 7.0 published on 5 March 2019)

Detention Centre Rule 35 and Short-Term Holding Facility Rule 32

13. This Detention Services Order (“DSO”) sets out Home Office policy regarding the preparation and submission of rule 35 reports by medical practitioners, and the process to be followed by Home Office staff in response to a rule 35 report. Its purpose is also to ensure that all staff working in IRCs and those responsible for maintaining and reviewing detention understand the purpose of rule 35 and are aware of the procedures for recording and dealing with such reports.
14. In relation to Rule 35 of the 2001 Rules the guidance makes the following points:
 - i) The purpose of Rule 35 “is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention”.
 - ii) IRC doctors are required to report defined illnesses and conditions to the IRC manager, using the prescribed forms appended to Detention Services Order 09/2016 – Detention Centre Rule 35. These reports are then passed, via Home Office contact management teams in IRCs, to the officer responsible for managing and/or reviewing the individual’s detention. The information contained in the report must then be considered by the case worker and a decision made on whether the individual’s continued detention is appropriate, or whether they should be released from detention, in line with the adults at risk process.
15. On receipt of a rule 35 report the caseworker concerned must review the appropriateness of the individual’s continued detention in light of the information in the report (see Detention – general guidance) and respond to the centre, within two working days of receipt.

Adults at Risk in Immigration Detention (Version 5.0 dated 6 March 2019)

16. Further guidance issued by the Home Office on 6 March 2019 states:

“There is an existing presumption in immigration policy that a person will not be detained. The adults at risk in immigration detention policy strengthens this presumption against the detention of those who are particularly vulnerable to harm in detention.”
17. In the section on “Torture victims”, under the heading “Medico-Legal Reports”, the policy states (at p.10):

“Evidence that an individual is a victim of torture may emerge from a rule 35 [report]... Individuals with such a report which

indicates that the individual has been a victim of torture will be regarded as meeting level 3 evidence under the policy, providing the report meets the required standard.”

Factual Background

18. In summary, the factual background in relation to MR (Pakistan) and AO (Nigeria) relevant for the purposes of determining the principal issue in this claim is as follows:

MR (Pakistan)

19. On 10 September 2003 MR was granted leave to enter the United Kingdom as a student.
20. On 2 December 2015 he was sentenced at North London Magistrates’ Court for breach of a non-molestation order to one week’s imprisonment, and ordered to pay a victim surcharge of £80.
21. On 29 February 2016 he was convicted of two counts of breach of a non-molestation order and on 22 April 2016 he was sentenced to 12 months’ imprisonment and made subject to a restraining order for 5 years.
22. On 9 July 2016 the SSHD decided that MR was liable for deportation, and on 20 July 2016 he was served with a notice of liability to deportation.
23. On 29 July 2016 MR made representations to the SSHD that he could not return to Pakistan as his family would kill him due to his lifestyle and convictions in the UK.
24. On 9 September 2016 MR was served with a decision to make a deportation order.
25. From 22 April 2016 to 27 September 2016 he served his sentence of imprisonment at HMP Thameside. From 27 September 2016 to 10 November 2016 he was in immigration detention under remand conditions at HMP Tameside.
26. On 27 October 2016 MR signed a disclaimer stating that he wanted to return to Pakistan. On 10 November 2016 he was transferred to Colnbrook IRC in preparation for removal to Pakistan the next day. On 11 November 2016 he was deported to Pakistan.
27. On 17 July 2017 the SSHD received an e-mail from MR’s probation officer advising that his former partner had stated that he was back in the UK and acting in breach of his restraining order.
28. On 14 October 2017 MR was apprehended and remanded in custody. On 15 October 2017 he was transferred again to HMP Thameside. On 27 November 2017 he was transferred to HMP Pentonville.
29. On 14 December 2017 MR was convicted of two counts of battery and two counts of breach of a restraining order, and sentenced to a total of 8 weeks’ imprisonment, and a further 5-year restraining order was made.
30. On completion of his sentence, MR was detained in prison under immigration powers.

31. By letter dated 19 December 2017 MR's previous legal representatives informed the SSHD that he wished to make an asylum claim.
32. On 27 April 2018 an immigration judge granted MR bail and he was released from detention on 30 April 2018.
33. On 18 May 2018 he was arrested for a further harassment offence. He was charged with breach of a restraining order on 19 May 2018, and granted bail.
34. On 15 June 2018 MR's asylum screening interview was completed. He claimed to have been targeted on return to Pakistan by the MQM group in Karachi and abused, so he left Pakistan and returned to the UK via Ireland.
35. On 5 November 2018 he was committed to prison again in connection with further offences. On 8 April 2019 he was sentenced to three months' imprisonment for offences relating to breach of the restraining order.
36. MR's asylum claim remains outstanding.

AO (Nigeria)

37. It is not known when AO entered the UK. However, Home Office records confirm that he was issued with a valid visitor visa on 27 April 2006, which was valid until 27 October 2006.
38. On 10 January 2012 AO was convicted of possessing or controlling identity documents with intent and he was sentenced to 6 months' imprisonment.
39. On 27 July 2012 at Inner London Crown Court he was again convicted of possessing/controlling identity documents with intent, and sentenced to 6 months' imprisonment.
40. On 5 August 2014, at Newcastle Crown Court, AO was convicted of sexual activity with a female child under 16, and sentenced to 6 years' imprisonment. He was made the subject of a Sexual Offences Prevention Order (SOPA), and ordered to remain on the sexual offenders' register for an indefinite period.
41. On 17 March 2015 a deportation order was signed in relation to AO (with an out-of-country appeal).
42. On 2 December 2015 AO stated for the first time that he intended to make a claim for asylum, however he did not take any steps to claim asylum at that stage.
43. On 1 October 2016 AO informed an immigration officer that he wished to return to Nigeria but there was a problem. He was and remains a Christian, but some of his family members were Muslims. He stated that in the past, he became interested in learning more about the Muslim faith, so he talked to members of Boko Haram. The Chief Immigration Officer advised AO that what he had said would be taken as an asylum claim.
44. A full asylum interview was conducted on 26 January 2017.

45. On 12 May 2017 AO's asylum claim was refused and a decision made not to revoke the deportation order.
46. AO made submissions in response to that decision. On 19 October 2017 AO was served with a fresh asylum decision with an in-country right of appeal.
47. On 27 February 2018 the SSHD agreed to defer deportation as AO had lodged an out-of-time appeal with the First Tier Tribunal (FTT).
48. On 23 May 2018 he was granted bail in principle by a FTT judge, subject to the condition that he reside at an address provided by NOMS.
49. On 10 August 2018 he was released from detention.
50. From 5 August 2014 to 13 March 2017 AO served his sentence of imprisonment at HMP Northumberland. From 13 March 2017 to 10 August 2018 he remained in immigration detention at HMP Moorland, save for two short periods when he was temporarily transferred to an IRC for specific purposes.
51. On 18 October 2018 a second decision was made refusing AO's further asylum and human rights representations. The appeal against that decision was dismissed by the FTT in a decision dated 18 March 2019.
52. On 3 May 2019 AO was convicted of breaching the SOPA order and sentenced to four months' imprisonment.
53. On 9 May 2019 he was refused permission to appeal by the FTT; and on 19 June 2019 he was refused permission to appeal by the Upper Tribunal.

