Neutral Citation Number: [2018] EWHC 1045 (Admin)

Case No: CO/1195/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 May 2018

Before :

MICHAEL FORDHAM QC
(Sitting as a Deputy High Court Judge)

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Between :

R (JONAS LAUZIKAS)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

LAURA DUBINSKY and JANE ELLIOTT-KELLY
(instructed by **Lupins Solicitors**) for the Claimant
JACK ANDERSON (instructed by **Government Legal Department**) for the Defendant

Hearing dates: 21-23 February 2018

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Approved Judgment

MICHAEL FORDHAM QC:

1. This claim for judicial review raises two questions of principle concerning immigration detention: (1) whether there is an EU law based test of individualised proportionality and necessity (see §§20-35 below); and (2) when a public law flaw in a distinct decision renders detention unlawful (see §§36-54 below).

PART ONE: THE FACTS

2. At issue is the legality of the executive immigration detention of the claimant by the Secretary of State during the 3 months from 27 January 2015 until 29 April 2015 when the claimant was released on bail by order of the First-Tier Tribunal (FTT). It does not matter to the analysis, but what happened after that release on bail was that the claimant decided to return to Lithuania voluntarily (13 August 2015) to see his then hospitalised mother. He was then permitted to return (22 June 2016) for his deportation appeal, which succeeded (10 August 2016) based on the evidence before the FTT at the date of the hearing. The parties through their Counsel identified within the 3 months of immigration detention four distinct stages: "stages 1 to 4". I will adopt this same classification, describing each stage by reference to features of the key contemporaneous documents, the detailed contents of which I have read and considered. I will avoid long quoted passages, to keep this judgment manageable in length. I will use "IO" (for 'immigration officer') throughout, as a generic shorthand when referring to individuals participating in the decision-making processes for the Secretary of State.

Stage 1 (27 January 2015)

3. On 27 January 2015, the Secretary of State's Criminal Casework Directorate was notified that the claimant was being *"held at court"*, having that day received a single 14-month prison sentence for possession of an imitation firearm, but being *"due for release today"* on the basis of *"time served"* on remand at HMP Norwich. The *"paperwork"* was passed to IO Benson *"for allocation"*, and he issued a Form IS91 (authority to detain). IO Jell saw a photocopy of the police national computer print-out. That will have given the claimant's name and date of birth (22 July 1988), and will have shown that this was his first conviction. The claimant was given no reasons for detention, and no record of reasons was made. From then on, the claimant was held in immigration detention.

Stage 2 (from 28 January 2015)

4. On 28 January 2015, the case worker (IO Zabardast) wrote a proposal for the claimant's detention. The proposal referred to the claimant's conviction at Ipswich Crown Court, said to have been on 16 June 2014. In fact, the offence had been on 14 June 2014 and he was convicted on a guilty plea on 4 December 2014, when the crown court had adjourned sentence for a pre-sentence report (PSR). IO Zabardast's proposal referred to the offence (possession of an imitation firearm) and sentence (14 months), describing the offence as *"particularly serious"* and *"clearly serious"*. The claimant's nationality (Lithuanian) was recorded, as was his status as *"an EEA national"* with *"the freedom of movement within the European Economic Area"*. The proposal recorded that nothing was known as to claimed ties within the UK, other compassionate factors, evidence of previous absconding, non-compliance with

immigration conditions, disregard of immigration laws, or of other factors. It recorded that the claimant did not have *"an extensive criminal record"*. It recorded that the claimant had been served with an intention to deport notice (Form ICD 4932 EEA), that *"therefore it is considered that he will have little incentive to remain in touch with the authorities and will not comply with any terms or conditions of release"*, and that deportation being *"in process"*, the claimant *"can be removed from the UK as soon as possible"*. It stated the *"view that the serious harm that would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for him to re-offend"*. Finally, the proposal recorded that there was *"insufficient evidence"* that the claimant *"has adequately addressed the reasons for his offending behaviour"*, as by the completion of relevant programmes of *"Enhanced Thinking Skills"* (ETS) and *"victim awareness"*. A case note recorded that initial detention papers had been emailed to IO Yildiz for approval. IO Yildiz approved the detention on 28 January 2015, referring to the conviction and sentence and stating: *"I find that there are reasonable grounds for suspecting that [the claimant's] removal from the United Kingdom may be justified on grounds of public policy, public security or public health"*, and that having *"considered the facts"* she was *"satisfied that detention is both reasonable and proportionate to reduce the risk of harm, re-offending and absconding in this case"*.

5. A decision letter (form ICD.1913) dated 28 January 2015 was written by IO Zabardast and provided to the claimant. It referred to the claimant as being the subject of deportation action, and being detained *"to effect removal"* which was *"imminent"*. The letter recorded that *"there is a presumption in favour of release"*, but that *"because of the seriousness of the harm to the public should you re-offend and or high risk of absconding, there is reason to believe that you would not comply with any restrictions attached to your release"*. The claimant was described as *"likely to abscond if given temporary admission or release"*, which release *"carries a high risk of public harm"* and *"a risk of further re-offending"*. Factors relied on were that there were *"no barriers to your removal"*; that *"you do not have enough close ties (eg. family or friends) to make it likely that you will stay in one place"*; that the *"conviction(s) for a serious crime"* shows a *"lack of respect for United Kingdom law"*; that the claimant had been *"assessed as posing a serious risk of harm to the public because you have committed the … offence(s) Possession & or use of Offensive Weapon (Firearm Offences)"*; that he had *"committed an offence and there is a significant risk that you will re-offend"*; and his *"unacceptable character, conduct or associations"*. The decision letter went on to address ECHR Article 5, stating that *"deportation action"* meant there was a *"legitimate aim"*, and that *"taking into account all the known facts of your case … detention is proportionate to a social need being fulfilled and … is necessary for the prevention of disorder and crime and … in the wider public interest of the maintenance of an effective immigration policy"*. As to ECHR Article 8, the letter recorded that having *"weighed up the extent of your possible private/ family life against your criminal convictions"*, it was considered that detention was *"proportional to a social need being fulfilled"*.

6. By this stage, there was also a notice of liability to deportation (form ICD.4932 EEA) which was written for the Secretary of State by IO Fleming and dated 27 January 2015. It was subsequently served on the claimant at HMP Norwich when an IO attended there on 30 January 2015. As at 29 January 2015 the Secretary of State did not have the trial record sheet (TRS), Judge's sentencing remarks (JSR), any *"OASys*

Assessment" from the offender manager, or any PSR. These were all requested by IO Zabardast on 29 January 2015 in what her note described as *"Information gathering"*, with a *"chaser email"* being sent on 9 February 2015. At a visit by IO Champion on 4 February 2015 the claimant stated that he did not want to return to Lithuania and had a UK-born child from whose mother he was separated, about whom IO Zabardast had by 11 February 2015 asked for more details.

7. On 9 February 2015 the claimant wrote a letter to the Secretary of State from prison asking for further time to respond regarding the proposed deportation, and identifying two *"reasons I feel I should not be deported"*. The first reason concerned his son, born on 1 February 2014, who *"is my first child and … having a relationship with him is the single most important thing in my life"*, and *"if I am deported my relationship with him will be very difficult to maintain"*. The second reason concerned the claimant's record working in the construction industry in the UK, paying taxes and never taking benefits. On 12 February 2015 the claimant returned a questionnaire (form ICD.0350 EEA) giving details including as to his son and work. A reference (11 January 2015) from a Landing Officer at the Prison stated that the claimant *"consistently receives positive entries from education staff and wing officers"* and had *"managed to attain his enhanced IEP status due to his positive attitude and willingness to interact and progress"*. On 16 February 2015 the Secretary of State's bail team wrote to the claimant refusing his application for support (ie. an accommodation address) under section 4 of the Immigration and Asylum Act 1999. On 18 February 2015 the Secretary of State received the JSR, which described the following aspects of the individual circumstances: (i) the claimant had gone to an address with three others to confront the occupiers, taking an imitation firearm (BB gun) so that, if necessary and at a minimum, he could cause alarm; (ii) after an exchange of threats and insults, he broke a pane of glass and fired the BB gun, one pellet hitting the victim in the face, which was *"a serious matter"*; (iii) he had pleaded guilty early (with a full one-third discount), had no previous convictions, and was shown by documents to have *"used [his] time on remand well"*. On 21 February 2015 social services advised that the family had come to the attention of the police in April 2014 in a domestic violence context when the case had been closed, and then in June 2014 upon the incident which led to the conviction.

Stage 3 (from 25 February 2015)

8. For the first monthly detention review (25 February 2015) IO Zabardast wrote a recommendation for continued detention. The document referred to the fact that a deportation decision letter (form ICD 4933) had been served on 24 February 2015 (§9 below) and a deportation order signed. It described the risk of absconding, the risk of reoffending and the risk of harm as each being *"medium"*, based on the conviction and sentence. It described as *"1 month"* the expected date of resolution of any *"outstanding barrier to deportation"*, in circumstances where the deportation decision had been *"certified"* so that appeal *"would not be a barrier"*. It referred to the claimant's son, saying the claimant had *"not produced any evidence of his child's existence, his domestic circumstances, the nature of the relationship … or what is in their best interests"*, and that contact had been made with social services who had *"no known concerns or potential concerns"*. The recommendation referred to the offence as *"clearly serious"*, reflected in the sentence. It expressed *"the view that the serious harm which would be caused as a result of any similar instances of offending that it is*

not considered reasonable to leave the public vulnerable to the potential for him to reoffend", restated that there was *"insufficient evidence"* of adequately addressing the reasons for the offending behaviour through ETS or victim awareness courses, and recorded that the deportation decision had been certified. The authorising officer (IO Terry) authorised the detention for a further 28 days, referring to consideration in line with Chapter 55 of the Enforcement Instructions and Guidance and the presumption of liberty, and stating that release was not considered appropriate at this time. IO Terry reasoned as follows. Although a first offence, this was of a serious nature, as a result of which there was a medium risk assessment as to harm and reoffending. Deportation was being arranged and within a reasonable timeframe. With no close ties to the UK the claimant had little incentive to comply with restrictions placed on him and posed a medium abscond risk, outweighing the presumption of liberty.

9. The deportation decision letter of 24 February 2015 was an 11-page letter written by IO Taylor. It responded to the two points made in the claimant's 9 February 2015 letter and explained why deportation was considered appropriate and justified including by reference to the claimant's ECHR rights, going on to explain that the decision had been certified for the purposes of regulation 24AA of the Immigration (European Economic Area) Regulations 2006 (2006 EEA Regulations) so that he could be deported prior to appeal, albeit that he would have the right to be readmitted for the appeal hearing (regulation 29AA). Removal directions were set on 5 March 2015, for deportation on 12 March 2015. Solicitors for the claimant were now on the scene and sent representations on 26 February 2015, enclosing the PSR of 31 December 2014 which had been produced for the adjourned sentencing hearing on 27 January 2015. The PSR contained an offence analysis (*"a clear case of premeditation"*, *"his intentions [were] to cause harm"*), offender assessment and likelihood of reoffending (*"no previous convictions and there is no pattern of offending"*, but the use of a weapon was *"particularly dangerous and could possibl[y] [lead] to fatalities [which] indicates an escalation in culpability"*) and assessment of risk of serious harm (*"will pose a risk of harm to the public if he continues to exhibit aggression with the slightest provocation"*, *"has the propensity to be violent when threatened"*, *"The offence … shows an emerging pattern of violent behaviour towards members of the public"*, *"structured assessment based on actuarial factors … indicates that there is a low risk of re-offending. However the dynamic factors such [as] his anger management issues, poor victim empathy and his lack of consequential thinking … would likely increase his risk in the future if not addressed"*).

Stage 4 (from 11 March 2015)

10. By 11 March 2015 the claimant's solicitors had filed two challenges: an appeal (10 March 2015) to the FTT against the deportation; and a judicial review (11 March 2015) against the certification and detention. As a consequence, and in line with the Secretary of State's policy, the removal directions for 12 March 2015 were cancelled. On 16 March 2015 IO Zabardast wrote a 3-page decision letter refusing temporary release, giving reasons why the Secretary of State was not satisfied that the claimant would *"comply with the terms of any conditions imposed on him"*, expressing the belief that the claimant *"would abscond, should he be released"*, and stating that the claimant had *"failed to provide an address"* which prevented suitability checks such that *"temporary release should be refused for this reason alone"*.

11. For the next monthly detention review (23 March 2015) IO Zabardast wrote a recommendation for continued detention. The document referred to the deportation action, described the risk of absconding, risk of reoffending and risk of harm as each being *"medium"*, based on the conviction and sentence. It described as *"3 months"* the expected date of resolution of any *"outstanding barrier to deportation"*, being the judicial review proceedings. It by now gave the correct date for the claimant's conviction. It repeated that the claimant *"has not produced any evidence of his child's existence, his domestic circumstances, the nature of the relationship … or what is in their best interests"*, and the contact made with social services who had *"no known concerns or potential concerns"*. The recommendation repeated that the offence was *"clearly serious"*, reflected in the sentence. It repeated *"the view that the serious harm which would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for him to reoffend"*, and restated that there was *"insufficient evidence"* of adequately addressing the reasons for the offending behaviour through ETS or victim awareness courses. The authorising officer (IO Holton) authorised the detention on 23 March 2015 for a further 28 days, reasoning as follows. The claimant had been assessed as a medium risk of reoffending, although since this was a first offence it was unclear whether he was likely to offend again. The claimant did not want to be deported and had filed judicial review proceedings, which demonstrated that he may pose a high abscond risk. As to the timescale for deportation, it was said that: *"We need to ensure that this JR is expedited as quickly as possible to ensure this does not result in a substantial delay in his deportation"*, which was to be raised with the JR team. The reasoning concluded: *"Should the JR be dealt with quickly then deportation can take place within a reasonable timescale"* and *"as such"* it was *"proportionate to maintain detention for a further 28 days"*.

