Neutral Citation Number: [2016] EWHC 1217 (Admin)

Case No: CO/5197/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2016

Before :

Mrs Justice Andrews DBE

- -

Between :

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

- -
- -

Shu Shin Luh (instructed by **Duncan Lewis**) for the **Claimant**
Rory Dunlop (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 17 May 2016

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Approved Judgment

Mrs Justice Andrews:

BACKGROUND

1. This claim concerns an individual who was detained under the former Detained Fast Track ("DFT") processes, by which persons whose claims for asylum or humanitarian protection were considered by the Defendant ("the SSHD") to be capable of swift and fair determination were detained and their claims evaluated. The statutory structure for the detention of those claiming asylum, the history of the DFT and the most recent manifestation of the policy for determining the suitability of cases for entry to and management within the DFT were described in some detail in Ouseley J's judgment in *R (Detention Action) v SSHD [*2014] EWHC 2245 (Admin) ("*Detention Action (No 1)*") and need not be repeated here. The SSHD's policy for detention under the DFT was separate from the Enforcement Instructions and Guidance ("EIG") Chapter 55 on Detention, which sets out the SSHD's policy on the general criteria for immigration detention.

2. The DFT detention policy was subjected to a series of significant legal challenges, which ultimately led to its suspension on 2 July 2015. In *Detention Action No 1*, above, Ouseley J was not persuaded that identified shortcomings in the screening process or in the operation of safeguards to ensure that vulnerable persons, such as those who had been trafficked or who had been the victims of torture, were not detained under the fast track, made the policy itself unlawful.

3. The concept of "torture" in the context of immigration detention is a wide one. The meaning of that word in the general detention policy was defined by Burnett J in his seminal judgment in *R (EO and others) v SSHD* [2013] EWHC 1236 (Admin) at para 82 as:

> "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind*."

   The perpetrators do not have to be state agents, as the individual cases considered within that judgment demonstrate.

4. In *Detention Action (No 1),* Ouseley J. concluded that there were a number of remediable deficiencies which together fell short of showing that detention under the DFT was unlawful or that the process carried too high a risk of an unfair decision, thus making it inherently unlawful. However, he found that the policy was being operated unlawfully in one material respect, because those who were vulnerable or potentially vulnerable did not have access to lawyers sufficiently soon after induction to enable instructions to be taken and advice to be given before their substantive interview.

5. After the handing down of the main judgment, Ouseley J heard further submissions about the form of relief that he should grant. In a further judgment handed down on 25 July 2014, [2014] EWHC 2525 (Admin) ("*Detention Action (No.2)*") he explained why he was only prepared to grant a declaration limited to the specific respect in

which the operation of the DFT had been found to be unlawful. He refused to make a wider declaration that the operation of the DFT was unlawful.

6. There was some discussion as to what should happen to cases that had either already been allocated to the DFT, or had been processed using it. Ouseley J said that he did not see it as necessary for all those in the DFT awaiting a decision to be removed from it. A blanket approach that would remove from it many whose decisions were entirely fair, or who could find remedy within the DFT itself, with the improvements underway, was not necessary. In paragraph 7 he said this:

> "the notion of unlawfulness which goes beyond the aberrant individual decision, to cover cases which may not have been remediable within the appellate system, does not mean to my mind that every case now has to be re-examined. The applicant may have had a hopeless case; they may have been advised already to make a fresh claim; the processing of their claim may have been quite fair."

7. Ouseley J made it clear that if an individual was being removed, it was for that individual to raise the point that his claim was processed too quickly for fairness, even though he had not raised the point since in a fresh claim, based on the further evidence which he now had. That fresh claim would have to be based on something more than that the applicant was in the DFT, since the fact that someone has had a case decided in the DFT does not mean that the decision was unfair. There would have to be individualised evidence of a specific effect (my emphasis). In other words, an individual who asserts that his case was wrongly processed within the DFT must show a causal nexus between the failure by Home Office officials to spot its unsuitability during the screening process, and some procedural or other unfairness in the disposal of his application for asylum or humanitarian protection.

8. An appeal by Detention Action against Ouseley J's refusal to grant the wider declarations sought was dismissed: *R (Detention Action) v SSHD* [2014] EWCA Civ 1270.

9. Following the decision in *Detention Action (No 1)*, the process was changed, and lawyers instructed on behalf of individuals claiming asylum or humanitarian protection were afforded four clear days to consider the case and give advice before their client was interviewed. However, that did not assuage concerns about the fairness of the operation of the DFT, particularly with regard to its application to vulnerable or potentially vulnerable individuals.

10. Ouseley J left it open for individual claimants to challenge the way in which the DFT policy was operated in their particular case, and a number did so. In March 2015 two groups of representative lead cases were identified as raising generic issues about the lawfulness of the operation of the DFT processes, and were made the subject of an agreed case management order that they be determined sequentially.

11. The first group of cases raised issues as to (i) the adequacy of the screening process, (ii) whether Rules 34/35 of the Detention Centre Rules 2001 and the policy in Chapter 55.8 of the EIG were lawfully and adequately applied, and (iii) the correct interpretation of the Asylum Process Instruction ("API") on Medico-Legal Reports from the Helen Bamber Foundation and similar organisations. The second group of

cases concerned the compatibility of the DFT with the law relating to human trafficking, the Equality Act 2010, and Article 5 read together with Article 14 ECHR.

12. On the day after the Ministerial announcement that the DFT was being suspended, Blake J granted declaratory relief by consent in the first group of test cases. In his judgment, *R (JM and others) v SSHD* [2015] EWHC 2331 (Admin) he explained how the SSHD's position had changed over time and how on the morning of the hearing, he had been provided with a draft consent order agreed by the parties and an agreed statement in support of it, which demonstrated a further significant shift in the SSHD's thinking. It was now accepted that each of the claimants should never have been placed in the DFT in the first place, and that their detention was accordingly unlawful throughout the time that they were detained there.