The Parties' Submissions and Discussion on the principal issue

54. In summary, the Claimants' case (as set out in the amended grounds for judicial review and the Claimants' skeleton argument) is as follows.
55. First, there is an inherent unfairness in the scheme to limit the detention of the vulnerable (as set out in the statutory guidance) as it is applied in prisons. In particular:
 - i) Section 59 of the 2016 Act imposes a duty upon the SSHD to give guidance that is intended to limit the detention of the vulnerable. The statutory guidance is intended to comply with that objective.
 - ii) The statutory guidance requires the SSHD to be given information regarding a detainee's vulnerability if it is to be effective. The SSHD cannot take account of matters that they are unaware of.
 - iii) Rules 34 and 35 of the 2001 Rules demonstrate the importance of having a specified mechanism that ensures that key information is provided to the Secretary of State. Imposing a duty on those with direct responsibility for detainees to notify the SSHD should ensure that relevant material is provided. There is no such provision governing the supply of relevant material regarding immigration detainees held in prison. That is particularly significant in light of

the fact that a detainee may lack capacity to notify the SSHD of their vulnerability.

56. Second, the matters set out in para 55 above demonstrate that the failure to apply Rules 34 and 35 to ensure the protection of immigration detainees held in prison is unreasonable. That submission is supported by the reports of Her Majesty's Inspector of Prisons and Mr Stephen Shaw.
57. Third, the failure to enact rules such as Rule 34 and 35 to ensure the protection of immigration detainees held in prison is a violation of Article 14 ECHR.
58. Fourth, the Claimants and/or other vulnerable immigration detainees held in prisons are "disabled" for the purposes of the Equality Act 2010 ("EA 2010"), in that they have a mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities (section 6 and Schedule 1, EA 2010). The failure to apply equivalent protections to those contained in Rules 34 and 35 to immigration detainees held in prison is a breach of EA 2010.
59. Fifth, there has been no apparent compliance with s.149(1) EA 2010. As far as the Claimants are aware no due regard was given to the matters in accordance with s.149.
60. The Claimants point to what they describe as serious concerns about the absence of provisions equivalent to those contained within Rules 34 and 35 of the 2001 Rules in the scheme governing those detained under Immigration Act powers within the prison estate, which had been raised by Her Majesty's Inspector of Prisons in a November 2015 paper entitled "People in prison: immigration detainees", which noted (at para 1.41) that:

"On receipt of a Rule 35 report, the Home Office decision maker must review detention. We have regularly criticised failings in Rule 35 reports and Home Office responses: reports often fail to offer meaningful commentary and replies are dismissive. Despite these criticisms, Rule 35 reports have led to the release of some vulnerable detainees from IRCs. For example, at Harmondsworth IRC in 2013, 5% of the 234 Rule 35 reports submitted in the year to our inspection led to release. No equivalent safeguard is available in prisons. There is no obligation on prison medical practitioners to communicate information regarding a detainee's health, risk of suicide or history of torture to the Home Office decision maker. This could mean that a torture survivor, or detainee who has suicidal intentions, or whose health is being injured by detention, is unnecessarily detained."
61. Further, Mr Shaw, in a report presented to Parliament by the Secretary of State entitled "a Review into the Welfare in Detention of Vulnerable Persons" ("the Shaw Report") said that he thought "the safeguards (however imperfect in practice) that apply to detainees in IRCs do not extend to those held in prisons". He continued: "If someone is detained under immigration powers then the safeguarding mechanisms that the Home Office has established should be applied whatever the place of detention. I appreciate that this complicates relationships with NOMS, but that is a

consequence of the reliance on the Prison Service to house some immigration detainees” (para 4.121).

62. Ms Elizabeth Rhodes, a senior executive officer within the Removals, Enforcement and Detention Policy Team at the Home Office states in her witness statement that Home Office figures published on 28 February 2019 show that at the end of December 2018 there were 1,784 people in detention, of which 366 were detained under immigration powers in the prison estate.
63. In a follow-up report to the Home Office (“Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons”), dated July 2018, presented by the SSHD to Parliament, Mr Shaw said that he remained concerned about the position of detainees held in the prison estate and recommended that a policy be developed to equate to Detention Centre Rule 35. He wrote:

“2.43 Recommendation 22 was that the Detention Centre Rule 35 (or its replacement) should apply to those detainees held in prisons as well as those in IRCs. This was rejected on the grounds that a broadly equivalent provision (Rule 21) exists in the Prison Rules. (This provides that medical officers must report to the governor on the case of any prisoner whose health is likely to be injuriously affected by continued imprisonment or any conditions of imprisonment). It was also pointed out that prisons have their own well-established healthcare provision, and mechanisms for reporting any concerns, and that the Adults at Risk policy applies to individuals held in prisons under immigration powers as well as those in the immigration estate.

2.44 Following my discussions with senior prison officials, I am much less confident that Rule 21 is an adequate substitute. There are fewer full-time healthcare staff to make assessments, and less regular contact with detainees given the larger prison population numbers.

2.45 Indeed, I was unable to find any information on how often Rule 21 is used in prisons, and suspect that it is rare in the extreme.

2.46 Prisoners held under immigration powers may well be subject to wider vulnerability issues, and I do not believe the current system is likely to pick this up. This is a worrying gap and needs to be remedied.”

64. Dr Annie Bartlett, Professor of Offender Healthcare at St George’s Hospital, University of London, who is an expert with particular knowledge and experience of healthcare in secure settings (including prisons and IRCs), states (at para 12) in her witness statement that healthcare screening in prison “aims to identify, as soon as possible after arrival, any urgent and important health issues relating to a prisoner and to ensure their appropriate immediate management”. This will include identifying any risk of self-harm or suicide and putting in place a suitable care plan. However,

the primary function of health care screening is not to consider whether a person is suitable for detention in the particular prison. She states it is possible that as a result of the non-standardisation of historical screening and the fact that some prisons deal specifically with foreign national prisoners that screening questions on torture have been added by local health practitioners, but she has never encountered evidence that this is the case. She states that the situation is clearly different from the situation in IRCs where questioning on experience of torture is mandatory (see Rule 35 guidance). She states that while her own experience may be atypical, her view is that Rule 21 does not feature explicitly in routine health work in prisons. In her experience the most likely route of assessment of potentially treatable sequelae of torture will be via the prison mental health team (para 30). In conclusion (at para 49) Professor Bartlett states:

“While the issues explicitly raised by Rule 35 could be encountered by clinical staff working in relation to Rule 21, it seems much more likely that they would be seen to be only clinically significant and the explicit, non-clinical concept of ‘suitability for detention’ would not be considered, even if some individuals might require care outside the prison environment.”

65. Mr Hugh Southey QC, for the Claimants, describes the fundamental issue in this case as being whether the failure to have in the prison scheme an equivalent to rules 34 and 35 is lawful.
66. He says, contrary to the assertion of the Defendants, that it has never been the Claimant’s case that rule 35 is required to “trigger” the Adults at Risk policy (see para 12 above), but he does describe rule 35 as being an important safeguard. There are detailed procedures in place to ensure the decision-maker receives the rule 35 report which is not the position in the prison context. Rule 35 needs to be viewed in relation to the overriding objective of the Guidance which is to minimise the period of detention for those who are vulnerable. In order to achieve that there need to be proper procedures in place. That being so, procedural fairness is an issue.
67. Mr Southey submits that rules 34 and 35 provide the best opportunity for torture to be identified. There is a detailed set of rules to ensure prompt consideration of the rule 35 report. Mr Southey emphasises the significant weight given to professional opinion when deciding whether an individual is vulnerable.
68. The Adults at Risk in Immigration Detention guidance (version 5.0 of 6 March 2019, see paras 16-17 above) recognises that evidence of torture may be important, and Mr Southey submits, may corroborate a claim for asylum. The vast majority of rule 35 reports relate to torture. Whilst doctors may pick up obvious healthcare needs, there is, Mr Southey submits, no reason to believe that they will pick up a history of torture.
69. Further Mr Southey submits the decision not to have rules in the prison estate equivalent to rules 34 and 35 is irrational when the vulnerability of individuals is the same in both the prison estate and IRC’s. The absence of consistency in the two regimes may be considered, Mr Southey submits, as an aspect of rationality (see *R (Gallaher Group Ltd) v Competition and Markets Authority* [2019] AC 96, per Lord Carnwath JSC at para 26).