12. On 30 March 2015 the Secretary of State filed her acknowledgment of service in the judicial review proceedings, also producing two OASys Assessment reports (31 December 2014 and 30 March 2015) written by the offender manager. The first of these had been written at the time of the PSR, assessing the risk of reoffending as *"low"* but likely to increase in future if dynamic factors were not addressed, with a *"medium"* risk to a known adult. The second was written on 30 March 2015 and contained the same assessment as before, except that the risk to the known adult was assessed as *"high"*. An interim relief hearing, at which the claimant was seeking an order for release from detention, was adjourned. The Judge directed fresh decisions on section 4 bail accommodation and whether to maintain (continue) detention, with an oral hearing to be listed for the first available date after 20 April 2015. This further hearing was described in the case notes (31 March 2015) as being a *"permission"* hearing. In fact, it was the adjourned hearing of the interim relief applications. On 31 March 2015 a licence was prepared by the Ministry of Justice, in case the claimant was released.

13. The fresh detention decision was a further detention review (9 April 2015) for which a further recommendation for continued detention was written, whose authorship is unclear. The document referred to the deportation action, described the risk of absconding as *"medium"*, based on the conviction and sentence. It described the risk of reoffending as *"medium"* and the risk of harm as *"high"*, referring now to recent assessments by the offender manager. It described as *"3 months"* the expected date of resolution of the *"outstanding barrier to deportation"*, namely the judicial review

proceedings. The summary of the case now referred to the JSR and PSR, making several references to the OASys Assessment, including *"low risk of reoffending"*, and reference to *"risk of harm to the public"*. The document repeated that the claimant *"has not produced any evidence of his child's existence, his domestic circumstances, the nature of the relationship … or what is in their best interests"*, and the contact made with social services who had *"no known concerns or potential concerns"*. The recommendation repeated that the offence was *"clearly serious"*, reflected in the sentence. It repeated *"the view that the serious harm which would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for him to reoffend"*, and repeated that there was *"insufficient evidence"* of adequately addressing the reasons for the offending behaviour through completing programmes or fully addressing the issues in custody. The authorising officer (IO Foster) authorised the detention on 9 April 2015, for a further 28 days, referring to the serious offence and prison sentence and continuing as follows. The claimant had been assessed as a high risk of harm to the public and a low risk of reoffending. He was subject to a deportation order with no close ties to the UK and was considered to pose a high abscond risk. He had been considered for release in accordance with chapter 55 EIG, but the risk factors of absconding, reoffending and harm to the public outweighed the presumption to release. Removal had been deferred given the judicial review proceedings, but *"pending an adverse decision on the JR it is considered his deportation can take place within a reasonable timescale"*. *"As such"* it was *"proportionate to maintain detention for a further 28 days"*.

14. The fresh section 4 decision was taken on 10 April 2015 when a section 4 accommodation address was granted, a separate judicial review claim challenging the 16 February 2015 section 4 refusal having been filed on 24 March 2015. Those judicial review proceedings later culminated in a consent order allowing the claim (8 June 2015). A bail summary was produced by the Secretary of State on 21 April 2015. The FTT granted the claimant bail on 29 April 2015.

PART TWO: THE LAW

Some general principles

15. The law applicable to immigration detention is well-trodden ground. The many cases cited to me by Counsel in the present case are themselves just a small proportion of the wealth of authoritative analysis and working example available in this field. The arguments in this case included two questions of principle with which I will deal separately below (§§20-54). Some other self-contained propositions of law will in due course feature in my analysis of the grounds of challenge (§§55-82). It will be helpful, before proceeding further, to identify some general principles relevant to the present case.

16. Mr Anderson, for the Secretary of State, submitted that I should approach the evidence in this case in the following way: (1) considering the evidence in the round and not as snapshots in isolation; (2) treating contemporaneous records as a summary not an exhaustive exposition; (3) avoiding imposing or expecting artificially high standards; and (4) avoiding hindsight. In support, he cited *R (ASK) v SSHD* [2017] EWHC 196 (Admin) (Green J) at §§71, 74, 76 and 79. I accept these submissions and adopt this approach.

17. At common law, immigration detention with a view to deportation must satisfy *Hardial Singh Principles*. Those principles do not exhaust the common law: for example, there is the public law duty to comply with published detention policy (*R (Lumba) v SSHD* [2011] UKSC 12 [2012] 1 AC 245 at §26), and not to adopt or apply an over-rigid policy. There are four *Hardial Singh Principles* (*Lumba* at §22): *"(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 a deportation within a reasonable period, [she] should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal"*. Principles (ii) ("*Hardial Singh 2"*) and (iii) ("*Hardial Singh 3"*) will feature in the analysis of this case. The *Hardial Singh Principles* reflect basic common law standards regarding statutory powers (*Lumba* §30), posing objective questions for the Court to decide (*R (A) v SSHD* [2007] EWCA Civ 804 §62). The assessment is conducted without hindsight and on the evidence which was before the Secretary of State at the time of the decision to detain or continue detention (*Fardous v SSHD* [2015] EWCA Civ 931 §42) including facts known to the Secretary of State which did not feature in the reasons for detention (*AXD v Home Office* [2016] EWHC 1133 (QB) §176). The onus is on the Secretary of State to satisfy the Court that there was lawful justification for detention (*Lumba* §65), but the Court can properly afford such weight to the evaluative judgments of her officials as is appropriate to the matter in question in the circumstances of the individual case (*A* §62; *AXD* §176).

18. *Lumba* is authority for this proposition: the type of public law breach by the Secretary of State which renders detention unlawful is any public law breach bearing on her decision to detain. I will call this the *"What-Breach Principle"*. It was articulated by Lord Dyson in *Lumba* at §68. As to this principle:

    i) Lord Dyson was discussing different types of *"breach of a rule of public law"* in impugning a *"purported lawful authority to detain"* (§66). He was addressing the Secretary of State's arguments as to *"the nature and extent of the public law error"*, and considering the example of *"a decision to detain made by an official one grade lower than that specified in the detention policy (but which is otherwise unimpeachable)"* (§67).

    ii) Lord Dyson was disagreeing with a minority approach which preferred a *"more demanding test of the wrongful exercise of statutory power amounting to an abuse of power"* (§69). That would have been a sub-category of public law breach, characterised by its serious and substantive nature.

    iii) Lord Dyson saw *"in principle no difference"* between ultra vires detention and detention which was unlawful *"because the decision to detain ... was made in breach of a rule of public law"* (§66). That gave *"the correct and principled approach"* (§68).

    iv) Lord Dyson articulated the *What-Breach Principle* as follows (§68): *"the error must be one which is material in public law terms. It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on*

and be relevant to the decision to detain.". He continued: "*Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain a person under conditions different from those described in the policy. They are not capable of affecting the decision to detain or not to detain"*.

v) In the subsequent case of *R (Kambadzi) v SSHD* [2011] UKSC 23 [2011] 1 WLR 1299 Lord Hope spoke (at §41) of *"a breach of public law which bears directly on the discretionary power"* and Lord Kerr spoke (at §80) of "*an adequate connection between compliance with the duty and the lawfulness of the detention"* and (at §88) *"a public law error that bears directly on the decision to detain"*.

19. Turning to the remedy of damages, executive detention constitutes the tort of false imprisonment where there has been *"the unlawful exercise of the power to detain"*, even if *"it is certain that the claimant could and would have been detained if the power had been exercised lawfully"*, because detention by *"a public authority"* requires *"power to detain"* which has been *"lawfully exercised"* (Lumba §71). However, only nominal and not compensatory damages are recoverable where, had the power been exercised lawfully, *"it is inevitable that the [claimant] would have been detained"* (Lumba §§95, 169) or (as it was later put in *R (OM) v SSHD* [2011] EWCA Civ 909 at §§22-23) *"the claimant would and could have been detained"*.

Question 1: Individualised proportionality and necessity (Article 27.2 standards)

20. This was the first of the two questions of principle. The starting point is that it was common ground that the claimant's immigration detention in stages 1 and 2 was detention pursuant to regulation 24(1) of the 2006 EEA Regulations (detention pending a regulation 19(3)(b) removal decision) and in stages 3 and 4 was detention pursuant to regulation 24(3) (detention following a regulation 19(3)(b) removal decision).

21. Ms Dubinsky submits that, as a matter of EU law, the decisions to detain the claimant attracted a legal standard which includes individualised proportionality and necessity. The standards on which she relies can be found in Article 27.2 of the Directive 2004/38/EC (the Citizens Directive). I shall call them "the Article 27.2 Standards". They require, of a state restriction to which they apply, the following, that: (a) it *"compl[ies] with the principle of proportionality"*; (b) it is *"based exclusively on the personal conduct of the individual concerned"*; (c) the individual's *"previous criminal convictions [do] not in themselves constitute grounds for"* the restriction; (d) the *"personal conduct of the individual concerned"* must "*represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"*; and (e) the justification for the restriction must not be *"isolated from the particulars of the case or … rely on considerations of general prevention"*. In turn, says Ms Dubinsky, *"the principle of proportionality"* in (a) requires that the restriction be *"necessary"*, so that no less restrictive measures "*could have been equally effective"*.

22. The Article 27.2 standards featured explicitly in the Secretary of State's deportation decision-making in the present case, by reference to regulation 21(5) of the 2006 EEA

Regulations. IO Taylor's 24 February 2015 deportation decision letter said this: *"Consideration has been given to the following principles ... the decision must comply with the principle of proportionality, the decision must be based exclusively on the personal conduct of the person concerned, the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision, and the person's previous criminal convictions do not in themselves justify the decision"*. This framework of questions was not, however, used in the detention decision-making.

23. As I discerned them, the essential steps in Ms Dubinsky's argument on this question of principle came to this. (1) The claimant could be the subject of a deportation (expulsion) decision on grounds of public policy or public security: see Article 28.1 of the Citizens Directive. (2) Immigration detention pending or following a deportation decision is a *"restriction of movement [or] residence"*, itself permissible on grounds of public policy or public security for the purposes of Article 27.1 of the Directive. (3) Such detention is also a *"measure"* taken on grounds of public policy or public security, for the purposes of Article 27.2. (4) It follows, by reason of Article 27.2, that such immigration detention is lawful only if it meets the Article 27.2 standards. (5) The Article 27.2 standards are applicable in law to a decision to detain, albeit that they are applied under the domestic implementing regulations only to a *"relevant decision"*, being an *"EEA decision"* (*"a decision ... that concerns ... a person's removal from the United Kingdom"*): see 2006 EEA Regulations reg.21(5) and reg.2(a). (6) The *"principle of proportionality"* applicable to a decision to detain, which limits the recognised right to liberty, requires that the action be *"necessary"*, this being (a) part of the recognised general EU test of proportionality (*R (Lumsdon) v Legal Services Board* [2015] UKSC 41 [2016] AC 697 at §33); (b) part of the standard articulated in the EU Charter of Fundamental Rights (CFR) (Article 52.1, here with Article 6.1) applicable to a member state when implementing EU law (CFR Article 51.1; *Lumsdon* at §48); and (c) recognised in the CJEU case-law in the context of national measures derogating from fundamental freedoms (*Lumsdon* at §§50-51, 55) and in the specific context of Article 27.2 (see eg. *Aladzhov* Case C-434/10 at §§42 & 47). (7) In turn, *"necessary"* requires in this context that *"no other measures could have been equally effective but less restrictive of the freedom in question"* (*Lumsdon* at §§55 and 67; *Aladzhov* at §47). (8) It follows that the decision to detain the individual must be justified by the Secretary of State as being individually necessary applying the Article 27.2 standards, and with no less restrictive measure being as effective.

24. Mr Anderson resists this argument. His submission is that Article 27 of the Directive does not apply directly to the decision to detain, which is not an *"EEA decision"* (resisting Ms Dubinsky's step (5)). He submits that any test of necessity (Ms Dubinsky's steps (4)(a), (6) and (7)) applies only to regulate the necessity of the existence of a power to detain, not the necessity of its exercise in any individual case. He also submits that the applicable law comprises the domestic law *Hardial Singh Principles* (§17 above) together with the ECHR Article 5(1)(f) case-law, which he submits has no individualised proportionality or necessity test. In support of these submissions Mr Anderson relies in particular on two authorities. The first is the decision of the Supreme Court in *R (Nouazli) v SSHD* [2016] UKSC 16 [2016] 1

WLR 1565, which Mr Anderson submits supports the contentions that (a) necessity applies only to the existence of the detention power or (b) to the extent that a necessity test requires individualised consideration that requirement is met through consideration of the necessity of the deportation (with which the detention is linked). The second is the judgment of Kerr J in *Machnikowski v SSHD* [2016] EWHC 54 (Admin) [2016] 1 WLR 1655. Mr Anderson also relied on the absence of a necessity test for detention under ECHR Article 5(1)(f), together with the presumptive symmetry between the CFR and ECHR, which presumption is reflected in CFR Article 52(3).

25. On this first question of principle, I have concluded that Ms Dubinsky is correct. In my judgment, each of the steps in Ms Dubinsky's analysis (see §23 above) is sound. If Article 27.2 standards are applicable to detention, then in my judgment two key consequences must follow. First, the Article 27.2 standards including proportionality and necessity must govern not the existence of the power but its exercise against the individual. Secondly, those standards must govern the decision to detain and not merely the linked decision to deport, otherwise any deportation action could, consistently with Article 27.2 standards and without further analysis, always be accompanied by detention. These consequences reflect the nature, design and clear purpose of the Article 27.2 standards. No part of the analysis is undermined by reference to ECHR Article 5, *Nouazli* or *Machnikowski*. I will start with *Nouazli*. That is a case which calls for careful examination. In particular, when examining the reasoning, it needs to be recognised and remembered that in *Nouazli* it was not being said by the claimant that the exercise of the power of detention against him involved any detention decision which had breached the Article 27.2 standards. I will endeavour to explain what the arguments were in *Nouazli*, how the Courts dealt with them, and what can be taken from that case for present purposes.