13. Whilst acknowledging that the heart of the problem in that case was the application of too rigid an approach to policy, Blake J expressed concerns as to the wording of the order that he was being asked to make. He made the valid point that an order which referred to the operation of the DFT giving rise to "*an unacceptable risk of unfair determinations for vulnerable or potentially vulnerable individuals*" as defined in that order, gave very little objective information as to how such people could be identified. He accepted that the basis of the DFT policy was confined to those whose cases could be decided quickly, and that where detailed further investigation was needed, claimants would be unsuitable for the DFT process. He said that his first thought was that some threshold, such as a reason to believe or suspect that a person may be the victim of ill-treatment or torture, was appropriate, whilst making it clear that it was a process of summary adjudication, but a reflection of the information obtained in the screening process.

14. Despite his reservations, Blake J was ultimately persuaded to make the declarations in the form that had been agreed by the parties. He was persuaded that the draft declarations read as a whole (my emphasis) made it plain that it was by reason of what each claimant had said at screening interview that the decision to place them in the DFT was flawed. He added that the statement of reasons accompanying his order was of importance as indicating the factual basis on which those legal consequences were based.

15. The order that Blake J made declared that the DFT as operated at 2 July 2015 created an unacceptable risk of unfairness to vulnerable or potentially vulnerable individuals (as defined therein) because there was an unacceptable risk of failure:

    i) To identify such individuals and

    ii) Even when such individuals were identified, to recognise those cases that required further investigation (including, in some cases, clinical investigation).

    He also declared that each of the four representative claimants (all of whom claimed at their screening interviews to have been the victims of torture) should have been identified as having a claim that was unsuitable for a quick decision, and that they were unlawfully detained. Moreover the SSHD had acted unlawfully in refusing to accept a Rule 35 Report as indicating that the claim was unsuitable for a quick decision within the DFT, and removing them from the process. Full and detailed reasons were appended, which recorded that the SSHD had accepted that each of the

Claimants was vulnerable, but that despite this, the DFT systems as operated had failed to identify them as such, even though it should have been apparent on screening. The refusals of asylum were withdrawn, and were made subject to reconsideration.

16. The second group of test cases was resolved in a similar fashion. On 20 July 2015 Blake J made declarations in those cases (*PU and others v SSHD CO/678/2015 et al*) to the effect that the DFT processes operated without full compliance with section 149 of the Equality Act 2010 to the extent that certain vulnerable groups were at unacceptable risk of unfairness. In those cases each of the Claimants claimed to have been the victim of trafficking, and one of them also claimed to have been at risk by virtue of his sexual orientation. The decisions refusing asylum were quashed, and in two cases they were directed to be reconsidered after the receipt of further submissions.

17. On 29 July 2015, the Court of Appeal in *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 ("*Detention Action No. 3"*) upheld a declaration by Nicol J that the Fast Track Rules 2014 which governed appeals to the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") against refusals of asylum applications within the DFT were *ultra vires*, structurally unfair and put appellants seeking to challenge asylum decisions of the SSHD at a serious procedural disadvantage. The Master of the Rolls described the rules as "systematically unfair and unjust."

18. In consequence of that decision, in a ruling made on 4 August 2015, the President of the FTT directed that decisions made by the FTT on appeals under the Fast Track Rules 2014 were subject to a procedural irregularity. Therefore, determinations made on such appeals should be set aside in the interests of justice and the appeals re-heard by a different judge.

19. Since the withdrawal of the DFT policy, all immigration detention has been reviewed in the light of Chapter 55 of the EIG. Asylum claimants (including those who make claims for international protection on humanitarian grounds and/or under Arts 2 and 3 ECHR) may only be detained where their detention is consistent with Ch.55. They may no longer be detained solely on the basis that their claim is capable of a quick determination.

20. It is against that background that I have been asked to consider this claim, for which permission to bring judicial review was granted by Collins J on 10 December 2015.

THE FACTS

21. The Claimant is a national of Pakistan. He was born on 2 May 1969 and is now 47 years old. He arrived in the UK on 14 September 2006 on a family visit visa, which expired on 1 February 2007. He claims that the agent who organised his entry by this means took away his passport. He overstayed, but only came to the attention of the immigration authorities on 10 December 2010. He was served with a form notifying him of his liability to deportation and granted temporary release with reporting conditions.

22. On 23 December 2010, a firm named Lawmen Solicitors submitted an application on the Claimant's behalf for leave to remain outside the immigration rules, in reliance on

Article 8 ECHR and his private life in the UK. On 26 January 2011, that application was refused with no right of appeal. Two months later, he failed to report to the authorities, and on 25 May 2011 absconder action was initiated.

23. On 7 March 2012 the Claimant was arrested by the police as an absconder. He was again granted temporary release with reporting conditions, to which he adhered at all material times thereafter. Six months later, on 23 November 2012, Lawmen Solicitors submitted a further application on his behalf for leave to remain outside the immigration rules. That application was refused on 27 August 2013 with no right of appeal. The decision-maker noted that the Claimant had also made a claim for international protection, but that such a claim could only be made in person at the Asylum Intake Unit ("AIU") in Croydon. The letter, addressed to the solicitors, contained information about how to go about making such a claim. In a letter before action dated 28 September 2013, the solicitors said, inter alia, that the Claimant had left Pakistan because of danger to his life from his "enemies", but despite this, no claim for asylum or humanitarian protection was made. He alleges that the solicitors did not tell him that he could make such a claim, let alone how to go about doing so. They sought judicial review of the refusal of his human rights claim, but on 7 February 2014 permission was refused on the papers, and there appears to have been no renewal to an oral hearing.

