

**██████████ V SSHD - STATEMENT OF REASONS**

Summary background

1. The Claimant is a Moroccan national. He first arrived in the UK on 23 April 2004.
2. The Claimant was detained on 26 August 2018 under immigration powers pursuant to a deportation order dated 6 June 2017. He was initially detained at Harmondsworth IRC and was later transferred to Morton Hall IRC on 23 July 2019 where he remained until First-tier Tribunal Judge Dempster granted him conditional bail on the 31 July 2020.
3. The Claimant has been convicted of a number of criminal offence including attempted rape and sexual assault (for which he received a 40-month sentence) and theft (for which he received a 1-month sentence). He was subject to a deportation order.
4. On 21 February 2019 the Claimant made further submissions on asylum grounds on account of his bisexuality. The Claimant refused his further submissions on 3 October 2019 but granted him an in-country right of appeal. On 21 November 2019, FTTJ Khan refused the Claimant's application for an adjournment and dismissed his appeal.
5. On 27 February 2020, the Claimant's solicitors filed an application for permission to appeal to the Upper Tribunal against the decision of FTTJ Khan, along with an application to extend time for permission to appeal. On 3 March 2020, Upper Tribunal Judge Mandalia granted an extension of time for permission to appeal and granted the Claimant permission to appeal to the Upper Tribunal on all grounds.
6. On 2 March 2020, Consultant Psychologist Dr. Green issued a report following a face-to-face assessment of the Claimant at IRC Morton Hall on 24 February 2020. Dr. Green diagnosed the Claimant with Post-Traumatic Stress disorder and clinical Depression. Dr. Green's opinion was that *'the detention currently imposed upon Mr ██████████ is detrimental to his mental illness and a contributory factor to his mental ill-health'*. Dr. Green's report was served on the Defendant the same day.

7. This claim was filed on 24 March 2020. The Claimant's case was that his detention from 2 March 2020 was in breach of *Hardial Singh* principles 3 and 2 and in breach of the Defendant's published policy guidance '*Adults at Risk in Immigration Detention*', v.5, 6 March 2019 ('the AAR policy'). The Claimant argued that Dr. Green's report constituted Level 3 evidence that the Claimant was an Adult at Risk within the meaning of the AAR policy and that his detention could not be maintained consistently with that policy.
8. Due to an oversight, the Defendant did not substantively consider Dr. Green's report upon receipt, nor did she review the Claimant's detention in light of his conclusions. On 14 April 2020, nearly 6 weeks after Dr. Green's report was received, the Defendant sought the opinion of IRC Healthcare in relation to Dr. Green's report. IRC Locum Psychiatrist Dr. Patel responded on 14 April 2020 disagreeing with the diagnosis of PTSD but agreeing with the diagnosis of Depression. He did not comment upon whether detention was detrimental to the Claimant's mental health.
9. On 15 April 2020, the Defendant reviewed and maintained the Claimant's detention. The Defendant rejected Dr. Green's conclusions in favour of IRC Locum Psychiatrist Dr. Patel's response and on that basis assessed the Claimant as Level 2 (not Level 3) under the AAR policy. Subsequent detention reviews dated 24 May 2020 and 22 June 2020 also maintained the Claimant's detention.

#### These proceedings

10. The claim for judicial review was filed on 24 March 2020.
11. On 20 April 2020 the Claimant filed amended grounds of review in response to the Defendant's Summary Grounds of Defence dated 15 April 2020 and disclosure on the same date of IRC Consultant Psychiatrist Dr. Patel's response. By those amended grounds, the Claimant challenged his detention from 2 March 2020 on the following grounds:
  - a. Ground 1: The Claimant's detention was breach of *Hardial Singh* principle 3 and/or 2.
  - b. Ground 2: The Claimant's detention was in breach of the AAR policy. Dr. Green's evidence constituted Level 3 evidence of risk under the AAR policy and detention could not be maintained consistently with that policy. The Defendant

unreasonably delayed in considering Dr. Green's report and was not rationally entitled to prefer the response of Dr. Patel to Dr. Green and rely upon it to categorise the Claimant as a Level 2 Adult at Risk.

12. The Defendant defended the claim on the basis that:
  - a. The Claimant's appeal could be resolved within a reasonable period of time such that removal was reasonably in prospect and his detention had not exceeded a reasonable period;
  - b. She was entitled to make enquiries of the IRC healthcare department in respect of Dr. Green's report and was entitled to reject the evidence of Dr. Green in favour of Dr. Patel's response on the basis of alleged 'flaws' in Dr. Green's report and because Dr. Patel's report constituted the most recent medical evidence.
  - c. She was entitled to assess the Claimant as a Level 2 Adult at Risk within the AAR policy and maintain detention on this basis.
  