26. *Nouazli* was a claim for judicial review of immigration detention in the context of envisaged deportation action against an Algerian national who, as a consequence of marriage to a French citizen, attracted the protections of the Citizens Directive. Included within Mr Nouazli's arguments in the High Court (*R (Nouazli) v SSHD* [2013] EWHC 567 (Admin) [2013] 2 CMLR 54 Eder J) were the following. Mr Nouazli submitted that detention pursuant to regulation 24(1) of the 2006 EEA Regulations was prohibited by the Citizens Directive, because (a) the wording of Article 27(1) (*"may restrict the freedom of movement and residence"*) did not extend to detention pending a decision on removal (Eder J at §33); and (b) regulation 24 did not conform with the requirements of Article 27 (Eder J at §36(d)). Mr Nouazli did not argue that the SSHD had in fact acted contrary to the principle of proportionality in detaining (Eder J at §21). The claim failed in the High Court, where Eder J accepted the Secretary of State's arguments that (a) the wording of Article 27(1) (*"may restrict the freedom of movement and residence"*) did extend to detention, including detention pending a decision on removal (Eder J at §§33 & 35) *"subject always to the conditions set out in … Art 27"* (§35); and (b) regulation 24 did conform with the requirements of Article 27 (§41iii) *"provided of course [that] the conditions set out in … Art 27(1) and (2) are satisfied"*, including *"the safeguard contained in … art 27(2) ie. the necessity to comply with the principle of proportionality"* (§39).

27. In the Court of Appeal (*R (Nouazli) v SSHD* [2013] EWCA Civ 1608 [2014] 1 WLR 3313), Mr Nouazli included these same arguments, submitting (see 3315G-H) that

Eder J had *"erred in law (1) in holding that article 27(1) of Directive 2004/38 was wide enough to include detention of any kind provided that it was done for one or more of the grounds stated therein and was proportionate; and (2) in holding that regulation 24(1) of the 2006 Regulations was not incompatible with article 27(1) of Directive 2004/38"*. The Court of Appeal addressed both arguments (CA at §10), and rejected them on the basis that: article 27(1) including *"the requirement of proportionality"* applied to detention (CA §16); and regulation 24 was compatible with the Directive *"provided that the safeguards for which it provides, … themselves reflected in regulation 21, are met"* (CA at §17).

28. In my judgment, *Nouazli* in the Court of Appeal and High Court stand – unless displaced by the Supreme Court – as authority for this proposition: the immigration detention of an individual pursuant to regulation 24 of the 2006 EEA Regulations attracts the Article 27.2 standards, as it must in order for the detention to be compatible with the applicable EU law. In my judgment, this proposition is left intact by the judgment of the Supreme Court in that case, as I will explain.

29. When *Nouazli* reached the Supreme Court (*R (Nouazli) v SSHD* [2016] UKSC 16 [2016] 1 WLR 1565), a new argument was advanced as to the scope of the domestic detention powers. The argument was that the absence of any statutory maximum time-limit for administrative detention infringed EU law requirements of *"legal certainty and proportionality"* (SC at §63). That new argument was rejected (SC at §76), it being observed that neither the ECHR caselaw nor the EU caselaw indicated any requirement for a statutory maximum time-limit (SC at §§69, 70, 76). Mr Anderson emphasised Lord Clarke's discussion of the virtues of the *Hardial Singh Principle* (at §§64-67, 74-75) and his observations that EU law was not more expansive than ECHR law (at §§70, 76). However, those passages were discussing the duration of immigration detention and the suggested requirement of a statutory maximum time limit to meet proportionality and certainty standards.

30. Mr Nouazli repeated in the Supreme Court the argument that regulation 24 was structurally incompatible with Article 27 of the Citizens Directive. His argument, by now, was based on the submission that, under the 2006 EEA Regulations, regulation 24(1) detention was not an *"EEA decision"* so as to attract the Article 27.2 standards through the application of regulation 21(5), unlike the decision to remove (deport) under regulation 19(3)(b) which did attract those standards (SC at §80). On that basis, the 2006 Regulations were said to be incompatible with the Directive. Lord Clarke gave two *"reasons"* (SC at §84) for concluding that there was no structural incompatibility. First (at §81), there was Lord Clarke's *"short answer"*: that regulation 24(1) detention is *"ancillary"* to regulation 19(3)(b) removal, to which regulation 21(5) applies; and this in a context where the *"power"* of detention was *"suitable and proportionate"*; and where it was *"not said that the impugned decisions were arbitrary or disproportionate on the facts"*. Secondly (at §§82-83), there was Lord Clarke's acceptance of *"the submission … on behalf of the Secretary of State"*: that the relationship between regulation 24(1) detention and regulation 19(3)(b) removal was such as to mean the person is *"detained pursuant to a decision which 'concerns … a person's removal' within the meaning of … an 'EEA decision'"*. In a separate concurring judgment, Lord Carnwath agreed (at §106), putting Lord Clarke's second answer first.

31. Basing himself on the decision of the Supreme Court in *Nouazli*, Mr Anderson submitted to me that Article 27.2 standards do not apply to the decision to detain. Mr Anderson suggested that Lord Clarke was concerned only with whether the *"power"* to detain was proportionate in its existence, not its exercise in the individual case, which he submitted did not need to be proportionate. I cannot accept this analysis.

32. I find no support in the Citizens Directive for a distinction between the existence of the power of detention and its exercise. If Article 27.2 standards have no application to the exercise of the power to detention, then I do not see what they would have to do with the existence of the power to detain either. Once detention, and the power to detain, is subject to the standard of proportionality found in Article 27.2, I cannot see on what basis the exercise of that power escapes that standard. I think Lord Clarke's reasoning reflects the particular argument that was being advanced in the Supreme Court. It is true that within Lord Clarke's *"short answer"* was his reference to the *"power"* as being *"suitable and proportionate"*. But Lord Clarke did not say the proportionality of the existence of the power was legally sufficient, so far as concerned the legality of the detention of an individual, where challenged. Indeed, Lord Clarke referred expressly to the *"impugned decisions"* to detain as not being *"disproportionate on the facts"* (SC at §81). Further, Lord Clarke had a second and independent reason, which was Lord Carnwath's first answer. The thrust of Lord Clarke's second reason was all about the exercise of power. It involved characterising regulation 24(1) detention as being *"pursuant to … an 'EEA decision'"*, precisely so as to attract the Article 27.2 standards by virtue of regulation 19(5). Once the Article 27.2 standards are in play in relation to detention, they are an individualised protection, by their content and design. It is their very essence to ensure, when relevant power is applied to an individual, it is on a basis which is justified in the circumstances which relate to that individual. I find nothing in the judgment of the Supreme Court which casts doubt on what the lower courts had concluded: that the wording of Article 27.1 applied to a decision to detain, so that EU law compatibility required adherence to the Article 27.2 standards in respect of that decision to detain. On the contrary, Lord Clarke had already recorded it as common ground that the regulation 24(1) power of detention *"must be applied proportionately"*, noting that it was *"not said on this appeal that it was applied disproportionately on the facts"* (SC at §62). Lord Clarke recorded that Mr Nouazli had not argued *"that the Secretary of State had acted contrary to the principle of proportionality"* (SC at §16). In my judgment, the Supreme Court in no way disturbed the proposition, identifiable from the two Courts below (§§26-28 above): that the immigration detention of an individual pursuant to regulation 24 of the 2006 EEA Regulations attracts the Article 27.2 standards, as it must for the detention to be compatible with the applicable EU law.

33. I turn to the other case on which Mr Anderson relied, namely *Machnikowski*. That was a case where a Polish national had been detained in conjunction with deportation for some three years, there being a recognised *"substantial risk or absconding and of reoffending"* (§7). The issue in the case was whether the detention was excessive in its duration. On that issue, the claimant argued that the approach to proportionality required a *"separate and distinct"* approach because detention deprived him of rights under EU law to reside and work (see §62). The Judge disagreed with that submission, identifying the essential point as whether the detention had *"gone on too long"*, in circumstances moreover where the alleged rights of residence and work

were themselves contingent upon whether the claimant could properly be deported (see §69). On the question of excessive duration, *Hardial Singh Principles* provided the answer and proportionality added nothing of substance (at §70). That is as far as that case goes. In my judgment, nothing in Kerr J's analysis of the issue in that case serves to undermine the steps in Ms Dubinsky's argument in the present case.

34. I did not hear detailed submissions on the extent to which the Article 27.2 standards of proportionality and necessity are more protective in the context of executive immigration detention than those under (i) ECHR Article 5(1)(f) and section 6 of the Human Rights Act; (ii) *Hardial Singh Principles*; or (iii) chapter 55 of the *Enforcement Instructions and Guidance* (EIG) to which a public law duty of adherence applies. It is not necessary to undertake an analysis of that interrelationship. I agree with Ms Dubinsky that, to the extent that Article 27.2 standards are more protective than ECHR Article 5, that illustrates what the Luxembourg Court has described as a *"more extensive protection"* under EU law than the *"article 5 … minimum threshold"* (*Policie CR v Al Chodor* Case C-528/15 [2017] 4 WLR 125 at §37). Beyond that, I merely record the following. As to Article 5 and the possibly more protective *Hardial Singh Principles* my attention was drawn by Ms Dubinsky to the observations of Lord Brown in *R (Kambadzi) v SSHD* [2011] UKSC 23 [2011] 1 WLR 1299 at §94, discussing *Saadi v United Kingdom* (2008) 47 EHRR 427 §72 and *Chahal v United Kingdom* (1996) 23 EHRR 413 §112. An exercise in comparing legal standards and considering their congruence could doubtless usefully also include Article 9 of the International Covenant on Civil and Political Rights as interpreted in the UN Human Rights Committee. I am aware of (and was involved in) the discussions of the topic of necessity and proportionality in reports such as *Immigration Detention and the Rule of law* (Bingham Centre 2013 pp.65-72) and *Detention of Asylum Seekers and Illegally Staying Third-country Nationals and the Rule of Law: European Standards* (European Law Institute 2017 pp.126-128). As those discussions point out in *Saadi* the Strasbourg Court did consider it relevant (at §66) that, for the pursuit of the objective which it considered legitimate in that case, *"any arrangement short of detention would not have been as effective"*. The idea of individualised proportionality and necessity under Article 5 would, as it happens, be consistent with the contents of the Secretary of State's own 28 January 2015 decision letter in this case (§5 above). As to necessity and alternatives to detention in chapter 55 of the EIG, Ms Dubinsky reminded me that the governing principle is the *"presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used"* (§55.1.1), that *"cases concerning foreign national offenders … are subject to … the presumption in favour of … temporary admission or release"* (§55.1.2, also §55.20), and that detention involves a caseworker *"assessing what is reasonably necessary and proportionate in any individual case"* who "*must look at all relevant factors … and weigh them against the particular risk of re-offending and of absconding which the individual poses"*.

35. I add one further point about the Article 27.2 standards, on which I did hear argument. It concerns the phrase: *"Previous criminal convictions shall not in themselves constitute grounds for taking such measures"*. In my judgment, the vice with which this safeguard is concerned is to prohibit measures taken against an individual (or class of individuals) on the basis of the fact of having been convicted of a crime (or class of crime). That means, in the case of any individual who has been convicted of any crime, the state can never stop the enquiry at the fact of conviction. It is always

necessary to consider the individual's conduct, which includes the offending resulting in the conviction (*Nouazli* CA at §30), the individual circumstances, and the threat which the individual is assessed to pose.

Question 2: Flawed distinct decisions rendering detention unlawful

36. This was the second point of principle which was argued by the parties in the present case. It involves the situation where the Secretary of State has made a "distinct decision": that is, a decision which is "distinct" from the decision to detain or continue detention. The question of principle is this: when can a public law error in a distinct decision by the Secretary of State render detention by the Secretary of State unlawful? Examples of a distinct decision are these: it could be a decision to remove the claimant; the making or maintaining of a deportation order; the issuing of removal directions; or the certification of a claim. In the present case, the question of principle arises in the context of two arguments by the claimant. One is the claim that the certification decision of 24 February 2015 vitiated the detention from that date (§§71-75 below). The other is the claim that the unlawfulness of the refusal of section 4(1)(c) accommodation of 16 February 2015 vitiated the detention from 16 March 2015 when the absence of a bail address featured in the Secretary of State's reasons to refuse temporary admission or release (§§76-78 below).

37. Ms Dubinsky's essential argument for the claimant was that immigration detention is rendered unlawful where the Secretary of State has made any material public law breach in a distinct decision which breach *bears on and is relevant to the detention.* Mr Anderson for the Secretary of State resists that. His essential argument is that a material public law error in a distinct decision can only render detention unlawful if the breach is of a particularly serious species, namely irrationality (unreasonableness) or bad faith. A significant number of cases were cited by Counsel on this topic. I agree with Ms Dubinsky that cases involving a *"second actor"* (where a distinct decision is also one made by a distinct public authority: see eg. *R (Shoesmith) v Ofsted* [2011] EWCA Civ 642 [2011] PTSR 1459 at §§119, 136, 141), and cases which concern a distinct decision to make an invalid 'law' such as byelaws or delegated legislation (see eg. *Percy v Hall* [1997] QB 924 at 947G-948C, 951D-E), give rise to different considerations. I shall not dwell on them.