24. In March 2015, the Claimant instructed a barrister named F. Khan, who appears to be a sole practitioner working from an address in Hounslow, to represent him in making a claim for asylum/international protection. Mr Khan drafted a letter to the AIU dated 6 March 2015 signed by the Claimant in which it was stated, inter alia, that when he was 17 years old, he was involved in a fight with a fellow student at the High School they attended in Lahore. A gun was involved, and three people were shot, one of whom was killed. The Claimant was assaulted (the letter does not make it clear whether this was during the school fight or on a different occasion). He was severely injured, receiving a bullet wound in the right side of his chest, a nasal fracture and broken teeth, of which he claimed to have photographic evidence. He said that if he were to return to Pakistan he feared being tortured or killed by the family of those people who were injured by the gunmen who shot, killed and injured several people during the school fight. The reason for this is that they mistakenly believe that he was responsible. He said that he could not go to Pakistan as the police would not be able to protect him: "*I will be found wherever I go in Pakistan, even if I go into hiding because the people who are after me are very powerful.*" He said he had photographic and medical proof of his injuries. Reference was made to Articles 2 and 3 ECHR in this context.

25. He also said that he suffered severely with his health, that he had kidney stones, a cyst on his liver, bladder problems, and what he described as a severe pain in his left loin. He also said that he was on medication for depression. He claimed that if he were to be returned to Pakistan he would not receive the medical treatment that he could receive in the UK, because he could not afford to pay for it. He claimed that for that reason also, it would be a breach of Art 3 if he were returned to Pakistan.

26. The internal computer records kept by the AIU in respect of the Claimant contain entries dated 11 and 19 March 2015, both of which also include "memory loss" amongst his claimed medical conditions. Although there is no reference to memory loss in the letter of 9 March, other documents disclosed by the SSHD indicate that a

telephone call was made to the AIU on 11 March, which explains where this additional information came from.

27. The first entry on the Home Office GCID case record sheets relating to the Claimant indicates that his screening interview was set for 9am on Thursday, 19 March 2015. At that stage, the case had been accepted into the non-detained asylum routing process. The purpose of the screening interview was to glean information from which it could be ascertained whether or not his claim was suitable for the DFT. Another entry made on 19 March 2015, apparently before the screening interview, stated that the case had been assessed as potentially suitable for the fast track process, but the NAAU were currently not accepting any AIU cases due to bed restrictions. However, there is no evidence that the absence of an available bed played any further part in the determination of the route by which this claim was to be processed.

28. On 19 March 2015, the Claimant's screening interview took place at the AIU. An Urdu interpreter was present. Apart from his kidney and bladder problems and depression, he said that he had hearing problems and suffered from asthma and nosebleeds. He described his prescribed medication. When asked what his reason was for coming to the UK he said "*I had problems with people in Pakistan. I was shot in the chest, and stabbed in both my arms, three teeth were knocked out and my nose broken."* When asked when this happened, he said he was shot in 1998 and beaten up and stabbed in 2005. When asked why, he said "*they were asking me for money and things. One day I was going somewhere and the gangsters shot me. In 2005 I was kidnapped by 4 people and beaten up*". He said they kept him for 2 days but he escaped when three of them had gone out and one was asleep. He added that the gangsters had killed 20-25 people and one of his friends. He said they sent letters to his house in Pakistan even after he left.

29. The Claimant said that he did not know about asylum when he first arrived at the airport, and explained that it had taken him so long to claim asylum because "*I asked a couple of people and they said don't claim asylum*". When asked if he had any documents or evidence in support of his application he said "*I will submit through my Barrister*". When asked if there were any reasons why his claim might not be suitable for being decided quickly, in 10-14 days, and why he should not be detained for a quick decision in the detained fast track, he said "*I don't know, it is up to you*." I was told by Mr Dunlop, who appeared on behalf of the SSHD, that those two specific questions were added to the list of questions on the screening interview form following the decision in *Detention Action (No 1).* The fact the Claimant answered them in the manner in which he did indicates that he was not sufficiently cognizant of the process to appreciate what he was being asked and what sort of information would be relevant to that decision. A person who had received proper legal advice about his claim would not have answered in that way.

30. Following that interview, the case was accepted into the non-detained asylum routing process, and the Claimant was granted temporary admission, again with reporting conditions. The GCID case record sheet contains an entry on 19 March 2015 which was plainly made after the screening interview had taken place. That entry unambiguously states "NAM (National Asylum Model) routed – subject not suitable for DFT." That means that a decision was taken on the basis of the information provided at the screening interview that the matter would proceed on a normal timetable and the Claimant was to be dealt with in the community and not to be

detained. The special needs conveyed to those responsible for managing his claim by the referring officer were kidney problems, asthma, memory loss, and depression. He was to continue to report to Eaton House. A note to that effect was made on the case record sheet on 23 March 2015.

31. Despite this, and in circumstances that the SSHD has produced no evidence to explain, a subsequent note on the case file dated 28 April 2015 recorded that the Claimant was potentially suitable for DFT and that he would require a mitigating circumstances interview to establish if he was still suitable for it. The note directed that when the Claimant next reported, the NAAU should be contacted after conducting the mitigating circumstances review for the case to be assessed for possible detention. A similar note was made on the records on 8 May. The reasons for this *volte face* are not recorded.

32. On 18 May 2015, when the Claimant next reported to Eaton House, what was described as a "change of circumstances" interview was conducted. The Claimant said he was staying in a house offered by a friend from the mosque. A note was made of all of his medication. A form was completed which identified "medical problems/concerns" as the only potential risk. The matter was referred to an unidentified individual who decided (for reasons that are not recorded) that the case was considered to be suitable for the DFT if the Claimant could be transferred to Harmondsworth detention centre. He was detained on the same day. The notice he received setting out the reasons for his detention gave one reason only, namely: "*on initial consideration, it appears that your application may be one which can be decided quickly*." Yet that appears to have been the opposite of what was concluded on initial consideration of the Claimant's responses to questions at the screening interview and other relevant materials available to the SSHD. There had been no material change of circumstances relating to the Claimant himself or to his claim in the intervening period. Mr Dunlop very fairly did not seek to argue that there had.

33. After the Claimant was detained, Mr Khan, his barrister, apparently rang the AIU to say that he was going to send in an application for bail, but that did not happen. In a witness statement dated 5 May 2016, to which the SSHD has objected but which I have read *de bene esse*, the Claimant said that this was because Mr Khan had wanted more money from him.