70. Mr Southey contends that the evidence shows that MR in prison has consistently reported his allegations of torture, flashbacks, nightmares, anxiety and PTSD based on his experience of ill treatment in Pakistan, and that his mental health deteriorated in prison, yet the key decision makers at the Home Office were not made aware of the extent of his health issues.
71. The evidence in AO's case, Mr Southey submits, provided indicators as to his vulnerability throughout the period of his long detention since 14 March 2014, namely that he is a victim of torture and that there were concerns as to his mental health.
72. Despite AO repeatedly providing such indicators to prison health care, Mr Southey submits the SSHD, from the outset of his detention under immigration powers, repeatedly reviewed and maintained detention on the grounds, inter alia, that no risk indicators for the purposes of the Adults at Risk policy had been raised by AO, and/or he was unaware of any medical issues and/or that AO's circumstances did not engage the "Adults at Risk" policy and/or that no application for a Rule 35 report had been made, nor had a Rule 35 report been completed.
73. Mr Southey submits that it was only when AO was transferred to Colnbrook IRC in order to pursue removal action on 26 February 2018 that a Rule 35 report was completed on 28 February 2018. That report, almost 2½ years after he first informed the health care team in prison that he had experienced torture in Nigeria, stated that his injuries were consistent with his account of having been tortured. The report also made clear that AO was experiencing "significant mental distress", that he would be referred to the mental health team, and that his case should be reviewed and investigated further. Two weeks earlier, HMP Moorland Health Care, in a letter dated 14 February 2018, said that it was believed that AO "would benefit from further psychological interventions but that it is not appropriate to undertake trauma processing at present in light of uncertain time left in custody which consequently may become a detriment to mental health".
74. On 2 March 2018 the SSHD responded to AO's Rule 35 Report. He accepted that AO's account of ill-treatment and the rule 35 report setting out that account, met the definition of torture and that he was a "level 2 Adult at Risk". On 6 March 2018, the health care team at Colnbrook IRC stated that there was evidence of "episodes of frank psychosis" when AO was detained within the prison estate at HMP Moorland.
75. The Claimants' contention in relation to the relevance of their individual cases to the principal issue is put by Mr Southey and Mr Raza Halim at paragraph 7 of their skeleton argument in the following terms:

"The Defendants failed to (timeously) discover AO and MR's experiences of torture and mental ill health. That is because there is no equivalent protection to that of Rules 34 and 35 of the 2001 Rules, contained within the 1999 Rules. As a result, their vulnerability was not brought to the attention of the Defendants. That meant that their suitability for detention was not (adequately) reviewed by either Defendant. In those premises, the Claimants were unlawfully detained. ..."

76. In response, Mr Robin Tam QC and Ms Julie Anderson, for the Defendants, in their skeleton argument at paragraphs 2.4 and 2.5, summarise the Defendants' position:
- i) First and foremost, the claim is not a conventional claim that there was a failure by the Defendants to comply with the legal regime applicable to the Claimants' detention. Rather, the Claimants claim that a legal regime which is not formulated for the circumstances of their detention must be applied to their cases as a matter of legal obligation, and that the Defendants' failure to do that renders the prison legal regime unlawful.
 - ii) Second, it is to be noted there is no general complaint that the Defendants' *procedures* for the different specific cohorts of IRC detainees and prison detainees fail to comply with the *legal regime* in place for that cohort. Rather, the Claimants seek to graft part of the legal regime applicable to detainees in IRCs onto the legal regime for detention in prison to fill an alleged "gap" in the latter legal regime.
 - iii) Third, the two cohorts of detainees have distinct characteristics that are duly reflected in their respective legal regimes. The ultimate legal question must be whether the prison legal regime is lawful, applying the *Detention Action* test (see para 102 below).
 - iv) Fourth, there is no basis for speculating that either MR or AO would have "discovered" their historical claims through health screening or that a Rule 35 report would have been made prior to the threat of imminent removal.
 - v) Fifth, illegality is not demonstrated by merely showing that a regime could be improved, as that is almost always true of most legal and operational arrangements.
 - vi) Sixth, even if the unlawfulness of one legal regime could legitimately be established simply by comparing with a different legal regime, any difference in form between the two legal regimes in question in this case are amply justified by the differences between the cohorts of detainees and the circumstances in which they are held. Both are lawful.
77. Mr Rupert Bailie, an employee of Her Majesty's Prison and Probation Service ("HMPPS"), an executive agency sponsored by the Ministry of Justice, has since Autumn 2012 been working in national roles in the Health, Wellbeing and Substance Misuse team in HMPPS's headquarters. He states in his witness statement that prison health services are a part of the National Health Service provided to all citizens, and are therefore required to adhere to the same clinical guidelines which govern health services provided to the general population. It is the responsibility of NHS England to arrange prison healthcare services (para 9). It is also the responsibility of NHS England's contracted providers to deliver prison healthcare services.
78. Mr Bailie explains that all men and women received into prison are screened by healthcare services upon reception. This requirement is set out in PSI 07/2015 Early Days in custody – Reception in, First Night in Custody, and Induction to Custody which states:

“2.39 All incoming prisoners must be medically examined, in private if possible, by a qualified member of the Healthcare Team, or a competent and trained Health Care Assistant, who has been trained in ACCT [Assessment, Care in Custody and Teamwork] procedures, to determine whether they have any short or long term physical or mental health needs, including disability, drugs or alcohol issues, and ensure that any follow up action is taken.”

79. Mr Bailie states in relation to the application of Rule 21 of the Prison Rules, that he is not aware of any prison service operational policy which provides for any specific requirements with respect to healthcare assessments of immigration detainees held in prisons, nor of any prison service operational policy in relation to Rule 21 and the prison population in general.
80. He notes that NHS’s contracted healthcare providers must respect its code of confidentiality – so there is limited scope for healthcare to share medical information about prisoners with a prison custodial service or HMPPS. However, there are exceptions where this confidentiality can be breached in order to protect life, for example in some emergencies or when managing individuals with severe or complex needs such as men and women who are suicidal or severely mentally ill, or who lack mental capacity, or in situations where the individual consents to the information being shared. In these situations, the healthcare professional would, in line with the NHS code, inform the relevant staff at the prison of certain information. What information is shared in these exceptions is a matter for the healthcare staff and is not something the prison custodial provider or HMPPS would have control over. However, an individual detained in prison can give consent for their medical information to be shared (para 25).
81. Mr Graham Wilkinson, Head of the Foreign National Offender Operational Practice Team at HM Prison and Probation Service, is responsible for policy and practice relating to the detention of foreign national offenders in prisons in England and Wales. This includes those held in prisons under immigration powers. In his witness statement Mr Wilkinson states (at para 25):
- “Because of the very nature of prisons and their need for enhanced security, prisons are not able to replicate the regime of an Immigration Removal Centre. Immigration Removal Centres are intended to hold a detainee for a short period of time while arrangements are made for their removal, while prisons hold those subject to a sentence of imprisonment often for long periods of time.”
82. Under the heading “General FNO [foreign national offender] Policy Update” Mr Wilkinson said:
- “35. In January 2016, Stephen Shaw CBE, published a report entitled ‘Review into the welfare in detention of vulnerable persons’. This report looked at those detained under immigration powers and made a number of recommendations for change. Mr Shaw was subsequently asked by the

Government to conduct a review of his earlier report and this was published in June 2018 under the title ‘Assessment of government progress on implementing the report on the welfare in detention of vulnerable persons’. This report made a number of further recommendations including two recommendations relating to the detention of immigration detainees in prisons. Recommendation 3 recommended that HM Prison and Probation Service and the Home Office put in place a joint policy for the management of immigration detainees in prisons. Recommendation 4 recommended that a policy be developed to equate to Detention Centre Rule 35. These recommendations coincided with a planned review and refresh of PSI 52/2011.