38. I shall address the directly relevant line of cases in chronological sequence. However, a sensible starting point is the *What-Breach Principle* from *Lumba*, which I have described already (§18 above). Ms Dubinsky submits that the *What-Breach Principle* assists in answering this second question of principle. I agree. It is true that *Lumba* was a case which involved impugning the decision to detain, by pointing to a public law error in that decision. It is true that *Kambadzi* was a case about impugning the continuation of detention by impugning the absence of a required detention review decision. That means neither of these cases was concerned with the problem of a distinct decision which breaches public law. Nevertheless, the *What-Breach Principle* on the face of it does provide a principled and workable answer when lines need to be drawn regarding distinct decisions involving public law breaches. Moreover, on closer analysis the idea of a distinct decision was not far detached from the logic of *Lumba*. It is possible to analyse the position in *Lumba* by pointing to distinct decisions by the Secretary of State: the distinct decision making an unlawful policy; the distinct decision not to publish that policy. Those aspects were part of the picture, and did feature in the analysis of the relevant breaches of public law, bearing directly on the

decisions to detain and continue detention, under the *What-Breach Principle*. The point goes further. Lord Dyson's example regarding the wrong grade of official could also have been the subject of a distinct decision: a prior decision to allocate the detention decision to an official of the wrong grade. So could Lord Dyson's example as to conditions of detention: the Secretary of State could decide to detain, and then address where and in what conditions. What mattered to Lord Dyson was not whether matters such as these were separable, or distinct, decisions. What mattered was the nexus between the public law breach and the detention. It was part of the function of the *What-Breach Principle* to address that nexus. Pausing there, and before turning to the other authorities in sequence, it is therefore a helpful discipline to articulate what answer to the question of principle would draw on the *What-Breach Principle.* In my judgment, the approach so derived could be encapsulated in this proposition: detention by the Secretary of State is rendered unlawful by a material public law breach in a distinct decision where that decision and that breach bear on the detention. Free from other, binding authority in the line of cases concerned with flawed distinct decisions, this is the approach I would have adopted and applied.

39. In *Ullah v Home Office* [1994] Imm AR 166 (decided by the Court of Appeal on 23 June 1994), the claimant was an overstayer who was detained on 29 September 1992 for proposed deportation. The distinct decision of the Secretary of State was the decision to make a deportation order, notice of which was issued at the same time as the detention. When in October 1992 the claimant appealed the deportation order, the Secretary of State withdrew the decision to deport, accepting that relevant matters had not been fully considered so that the decision to deport had not been in accordance with the law. The claimant argued that the detention was vitiated by reason of the public law flaw in the deportation decision. The Court of Appeal held that, on the proper interpretation of the Immigration Act 1971 Schedule 3 para 2(2) (*"Where notice has been given to a person … of a decision to make a deportation order against him, he may be detained …"*), detention was lawful provided that the condition precedent of a notice in fact given was satisfied, whether or not it was flawed in public law terms, except (as the Home Office contended) in a narrow sub-category of cases where the individual was a person in respect of whom no notice could be given, or the decision to deport had been made in bad faith. In my judgment, *Ullah* turned on a question of statutory interpretation in a statutory context where a distinct decision (the notified deportation decision) was a statutory condition precedent to detention, in which context it identified a sub-category of public law error (in the issuing of the notified deportation decision).

40. In *D v Home Office* [2005] EWCA Civ 38 [2006] 1 WLR 1003 (decided by the Court of Appeal on 27 January 2005), the claimants were families who alleged that their detention was an unlawful exercise of the power to detain, on grounds of unreasonableness, disproportionality, non-adherence to policy, best interests of the children and breach of the common law (§37). This was a direct challenge to detention. It did not involve impugning any distinct decision. The Home Office contended that there was no liability in false imprisonment for *"simple public law error"* (§77), relying on *Ullah* as having *"held that the giving of a notice of intention to make a deportation order made Mr Ullah's detention legitimate"* (§87) so that: *"So long as there appeared to be a valid notice of intention to deport, which was not vitiated in any of the ways suggested in the judgments, no challenge could be made to the legality of the administrative detention that followed"* (at §90). In my view, this

was a mischaracterisation of *Ullah*. That is because *Ullah* had only been a case about the following question: in what circumstances did a public law error in the decision to deport vitiate the detention? I think the Court in *Ullah* would have been very surprised at being depicted as having excluded reliance on a public law error in the decision to detain. As Brooke LJ explained in *D*, in *Ullah* *"there was no challenge to the discretionary decision to detain"* (§115). Nevertheless, *Ullah* was relied on by the Home Office in support of the submission that – where the statutory preconditions were satisfied – no liability in false imprisonment could arise for any public law error in the decision to detain, beyond a sub-category of error in the *"old, narrow sense"* of immigration officers having *"strayed wholly outside their jurisdiction"* (§115). That contention was rejected (§120), it being sufficient to find false imprisonment that *"immigration officers … asked themselves the wrong questions, so that their decision to deprive an immigrant of his liberty was a nullity and consequently unlawful"* (at §121). In my judgment, *D* was not a case about a public law error in a distinct decision (eg. to deport) which bore on the detention. What can, however, be said is this. The Court of Appeal in *D* called into doubt the correctness of *Ullah* with its invocation of a sub-category of public law errors. This fits with what Lord Dyson was to say in *Lumba* at §66, six years later (§18 above).

41. In *R (Kullas) v SSHD* [2009] EWHC 735 (Admin) (decided by Nicol J on 6 April 2009), the claimant was an American detained on arrival at Glasgow on 19 November 2006. His detention was then continued when the Secretary of State on 21 November 2006 made the distinct decision refusing leave to enter. The claimant subsequently successfully appealed against the refusal of leave to enter. He claimed in the judicial review that the refusal of leave to enter had been obviously flawed in that his human rights grounds (ECHR Article 8 family life) appeal had been *"bound to succeed"* (§2). The Secretary of State's position was to accept that *"the underlying refusal of leave"* could *"taint"* the decision to detain rendering detention unlawful, but only in a case of *"bad faith … or irrationality"* (§5). Nicol J agreed, reasoning that this protected the individual *"against detention which is consequent on refusals of leave to enter that are bizarre or wholly unreasonable"* (§6). He also accepted (§6) that it was *"unhelpful and unnecessary for the Immigration Officer to have to go through the exercise of trying to predict whether an appeal … was bound to succeed"* (§5), and that only the information available to the detaining decision-maker (rather than other Home Office officials) should be relevant (§§7-8). In my judgment, *Kullas* was authority for this proposition: that it is legally insufficient that a distinct decision later proves to have been vitiated on human rights grounds, and it is legally irrelevant in that context to ask whether that outcome should have been predicted at the time of the detention.

42. In *R (Hatega) v SSHD* [2009] EWHC 1980 (Admin) (decided by Mr CMG Ockelton sitting as a Deputy High Court Judge on 31 July 2009) the claimant had been detained on 30 November 2007, on which day reasons for a distinct decision refusing a putative fresh claim were given (§16). Subsequently, the Secretary of State withdrew that refusal, replacing it with a fresh decision dated 8 May 2009 to the same effect (§19). The case squarely raised the issue *"what is the effect on the lawfulness of the detention of a finding that the rejection of the claimant's [fresh claim] submissions was not reasonable or not lawful"* (§27), with the Secretary of State arguing (at §35) that the *"detainor"* was *"entitled to rely on the letter refusing the submissions and to take it as showing that the claimant's removal was imminent"* (§35). The Deputy

Judge held that, where (as here) the distinct decision rejecting the fresh claim submissions had been unreasonable, that would in turn vitiate the detention because *"no reasonable Secretary of State could regard removal as imminent"* (§38). He also held that it was relevant to consider the material available to the Home Office officials who rejected the fresh claim submissions, and not just those who detained the claimant, so as to avoid an outcome *"repugnant … to the right to liberty"* (§36). *Hatega* was in my judgment authority for this proposition: that a public law error in a distinct decision bearing on the detention can render the detention unlawful, notwithstanding that the public law error was not bad faith or 'jurisdictional' error, provided at least that it is substantive unreasonableness which renders the detention itself unreasonable.

43. At this point in the sequence the Supreme Court decided *Lumba*, on 23 March 2011, and articulated the *What-Breach Principle* (§18 above). Only *D*, from the cases referred to in this line of authority, was cited in *Lumba*. I have discussed the significance of *Lumba* already (§38 above). Next, in *R (Qader) v SSHD* [2011] EWHC 1956 (Admin) (decided by Mr Ockelton sitting as a Deputy High Court Judge on 29 June 2011) the claimant was detained from 9 December 2009 for a proposed removal to Iraq (§8), and on 13 December 2009 the distinct decision was made setting directions for his removal to the Kurdish Regional Government (KRG) area (§12), that being regarded as making the removal imminent (§34). The claimant challenged the detention on the basis that the setting of removal directions for the KRG was flawed in public law terms. That was because the tribunal had on a previous appeal made a determination of fact as to the claimant's origin, the effect of which was that he was removable only via Baghdad (§33), so that the directions for the KRG erroneous in public law terms, as being unreasonable or the disregarding of a relevant consideration (§§37, 39). The Deputy Judge held that the claimant was "*entitled to succeed in a challenge on public law grounds to the decision to give directions for his removal to the KRG"* (§42). He posed the question *"does the illegality of the directions itself render the detention unlawful"* ? (§70). He referred to the *What-Breach Principle* (§§70-71, citing Lady Hale in *Kambadzi* at §207), but reminded himself that *Lumba* was a case *"where the breach of public law duty went directly to the process of initiating and maintaining detention"* (§72). Referring to *Kullas* and *Hatega* (§72) the Deputy Judge concluded that the decision to detain was *"referable and referable only to the directions for removal to the KRG… which … were unlawful"* (§72), that there was *"no initial illegality"* from detaining *"on the strength of a decision made by another Home Office official … tainted by illegality"* (§73), but that given the Secretary of State's *"duty to keep detained cases under review, and to check at each review that the detention continues to be lawful"* it followed that *"the illegality in the removal directions tainted the … detention and rendered it unlawful … from the date of the first review after 9 December 2009"* (§§73, 79). *Qader* is in my judgment authority for this proposition: unlawfulness in a distinct decision to which the detention is referable, at least where the unlawfulness is discernible from a past event, vitiates the detention from the time at which the detaining decision-maker had the role of addressing the continuation of the detention.

44. In *R (Draga) v SSHD* [2012] EWCA Civ 842 (decided by the Court of Appeal on 21 June 2012) the claimant was a refugee who had been detained from 2 August 2006, on which date the SSHD had made the distinct decision to make a deportation order, relying on her own statutory instrument (a 2004 order) purportedly specifying

'particularly serious crimes'. The claimant had appealed and been released on bail on 29 March 2007. The appeal was known to have failed by 26 October 2007 and the Secretary of State re-detained the claimant on 30 November 2007, now making a deportation order, again relying on the 2004 order. On 26 June 2009 the Court of Appeal, in a different case, had decided that the 2004 order was unlawful. The claimant sought revocation of the deportation order on 29 October 2009 but by 1 January 2010 the Secretary of State was maintaining the detention for other 'cessation' reasons. The claimant's appeal against the refusal to revoke the deportation order was upheld by a tribunal on 8 September 2010, because of the unlawfulness of the 2004 Order and of the alternative 'cessation' reasons which the tribunal characterised as a 'device'. The claimant sought damages for false imprisonment, on the basis that the deportation decision and order were vitiated by a public law error and bore on the detention. The Court of Appeal held that the detention was unlawful but only from 1 January 2010. Sullivan LJ gave the lead judgment and Pill LJ a concurring judgment. *Draga* is a significant case, and has loomed large in some of the later authorities, as it did in the argument before me. There were various strands in the analysis. In my judgment, the decision of the Court of Appeal in *Draga* is authority for four key propositions:

i) A public law error in a distinct decision (eg. to make or not revoke a deportation order) can render detention unlawful. This proposition is supported by Sullivan LJ's recognition (at §60) that there *"will … be some cases where … there was a breach of a rule of public law in the process of making the decision to make the [deportation] order, where the nature of the breach will have been such as to render the detention unlawful"*; and by the outcome in *Draga* where non-revocation of the deportation order in reliance on the cessation 'device' was *"a public law error in the decision making process which renders the detention unlawful"* (§72) from 1 January 2010 (§73).

ii) Not every allowable appeal would be a public law error rendering detention unlawful. This proposition is supported by Sullivan LJ's reasoning that: *"the mere fact that an appeal has been allowed under section 82(1) will not mean that the decision to make the deportation order was unlawful in a way which was relevant to the decision to detain"*, because allowable appeals could be where *"the Tribunal takes a different view as to the proportionality of an interference with the appellant's rights under article 8 of the ECHR, or because, with the benefit of further evidence, the Tribunal reaches a different conclusion as to the risk of persecution on removal, the application of a particular immigration rule, or the manner in which a discretion should have been exercised under the rules"* (§60).

iii) The *What-Breach Principle* governs whether a public law error in a distinct decision (eg. to make a deportation order) renders detention unlawful. This proposition is supported by Sullivan LJ's analysis, having cited *Lumba* (at §52) and having observed that *Lumba* itself concerned challenges to decisions to detain (at §56), nevertheless asking of the "*breach of a rule of public law"* in the decision to make the deportation order: *"did it bear upon, and was it relevant to, the decision to detain …?"* (§57). That is what Sullivan LJ was addressing (§58: *"I have not found this an easy question to answer"*) and

answering (at §60: as to whether *"the decision to make the deportation order was unlawful in a way which was relevant to the decision to detain"*).

iv) Where no public law error in the distinct decision (eg. to deport) was identified through statutorily-conferred appeal rights, that feature may mean none can subsequently be characterised as having rendered the detention unlawful. As it seems to me, this fourth proposition reveals the topic with which *Draga* was centrally concerned. The Court of Appeal was concerned that the public law error in the original decision to deport (and deportation order) had come to light only in a Court of Appeal decision on 26 June 2009, in a different case, the claimant's own appeal having been finally determined adversely to him by 26 October 2007, after which the Secretary of State had made the deportation order. In my judgment, what the Court of Appeal did was to adjust the application of the *What-Breach Principle* to apply to that specific context. As I have explained, Sullivan LJ had posed the question whether there was a breach of a rule of public law which bore on, and was relevant to, the decision to detain (§57). That was the question with which he was grappling (§58). He answered it in a way which he considered provided a principled fit with the primary legislation and its purpose. He emphasised *"the statutory scheme"* with its *"two-stage process"* whereby a deportation order could only be made once the claimant's appeal against the notice to make a deportation order had been finally determined adversely to the claimant (§§58, 61). He emphasised that *"Parliament has established a comprehensive statutory scheme for determining the lawfulness of a decision by the Secretary of State to make a deportation order"*, and *"in order to give effect to that statutory scheme"* there was a *"very strong case"* for treating the outcome of the appeal as *"determinative"*, in the interests of *"finality"* and *"legal certainty"* (§61). He considered that it would *"frustrate the operation of the statutory scheme"* if the Secretary of State could not rely on the outcome of the appeal (§62), or if a claimant who had brought no appeal at all could rely on a later decision of the Court of Appeal or Supreme Court which now made it clear that the original decision to make a deportation order had been made on an erroneous legal basis (§65). He concluded that the Secretary of State was entitled to rely on the lawfulness of the decision to make a deportation order as determined by the tribunal (§66). In my judgment, what Sullivan LJ was saying was this: no public law error should be characterised as bearing on the detention where none has been identified through the statutorily-interposed contemporaneous judicial safeguard for identifying such an error. That is why the analysis of the detention linked to the refusal to revoke the deportation order was different. There, the statutorily-interposed contemporaneous judicial safeguard *had* identified the public law error, which could therefore bear on the detention under the *What-Breach Principle*.