34. On 19 May 2015 the Claimant was examined by a healthcare assistant, who indicated that he spoke poor English and that he had said he was suffering from depression. On the following day, he was examined by a doctor, who noted the problems with his kidney and his bladder (occasional blocking of urine) which was said to have been a problem for the last three years, as well as his depression. His note reads: "*Plan: adv[ised] to get medication"*. On 21 May, which was when he was transferred to Harmondsworth, an appointment was made for the Claimant to see a GP the next day, 22 May. That doctor, who had more information about his medical history, diagnosed renal colic. He prescribed night sedation for a week, and noted the need to chase his GP records urgently, including hospital results/discharge letters. He referred the Claimant to a mental health practitioner for depression and anxiety. Unfortunately, it took some time before he could obtain an appointment.

35. The Claimant's induction into the DFT process took place on 26 May 2015. The section of the form completed at the induction interview which asks the question "Are

there any other factors known about the case that render it unsuitable for the DFT process?" was answered "no". The induction interview appears to have been carried out in Punjabi, rather than Urdu, which is the Claimant's first language, though there is some information to suggest that he does understand Punjabi. The Claimant indicated that he wished to instruct a firm of solicitors named GK Legal Associates privately, and provided their telephone number. He explains in his witness statement that a friend had recommended that firm to him, and that he had to pay the barrister Mr F. Khan £500 to transfer the file to GK Associates. However, the lawyer at that firm who was supposed to be handling the matter, a Mr Kale Khan, never came to visit him in the detention centre and the Claimant tried, but was unable to contact him by telephone to find out what Mr Khan could do to help him.

36. The Claimant's substantive interview took place on 8 June 2015. Mr Khan of GK Legal Associates was not present. Ms Luh, who appeared on behalf of the Claimant, referred to the court to Section 5 of the SSHD's policy entitled "Detained Fast Track Processes – Timetable Flexibility" which specifically addresses the scenario where a named legal representative fails to attend the interview. Paragraph 5.1 provides as follows:

> "*If a legal representative is properly notified of an asylum interview but fails to attend, the case owner must attempt to make contact with the appropriate legal firm to ascertain the reason for non-attendance.*
>
> *If the legal representative's non-attendance is due to problems unrelated to the applicant, the situation must be fully explained to the applicant, who must then be offered the options of either conducting the interview without the legal representative, or of delaying the interview (taking into account the reason and the need for reasonableness and fairness), but normally for no more than two working days."*

There is no indication of what would count as a problem "unrelated to" the applicant, or of how the failure of a privately funded solicitor to turn up because he was not going to be paid for his attendance would be treated within the policy. However the overriding concern identified is one of reasonableness and fairness, and that must depend on the facts and circumstances of the particular case.

37. There was no evidence adduced by the SSHD that the procedure mandated by the policy was followed. However, the claimant's witness statement describes what happened in these terms:

> "*When I attended my substantive interview on 8 June 2015, the Home Office interviewing officer asked me where my legal representative was. I told them I did not know. The Home Office called Kale Khan and spoke to him. I do not know what was said because they talked in English which I could not understand. I also spoke to Kale Khan who told me he was not attending.*
>
> *After my substantive interview, I tried to call Kale Khan at GK Associates several times. He insulted me on the phone and he did not provide me with any legal advice.*"

38. If that is an accurate account, the Claimant was not given the option of delaying the interview or getting alternative legal representation, for example from the duty solicitor. No evidence has been adduced to explain why it was that the interview went ahead in the absence of the lawyer. I cannot speculate, let alone speculate in the SSHD's favour, about any view that was formed at the time about whether it was the Claimant's informed choice to be unrepresented. However, it should have been apparent to the interviewing officer that this was not a case where the applicant was deliberately dispensing with the services of his lawyer, or had made a fully informed choice to be interviewed without one. If he did not know where his lawyer was, he was plainly not expecting the lawyer to be absent.

39. Regardless of whether there was a failure to follow the policy by going ahead with the interview then and there, the records of the interview indicate that it should have become obvious within a relatively short time that the process could not be fairly conducted on that day. The interviewer was concerned enough to make a note on the final page of the interview notes, recording that the Claimant was having problems in understanding the questions – possibly due to his hearing problems – and that most questions needed to be repeated. The note also records that the Claimant also spoke very fast *and in a confusing manner* at times, and the interpreter had to ask him to repeat himself. In those circumstances, there had to have been some doubt as to whether he really understood what he was being asked, and whether his responses were being fully and accurately recorded.

40. This is reflected in the record of the specific questions and answers; for example, questions 54 and 150 had to be repeated; question 60 was repeated twice. When he was asked question 127, the Claimant interrupted with an unrelated answer and had to be drawn back into the line of questioning that was being pursued. When asked about the address of a house he lived in at one time in Pakistan, he said "*I forgot the house number, it's with the solicitor.*"

41. When he was asked whether the contents of the screening interview had been read to him in a language he understood, the Claimant said "*the solicitor took the papers from me but he never read back to me.*" That answer alone should have alerted the interviewer to the possibility that the Claimant had not been properly advised. There was little point in asking the question if a negative response made no difference. In another answer he referred to documents he had given to Lawmen Solicitors but nothing was asked to ascertain who they were, though the name was different from that of his current legal representatives. It may be that some confusion arose because of the name of the firm. Be that as it may, none of the questions he was asked managed to elicit from him the fact that he had instructed three different legal representatives at different times, and the first solicitors were still holding on to a file of relevant documents.

42. There was one occasion where the Claimant was recorded as becoming emotional, and being offered a break, which he declined. A two-minute break is recorded from 12.35 to 12.37, when question 101 was asked; again this appears to have been precipitated by concerns about the Claimant's health, because he was asked afterwards if he was well enough to continue. After question 125 was asked, several pages later, the record states "lunch break 11.55 resume 2.15". The first of those times must be a mistake if the 12.35-12.37 entry is correct. If the lunch break began at 12.55, he had a break of an hour and 20 minutes; but if it was at 1.55 (which seems

more likely in the light of the substantial number of questions asked and answered via a translator after the questioning resumed at 12.37) it was only a 20 minute break. On any view, the interview process took well in excess of four hours and that was the only break of any significant length.