36. In response to recommendations 3 and 4 of the Shaw Report the prison service is currently developing a policy for the management of detainees in prisons, this will bring together existing policy strands, but is separate to the review and refresh of PSI 52/2001. It is intended that this new policy will set out the rights and obligations of detainees and will look to define in a clear way the process governing the transition of an individual from a serving prisoner to an immigration detainee. It is expected that this policy will be agreed and put in place by the summer.

37. HM Prison and Probation Service is currently working with the Home Office and NHS England in their preparation of a response to recommendation 4. The anticipated role of the prison service in this would be to provide FNOs/immigration detainees with access to prison medical staff in the prison estate to enable a process similar to that which currently exists in Immigration Removal Centres under rule 35. Work is still being done to identify whether and how such a process could be implemented within the structure and resources of the prison system and the prison healthcare system. ...”

83. There are many ways the relevant information can come to the SSHD: from individuals, from legal representatives, through the healthcare system and from external GP’s.
84. Mr Tam accepts that rule 35(3) reports may be relevant evidence in an asylum claim and may provide support for it, but, he observes, that is not the purpose of a rule 35 report.
85. The wording of rule 35(3) makes clear that it is only when a medical practitioner “is concerned” that a detained person may have been the victim of torture that he is under a duty to make a report. The duty therefore only arises after a clinical judgement has been made by the medical practitioner. For whatever reason no rule 35 report was made on the first occasion AO went to Colnbrook IRC. Certainly, Mr Tam submits, it cannot be said on the evidence that a rule 35 report is made immediately on an individual being detained in an IRC.

86. Mr Tam warns against assuming that it is easy to make changes to the scheme operating in the prison estate. He points out that the fact doctors in prisons are not Home Office employees may be of some significance when considering whether they can be made subject to a rule 35 duty.
87. The Claimants suggest that there are three fundamental problems with the Defendants' evidence, and through it, their case. First, the screening processes and assessments in prison have a critical lacuna: they do not enquire as to whether a detainee is a victim of torture by contrast with Rules 34 and 35 where questions as to torture are mandatory.
88. Second, an assessment in an IRC under rules 34 and 35 is intended to facilitate prompt consideration as to suitability of continued detention, whereas the objective and focus of the Prison Service's assessment is to determine the health needs of the detainee. The SSHD who makes the decision to detain FNOs is likely to have little or no insight into the vulnerability of the person being detained.
89. Third, the fact that the Defendants are "currently working" to act on the recommendations within the Shaw report constitutes a tacit recognition on their part that the present system suffers from the deficiencies identified by the Claimant. Further, there is no certainty that these deficiencies will be removed or when any changes will be implemented.
90. I do not accept there is what Mr Southey describes as a "lacuna" in the scheme governing the detention of vulnerable persons, including victims of torture, or those suffering from mental health, detained under immigration legislation within the prison estate.
91. It does not follow from the fact that Rule 35 of the 2001 Rules, which applies to immigration detainees held in IRCs, has no application to immigration detainees held in prison that the rules relating to the detention of detainees in prison (which includes immigration detainees) are unlawful.
92. Mr Paul Gasson, employed by the Home Office as a Senior Executive Officer in the role of Litigation and Guidance Manager for Detention and Escorting Services provides in his witness statement an overview of health care in IRCs and prisons. He states that within IRCs and prisons NHS England provides health services so that people in detained settings have access to the same standard and range of healthcare services as people in the community. He confirms that the health care services in prisons and in IRCs use the same electronic health care records system to record medical assessments, interventions and diagnoses, and this can be assessed at other facilities on any transfer by the relevant responsible clinicians.
93. The SSHD receives information about the healthcare circumstances of immigration detainees in prison through a range of sources. Mr Richard Bell, Acting Assistant Director of the Criminal Casework Prison Operations and Prosecutions Team ("POP") in the Immigration Enforcement division of the Home Office, refers in his witness statement to members of his team attending Assessment, Care in Custody and Teamwork ("ACCT") reviews. He explains that an ACCT review is an internal multi-agency meeting organised by the prison to formally review an individual's current risk and vulnerabilities in relation to self-harm and suicide. At the meeting there is

input from all agencies/departments who have had contact with the individual to enable informed conclusions to be reached.

94. The claim, based on the applicability of Rules 34 and 35 to IRCs alone, Mr Tam submits, and I agree, fails to have regard to a critical distinction between individuals who are entering immigration detention in IRCs and those who are entering immigration detention in prisons. In the main, detainees who enter IRCs enter detention from liberty. That being so there may well not be available to the SSHD up-to-date healthcare information about the individual. Rules 34 and 35 ensure that there is a process on induction to an IRC for ascertaining whether there are matters about which the SSHD should be aware relevant to the question of whether the detainee is fit to be detained in an IRC. Such information needs to be obtained speedily. By contrast, detainees who are in prison at the time they become immigration detainees are likely to have been serving a custodial sentence. Not only will a prisoner have undertaken an NHS health screening on entry to prison as a result of which relevant medical information will be recorded, but prior to the expiration of a custodial sentence in order for a decision to be taken as to whether an individual should be detained under immigration powers at the completion of their sentence, application of the Guidance will involve consideration of medical evidence. If there is no up-to-date medical evidence available, it should be requested from the prison health care services.
95. Mr Tam further points out that those who enter immigration detention through the prison route will usually be criminals who have served a significant period of imprisonment. This is relevant for the purposes of determining whether or not their detention should continue, even if they may have been victims of torture or have other healthcare issues because they are more likely to pose a risk of absconding and/or a risk of re-offending. Those who remain detained in prison for longer periods will tend to be those who pose too great a risk to be detained in an IRC.
96. In MR's case it is clear from the evidence that the Defendants have been aware during his two periods of imprisonment of his mental health issues and have taken them into account in dealing with his case. His mental health issues have been known about for a long time, and since before his return to the UK. In September 2016, prior to the decision to detain under immigration powers, consideration of the AaR policy led to an assessment of MR as "Level 2 – depression"; and throughout his immigration detention he was assessed under the AaR policy as remaining at Level 2.
97. In AO's case also the Defendants had been aware of his mental health issues and had taken them into account in dealing with his case. Before AO's transfers to IRC Colnbrook and before the Rule 35 report made in relation to him on his second transfer to IRC Colnbrook, the SSHD had been dealing with him as a Level 2 Adult at Risk.
98. In *R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber) and others* [2015] 1 WLR 5341, Lord Dyson MR summarised the applicable legal principles for a challenge of this kind as follows:

“27. ... (i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must

show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts. I would enter a note of caution in relation to (iv). I accept that in most contexts the threshold of showing inherent unfairness is a high one. But this should not be taken to dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals.”