45. That, in my judgment, is the correct reading of *Draga*. What I do not accept is that the Court of Appeal in *Draga* was taking the class of public law breaches bearing on the detention, and identifying a sub-category of that class. Rather, the Court recognised that not every public law breach in a distinct decision would bear on and be relevant to the detention. It recognised that not every basis for a successful appeal would be a public law error, still less one bearing on the detention. Sullivan LJ (at §60) gave examples which he indicated would not suffice; he referred to *Ullah* as having given

"examples" which would; he then observed that *"it is difficult to identify any principled basis for distinguishing between those public law errors which will render the decision to detain unlawful and those which will not"*; and finally he reminded himself of what Lord Dyson has said in *Lumba* about *"a single category of errors of law, all of which render[] a decision ultra vires"*.

46. In *R (AA (Afghanistan) v SSHD* [2013] UKSC 49 [2013] 1 WLR 2224 (decided by the Supreme Court on 10 July 2013) the claimant had arrived as an unaccompanied asylum-seeker on 8 October 2008 and was refused asylum on 6 November 2008. The Secretary of State relied on a 9 October 2008 local authority age assessment which had concluded that the claimant was an adult. The claimant was detained on 7 July 2010 on which date the Secretary of State set removal directions for 20 July 2010, but these were stayed and his release from detention was ordered on 20 July 2010. A fresh local authority age assessment on 6 August 2010 concluded that the claimant was still only aged 17. The Secretary of State accepted that the claimant had in fact been a child when detained, and that detention of a child was a breach of public law being incompatible with the published detention policy, but relied on the reasonableness of the belief that he had been an adult. The reasonableness of the Secretary of State having proceeded on the basis that the claimant was an adult had been held by the Courts below to be unimpeachable and was not in issue (§15). The claimant's argument was that, since objectively the claimant had been a child, the Secretary of State had breached her statutory duty in section 55 of the Borders Citizenship and Immigration Act 2009 (to make arrangements for ensuring that immigration functions are discharged having regard to the need to safeguard children's welfare), which rendered the detention unlawful. The Supreme Court accepted (Lord Toulson at §44) that *"if there was a material breach of section 55, it would make the detention unlawful"*, for which proposition Lord Toulson cited *Lumba*. However, there was no breach because the correct construction (§44) of section 55 did not involve the Secretary of State having to identify objectively correctly whether an individual was a child. Rather, Parliament imposed by section 55(1) a direct responsibility (§46) to *"establish proper systems"* for reliable age assessment (§47), with which duty the Secretary of State's guidance complied (§48); and it imposed a vicarious responsibility (§46) for any failure by an official to follow that guidance as required by section 55(3), with which the officials had complied (§48). In my judgment *AA (Afghanistan)* is relevant to the analysis of distinct decisions and public law errors rendering detention unlawful. The Secretary of State's approach to an asylum-seeker's age, and the s.55(3) exercise of a function having regard to guidance, could be part and parcel of a decision to detain, but it may not be. Section 55 is not a detention provision. It applies to all immigration and asylum functions (s.55(2)). Accordingly, age could well be addressed by immigration officials as a distinct and general stage, to inform their approach to all functions, powers and safeguards. I cannot accept that the legal analysis of the consequences of breach would turn on whether s.55 is addressed in a detention decision or in a linked but distinct decision. I read the Supreme Court as accepting that, in an individual case, a material s.55 breach (§44) or failure under s.55(3) to have regard to the guidance (§48), would in principle render detention unlawful. I also read the Court as recognising (at §44) that the *What-Breach Principle* provides the governing principle. For these reasons, and as a Supreme Court decision, I find in *AA (Afghanistan)* a corner piece of the legal jigsaw.

47. In *Tsavdaris v Home Office* [2014] EWHC 440 (QB) (a decision of Lang J on 25 February 2014) the claimant was a Greek national who had been in the United Kingdom since 1994. On 13 April 2005 the Secretary of State had issued a notice of the decision to make a deportation order and, there having been no appeal, on 20 March 2006 a deportation order was made. On 30 April 2006 the 2006 EEA Regulations were made, applicable to the deportation order under transitional provisions (§16), and containing new restrictions rendering the claimant irremovable (§§50, 55). Nobody noticed this. Removal directions were set on 17 May 2006 (for 31 May 2006) and the claimant was detained from 28 May 2006. His detention was continued until 5 December 2006 when it was recognised that the deportation order required to be revoked, as it was on 7 December 2006. Meanwhile, the claimant's request for revocation had been refused on 30 May 2006. Regular detention reviews had continued, and one review date may I infer have been 1 July 2006. Lang J held that detention had been unlawful from 1 July 2006, when it should have been appreciated that the claimant could not be removed within a reasonable period for the purposes of lawful detention under *Hardial Singh* principles (§61). On the Judge's analysis, the decision (17 May 2006) to set removal directions had not been unlawful (§§63-66), but the refusal to revoke (30 May 2006) involved the public law error of failure to consider the effect of the 2006 Regulations (§49), whose effect should have been recognised by 1 July 2006. In my judgment, *Tsavdaris* can properly be seen as a case of a public law error in a distinct decision which, from the time when the substantive position should have been appreciated, bore on the detention by informing the removability which was the purpose of the detention.

48. In *R (Khan) v SSHD* [2014] EWHC 2494 (Admin) [2016] 1 WLR 747 (a decision of Green J on 23 July 2014) the claimant was a Pakistan national with limited leave to remain. On 9 May 2012 he was detained for removal and issued with a distinct removal decision. He was released from detention on 16 May 2012. Under the statutory scheme he had a right of out of country appeal against the removal decision. He challenged by judicial review the removal decision and the detention, arguing that a public law breach in the removal decision rendered the detention unlawful. Green J decided that judicial review of the removal decision was inapt given the adequate alternative remedy (§80), and declined *"at this stage"* to deal with the detention issue, since the *"decision on the merits of the removal decision should be determined first"* (§86). The Judge accepted that if the removal decision *"was unlawful this almost certainly provides significant support to the claimant that his subsequent detention was unlawful"* (§86). He did not accept that a finding of *"illegality"* in relation to the removal decision would *"automatically lead to the conclusion that the detention was unlawful"*, citing (at §§86-87) §§58 and 60 of Sullivan LJ's judgment in *Draga*, and observing that (§88): *"a decision by the tribunal as to the legality of the underlying removal decision <u>may</u> have a material impact on the legality of the subsequent detention; but will not necessarily do so"*.

49. In *R (X) v SSHD* [2016] EWHC 1997 (Admin) (a decision of Walker J on 29 July 2016) the claimant was a Romanian national detained on 23 March 2015 (2006 EEA Regulations regulation 24(1)) while a decision was taken on whether to deport him (§§60-61). Detention was continued from 23 April 2015 pending deportation (regulation 24(3)), the Secretary of State having by then made the distinct decisions to deport him and to certify that he was human rights-compatibly removable prior to his appeal (regulation 24AA) (§§73-74). The claimant was released on bail on 21 July

2015 and subsequently succeeded in his deportation appeal (§97). Walker J held that the certification decision had been in breach of public law, the Secretary of State having asked the wrong question (§§145-146) and failing to persuade the Court that a correct approach in law would inevitably have led to certification (§§151, 154). The Judge also held that the detention had been unlawful throughout, because the reasoning based on risk of absconding and reoffending did not withstand scrutiny (§172) as a tenable or reasonable basis for detention (§§185, 191). No argument was evidently made that the nature of the flaw in the deportation decision (in the light of the successful appeal) or the certification itself rendered the detention unlawful.

50. In *R (TN (Vietnam) v SSHD* [2017] EWHC 59 (Admin) [2017] 1 WLR 2595 (a decision of Ouseley J on 20 January 2017) the claimants were asylum-seekers whose asylum decisions and unsuccessful appeals had been made under the 'detained fast-track' procedure for which 2005 Rules had made procedural provision. Ouseley J gave declarations that the logic of a 29 July 2015 Court of Appeal judgment, regarding later 2014 Rules, applied equally to the 2005 Rules which were therefore unlawful as not providing a fair procedural system. The Judge explained that this consequence did not mean that all asylum and appeal decisions in all individual cases under the 2005 Rules were thereby rendered ultra vires (§95). In his reasoning, Ouseley J referred to *Draga* (§§88-93), in terms which read *Draga* as applying the *What-Breach Principle* (§89), characterising *Draga* as illustrating *"that the nullification of one executive act or order does not make all related or dependant acts nullities"* (§94). I note that *TN (Vietnam)* involved no question of the lawfulness of the detention, and the case – like *Draga* itself – concerned individual appeals unsuccessfully pursued, and the flaw in a statutory instrument being exposed much later.

51. In *R (AB) v SSHD* [2017] EWCA Civ 59 (a decision of the Court of Appeal of 9 February 2017) the claimant was a 'detained fast-track' asylum-seeker dealt with under the 2014 Rules. On 10 November 2014 his asylum appeal had been refused (§5) and in December 2014 he was removed to Cameroon (§7). After the 29 July 2015 Court of Appeal decision (described in *TN (Vietnam)*) his appeal was reopened on 12 November 2015 (§12), and after a hearing the Upper Tribunal held that the removal had taken place before the appeal had properly been determined (§25), so that a fresh appeal hearing should now take place (at §15). On judicial review the claimant sought an order requiring the Secretary of State to use best endeavours to secure his return. His argument included the contention that it had now been established, in his restored appeal, that the removal had been rendered unlawful by the public law breach in the asylum process. It was common ground between the parties that the central question was whether the Secretary of State had *"cause to know"* of the unlawfulness of the removal at the time it took place (§§57, 68). Refusing to make the best endeavours order sought, the Court of Appeal relied on two principles. One (§68) was that the lawfulness of removal was to be assessed on the basis of the material before the Secretary of State at the time (applying *Fardous v SSHD* [2015] EWCA Civ 931). The other was based on *Draga* and was that *"the simple fact that a decision relied upon by a decision-maker is found subsequently to have been unlawful does not affect the unlawfulness of a later decision based upon it but made prior to the date on which the relied upon decision was held to have been unlawful"*, since *"to hold otherwise would frustrate the operation of the statutory scheme"* (§68); so that *"in absence of any additional basis for holding that decision 'B' was made unlawfully, a later*

finding that, in the event, an earlier decision 'A' that was relied upon was unlawful does not, of itself, affect the validity of decision 'B'" (§69). In my judgment, the context of the *AB* case is important, and that context explains the special significance of *Draga*, in circumstances where *AB* was about removal and not detention. As in *Draga*, *AB* was a case in which a statutorily-conferred right of appeal was available to bring to light whether the removal would be lawful or unlawful, and as in *Draga* that right of appeal had been pursued and had failed. As in *Draga*, it was held to be insufficient that a Court in a later case had brought to light that the original appeal decision was legally unsound. The Secretary of State was entitled to rely on the adverse final determination of the appeal, and to remove as a consequence. It is that context which explains the significance of avoiding an approach which *"would frustrate the operation of the statutory scheme"* (*AB* at §68, citing *Draga* at §65). Further, in my judgment, the phrases *"the simple fact"* and *"of itself"* are consistent with a general recognition that a subsequent finding that decision A was unlawful would not *automatically* have the consequence of undermining decision B. That was the point which had been made by Green J in *Khan* (§48 above). I do not read *AB* as supporting the proposition that detention can never be rendered unlawful, by a public law breach in a distinct decision bearing on the detention, which was not known to the Secretary of State at the time of the detention because no court or tribunal had yet considered it. That proposition would have far-reaching consequences, far removed from the context with which *AB* was concerned. *AB* was not concerned with detention, and the *"cause to know"* approach was common ground between the parties.