43. In his interview, the Claimant said that his kidney problems and his depression had started in Pakistan. He accepted that medical treatment was available for those problems there. He gave an account of the various places in Pakistan in which he had lived at various times. He named four people with whom he said he had a feud, including a man named Akbar Jutt. He described them as "gangsters" although they did not have a gang name. He said that they shot him, broke his nose, cut his arm and struck him on his knee with a rod, which caused an injury requiring stitches. He said the dispute with them was about land which he owned and which they wanted to be transferred into their name. The land had subsequently been transferred out of his name by his brother, who had severed all links with him, but they were still harassing his brother and sending letters to his family trying to find out where he was. He knew this through his sister, who had kept in touch with him.

44. He said that Akbar Jutt and his associates beat him up (or attacked him physically) on four separate occasions, in 1985, 1998, 2004, and 2005. His knee was smashed up in 1985. He said that they knocked on his door and pulled him out to force him to go to their place of residence, and when he refused to go, they beat him with a rod which split his knee. He had to go to hospital and have the wound stitched.

45. There was no further trouble until he was shot in the chest in 1998 when he was on his motorbike, and he had to go to hospital for an operation. There were two people on another motorbike which pulled in front of him; they were wearing helmets, but he recognised them. The man who shot him was Akbar Jutt. A crowd gathered, and the attackers escaped. He stayed in hospital for 7 to 8 days. He named the surgeon who performed the operation on his chest.

46. The claimant said he was beaten up in 2004 by all four of them; his nose was smashed and three of his teeth were broken and he had to go to hospital for two days. After he moved to Peshawar in 2005 he was beaten up again in front of his friend Nadeem Rana's family.

47. A little later in his interview, he said that in 1986 he was shot at and escaped, but three bystanders were injured, one of whom died. He named those three people. He said that he went to court and was acquitted of any wrongdoing because the people who were injured said he was not the person who fired at them; the people who had accused him of being the gunman were Akbar and his three associates who were "collaborating with the police". He said he did not know why his accusers did not attend the court. He named the lawyer who represented him in that court case.

48. When he was asked about whether he had reported the attacks upon him to the police, the Claimant said he did report the 1998 shooting when he was in hospital, but that the police did not arrest the perpetrators. He said that when they found out he was still alive, three people had come looking for him in hospital armed with pistols/guns, and that the doctor told him afterwards that he had told them the Claimant was no longer there. The Claimant said the police never even raised a FIR (a type of arrest warrant

in Pakistan) against his attackers, and that he went back 4 or 5 times with his brother to follow the matter up but the police paid no attention, they would not listen.

49. When he was asked whether he could return to Pakistan and report the matter to the police, he said that the gangsters had shot dead two of his other friends, but the police never arrested anyone for the shootings. He said that the members of the gang had political affiliations to "whichever government comes".

50. He confirmed that his solicitors had copies of all of the documents on which he sought to rely, but it was unclear from his responses which firm he was referring to. On 9 June 2015, the day after the substantive interview, GK Legal Associates provided the Home Office with further documents, but the Claimant says that they did not obtain his file from Lawmen Solicitors. An email from Mr Kale Khan to the relevant caseworker indicates that the documents he sent were medical reports and evidence of injuries. GK Legal Associates were contacted by telephone on behalf of the SSHD on 10 June, and confirmed that they had provided all the evidence they intended to provide.

51. On 12 June 2015 the Claimant's claim for asylum or international protection was refused and certified as clearly unfounded. The decision-maker treated the claimant's account of having been attacked in the past by four "gangsters" as a truthful one. However, she concluded that the reason given for a well-founded fear of persecution did not fall within the refugee convention, therefore he did not qualify for asylum. At that stage, the information provided by the Claimant indicated that the "gangsters" were not agents of the state, but private individuals. So far as the claim for international protection was concerned, she considered the ability of Pakistan to afford protection, by reference to the guideline case of *AW (sufficiency of protection) Pakistan* [2011] UKUT 31 (IAC) and held that there was a sufficiency of protection available.

52. After this decision, the SSHD maintained the claimant's detention applying chapter 55 of the EIG, taking into account, amongst other matters, what was described as "the high risk of his absconding" given the imminence of removal. This decision appears to have been taken notwithstanding his recent good reporting record, and the fact that removal directions had not yet been set. His medical conditions were considered to be manageable within detention.

53. After the DFT procedure was suspended on 2 July, the Claimant's case was ostensibly reviewed on 6 July 2015 by the National Removals Command to consider his ongoing detention and any unfairness that he may have suffered as a result of his application being processed within the DFT. A standard form letter was sent to him dated 7 July 2015 which stated that, having reviewed all the information on his file, it was considered that his claim was properly considered and that he had suffered no unfairness as a result of his application being processed whilst being detained. No documents have been disclosed by the SSHD pertaining to the alleged review, so the court is none the wiser as to what matters were taken into consideration in reaching that conclusion.

54. On 6 August 2015 a Rule 35(3) report was made in respect of the Claimant, recording concerns by a medical practitioner who had examined him that the Claimant may be a victim of torture. The report was considered by the SSHD on 10 August 2015, but the

decision was made to maintain the Claimant's detention on the basis that the report did not contain independent evidence of torture. The SSHD pointed to the fact that the report was based upon a factual account given by the Claimant which she regarded as being wholly inconsistent with what he had said at his previous substantive asylum interview. In any event, the decision to turn down his claim had not been based on a lack of credibility, but rather on the basis that there was a sufficiency of protection and (so far as relevant) a reasonable opportunity for internal relocation.