99. I accept Mr Tam’s submission that these principles have not been satisfied in the Claimants’ cases. They have not provided evidence about “the full run of cases”. Mr Toufique Hossain, the Claimants’ solicitor, details his firm’s experience of representing vulnerable clients who are held under immigration powers within the prison estate. He gives evidence relating to seven cases. I agree with Mr Tam that this evidence falls far short of satisfying the requirements to make out the Claimants’ case which is essentially an allegation of a failure of information flow. If there is inadequate medical information at the time of the initial detention decision then prison health care will be requested to provide a medical report prior to a prisoner reaching the end of their custodial sentence. The Claimants’ own cases show that the SSHD was aware of the relevant medical information and considered it as part of the routine application of the AaR policy.
100. Mr Tam urges, I think correctly, caution with transplanting the concept of fairness into the present claim. What rule 35 is concerned with is the provision of a flow of information. That is not, essentially, an issue of fairness.
101. I reject the contention that the absence of equivalent rules to Rules 34 and 35 applying to the prison estate leads to inherent unfairness and unreasonableness, resulting in the scheme governing the detention of immigration detainees held in the prison estate being unlawful.
102. The evidence before this court leads me to the conclusion that there is nothing inherently wrong with the system that applies in the prison estate, even if it could be improved.
103. In the light of the findings and conclusions that I have already set out in relation to the principle issue I can take the claims of the unlawful discrimination in breach of Article 14 ECHR and unlawful breach of the EA 2010 shortly.
104. I agree with Mr Tam that the two regimes and the two cohorts are so different that either they are not properly comparable or the differential treatment is justified by the difference between the cohorts. That being so, I am of the view that no discrimination or equality complaint can be properly established.

Conclusion

105. In my judgment the Claimants have failed to make out their cases that there is inherent unfairness/unreasonableness in the failure to put in place an equivalent mechanism to Rules 34 and 35 of the 2001 Rules in the case of immigration detainees held in prison. Further, there is no unlawful discrimination in breach of Article 14 ECHR, and there is no unlawful breach of the EA 2010.

(B) AO's claims for unlawful detention

(1) Breach of the Hardial Singh principles

106. AO contends that his detention became unlawful following the receipt by the SSHD on 28 February 2018 of a Rule 35(3) report. The assessment by a doctor in Colnbrook Healthcare stated:

“He claims he was tortured by members of Boko Haram in Nigeria for not carrying out a killing they wanted him to do.

His narrative appears consistent with his injuries in my opinion as a GP. He has no acute physical disability in the detention centre that I am aware of which impacts him being in the centre.

However he does have significant mental distress from this episode and he will be referred to the Mental Health Team as per protocol to be assessed by them.

I will be grateful if you would review this further and investigate as you feel necessary.”

107. On 2 March 2018 the SSHD responded to the Rule 35 Report, accepting that AO's account of ill-treatment meets the definition of torture and that he is regarded as a Level 2 Adult at Risk. The response stated that his detention had been reviewed and the report considered when determining his suitability for detention under the “Adult at Risk” policy. Balancing risk factors against immigration control factors, the SSHD stated:

“Consideration has been given to balance your wellbeing whilst in detention, against the risks of harm to the public and the need to maintain effective immigration control.

It is also considered, in view of your history of offending which involves sexual activity with a female child under 16, that you present a risk to the public and that your detention is therefore justified.

You are currently known to be receiving medication for mental health issues and although it is accepted that you are an Adult at Risk, the doctor has not indicated that a period of detention is likely to worsen your symptoms.

The only barrier to your removal is the need for a travel document and this can be obtained with your compliance, therefore the onus is on you to co-operate in this matter. It is considered that if you comply, removal can be effected within a three-month timescale.”

108. The SSHD’s response concluded:

“It is acknowledged that you are an Adult at Risk but it is considered that your removal can be enforced within a reasonable timescale.

Therefore when balancing the indication of vulnerability against the negative immigration factors highlighted above and the timescale for your removal, it is considered that the negative factors outweigh the risks in your particular circumstances. Therefore a decision has been made to maintain your detention.”

109. Mr Southey observes that the SSHD’s response does not refer to the fact that the GP said there was a need to follow up on his mental health condition from persons with expertise in the area.

110. On 7 March 2018 AO was transferred back to HMP Moorland.

111. On 13 March his detention was reviewed and maintained by the SSHD. The authorising officer noted: “[AO] has frustrated the deportation process, ... he has now lodged [an] out-of-time appeal. His risk of absconding is heightened given his reluctance to return and his previous history of obtaining forged documents to deceive the authorities... I am concerned that [AO] has been detained for 13 months, but aware that this is due to his avenues to frustrate the removal process. Investigations need to take place to ensure that the appeal process can be concluded within 3 months as stated in the review. I am not convinced that this may be the case... We may have to consider release...”. A possible release address is to be investigated.

112. On 10 April 2018 his detention was further reviewed and maintained. The recommendation by the Reviewing Officer includes reference to a Rule 35 application having been submitted on 28 February 2018, followed by the sentence: “His detention has been reviewed and a decision made to maintain detention”. He is said to be suffering from psychotic illness. It is stated that there are “no barriers to his removal and further RDs should be set without delay”.

113. His detention was reviewed and maintained on 15 May 2018 on the basis that his appeal was listed for 7 June 2018 and that there was a reasonable prospect removal could take place within a reasonable time (1-2 months), depending on the outcome of the appeal.

114. There was a further detention review on 11 June 2018 when his detention was maintained. The SSHD states that “there remains a clear intention to deport and that removal can be effected within a reasonable timescale”. The SSHD states that probation services should be approached “in case we need to consider release”.

115. On 12 July 2018 his detention was reviewed and maintained. The SSHD states that “removal remains realistic” and that a proposed release address should be sought “in case removal becomes unrealistic”.
116. On 7 August 2018 his detention was further reviewed and maintained. The SSHD stated that the Claimant “can be removed within a reasonable timeframe” and that he should be “detained until the appropriate accommodation is procured for his release”.
117. On 10 August 2018 AO was released to probation-approved premises in Middlesbrough.
118. The SSHD contends that at all times AO’s detention remained lawful.
119. Mr Southey points to evidence that he suggests indicates AO was saying at an early stage that he was a victim of torture. However, the asylum claim he stated in April 2014 that he wished to make, he did not progress.
120. Despite some confusion arising from the detention reviews as to when AO’s rule 35 application was known about, I am satisfied that the reviewing officer knew about it until April 2018 and that then and subsequently regard was had to it. The rule 35(3) report made no difference, no doubt because of countervailing considerations, to the decision to detain him.
121. The relevant principles for determining the lawfulness of AO’s detention are not in issue. In *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, Lord Dyson JSC, referring to the *Hardial Singh* principles, stated (at para 22):

“It is common ground that my statement in *R (I) v Secretary of State for the Home Department* [2003] INLR 196, para 46 correctly encapsulates the principles as follows: (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.”
122. By the end of February 2018 AO had been detained for about a year. He had been identified as both a victim of torture and suffering from psychotic illness. The appeal that he was pursuing might take a reasonable period of time. The first detention review after the Rule 35 report on 13 March 2018 incorrectly stated that no rule 35 application had been received. Accordingly, a key factor of the evidence of torture, Mr Southey submits, was not taken into account at that detention review. The risk of AO absconding was stated to be “High”, however no explanation for the probation officer’s assessment that AO “is fearful of deportation and has taken steps to avoid his return to Nigeria” is given. Mr Southey submits that AO had very powerful reasons to remain in contact in the UK with his potentially meritorious appeal pending. Further, Mr Southey submits that the assessment in the review that he posed a high

risk of re-offending, based on the probation officer's assessment, was incorrect in the light of the OASYS risk assessment which placed him within a low group for further violent or non-violent offending and failed to have regard to the fact that he would be subject to supervision on release and would be residing in approved premises.