52. In *DN (Rwanda) v SSHD* [2018] EWCA Civ 273 (a decision of the Court of Appeal on 22 February 2018) the claimant was a Rwandan refugee whose facts were materially identical to those in *Draga*. Having been notified of the Secretary of State's decision to make a deportation order, his statutory appeal had been adversely finally determined, following which the Secretary of State pursued deportation and detained him in connection with that deportation. He sought judicial review, in proceedings stayed behind *EN (Serbia)* and then *Draga*. *EN (Serbia)* had established that the deportation order could not stand, but *Draga* had then held that no damages arose from the public law flaw now known to have arisen in the making of the deportation order. The Court of Appeal in *DN (Rwanda)* held that *Draga* was binding and that overturning it was something only the Supreme Court could effect. In my judgment, three features of *DN (Rwanda)* are illuminating for the purposes of the question of principle which I am addressing:

i) First, the Court of Appeal read *Draga* as being a case which had accepted that the *What-Breach Principle* was the relevant principle in play, when deciding whether a distinct decision in breach of public law renders detention unlawful. Arden LJ, for the Court of Appeal, explained that *"Draga is a decision of this Court applying the recent decision of the Supreme Court in … Lumba"* (§9); *"Draga … turns on the decision … in Lumba"* (§10); *"In Draga, this Court applied the decision in Lumba"* (§17); *"this Court's decision in Draga followed the law as explained by the Supreme Court in Lumba"* (§34); *"this Court in Draga was applying Lumba"* (§38). As to the *What-Breach Principle*, Arden LJ describes this at §13 (*"not every breach of public law was sufficient … the breach had to 'bear on and be relevant to' the decision to detain"*) and §16 (*"Critically, to give rise to a liability in damages, the public law error*

made by the Secretary of State had to be relevant to and bear on the detention").

ii) Secondly, the Court of Appeal recognised that *Draga* had concluded that there was, in making the deportation order, no public law error *bearing on the detention* because of the special feature that a statutorily-conferred appeal which should have elicited such an error had failed to do so (see §44(iv) above). The report records Arden LJ as saying (§34): *"This Court [in Draga] concluded that the claim for damages did not bear on and was not relevant to the public law error which led to the making of the 2004 Order because the appeal from the detention order had failed"*. In my judgment, something has gone wrong in the transcription of this sentence. What matters is that Arden LJ is clearly saying that the *"bearing on and relevant to"* test (the *What-Breach Principle*) was not satisfied where an appeal had failed. That is what I take from it. I suspect that adjusted text, to convey the intended thrust of the sentence, could read as follows: *"This Court [in Draga] concluded that the [public law error in the making of the deportation order] did not bear on and was not relevant to the [detention] because the appeal from the [decision to make the deportation] order had failed"*. I note that Counsel for the Secretary of State had put this point (§32) using this language: *"the detention was lawful because the appeal was dismissed …"*.

iii) Thirdly, in *DN (Rwanda)* among the criticisms of *Draga* advanced by Counsel for the claimant is a point which I would express in the following way: (1) The Court of Appeal in *Draga* treated an adverse finally-determined deportation appeal as meaning there was no *public law breach in the making of the deportation order, bearing on and relevant to detention*. (2) However, where it is known to the Court having the function of determining the legality of the detention that there was such a *public law breach in the making of the deportation order* the previous appeal outcome is no basis for denying that conclusion. (3) Moreover, it is artificial to treat the existence or purpose of the statutorily-conferred right of appeal as denying what it would otherwise have accepted, namely that such a breach was one *bearing on and relevant to the detention*. In relation to this line of argument I note that among Counsel's submissions recorded in *DN (Rwanda)* were the points that: the statutory appeal provisions do not displace the *"fundamental principle that it is for the courts to determine the legality of detention"* (§27); and *"the dismissal of the appeals against the deportation order did not break the chain of causation"* (§29). As Arden LJ observed (§35), these and other points involve an argument that *"Draga conflicts with fundamental principle"* and *"this Court should have interpreted Lord Dyson's test [in Lumba] more widely"*. But, said the Court of Appeal in *DN (Rwanda)*, unless and until the Supreme Court decides otherwise, *Draga* stands as binding authority for that which it decides.

53. Those are the cases that were cited to me in this line of authority. They are something of a patchwork. I have examined each and indicated what I have made of them. In looking at them as a body of authority, it is possible in my judgment to distil the following by way of headline points:

i) A public law breach in a distinct decision can render detention unlawful (*Draga* §§60, 72; *Khan* §88). Examples of relevant distinct decisions public

law breaches in the making of which could render detention unlawful are: a refusal of leave to enter (*Kullas*); the refusal of a putative fresh claim (*Hatega*); the making of removal directions (*Qader*); the making of a deportation order (*Draga*) or a refusal to revoke a deportation order (*Draga*, *Tsavdaris*); or a decision assessing age (*AA (Afghanistan)* at §§44, 48).

ii) Not all public law breaches in making a distinct decision will render detention unlawful (*Khan* §88). Nor indeed do all public law breaches in a decision to detain render detention unlawful (*Lumba* §68). Nor will all grounds on which an appeal could succeed do so, remembering that some appeal grounds extend beyond public law error at the time of the decision (*Draga* §60). Examples of public law breaches which can render detention unlawful are: an error as to whether the individual is a person against whom removal action can be taken, where detention is for removal (*Ullah*); unreasonableness (*Kullas*; *Hatega*); the failure to follow statutory guidance in an age-assessment decision (*AA (Afghanistan)*); departing without justification from a tribunal's finding of fact (*Qader*). Examples which would not do so include: the taking of a different view as to the proportionality balance in the case of refusal of leave to enter (*Kullas*) or decision to deport (*Draga* §60). Depending on the circumstances, it may be appropriate to conclude that the detention was unlawful only from a particular point in time, such as the date of a review (*Qader*; *Tsavdaris*).

iii) The governing principle is the *What-Breach Principle*: whether the public law breach, in the distinct decision, is one bearing on and relevant to the detention (*Draga* §§57-58, 60; *AA (Afghanistan)* §44; *TN* §89; *DN*). Using historic or technical classifications of grounds for judicial review for this purpose would be unsupported by any clear principled basis (*Draga* §60; *D* §§120-121; *Lumba* §§66, 68).

iv) Special considerations may arise where no public law breach in the distinct decision was identified through a statutorily-conferred appeal. Special policy reasoning has been identified in that situation, and it has been considered contrary to the statutory purpose for a Court considering the legality of the detention to characterise a subsequently-recognised public law breach as one bearing on and relevant to the detention (*Draga* §§58, 61-62, 65-66; *AB* §68; *DN* §34). Whether that position will withstand scrutiny at Supreme Court level remains to be seen. It may not.

54. I can return to the starting-point which *Lumba* presented (§38 above). It was as follows: detention by the Secretary of State is rendered unlawful by a material public law breach in a distinct decision where that decision and that breach bear on the detention. In my judgment, that principle is supported and not undermined by the case-law which I have examined. It is a clear operative principle, which Courts will in my judgment readily be able to apply. It cuts through a knotty problem in this area of the law. It allows a focus on substance, and avoids technical distinctions and the drawing of defensive lines.

PART THREE: THE ANALYSIS

55. I turn to deal with Ms Dubinsky's sustained and multi-faceted challenge to the executive immigration detention in the present case. Based on the oral and written

submissions of the parties, I consider that the arguments fall under the following identifiable grounds of alleged unlawfulness of detention. I shall endeavour to encapsulate the essential thrust of the arguments on each side, before stating my conclusions and reasons.

(1) No reasons at stage 1

56. Mr Anderson accepts that the detention at stage 1 was unlawful because no reasons were provided to the claimant. But he submits that this is the only basis of unlawfulness at stage 1 and that any remedy could at most be nominal damages, because the claimant could and would lawfully have been detained at stage 1 in any event. Ms Dubinsky accepts that the claimant cannot, on the no-reasons point standing alone, recover anything other than nominal damages in relation to stage 1. On that basis, I will turn to the other issues, to determine whether anything other than nominal damages arise at stage 1.

(2) The absence of a decision at stage 1

57. Ms Dubinsky submits that the detention at stage 1 was unlawful because there was no decision to detain at all on 27 January 2015, so that there was no authority to detain on that day and the Form IS91 was unlawfully issued by IO Benson. Mr Anderson submits in response that Form IS91 reflected a decision to authorise detention in the circumstances that arose on 27 January 2015, albeit that no reasoned decision was contemporaneously recorded until stage 2 (the following day). I do not accept that the detention was unlawful because no decision to detain was made on 27 January 2015. My reasons are as follows. I agree with Mr Anderson that when IO Benson issued Form IS91 he was doing so to embody a decision on that day, authorising the detention. The decision was a response to the notification received by the Criminal Casework Directive, and was based on the "paperwork" received. The first contemporaneously-recorded reasoned decision to detain was on 28 January 2015, but I do not accept that this was the first decision to detain.

(3) Proportionality and necessity (Article 27.2 standards): stages 1 and 2

58. Ms Dubinsky submits that detention in stages 1 and 2 was unlawful as a breach of the Article 27.2 standards (§21 above), because at stages 1 and 2 detention was not in fact based on the claimant's personal conduct and the threat he individually posed. Rather, detention was based on the fact of his criminal conviction and considerations of general prevention. The Secretary of State did not have and could not assess appropriate individualised information and so could not detain. Mr Anderson, who disputes this approach in principle, in the alternative submits in response: (i) that the Secretary of State considered throughout the conduct of the claimant (ie. the conduct constituting the offence, not the mere fact of the conviction: *Nouazli* CA §30) and the threat posed by the claimant as an individual; (ii) that the information relied on at stages 1 and 2 concerned the claimant's personal conduct whose seriousness was reflected in the nature of the crime and punishment; (iii) that it would be unduly burdensome in the circumstances to expect the Secretary of State to have fuller individualised information; and (iv) that no absence of material or assessment at stages 1 or 2 can have been material (or no damages can be more than nominal) given the proportionality and necessity demonstrated in stages 3 and 4 once fuller individualised information was forthcoming.

59. I accept that, for stage 2 but not for stage 1, the detention was unlawful on grounds of breach of Article 27.2 standards, and with compensatory and not nominal damages being recoverable. My reasoning is as follows. (1) I agree with Ms Dubinsky that the Article 27.2 standards were applicable to the detention (§§20-35 above). (2) I find on the evidence before me (which the Secretary of State does not contend is materially incomplete) that all that the Secretary of State knew at stage 1 on 27 January 2015, and again at stage 2 on 28 January 2015, was: the claimant's name, date of birth, Lithuanian nationality, and that he had been convicted and sentenced to 14 months custody by the crown court for a first offence of possession of an imitation firearm, and that the custodial term of that sentence had immediately expired based on time served on remand. Nothing was known about key topics. Materials such as the JSR and PSR, containing relevant content as to the claimant's individual behaviour and the risk he posed, were requested. But that *"information gathering"* was only started on 29 January 2015 and chased up on 9 February 2015. The JSR were not received until 18 February 2015 and not considered in any detention decision until 25 February 2015 in stage 3. (4) This situation and sequence raises a serious concern as to how the detention could be *"based ... on the personal conduct of the individual"* as it is required by Article 27.2 standards *"exclusively"* to be, and whether the claimant's *"criminal conviction[]"* was treated as itself "*constitut[ing] grounds for"* the detention. The onus is on the Secretary of State to satisfy the Court that legally sufficient evidence and reasons were present to justify detention, having regard to applicable standards of individualised proportionality and necessity. (5) I agree with Mr Anderson that the stage 1 and 2 detention decisions were focusing on what was known about the claimant's individual case and circumstances, and that detention was not treated as automatically following from the fact of his being 'a convicted criminal'. (6) I agree with Mr Anderson that it is important, in considering whether legally adequate evidence and reasons were present for detention of the individual, to pay close regard to context, circumstances and practical realities. I agree with him that the law should not impose an impossible burden, or place the Secretary of State in an invidious position where circumstances of urgency necessarily mean that only limited information about an individual is available. (7) I agree with Ms Dubinsky that, if no legally adequate evidence and reasons were present, it is no answer to say that detention would have been continued had the Secretary of State had such further information as could have been available to her.

60. In relation to my point (6) above, Mr Anderson drew my attention to two authorities. In *R (Vovk) v SSHD* [2006] EWHC 3386 (Admin) at §23, Calvert Smith J observed that a court might *"very well be prepared to consider the practicalities"* of a case in which the implications of criminal sentence and remand raised problems as to *"the practicalities of complying with the requirement for the human mind to apply itself to a decision to detain or not"*. That observation envisaged that there might be a delay in deciding to authorise detention, which is not the way Mr Anderson or I have analysed stage 1 in this case (§57 above). In *R (Hussein) v SSHD* [2009] EWHC 2492 (Admin) at §52, Nicol J considered what was *"sensible"* and what would *"not be practicable"* so far as prospectively considering the appropriateness of deportation action while the individual was serving their criminal sentence. That was a case about the fourth of the *Hardial Singh Principles*, the due diligence principle (§17 above). Neither of these cases directly addresses the point with which I am concerned, but they are observations having a resonance which I have found helpful to point (6).

61. In analysing the lawfulness of detention at stage 1, it is point (6) above which is critical to my conclusion that the detention in the first 24 hours was lawful. The Home Office had been alerted to a case arising out of crown court proceedings, where the sentence of the Court and period on remand combined to make the question of immigration detention urgent. The requirement of individualised proportionality and necessity can in my judgment cater for situations where very little is known about the individual but there are real grounds for concern, provided always that the recognition of that situation is accompanied by a recognition of the need to obtain such fuller information as is available about the individual's conduct, circumstances and risk profile, with imperative urgency. It would, on the face of it, be best if proactive liaison arrangements between the Home Office and criminal justice authorities put an executive detaining decision-maker in a more informed position from the outset. In this case, the claimant had pleaded guilty, his case had been adjourned for a pre-sentence report, and the extent and implications of his lengthy period on remand were discernable. I cannot describe as satisfactory the situation in which the Home Office found itself at stage 1. Nevertheless, I have concluded that the Secretary of State discharges the onus of demonstrating that her undoubtedly protective and precautionary approach based on what was known about the claimant satisfied the Article 27.2 standards on that first day. The protective approach is perhaps encapsulated in IO Zabardast's phrase in the form ICD3079, that in the known circumstances it was *"not considered reasonable to leave the public vulnerable to the potential for him to re-offend"*. Executive detention is a serious step and urgent initial intrusive action will in my judgment continue to satisfy Article 27.2 standards on the proviso that further information about the claimant's conduct and circumstances is obtained and considered as a matter of imperative urgency. I see that proviso as a vital one, reconciling the policy imperatives and securing that Article 27.2 standards provide a robust and disciplined protection for the individual against executive detention.