13. On 21 April 2020, a telephone permission and hearing took place remotely before Mercer J. On 24 April 2020, Mercer J refused permission and refused interim relief in an oral judgment given over the telephone. The Claimant made an application for permission to appeal which was refused.
  
14. On 23 April 2020 the Claimant filed grounds of appeal to the Court of Appeal. On 1 May 2020 the Claimant filed a skeleton argument in support of his application for permission to appeal to the Court of Appeal.
  
15. On 21 and 22 May 2020, following an internal review of a previous decision to decline a request by the Claimant's solicitor under the Freedom of Information Act 2000, the Defendant disclosed previously unpublished guidance to case workers on the approach under the AAR policy to medico-legal reports (MLRs) (the unpublished guidance) and related email chains.<sup>1</sup> The documents disclosed were:

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<sup>1</sup> Email chain June 2018 (Annex 1); Email chain December 2018 (Annex 2); Adults at Risk Returns Assurance Team 'Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions, June 2018 (Annex 3).

- a. The Adults at Risk Returns Assurance Team's 'Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions' guidance dated June 2018;
  - b. An email chain dated June 2018;
  - c. An email chain dated December 2018.
16. These documents provided, *inter alia*, that that where there are no obvious errors in a Medico-Legal report, the doctor's clinical opinion should be accepted and detention reviewed in light of the report's conclusions, even if there is conflicting information from IRC Healthcare.
17. On 27 May 2020, the Claimant filed amended grounds for permission to appeal to the Court of Appeal incorporating a challenge to the Defendant's failure to publish the 'Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions, June 2018 policy.
18. On 29 June 2020, Singh LJ granted permission to appeal and permission to apply for judicial review on all grounds, and remitted the case back to the Administrative Court for a final judicial review hearing.
19. On 11 August 2020 the Claimant filed amended grounds of review:
- a. Ground 1: The internal guidance, *Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions*, June 2018, on the approach to MLRs and Level 3 evidence under the AAR policy should have been published and made publicly available (the unpublished guidance);
  - b. Ground 2: The Claimant's detention was unlawful because it was in breach of the Defendant's published AAR policy guidance and her unpublished policy guidance *'Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions'*, July 2018.
    - i. The Defendant erred in law and/or misapplied the AAR policy in failing to treat and/or in rejecting the Consultant Psychologist Dr. Green's medico legal report dated 2 March 2020 as constituting Level 3 evidence under the AAR policy and in consequence in maintaining the detention of Claimant on or after 2 March 2020.

- ii. The Defendant's application of the AAR policy was unlawful as contrary to and inconsistent with her own internal guidance on the correct approach to *Medico-Legal Reports (MLR) when applying the AAR policy*.
- c. Ground 3: The Defendant erred in law and/or irrationally relied upon Dr. Patel's response in rejecting Dr. Green's report and rely upon it to categorise the Claimant as an Adult at Risk Level 2.
- d. Ground 4: The detention of the Claimant from on or after 3 March 2020 following UTJ Mandalia's grant of permission to appeal to the Upper Tribunal was contrary to *Hardial Singh* principles given that he had already been detained for an unreasonable period of 19 months in breach of *Hardial Singh* principle 2 and /or there was no realistic prospect of removal within a foreseeably reasonably period

20. On 25 August 2020, the Defendant filed Detailed Grounds of Defence in which:

- a. The Defendant concedes that the Claimant was unlawfully detained between 2 March 2020 and 31 July 2020 and is entitled to substantive damages on the basis that Dr Green's conclusion that continued detention would have a detrimental effect on the Claimant's mental health was not displaced by the report of Dr Patel, and that the Claimant should have resulted in the Claimant being categorized as a Level 3 Adult at Risk under the AAR policy at that stage, even if, on receipt of Dr Green's report, the caseworker had initially considered it necessary to consult the Healthcare team.
- b. The Defendant contends that the Claimant's challenge relating to the document 'Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions' ('the ARRAT document') and associated emails should not be entertained in circumstances where: (i) the ARRAT document did not apply to the Claimant's case; and (ii) this challenge is, in any event, academic.
- c. The Defendant contends that even if the Court is persuaded that there are exceptional circumstances for entertaining the academic challenge to the ARRAT document, this challenge should nevertheless be dismissed because: (i) the ARRAT document is not of the quality of policy of the type that requires publication; and (ii) there are further reasons why the ARRAT document did not fall to be published under the *Lumba* principle.

### Reasons for the Order

21. The Defendant has conceded the Claimant's detention between 2 March 2020 and 31 July 2020 was unlawful and that he is entitled to substantive damages for false imprisonment and which have been agreed.
22. On this basis the Claimant has agreed not to pursue all other grounds of the challenge including in respect of the unpublished guidance.
23. The consent order and proposed settlement of the claim is subject to the Court's approval pursuant to CPR Part 54, Practice Direction 54A, para. 17.2-3.