123. Mr Tam submits that AO was a serious criminal whose detention was properly justified throughout, given the high risk of absconding and re-offending which included a high risk of harm to children. The authorising officer commented in the 13 March 2018 review that AO's risk of absconding was heightened given his reluctance to return and his previous history of obtaining forged documents to deceive the authorities.
124. I accept Mr Tam's submission that AO's case was one which was properly assessed as showing a very significant risk of absconding and a very significant risk of re-offending, by reason of which his continued detention was justified.
125. Mr Southey suggested that the third *Hardial Singh* principle was particularly in issue in AO's case. However, as the Court of Appeal stressed in *R (Muqtaar) v Secretary of State for the Home Department* [2013] 1 WLR 649 at [36] and [38], "It is important not to water ... down" the word "*apparent*" used in the approved formulation of the third principle of *Hardial Singh* "so as to cover situations where the prospect of removal within a reasonable period of time is merely uncertain". I am not persuaded that AO has identified any point in time when it was objectively "*apparent*" that there was no realistic prospect of his removal within the reasonable period available.

Conclusion

126. I am satisfied that at all relevant times AO's detention was lawful on the *Hardial Singh* principles, and accordingly that this part of his claim fails.

(2) The delay in finding AO bail accommodation

Introduction

127. AO contends that the time taken to find him approved premises ("AP") following the grant of bail in principle by the First-Tier tribunal ("FTT") on 22 May 2018, rendered his detention unlawful. This delay of almost three months is said to amount to public law unreasonableness and to undermine the FTT's decision to grant bail. AO submits that the delay should be taken particularly seriously because it resulted in deprivation of liberty.
128. In the original Grounds for Judicial Review AO contended in two short paragraphs that the delay "frustrated the right to liberty that [he] had only been able to vindicate by making an application to the Tribunal and was unreasonable in all the circumstances" (see paras 12 and 80). Mr Southey briefly expanded upon this contention in his skeleton argument for the July hearing at paras 112-114. During the course of his oral submissions on the third day of the hearing an issue arose as to whether the basis of this aspect of the claim had been clearly pleaded so as to allow the SSHD a proper opportunity to respond to it. Mr Tam contended that it was not clear what duty was said to be owed, by whom and how it was said to have been breached.

129. On 19 July, at the conclusion of the three-day hearing, I adjourned the claim part-heard for the grounds of judicial review to be amended to set out with clarity the claim that was being made with regard to the delay in the provision of AP and which of the Defendants were alleged to have acted unlawfully. It is not necessary to recount in detail in this judgment how matters progressed procedurally thereafter. Suffice to say that AO's grounds of claim on this delay issue were amended, both Secretaries of State responded by way of supplementary grounds of defence, the parties provided supplementary skeleton arguments and the hearing resumed on 22 November.
130. At the resumed hearing Mr Southey made two submissions: first, that the delay in finding AO approved AP amounted to public law unreasonableness (Ground A); and second, that the delay in obtaining and providing AP was discriminatory in breach of Article 14 ECHR as compared to the position of prisoners. (Ground B).

Factual Background

131. The factual background to AO's case is set out at paragraphs 37-53 above. The following further facts are relevant to this aspect of AO's claim.
132. On 22 May 2018 the National Probation Service ("NPS") was informed that AO had been granted Immigration Bail.
133. AO could only be released on bail once AP was secured for his accommodation because he was assessed as posing a high risk of harm.
134. Searches for AP were first limited to the NPS's North East region of England, as that was where AO was detained and had lived prior to his arrest. It was NPS policy to begin searches for AP within the area where the detained person had previously lived. It was a bail condition that AP be found outside of Newcastle-upon-Tyne where there was an exclusion zone. Two APs were excluded because they fell within the exclusion zone.
135. On 24 May 2018 a NPS caseworker noted the need to speak to AO about possible AP locations, AP rules and licence conditions. At that stage the earliest possible date for a video-link telephone call was 4 June 2018.
136. On 25 May 2018 the NPS caseworker estimated a release date of 11 June 2018.
137. On 7 June 2018 it was noted by the NPS caseworker that an AP placement was reserved for AO in Middlesbrough in the North-East region from 10 October 2018. Given the length of time until the availability, efforts were being made to talk to AO to discuss placement in other areas in England or Wales.
138. On 6 July 2018 a Multi-Agency Public Protection Arrangements ("MAPPA") level 2 referral was made (to be considered by a MAPPA level 2 meeting on 4 September 2018).
139. On 17 July efforts were still being made to find AP available before 10 October.
140. On 30 July the NPS caseworker noted that a telephone link with AO was scheduled for 1 August. The phone call took place on 1 August, during which AO said that he

was willing to go anywhere except London. AO did not have strong links to areas outside of the north-east.

141. On 2 August a place was found in the north-east region in Cuthbert House. AO could move in on 13 August.
142. On 7 August Cuthbert House was changed for another AP, namely 13 The Crescent in Middlesbrough in the north-east region. This was because there was a right-wing extremist in residence at Cuthbert House. AO could be accommodated immediately at 13 The Crescent.
143. On 10 August AO was released to 13 The Crescent. The release was initially for a three-month period, but it was extended while suitable follow-on accommodation was sourced.

The Parties' Submissions and Discussion on Ground A

144. Mr Southey submits that there is a legal principle that delay can amount to public law unreasonableness; that delay undermined the decision of the FTT to grant bail; and that excessive delay in releasing from detention may violate Article 5(1) ECHR. In considering whether there has been unreasonable delay, Mr Southey submits, the court should look at the overall period; alternatively, the period up to the start of August 2018 (on the basis that thereafter proper action was taken).
145. In support of his submission that the Defendants were under a duty to provide accommodation and to do so without unreasonable delay, Mr Southey referred to *Qarani v Secretary of State for the Home Department* [2017] EWHC 507 (Admin) at paras 73-74, and *DM (Tanzania) v Secretary of State for the Home Department* [2019] EWHC 2351 (Admin) at para 149. On the facts of the case Mr Southey submitted that the delay was unreasonable and unlawful. In support of that submission he relied on the following matters: first, that the Defendants spent three months searching for available AP in the north-east region of England with very little consideration being given to other areas. There was, he submits, no need or justification for restricting the search for AP to the north east of England. The only requirement as to the location of AP was that AO reside in an AP outside of Newcastle-upon-Tyne (where there is an exclusion zone). Second, and more generally, Mr Southey submits there was inefficiency in the search for a suitable AP. There appears, he suggests, to have been no basis for the initial view that an AP would be available on 11 June. Further, it became clear there was a risk of considerable delay on 4 June. However, it then took almost two months to arrange a video conference to confirm whether AO was willing to move to other areas of the UK. Moreover, it appears that 13 The Crescent was only approached to provide an address after another address had been withdrawn. It had immediate availability.
146. Mr Tam submits that the evidence that has now been filed by the SSJ demonstrates that there was no public law error in relation to the provision of bail accommodation. Ms Sarah Mainwaring, who is an employee of Her Majesty's Prison and Probation Service (HMPPS) and works as the head of public protection for the north-east division, in her witness statement dated 27 September 2019, provides information on how APs are located generally, provides an overview of the process from the initial referral through to its conclusion, and refers to the relevant guidance documents. Ms

Jenny Hutchinson, who is also employed by HMPPS and works at the NPS Newcastle office, in her witness statement dated 12 September 2019 gives evidence of the steps taken in AO's case to find suitable APs.

147. Ms Mainwaring explains that when a probation officer starts the process of looking for an AP, they will first identify the three first choices of address, based on the individual circumstances of the case. She states:

“8. ... The objectives are (i) the AP placement is a success so that the offender can move on to more permanent accommodation, having remained properly in contact with those responsible for his supervision and (ii) the offender does not re-offend, and does not raise his risk of re-offending, whilst on the temporary placement at the AP. Achieving these results are in both the interests of the offender and the public.