62. As to stage 2, the Secretary of State has not in my judgment discharged the onus of justifying the detention applying Article 27.2 standards. In short, the proviso was not satisfied. There was nothing impossible or invidious in the urgent circumstances which prevented the decision to detain at stage 1 from being accompanied by a recognition that the position was unsatisfactory and the action intrusive, insisting that further relevant materials about the claimant's conduct and circumstances be provided as a matter of imperative urgency, if the detention were to be continued beyond the first 24 hours. No reason has been provided as to why the PSR should not have been urgently obtained. It existed, it will have been known to and available to those from whom the notification had originated. Importantly, no witness statement evidence has been filed in this case, explaining that some impediment or undue burden arose. No information gathering started until 29 January 2015, after the stage 2 decision, and in readiness for the first monthly detention review on 25 February 2015. Applying the same contextual approach urged by the Secretary of State, the absence of information about the individual conduct and circumstances left her in my judgment with material and reasons which were not legally adequate to justify the continuing detention. The stage 2 decision was based on what was known about the claimant, but it has not in my judgment been shown to be sufficient to meet the standard of individualised proportionality and necessity in all the circumstances. The price for urgent protective action was an urgent review which would need fuller individualised information in order for justification for detention to continue.

63. Mr Anderson pointed to the classification of offences for seriousness under EIC chapter 55, but that does not in my judgment assist him on this point, at least not beyond stage 1. The fact that the name of the offence is known, and that offence is given a classification by the executive, does not qualify the need to examine the specific individual conduct, circumstances and threat. If anything, the classification illustrates the danger of an approach which is not informed by such matters. So, for example, §55.3.2.1 of the EIC provides that for listed offences the *"risk of reoffending or harm to the public"* is a criterion to be given *"particularly substantial weight"* when deciding whether to release (or detain). That risk and balancing exercise must nevertheless be approached compatibly with Article 27.2 standards. Mr Anderson also drew my attention to §55.3.2.8, which states that where no risk assessment is available from NOMS (the National Offender Management Service) there must be *"a judgment on the risk of harm based on the information available"*. That cannot excuse an approach which, without evidential support, fails urgently to secure available information about individual conduct, circumstances and risk.

64. Point (7) above becomes relevant to the analysis here. As to that, I cannot accept Mr Anderson's submission that the Court should look to fuller information which could have been obtained and considered by the Secretary of State, and to later detention decisions at a point in time when it had been obtained and was considered. Mr Anderson invited me to adopt this approach and conclude that detention would have been imposed, had material and reasons been present which were absent, so that only nominal damages are recoverable applying the approach in *Lumba*. I cannot accept that submission. In the first place, it is well-established in the case-law that the legality of detention is considered on the basis of the material that was before the Secretary of State (§17 above). That is a principled approach which can, and in my judgment should, cut both ways. The Secretary of State is not to be castigated, but neither exonerated, by material of which she was not aware at the time of the decision to detain or continue detention. It is one thing to say, on the same evidence as was before the Secretary of State at the time, that a decision involving some public law breach would have been the same absent that breach. That in my judgment is what the approach to nominal damages *Lumba* is envisaging (§19 above). It is quite another thing to posit different material as having been before the Secretary of State. Even if that would be a correct approach in a case based on the public law breach being a failure of the so-called *Tameside* duty of sufficient enquiry, I agree with Ms Dubinsky: that is not this case. The Article 27.2 standards involve an enquiry, as part of a substantively reasoned and justified outcome. The wording and clear purpose of the Article 27.2 standards stand, in my judgment, as meaningful protection for the individual from action lacking a presently evaluated and informed justification based on individual conduct and threat. The state can make an informed decision, or not impose the restriction. In my judgment, it would undermine the disciplined safeguard of the Article 27.2 standards were the executive able to avoid liability for unlawful detention, under standards of proportionality and necessity, by reference to what an individualised enquiry would have elicited had it been undertaken. That reasoning stands to excuse detention based on suspicion, provided that the suspicion proves well-founded after the event. It stands to legitimise a 'detain first, ask questions later' arbitrariness. That would be very surprising, given that the protection against arbitrariness is a central value of standards of proportionality. I recognise that the law often treats proportionality as a function of outcome, not reason or reasoning. But I cannot see, especially in the context of executive deprivation of liberty and Article

27.2, how it is consistent with the rule of law to excuse and legitimise detention for which the detaining decision-maker has no adequate justifying material at the time of the detention. Only clear binding authority to that effect, on this specific point, would lead me to such a conclusion. I was shown none. For these reasons, in my judgment, absent the availability before the decision-maker of legally adequate material and reasons to justify executive detention under Article 27.2 standards, the detention is unlawful and the remedy must be compensatory and not nominal damages.

(4) Proportionality and necessity (Article 27.2 standards): stages 3 and 4

65. Ms Dubinsky next submits that detention in stages 3 and 4 was unlawful as a breach of the Article 27.2 standards, because, although now based on the claimant's personal conduct and the threat he individually posed, detention was not proportionate and necessary based on that conduct and threat having regard to less restrictive measures, which were never properly considered. Ms Dubinsky emphasises the claimant had used his time on remand well, his known stated intention establish contact with his son, the absence of any history of non-compliance, the absence of previous offending or a pattern of offending, references in the materials to a 'low' risk of offending and harm, and the fact that even those 'medium' or 'high' risk references related to a specific victim rather than the public a whole. Mr Anderson submits that the Article 27.2 standards (if applicable) were met and alternatives were properly considered and convincingly rejected.

66. I do not accept that there was any breach of Article 27.2 standards at stages 3 and 4. By the time of IO Zabardast and IO Terry's 25 February 2015 detention review and IO Taylor's 24 February 2015 deportation/certification decision letter to which that review referred, the material before the Secretary of State was much fuller and had been evaluated. The JSR had been received on 18 February 2015, as well as the letter 9 February 2015 and questionnaire 12 February 2015 from the claimant and information from social services on 21 February 2015. The specific facts of the offending, described in the JSR and IO Taylor's letter, were known and considered. Although the PSR was still not obtained until 26 February 2015, after the detention review, the reviewing decision-makers conscientiously and in my judgment justifiably assessed as medium the risk of absconding and reoffending. The PSR and other available information was duly considered in the later stage 4 decision-making. The Secretary of State has in my judgment discharged the onus in respect of stages 3 and 4 and the Article 27.2 standards.

67. It is clear, in my judgment, that consideration was being given throughout to whether detention was needed, or whether alternatives to detention would be sufficient, given in particular the risks of reoffending and absconding. Ms Dubinsky submitted that the alternative to detention was temporary release on conditions and on licence, with a suitable non-contact licence condition in respect of the victim of the claimant's crime (as was in fact promulgated by the Secretary of State for Justice on 31 March 2015). She submits that alternatives were considered for the first time when on 16 March 2015 IO Zabardast refused temporary release. I cannot accept that. In my judgment, when for example IO Zabardast and IO Terry conducted the detention review of 25 February 2015 the assessment that *"the risks outweigh the presumption of liberty"* based on the claimant being *"assessed as posing a medium risk of harm and to re-offend"* and *"a medium risk to abscond"* the decision-makers were addressing their minds to whether release with conditions was an adequate alternative.

68. Ms Dubinsky submitted that the assessment of the levels of risk and harm could not satisfy standards of proportionality and necessity to detain, for what was a first and only offence and involved a specific known victim. I am satisfied that each of the various assessments of risk and harm, in the detention decision-making documents, in the PSR and in the OASys reports was a justifiable assessment at the time and based on the available information. I have considered the observations of FTT Judge Blundell on 10 August 2016 about those materials when allowing the claimant's appeal, when the Judge was approaching present risk on all the then available material after a period without incident and a healthy reconciliation between the claimant, his ex-partner and their child. I agree with the Judge that the OASys assessments involved an *"understandably cautious approach"*. I do not think the PSR reference to *"an emerging pattern of violent behaviour"* shown by *"the offence"* supports, could be taken to support, or was taken by the Secretary of State to support any suggestion of prior reoffending. The PSR in terms recorded *"no previous convictions and as such there is no pattern of offending"*. Looking at the Secretary of State's detention decision-making, and on the material available to the Secretary of State at stages 3 and 4, the circumstances and implications of the claimant's conduct and the threat he was assessed to pose, as to risk of absconding and risk of reoffending, was assessed in a way which in my judgment was objectively justifiable.

69. Ms Dubinsky submitted that certain references in the detention decision-making documents, to the claimant not having demonstrated that he had adequately addressed the reasons for his offending behaviour through ETS or victim awareness courses, were unjustified and unfair, given the absence of such opportunities for a remand prisoner (she referred to an internal instruction PSI 19/2014 §§1.9, 2.1, 2.8). In my judgment, the claimant was not being condemned or penalised for something beyond his control. Rather, the question whether the Secretary of State could or could not be satisfied that underlying reasons had been addressed was relevant to the assessment of risk of reoffending and harm. This concern was one which the contents of the PSR served to reinforce. It was relevant whether such demonstration was, or was not, available.

(5) Hardial Singh 2: stages 2 and 3

70. Ms Dubinsky submits that detention in stages 2, 3 and 4 was unlawful as a breach of *Hardial Singh 2* (§17 above), because there was no proper assessment or information as to the claimant's behaviour or the risk he posed. Mr Anderson submits in response that there was no breach, given the *"paramount"* importance of the risk of absconding or reoffending (*Lumba* §121). Alternatively, he submits that damages can at best be nominal because the Secretary of State could and would have detained the claimant had further information been considered or a further assessment undertaken. *Hardial Singh 2* (detention only for a reasonable period) is informed by well-known considerations: *Lumba* §31 (including *"the length of the period of detention, the nature of the obstacles … preventing a deportation; the diligence, spend and effectiveness of the steps taken …; the conditions in which the detained person is being kept; the effect of the detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences"*). My conclusion is that I cannot see how in the circumstances of the present case *Hardial Singh 2* could produce a different outcome, or one better for either party, once the Article 27.2 standards have been applied. If

Article 27.2 standards of individualised proportionality and necessity have been infringed, the detention is already unlawful for that reason. If not, I cannot see how *Hardial Singh 2* factors could then render the detention unlawful, at least in the circumstances of the present case. I accept that *Hardial Singh 3* gives rise to different considerations, and I will deal with that separately later (§§79-81 below).

(6) Unlawful certification: stages 3 and 4

71. Ms Dubinsky submits that detention in stages 3 and 4 was unlawful because there was a flawed distinct decision, namely the regulation 24AA certification of 24 February 2015, whose unlawfulness rendered the detention unlawful because the decision and public law breach bore on the decision to detain. Mr Anderson, who disputes this approach absent irrationality in the distinct decision, submits further in response as follows: that the accepted misdirection in law in the certification was not a material error of approach, since the certification would have been lawfully arrived at absent the misdirection, so that no unlawfulness of detention can arise on this basis.

72. I do not accept that the detention was unlawful in stages 3 and/or 4 on grounds of unlawfulness of the certification. My reasoning is as follows.

i) I agree with Ms Dubinsky that a breach of public law, not limited to irrationality, in the making of a distinct decision can render the detention unlawful if the nature of the distinct decision and public law breach bear on the decision to detain or continue detention (§§36-54 above).

ii) I agree with Ms Dubinsky that IO Taylor's 24 February 2015 certification decision did bear on the decision to detain the claimant at stages 3 and 4 because it directly affected whether and how soon he could be removed. The detention was originally to effect an imminent removal, as it was put in the 28 January 2015 decision letter. The certificate was necessary for there to be any removal prior to appeal (so that appeal did not bar removal and undermine its imminence), as IO Zabardast recognised in the recommendation for the 25 February 2015 detention review. The time frame for removal was an important feature of the detention reviews and informed the decision to detain. *Hardial Singh 3* requires no less. The same decision letter could, in principle, deal with the linked aspects: the decision to deport, the decision to certify under regulation 24AA, and the decision to continue detention in the light of deportation and certification. The link can be seen in the documents. One example is the reference in the Zabardast/Terry detention review of 25 February 2015 to the barriers to removal as excluding the appeal given certification.

iii) I agree with Ms Dubinsky that a misdirection in law, *material to the certification*, would in turn be a public law breach (in the distinct decision) which itself bore on the decision to detain.

iv) As is common ground, there was a misdirection in law in the certification because the question asked and answered by the Secretary of State (in the decision letter as in the relevant guidance) *"focused erroneously on the question of serious irreversible harm and failed to address the statutory question whether removal pending determination of an appeal would be in*

breach of section 6 of the Human Rights Act" (*R (Kiarie) v SSHD* [2015] EWCA Civ 1020 [2016] 1 WLR 1961 at §73(ii), endorsed at [2017] UKSC 42 [2017] 1 WLR 2380 §38).

v) It follows that the critical question is whether the misdirection in law in the certification, which the Secretary of State concedes was present in that decision, was *material to the certification* or whether it is clear from the decision read as a whole and the circumstances of the case that the Secretary of State would lawfully have certified on a correct approach in law.

vi) I agree, on the authorities, with Mr Anderson that the Court can properly conclude that the misdirection was non-material if the Court is satisfied *"that the decision would have been the same if the correct approach … had been adopted"* (*Kiarie* CA at §74, the formulation of which was not doubted by the SC at §38), but with Ms Dubinsky that the Court should not do so where the Court *"cannot say that those acting for the Home Secretary, if they had properly understood their task, would inevitably have concluded that pre-redress exclusion of the [claimant] would not be a breach of s.6 of the Human Rights Act 1998"* (*R (X) v SSHD* [2016] EWHC 1997 (Admin) at §151).

vii) I agree with Ms Dubinsky that the fact that the Secretary of State concluded in the same decision letter that deportation would not breach section 6 of the Human Rights Act 1998 does not of itself mean that lawful certification would follow: the question whether removal prior to appeal is proportionate is distinct, and different considerations arise, and were it otherwise certification would be automatic.

viii) I am quite satisfied that the decision of the Secretary of State as to certification would have been the same, and that those acting for her would inevitably have concluded that pre-appeal exclusion of the claimant would not breach s.6 of the Human Rights Act 1998.