55. Once an emergency travel document had been obtained for him, the Claimant was made subject to removal directions, which were cancelled after Whipple J granted interim relief on 27 October 2015. By then, the Claimant had finally managed to secure proper legal representation, after being referred to his current solicitors by the Helen Bamber Foundation on 15 October. Public funding was secured on 26 October. He was finally released from immigration detention on 16 December 2015 on conditions of residence at a specified address and reporting every four weeks.

56. He has since been examined by an independent clinical psychologist, Dr Thomas, who has diagnosed him as suffering from significant symptoms of psychiatric disorder consequent on the experience of cumulatively traumatic life events. Those symptoms include a very short attention span, short-term memory loss, an inability to concentrate, and a failure to respond to the question that was asked, instead either responding to a completely different question which had not been asked, or a repetition of his answer to the previous question. That description is consistent with some of the features of his substantive asylum interview to which I have already alluded.

57. He has also been examined by Dr Juliet Cohen, who specialises in the examination of victims of torture, domestic violence, and trafficking. She has produced a report which, together with the report of the psychologist, forms part of a body of evidence that his current solicitors have placed before the SSHD. However, they are still in the process of trying to obtain the file from Lawmen Solicitors.

WAS THE CLAIMANT UNLAWFULLY DETAINED?

58. It is important to bear in mind that there are two different classes of case that were inappropriate for fast-tracking, and that screening officers should have been seeking to identify cases falling in either or both of these categories so that they could be eliminated from the DFT.

59. The first class comprises claims for asylum or humanitarian protection which, by reason of their nature or complexity, could not be dealt with fairly in the fast-track process, which was designed for straightforward and simple claims which could be assessed and disposed of fairly within a short timescale of around 1-2 weeks. This class will include cases where it was foreseeable that further inquiries were necessary to obtain clarificatory or corroborative evidence without which a fair and sustainable decision could not be made, and where it was not possible to foresee that those inquiries could be completed within about two weeks, see *R(JB) (Jamaica)* v *SSHD* [2014] 1 WLR 835, [2013] EWCA Civ 666 at [22].

60. The second class comprises claims made by claimants who were actually or potentially vulnerable (in the sense defined in *JM*) many of whom, in accordance with

the SSHD's general policy under the EIG Chapter 55, would not have been regarded as suitable for detention at all, let alone within the fast track, save in very exceptional circumstances. Of course claims brought by such persons may well be of a nature which would make them unsuitable for fast-tracking in the first place, and often will be; but that is not necessarily always the case. Thus a claim which, if brought by someone else, might well have been properly assessed as suitable for the DFT would not be suitable if the person making it was vulnerable or there was reason to suppose that he or she might be vulnerable.

61. The assessor, however, has to make that evaluation on the basis of the information that is available at the time of the screening interview, or the substantive interview, as the case may be. A person cannot claim that he or she was wrongfully detained by reason of information that they failed to volunteer in interview or in correspondence, and that would not be apparent to the person asking the questions. The SSHD's officers cannot be expected to know, for example, that a legally represented claimant has been receiving poor legal advice, unless he says something to raise concerns in that regard or to give rise to a reasonable train of further inquiry. In the two groups of test cases, *JM* and *PU*, the SSHD conceded liability because each of the individuals concerned had said enough in their screening interview to have triggered a requirement to eliminate them from the fast-track.

62. The question whether that should have happened in any given case depends on the evidence relating to that case and the individual applicant. My conclusions with regard to this case turn on its own peculiar facts, and are not to be regarded as setting any precedent for the future.

63. The question I have to address is whether the Claimant's claim should have been identified as unsuitable for speedy determination on the basis of the information known to the SSHD as at the screening interview or, failing that, on the basis of the information that emerged at the substantive interview.

64. Mr Dunlop submitted that the Claimant's claim, as presented to the screening officer and on substantive interview, was rightly assessed as one which was capable of a quick decision, applying the guidance in the DFT policy, paragraph 2.2. It was plainly not a claim for asylum because it was not of a nature falling within the Refugee Convention: the perpetrators of the violence were alleged to be gang members; the nature of the underlying dispute was private; and the last alleged incident of violence had occurred several years ago. Therefore this was a claim for humanitarian protection and the critical issue was always going to be whether there was sufficiency of protection in Pakistan.

65. Since it was incumbent on the Claimant to prove insufficiency of protection, and since he indicated that he or his lawyers had all the documents on which he wished to rely (and the lawyers subsequently confirmed that they had handed over everything) it was plainly capable of swift determination, and there would be no unfairness to him if it were expedited. That type of case, said Mr Dunlop, was a paradigm example of one that was suitable for fast-tracking. It appeared likely that no further enquiries would be necessary, and on the face of it, the claim was likely to be certified as "clearly unfounded" under s.94 of the Nationality, Immigration and Asylum Act 2002. Some or all of the factors referred to under paragraph 2.2.1 were also present, because the Claimant had taken a very long time to claim asylum and had only done so after

making two unsuccessful applications through lawyers for leave to remain on Art 8 grounds.

66. Mr Dunlop submitted that the SSHD could not have been aware that the Claimant had been ill-served by his previous or current legal representatives and there was nothing to put her on notice of any deficiencies in his legal advice. So far as her officials were aware, on the information before them, the Claimant had instructed lawyers far more than four clear days previously to assist him with his claim for international protection, and there was no reason for the SSHD to go behind that and assume that he would need more time. As to the Claimant himself, there was nothing about him or what he said at screening that would have led to his being identified as vulnerable or potentially vulnerable. His medical problems, including his depression, were all susceptible of being dealt with within detention, as indeed they were.

67. Ms Luh understandably placed heavy reliance on the absence of any record of the reasons why someone had decided that this case was suitable for the fast track, when the opposite conclusion had been drawn immediately after the screening interview. There was no note to say, for example, that it appeared likely that it would be certified under s.94. The reasons for detaining someone in immigration detention must be recorded, and in this case they were not. No explanation has ever been given for the assessment that this case could be dealt with fairly within the fast-track timescale and there was nothing on the face of the internal documents to assist in determining why the decision-maker reached that conclusion.