9. The principal factors that will be taken into account in identifying the most suitable AP include the following:

9.1 The individual circumstances and risks of the case (both risks presented *by* the offender and risks *to* the offender);

9.2 Family ties and other support networks in areas (such as friends, supportive professional organisations or community groups);

9.3 Positive links to an area such as employment and educational links;

9.4 Exclusion zones precluding residence in an area; and

9.5 The offender's views, since, generally speaking, where an offender engages with the process and supports an AP placement it is more likely to prove successful.

10. The experience is that most often a placement in the area where the offender lived previously is the best all-round choice unless there are strong reasons that exclude this choice (i.e. due to a risk presented *by* or *to* the offender specific to his local area). ...”

148. Ms Mainwaring states that the NPS is organised regionally. She explains (at para 14):

“... an NPS division only has responsibility for APs in its geographical area. If there is an unusual case where the best interests of the offender and the public are served by a transfer outside the home area, this will entail an additional search process involving other NPS divisions. This might arise if all APs in the NPS division's area are within zones from which the offender is excluded, or the risk posed by or to the offender

cannot be effectively managed within that NPS division's area, for instance, because of gang ties. ...”

149. At paragraphs 17-23 of her witness statement Ms Mainwaring explains the “Waiting lists” system. The supply of APs is not infinite and not every AP is suitable for every offender. Waiting lists are kept as part of the process of allocating suitable APs to offenders. Necessarily, the process cannot operate on a simple “first come, first served” basis as levels of suitability, risk and circumstances will not be uniform. The supply of APs is variable as it depends on whether, and when, the existing offenders move on as intended. The lists provide an indication of what accommodation will be available within what timescale. The Central Referrals Unit's (CRU) primary role is to manage the allocation of the suitable APs to offenders, taking account of all variables.
150. At paragraphs 24-27 of her witness statement Ms Mainwaring explains the Multi-Agency Public Protection Arrangements (“MAPPAs”) which are designed to help protect the public from serious harm by sexual and violent offenders. She states that the risks and difficulties associated with allocating APs outside an offender's home area are especially acute in MAPPAs cases, such as AO's case. If it is proposed that an offender will move to an AP outside his home area, this would entail a change in the agencies involved in the case and a need to secure their effective co-operation. Unless rigorously managed, any transfer to another NPS division raises the risk of miscommunication or misunderstanding of responsibilities. Also, it cannot be assumed that transfer will depend solely on availability of AP accommodation. The police force in the non-home area that is intended to receive the offender may want to see a robust move-on plan for the offender once his time in the AP is concluded before accepting responsibility for the high-harm offender. These consequences (of allocating an AP in a different area) underline, Ms Mainwaring states, the approach of seeking AP placements within the area covered by the NPS division already responsible for the offender's case.
151. Ms Hutchinson states that she was AO's Probation Officer from the time immigration bail was granted until his release to AP. It was therefore her role to locate available APs by working with the CRU for the north-east division. She states that she was first informed the Claimant was granted immigration bail on 22 May 2018, so she began looking for suitable APs. She made a referral to CRU soon afterwards at the earliest opportunity. The purpose of the referral was to ask whether AO was assessed as suitable for APs in the area and to ask what APs in the north east were available and from what date.
152. Ms Hutchinson states that it was her intention to make a referral to Pennywell House in Sunderland and two APs in Middlesbrough (Nelson House and The Crescent). She states that making three choices is standard procedure and sometimes the offender's preferences can be taken into account. However, she also asked that the search be widened to cover the wider north-east area if required (whilst appreciating that the Claimant was not suitable for APs in Newcastle as they are located in areas from which AO was excluded from entering due to the nature of his offending).
153. On 25 May 2018 she received a response from CRU stating that AO had been assessed as suitable but that the only availability was Pennywell House from 17 October 2018, Nelson House from 10 October and Cuthbert House (Gateshead) from

24 September. She let CRU know that Nelson House was the best option, being further away from AO's exclusion zone. However, she asked to be informed if anything became available sooner.

154. Ms Hutchinson states:

“11. On 4 June 2018 because of the complexities of securing accommodation in the Claimant's case (relating to the waiting time and the pending legal action) it was decided that a MAPPA... level 2 referral should be made. The Claimant was already subject to MAPPA level 1 arrangements. The referral was submitted to a screening panel (i.e. a Public Protection Probation Manager at NPS and an officer at the local police force) to decide whether the case warranted this status. Cases are referred to MAPPA where there is an additional need to co-ordinate risk management between agencies (police, NPS and the prison), but more so where senior oversight is required, and to ensure that adequate resources are being applied to the case in the circumstances.

12. A referral for the Claimant's case was accepted by the screening panel on 6 July 2018 so that it would be considered by a MAPPA level 2 meeting on 4 September 2018.

13. On 1 August 2018 I spoke with the Claimant on the telephone. I had tried to speak with the Claimant earlier. He stated that he was willing to go to Nelson House, and also was willing to go anywhere else in the UK apart from London. He told me that he would be OK in Manchester as there were people who would look after him, however he didn't know where these people lived. He also told me that his children lived there and would feel safe there. However, he also stated that he was only allowed indirect contact with his children. He did not state any specific APs he would like to go to or provide any addresses, and had not done so previously.

14. On 2 August 2018 I called CRU who informed me they would look into an earlier vacancy in the north east as a matter of urgency. That same day it was confirmed that there was a vacancy at Cuthbert House from 11 August 2018 to the end of September.

15. However on 7 August 2018, it was decided that Cuthbert House was no longer deemed suitable as a far-right extremist offender was due to move in shortly, and he may pose a risk to the Claimant. A place was available immediately at The Crescent (Middlesbrough), and it was confirmed the following day that the Claimant would be moving there on 10 August 2018 until late November 2018.

16. As mentioned, the Claimant's case was held by NPS North East. Our division and in particular our Newcastle office therefore had specific knowledge of the circumstances of his case and the risks he posed. Because of this, I focussed on finding accommodation in the immediate north-east area (i.e. Newcastle, Middlesbrough, Gateshead, Sunderland), the areas we cover from our office.

17. I did at one point consider a search for accommodation nationally. I know so as I recorded this in the delius notes in an entry on 2 August 2018 at 1400. However accommodation was found for the Claimant soon after and prior to that I decided that to do so would be problematic.

18. To try and locate accommodation outside the north east, we firstly need to request another NPS division to provide us with local supervision and oversight. Secondly, we would then need to establish that the case could be effectively managed in the receiving area. ... Thirdly, there would also need to be a 'move on plan' in place, which plans for where the Claimant would be living after the placement in the approved accommodation ends. Fourthly, we would have to consider with the local NPS division how to co-ordinate this change in area, to avoid disjointed risk management, due to changes in supervising officers, risk management officers (police) and the impact this may have on the offender.

19. There is not a single process by which a national search for approved premises can be carried out. Each regional division of NPS has to be approached separately, so that the referral process can be initiated through their branch of CRU. From experience, I know this can be time consuming and has the potential to cause further delays in the process of finding accommodation.

20. In the Claimant's case he was not able to show strong enough ties to any other area for me to justify such an approach, therefore his case was not referred to other NPS divisions because of this. ..."