73. As to point viii) above, I have reminded myself of the exacting scrutiny which a judicial review Court can properly apply in the context of judicial review of certification: see *Kiarie* SC at §§43, 47. I have also adopted the inevitability standard adopted in *X* at §151 (§49 above). I have tested the point, reading the decision letter carefully and as a whole and in context, and asking myself what – approached objectively by the Court on the basis of the material that was before the Secretary of State – was the correct conclusion as to whether interim removal would breach section 6 of the Human Rights Act. No more protective approach of the rights of the individual could apply than this.

74. I agree with Ms Dubinsky that there must be justification for what is in nature an interim removal. In *X* at §151 Walker J identified the special nature of regulation 24AA justification for *"pre-redress exclusion"*, commenting that: *"I do not suggest that regulation 24AA can only be invoked where there is a particularly strong reason to certify. However, the factor to be balanced on the other side [is] not the normally very strong public interest in permanent exclusion relied upon as warranting exclusion. It [is] the less strong, although still substantial and important, public interest in temporarily removing [the claimant]"*. This chimes with a point made by Lord Wilson in *Kiarie* at §35, when he identified as *"a public interest in … removal*

in advance of the appeal" the *"risk that, if permitted to remain pending his appeal, the foreign criminal would, however prejudicially to its success, take that opportunity to reoffend".* In *R (Macastena) v SSHD* [2015] EWHC 1141 (Admin) Collins J discussed justification and regulation 24AA-certified *"interim"* removals at §§16-19, commenting (at §17) that he found it *"difficult to see the point of exercising the power"* and (at §19) that *"only … in a case where it can be seen to be … really desirable [should] such power be exercised"* since *"it may be obvious that there is little point in removing someone if it transpires that the appeal in due course is allowed"*. However, in that permission decision with no certified point of principle, Collins J thought the regulation 24AA certificate lawful beyond argument and said he expected it to be *"comparatively rare"* for a claimant to be able to impugn such a certificate as unlawful (§16), the certification power having been conferred by Parliament (§18). I note similar observations about *Macastena* in the Upper Tribunal determination in *R (Masalskas) v SSHD* [2015] UKUT 00677 (IAC) at §42.

75. In addressing the proportionality of the claimant's interim removal, and questions of justification and fair balance, the following seem to me to be the factors of most significance. Removal of the claimant would be for a temporary period, prior to an appeal for the hearing of which he would be able to return. After that appeal, which is to be taken to be properly arguable and not clearly unfounded, the claimant would be able to remain if successful. The claimant was 26 with construction industry skills. His removal prior to the appeal would rupture his links and roots from some 3 years in the United Kingdom. But he would be returning to Lithuania, a country he had left at age around 23, where he had spent his formative years. There was no evidence suggesting any difficulties with language or accessing work there. The claimant had a 12-month-old son with a former partner, and he had told the Secretary of State how important he felt his son was for the future. However, he was not in a continuing relationship with the mother and had been absent from the baby's life for the 8 months he was on remand. The public interest in prompt removal arose from serious criminal conduct and its implications for the future. Although the claimant had no previous convictions, he had taken an imitation firearm with three others to the family home of his ex-partner's new boyfriend, breaking a pane of glass and firing the BB gun in the house, then firing again in the street, shooting the boyfriend in the face with a pellet. The probation service's pre-sentence report spoke of a low risk of offending based on actuarial factors, but also of increased risk if dynamic factors such as anger management issues, poor victim empathy and lack of consequential thinking were not addressed; it also recorded that the offending behaviour suggested a propensity to be violent when threatened and an emerging pattern and capability of violent behaviour. In my judgment based on factors such as these and the picture as a whole, I am left with no doubt that removal of the claimant prior to an appeal for which he could return would have been considered by the decision-maker not to breach section 6 of the Human Rights Act, because on the material before the Secretary of State the public interest in deporting now and for that temporary purpose outweighed the negative consequences for the claimant's private and family life of doing so. Asking myself whether I could have upheld a judicial review claim to such a certification, applying an objective approach to the question of proportionality, I am quite satisfied that I would not have been able to do so. I conclude that the decision on the material before the Secretary of State would inevitably have been to certify under regulation 24AA, and that such certification would have been lawful. It follows that there was no

material misdirection of law in the distinct decision, bearing on the detention, so as to render the detention unlawful on this ground.

(7) Unlawful section 4 refusal: stage 4

76. Ms Dubinksy submits that detention in stage 4 was unlawful because there was a distinct decision, namely the Secretary of State's 16 February 2015 refusal of an accommodation address under section 4 of the Nationality Immigration and Asylum Act 1999, whose unlawfulness (recognised in the consent order of 8 June 2015) rendered the detention unlawful. That is because the section 4 decision bore materially on the decision to detain, as is demonstrated by IO Zabardast's 16 March 2015 refusal of temporary release, absent an accommodation address, *"for this reason alone"*. Mr Anderson disputes this approach absent irrationality in the distinct decision, which he says cannot be inferred from the consent order of 8 June 2015. He further submits that the 16 March 2015 refusal of temporary release was not based on the absence of an accommodation address, when IO Zabardast's letter is read fairly and as a whole, or would inevitably have been the same had there been such an address.

77. On this issue, I do not accept that detention was unlawful on grounds of the unlawful section 4 decision. My reasoning is as follows. (1) As before, I agree with Ms Dubinsky that a breach of public law, not limited to irrationality, in the making of a distinct decision can render the detention unlawful if the nature of the distinct decision and public law breach bear on the decision to detain or continue detention. (2) I agree with Ms Dubinsky that the Secretary of State's 16 February 2015 refusal of a section 4 accommodation address was a decision capable, and the public law breach in that refusal a breach capable, of bearing on the decision to detain the claimant so as to render the detention unlawful, if a decision to detain was based on the absence of an available address. (3) I agree with Mr Anderson that IO Zabardast's 16 March 2015 refusal of temporary release (and so continuance of detention), read fairly as a whole, was not a decision based on the absence of an available address. (4) I also agree with Mr Anderson that the refusal of temporary release in the 16 March 2015 decision would inevitably have been the same, absent the reasoning concerning the absence of a bail address. (5) In those circumstances the question as to what precisely the public law breach was in the 16 February 2015 decision, on which the consent order gives no assistance and which was not argued out before me, does not present a concern. It may or may not have been a public law breach whose nature was capable of bearing on the decision to detain. I do not assume that all public law breaches would have that consequence: *Lumba* is authority to the contrary.

78. My reasons (3) and (4) above are closely linked and are fatal to the claimant's case. By way of further explanation, the thrust of the decision of 16 March 2015 in the *"consideration"* section of the letter was that detention was justified *"on the basis"* of the conclusion "*that your client is unlikely to remain in one place and could not be relied upon to comply with any terms of release at this stage"* and *"that your client would abscond, should he be released"*. The letter in its *"conclusion"* section says the request for temporary release was refused *"for the reasons stated above"* and one *"reason"* which had featured was in this final passage of the *"consideration"* section: *"Your client has failed to provide an address where he will reside in the event of temporary release being granted and has failed to offer any explanation for this omission. In view of this, checks to establish the suitability of a release address have*

been prevented. We submit that unless and until your client nominates an address and that it is checked and found suitable, temporary release should be refused for this reason alone". In my judgment, *"for this reason alone"* meant *'quite apart from everything else'*. That, together with "*we submit"* and the forward-looking focus (*"unless and until … should be"*), shows that this is being referred to as an additional point, not necessary for the decision. I do not read it as a link in the reasoning chain, or a significant strand in the reasoning rope. But even if it is read as part of the basis of the decision, looking at the other reasons and the circumstances of the case as known to the Secretary of State, I am in no doubt that the decision would inevitably have been the same had an address been identified, whether by the claimant or the Secretary of State under section 4.

(8) Hardial Singh 3: stage 4

79. Finally, Ms Dubinsky submits that detention in stage 4 was unlawful as a breach of *Hardial Singh 3* (§17 above), because the judicial review proceedings meant the claimant would not be removable within a reasonable time absent expedition as was recognised by the Secretary of State (IO Holton's review on 23 March 2015), but which expedition was never secured. Mr Anderson submits in response that expedition in the judicial review was a real prospect until 30 March 2015 (when the Secretary of State's acknowledgment of service did not seek it) but expedition was not necessary for compliance with *Hardial Singh 3* as IO Foster justifiably concluded at the 9 April 2015 detention review.

80. I accept that, for part of stage 4 (from 9 April 2015 to 29 April 2015) detention was unlawful on grounds of a breach of *Hardial Singh 3*. My reasoning is as follows.

i) As is common ground, no *Hardial Singh 3* issue arises in relation to stage 3. In particular, that is because the certification decision meant that an appeal would not be a barrier to removal. However, at stage 4 (from 11 March 2015) the circumstances were different because now there was a judicial review challenge to the certification decision, which constituted a barrier to removal.

ii) IO Holton's 23 March 2015 detention review decision dealt, in my judgment wholly convincingly, with the question of prospect of removal within a reasonable time. IO Zabardast's recommendation spoke of 3 months as an expected date of resolution of the judicial review challenge to certification. That time-frame would, in my judgment, have satisfied *Hardial Singh 3*. But it would need expeditious resolution of the judicial review. IO Holton recognised this. He identified the *"need to ensure that this JR is expedited"* so that deportation could *"take place within a reasonable timescale"*, which it could if the judicial review were *"dealt with quickly"*. Expedition was a real prospect at that stage. The acknowledgment of service was due on 30 March 2015. An oral (interim relief) hearing was in due course fixed for 31 March 2015, albeit not a permission hearing, as it was described in the case notes (31 March 2015). I am satisfied that there was that *"need"* for expedition, but there was as at 23 March 2015 the prospect of securing it.

iii) By the time of IO Foster's authorisation of detention at the 9 April 2015 review, the situation had changed. The opportunity had been missed. For reasons which are unexplained, the securing of expedition in the judicial

review had not been followed up. The acknowledgment of service contained no request for expedition, nor were directions sought when the 31 March 2015 interim relief hearing was adjourned. Those circumstances in my judgment meant that it was now apparent, and ought to have been recognised, that removal could not take place within a reasonable time. There was a judicial review of the certification, which was a bar to removal, and its expedited resolution had not been secured. I have been able to identify no satisfactory answer to this.

iv) There is reasoning which is relevant to the point, but I find it unconvincing in the context of the continued administrative deprivation of liberty. The key phrase used in the 9 April 2015 detention review was this: *"pending an adverse decision on the JR it is considered his deportation can take place within a reasonable timescale"*. I am cautious about subjecting a single sentence to penetrating scrutiny, but this is an important point, especially when the previous review had drawn attention to the significance of securing expedition. The reasoning is unsatisfactory and unconvincing. No deportation could take place *"pending"* a decision in the judicial review – those proceedings were a bar to removal. Nor do I consider that a 'wait and see' approach could be adopted *"pending"* judicial review. What was there to 'see'? The judicial review was a bar to removal, proactive steps were necessary to pursue expedition, and the opportunity had inexplicably been allowed to pass by. Deportation could take place *"depending"* on whether the decision on the JR was *"adverse"*, but the *"reasonable timescale"* would then depend on the timescale for final resolution of the judicial review proceedings. That, by now, was not being expedited. The perfect opportunity to do so had come and gone, and no other plan to achieve it was identified.

v) In my judgment it was apparent as at 9 April 2015, in the light of what had gone before and was now the case, that there was no longer a realistic prospect of removing the claimant within a reasonable time for the purposes of *Hardial Singh 3*, which principle was accordingly breached.

81. This conclusion illustrates that *Hardial Singh 3* is capable of providing greater protection than individualised proportionality and necessity under Article 27.2 standards. The reason for that lies in the special nature of *Hardial Singh 3*. That principle protects an individual, even though individualised justification for detention exists and even though the justifiable period of detention for removal has not yet expired, by adopting a particular disciplined focus on the future and asking whether it is now already apparent that deportation could not take place within that justifiable period. That is a very particular safeguard, as I explained in *R (Ademiluyi) v SSHD* [2017] EWHC 935 (Admin) at §5. I see no difficulty in its existence alongside principles of individualised proportionality and necessity, rather than embodied within them. But if I am wrong about that and *Hardial Singh 3* is a component of those standards, then it follows in my judgment, for the reasons which I have just explained, that after 9 April 2015 there was a breach of Article 27.2 standards in the present case.

Conclusion

82. For the reasons which I have given, I find and propose to grant declarations, as follows (using a noon reference point for each date given, so as to avoid overlapping

time periods): (1) The claimant's detention on 27 January 2015 to 28 January 2015 was unlawful for the absence of reasons, but only nominal damages are recoverable. (2) The claimant's detention from 28 January 2015 to 25 February 2015 was unlawful for breach of Directive 2004/38/EC Article 27.2 standards and compensatory damages are recoverable. (3) The claimant's detention from 25 February 2015 to 9 April 2015 was lawful. (4) The claimant's detention from 9 April 2015 to 29 April 2015 was unlawful for breach of *Hardial Singh Principle No.3* and compensatory damages are recoverable.