68. Ms Luh also contended that a case in which sufficiency of protection may turn out to be the key issue is self-evidently unsuitable for quick determination because enquiries about that are necessarily fact-sensitive. They must be tailored to the individual circumstances described by the applicant, and expert evidence may be required, so one could not reasonably expect all the necessary and relevant information to be gathered and available in two weeks. She pointed out that counsel for the SSHD had told the Court of Appeal as long ago as 2004 that those with a case which can be seen on presentation to be unsuitable by reason of its complexity are kept out of the DFT, and those applicants whose age or medical condition makes the fast track inappropriate are also kept out of it: see *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481 at [11]. The policy itself identifies as unsuitable those who clearly lack the mental capacity or coherence to sufficiently understand the asylum process and/or cogently present their claim. If medical evidence is unavailable, officers must apply their judgment as to an individual's apparent capacity.

69. Ms Luh submitted that the Claimant plainly did not have the ability to present his claim in a coherent manner, as appears to have been recognised by the person who conducted the substantive interview. There were also concerns about whether he understood the questions, but no serious attempt was made to ask follow-up questions to make sure that he did. The DFT policy mandated, in paragraph 3.3.1, that follow-up questions must be asked and documented where relevant to the suitability policy, and stressed that it is vital to obtain and consider relevant information where it can reasonably be obtained in a screening setting.

70. Ms Luh pointed out that the time at which an individual became aware that he could claim asylum/humanitarian protection is a vital inquiry, because he could not be expected to have obtained evidence to support a claim which he did not know he

could make. It was also relevant to know what steps he had taken to obtain legal advice, and with what results, since without that information it was not possible safely to conclude that there was no real prospect of his obtaining supporting evidence if further time were made available to him: see *R(JB)(Jamaica) v SSHD* (above) at [30]. She submitted that the questioning was deficient in this regard. This was a case in which it was, or should have been obvious that the Claimant could not cope fairly without legal support and that the solicitors he had instructed were not helping him to understand the process or to understand what he needed to do in order to present his application fairly.

71. I do not accept Mr Dunlop's submission that a claim for humanitarian protection which was likely to stand or fall on the sufficiency of protection by the home state is a paradigm example of the type of claim that was suitable for the DFT, but equally I do not accept Ms Luh's diametrically opposite submission that a claim of that nature would automatically fall to be excluded from the DFT because of its innate complexity. The assessment to be carried out depends on the particular facts on which the claim for protection is based. The question whether there is sufficiency of protection will be tailored to those specific facts. It is impossible to say that all cases of that type were either obviously suitable or obviously unsuitable for the DFT.

72. It is crucial not to evaluate matters in the light of hindsight, and I have not done so. However, despite Mr Dunlop's valiant attempts to defend the SSHD's stance, and regardless of the merits or otherwise of the Claimant's claim for protection, (about which I deliberately make no comment) in my judgment it should have been obvious that this Claimant should never have been detained in the DFT. Indeed it appears that it was obvious. The peculiarity about this case is that it is not an example of one in which the operational failures of the screening process identified in *JM and others* led to an applicant not being identified as vulnerable when he should have been. On the contrary, the screening process initially worked as it was supposed to and the claim was rightly excluded from the DFT. What went wrong was what happened thereafter, the reversal of that assessment, for which there is and can be no rational explanation.

73. Notwithstanding that the Claimant's claim, has (to put it neutrally) evolved somewhat over time, in my judgment there was more than enough information in the letter of 9 March 2015 and the contents of the screening interview to alert the screening officer to the fact that this claim was not straightforward and that it could not be dealt with fairly in 1-2 weeks, irrespective of the Claimant's own presentation. In any event, even if that had not been the case, there was more than enough material at that stage to give rise to concern about the Claimant himself such as to warrant deciding that this case was manifestly unsuitable for the DFT. Although he was not using the word "torture" he was claiming to have been seriously physically ill-treated, either as punishment for something that he did not do, or to extract payment from him, or both. He did refer in the letter to the police being unable to protect him. The claim to be at risk of violence on return was not an obvious recent fabrication, because it had been included in an earlier application for leave to remain. He was not only taking medication for depression, but suffering from memory loss, quite apart from his other medical conditions. He did not appear to have much idea of what the process of claiming asylum entailed or of what information he should supply to enable the screening officer to decide if his case should be fast-tracked.

74. Even if there had been some good reason to detain the Claimant in the DFT following the initial screening interview, contrary to the initial assessment, what happened at the substantive asylum interview put the unsuitability of this case for determination using the fast track process beyond doubt. There was, at the very least, room for concern as to whether he was voluntarily dispensing with the attendance of his lawyers. The Claimant was clearly having difficulties in understanding what he was being asked, in concentrating on the questions, and in giving a coherent account to the interpreter. Whatever the cause of those difficulties may have been, fairness dictated that the interview should have been stopped. He was plainly not a malingerer; quite apart from the confirmation of his various ailments, including his depression, for which he was taking prescribed medication, there was some medical documentation to corroborate his account of being hospitalised after a severe beating in 2005. More documentation was said by him to be in a file with a different firm of lawyers to the ones he was now instructing, but that piece of information was not picked up or acted upon.

75. Had the Claimant not been detained when he was, the adverse decision on his claim would not have been made when it was, and he would not have been detained thereafter under Chapter 55. This makes the whole period of his detention unlawful. There was therefore no need for me to hear argument about the supposed "review" of his situation in July 2015 in the wake of *JM and others* (which is undocumented apart from the standard form letter he received) or the failure by the SSHD to respond positively to the Rule 35 report in August 2015. However, there is no evidence from the SSHD that the issue of his vulnerability has ever been properly addressed at any stage during his detention, despite the fact that the person who decided his claim assumed the truthfulness of his account, and therefore assumed that he had been the victim of torture in the sense defined in *EO and others*. The fact that his claim was rejected on grounds of sufficiency of protection in Pakistan is irrelevant to the question whether he was vulnerable, or potentially vulnerable, and thus whether it was in accordance with policy that he be detained at all. Logically, an assumption or acceptance that he was telling the truth about his ill-treatment should obviate the necessity for independent medical evidence to corroborate that account, before releasing him.