155. In *R (Sathanantham) v Secretary of State for the Home Department* [2016] 4 WLR 128, a case that related to the use of the power conferred on the SSHD under s.4(1)(c) of the 1999 Act to provide accommodation for persons released on bail from detention under any provisions of the Immigration Acts, Edis J held that the SSHD's legal duty is to deal with each application fairly and rationally. If the process of dealing with the application in an individual case takes too long without a decision being made, it can be a breach of that duty. The breach consists of failing to determine that specific application either within a reasonable time, or at all.
156. Mr Tam submits (1) there has at no stage been any undue delay by the SSHD in trying to locate bail accommodation for AO, and no undue delay by the Defendants (or

others) in seeking or providing assessments of suitability of any of the addresses which had been suggested; (2) the overall length of time which it has taken successfully to locate bail accommodation for AO in his specific circumstances has not been unreasonable; and (3) accordingly there has been no breach of the SSHD's duty to determine AO's application within a reasonable time and there has been no unlawfulness. Accordingly, there has been no *Sathanantham*-based breach of duty.

157. The duty on the SSJ is different. In *R (Bowen) v Justice Secretary* [2018] 1 WLR 2170, a case concerned with the release subject to conditions including residence in specific approved premises of prisoners serving indeterminate sentences after expiry of minimum custodial terms, McCombe LJ said at para 57:

“Assuming, however, as I think, the Act does not require the immediate release of a prisoner if necessary conditions cannot be put in place, it is common ground that the Secretary of State is under a public law duty not to delay a prisoner's release beyond ‘a reasonable timeframe’.”

158. McCombe LJ continued (at para 83):

“In general terms, it seems to me that the decision as to whether any particular period prior to release of a life/IPP prisoner, with a residence condition, is unreasonable or not, will depend entirely on the facts of the particular case, unless it appears that the national unavailability of Approved Premises placements has had a genuinely adverse effect on an individual prisoner.”

159. Both *DM (Tanzania)* and *Qarani* were *Hardial Singh* claims against the SSHD, and as such neither assists in determining whether the SSJ has acted in breach of duty in the present case (see in particular *DM* at paras 125 and 156, and obiter comments in *Qarani* at paras 66-75).
160. In AO's reply to the supplementary grounds of defence dated 12 October 2019 AO alleges (at para 9) that the Defendants' public law error was material to AO's continued detention in that it bore upon and was relevant to continued detention (applying the approach in *R (Kambadzi) v Secretary of State* [2011] 1 WLR 1299 (at para 42)). Mr Tam observes that it appears that for the first time AO was making a *Lumba* claim for damages for false imprisonment arising out of a material public law error in making the decision to detain (*R (Lumba v Secretary of State for the Home Department)* [2012] 1 AC 245).
161. Mr Tam submits that the *Lumba* unlawful detention claim is unmeritorious. In *Lumba* and *Kambadzi* the focus was on the decision to detain (or the decision to continue detention). However, in AO's case the detention review noted that no suitable bail accommodation had been located so the FTT's grant of bail in principle could not be put into effect. There was no public law error in any of the decisions made in those detention reviews, and none, as I understand it, has been alleged.
162. Mr Tam and Mr Southey made detailed submissions on the differences of view within the majority in *Lumba* about the threshold that had to be surmounted to permit a claim for damages. However, I agree with Mr Tam it is unnecessary to decide which of

these tests is correct as it is clear from all of them that the flaw in question must be a flaw in the decision to detain. Lord Dyson's formulation (with which Lady Hale agreed), which has generally been adopted as a correct statement of the law, is that the breach of public law "must bear on and be relevant to the decision to detain" (para 68). However, AO's complaint is not of the decisions to detain or decisions on detention reviews, but of the compendious failure by the Defendants to provide accommodation timeously.

163. The recent Supreme Court decision in *R (Hemmati) v Home Secretary* [2019] UKSC 56, in respect of which I received further short written submissions from the parties on 4 December 2019, provides, in my view, no support for what I consider to be an attempt by AO to extend the *Lumba* principle to embrace legal errors in decisions other than the decision to detain.
164. Having set out the evidence and the arguments fully, I will endeavour to express my conclusions on Ground A reasonably shortly.
165. I am entirely satisfied from the evidence of Ms Mainwaring and Ms Hutchinson, that there was no public law error in relation to the provision of bail accommodation. The allegation that the delay was unreasonable and unlawful is, in my view, not made out. I accept Mr Tam's submission that AO's offending history and his risk profile made the identification of suitable accommodation particularly difficult. In addition, the complexity was added to by the need to safeguard AO from other criminals placed in bail accommodation who might pose a risk to him. There was no delay beyond a reasonable timeframe.
166. Further, the *Lumba* claim for damages for unlawful detention must, in my view, in any event fail. I accept Mr Tam's submission that even if collaterally there was some breach of either Defendant's duties in relation to bail accommodation there was no public law error that was material to AO's continued detention in that it bore upon and was relevant to continued detention.
167. There was at all times a lawful justification for AO's detention. The decision to detain was that of the SSHD. Any public law error by the SSJ could not undermine and render nugatory the lawful decision by the SSHD to detain AO. Accordingly, the *Lumba* claim for damages fails.

Ground B: Article 14

168. In this new ground AO contends that he would have been provided with an AP address on the date his sentence expired if he was a UK national. Because he was a foreign national he was held beyond the date when bail was ordered because of the delay in finding an AP (see Ms Mainwaring's witness statement at para 18).
169. The delay in obtaining and providing accommodation to AO by way of AP, AO contends, was discriminatory in breach of Article 14 as compared to the position of prisoners. The subject matter is within the ambit of Article 5 ECHR as it relates to liberty. There is a difference in treatment.
170. Mr Southey submits that the statistical data that has now been provided by the Defendants supports Ground B. It shows that between 22 May 2018 and 10 August

2018, the period during which AO waited for AP, 191 prisoners were admitted to APs in the north east; of that number only two were foreign national prisoners, one of them being AO. That data, Mr Southey submits, evinces a prima facie approach to the allocation of APs between foreign national prisoners and domestic prisoners, or an outcome, that is discriminatory. That difference is on the basis of a status that engages Article 14, namely nationality. The two groups are an analogous situation, having the same interests in liberty and in an AP. There is, Mr Southey submits, no justification for the difference in treatment.

171. I reject these submissions.

172. AO's Reply to the supplementary grounds of defence (at para 11) states:

“... The Claimant would have been provided with an AP address on the date his sentence expired if he was a UK national. It would have been unlawful to hold him beyond his release date. Because he was a foreign national, he was held beyond the date when bail was ordered because of the delay in finding an AP. This demonstrates a difference in treatment. This meant that the fact that the Claimant was a foreign national, delayed his release.”

173. I agree with Mr Tam that the two dates referred to are not comparable. Immigration bail was granted in principle to AO under immigration powers, which do not exist in relation to a British offender. What AO is really complaining about is that he is subject to deportation and so liable to immigration detention to facilitate deportation. That position depends on deportation action being taken, and as the SSHD contends, is neither due to AO being an offender *per se* nor to AO being a foreign national *per se*. A foreign national offender would not be liable to be detained in immigration detention if deportation action was not being taken against him, for example, if it was recognised that his deportation would breach the UK's obligations under the Refugee Convention or the ECHR.

174. The statistical evidence relied on by AO does not assist him. The fact that AO had to wait for AP longer than other domestic prisoners had to wait for AP does not, of itself, evidence any discrimination when it comes to protecting the right to liberty. The evidence of Ms Mainwaring was that the provision of AP depends upon case-specific factors, and the waiting list does not function on a “first come, first served” basis. There were specific factors in AO's case that made it more difficult for suitable AP to be found.

175. Further, I am satisfied that any difference in treatment due to deportability is lawful and justified. S.32(4) of the UK Borders Act 2007 affirms that “the deportation of a foreign criminal is conducive to the public good”. British nationals, by contrast, cannot be deported. It is plainly lawful to treat persons differently if they are in a materially different position from each other, such as those who are and are not deportable.

Conclusion

176. For the reasons I have given, none of the grounds of challenge are made out. Accordingly, this claim fails in its entirety.