76. In any event, the Claimant would never have been detained after 12 June 2015, had it not been for the unlawful decision to detain him in the fast-track on 18 May 2015. He is therefore entitled to a declaration that he was wrongfully detained, and to damages for the whole period of his detention. There is no period within the overall timeframe where those damages would be nominal.

SHOULD THE DECISION MADE ON 12 JUNE BE QUASHED?

77. It does not necessarily follow that because the decision to detain the Claimant was unlawful, any decision made in consequence is to be treated automatically as a nullity. Mr Dunlop relied on the decision of Cranston J in *Mulvenna and Smith v Secretary of State for Communities and Local Government* [2015] EWHC 3494 especially at [68] –[71]. He submitted, and I accept that fresh evidence post-dating the refusal could not justify a consideration *de novo*. Mr Dunlop submitted that, as Ouseley J had intimated in *Detention Action (No 2)* the appropriate course would be to allow the adverse decision to stand, and for the SSHD to treat any further submissions and evidence tendered on the Claimant's behalf as a fresh claim made under Paragraph 353 of the Immigration Rules. In practical terms, he said, this would make no difference to the

Claimant because the SSHD still has to make a holistic assessment of all the information about his claim as it currently stands, to see whether it stands a real prospect of success. A refusal of asylum under Paragraph 353 would generate an in-country right of appeal; a refusal to accept the claim as a fresh claim would be susceptible to judicial review, see *R(JN) v SSHD* [2013] EWHC 1842 (Admin) at [33].

78. However, Ms Luh pointed out that in such circumstances, the Claimant would be required to overcome the initial threshold for fresh claims set out in Paragraph 353, and that this could enure to his disadvantage. In order to qualify as a fresh claim the submissions must be "significantly different" from the material that has previously been considered. She also relied upon what was said by Sedley LJ in *R(Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481 at [15], in answer to the submission that a right of appeal cures any deficiencies in the intial decision-making process:

> "*First of all, an applicant is entitled not only to a fair appeal but to a fair initial hearing and a fair-minded decision. Secondluy, and perhaps more important, the consequences of the risk… may very well not be susceptible of appeal. If the record of interview which goes before the adjudicator has been obtained in unacceptably stressful or distressing circumstances, so that it contains omissions and inconsistencies when compared with what the applicant later tells the adjudicator, the damage may not be curable"*.

79. In my judgment, it would be inappropriate to allow the decision to stand. A right of appeal or to bring a further claim for judicial review is no answer to the harm caused by the deficiencies in the decision-making process. This Claimant has never been afforded a fair opportunity to put forward his claim, and I have grave concerns about whether he was truly in a fit state mentally to undergo the substantive interview, especially without a lawyer being present. If the unlawful decision had not been taken to switch his case to the DFT, and the matter had been left to be dealt with as was appropriately determined by the original decision-maker, then the evidence on which he now seeks to rely is likely to have been obtained before the decision on his claim for protection was taken. Moreover, it is less likely that his substantive interview would have suffered from the multiple deficiencies that have given rise to concerns about whether he really understood what he was being asked, though I appreciate that his current legal team are not finding it easy to take his instructions. Fairness dictates that the matter should be evaluated completely afresh. Ouseley J was not purporting to set out a rule of general application, nor was he addressing this particular type of case. I am not purporting to set out a rule of general application either. My view is based solely on the particular facts and circumstances of this case.

80. In the course of argument it appeared to me that the real issue of concern to both parties was the extent, if any, to which the SSHD should be entitled to rely on answers given by the Claimant in his previous interviews, especially if inconsistent with what he is now saying. Mr Dunlop asked rhetorically why the SSHD should be deprived of carrying out a comparison between earlier and later accounts given by the Claimant when assessing his credibility. If there had been no concerns about the reliability of his interview that would have been a fair point. However, Sedley LJ's observation in the *Refugee Legal Centre* case resonates strongly in the present case, at least so far as the substantive asylum interview is concerned. At the end of the day, if there is a real risk of an unfair outcome resulting from reliance on information produced in

consequence of the adoption of an inappropriate and unfair process, then that information should be excluded from consideration. It seems to me that that, whatever might be the position in other cases, that risk exists here.

81. In all the circumstances, it would be difficult to justify placing any weight at all on what was said by the Claimant in the substantive asylum interview – one cannot be sure that he understood what he was being asked or that the interpreter had managed to accurately convey his responses to the questions. Quite apart from the circumstances in which it took place, and the difficulties recorded by the person asking the questions at the time, there is no way of knowing to what extent being detained in and of itself had an adverse impact on this Claimant's cognitive abilities.

82. There is, of course no good reason to require the SSHD to ignore what was said in the letter of 9 March 2015, which reflected instructions apparently given in Urdu to an Urdu-speaking lawyer, or (for what it is worth) in the screening interview, which involved a relatively superficial examination of the nature of the claim for the purpose of identifying it as suitable or unsuitable for swift determination. It is only the information elicited from the Claimant in consequence of the application of the processes under the DFT that is so inherently unreliable because of the specific circumstances pertaining to this case, which must be left out of consideration as part of the evaluation of his claim.

CONCLUSION

83. For the above reasons this claim for judicial review succeeds. The Claimant is entitled to a declaration that he was unlawfully detained from 18 May 2015 to 16 December 2015 (inclusive) and to damages. His claim for damages will be transferred to the Central London County Court for assessment if the parties are unable to agree a figure within 3 months. The decision made on 12 June 2015 is a nullity and will be quashed. The claim for international protection must be determined *de novo* by the SSHD on the basis of all material that has been provided to her, but she will not be entitled to rely upon the Claimant's answers given at the substantive interview on 8 June 2015.