Neutral Citation Number: [2016] EWHC 1331 (Admin)

Case No: CO/5275/2015, CO/4046/2015, CO/5615/2015, CO/4572/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2016

Before:

THE HON. MR JUSTICE CRANSTON

- -

Between:

(1) TAHIDUL HOSSAIN **(2) ZUBERIA AULEEAR** **(3) MNK** **(4) TCV**	**Claimants**
- and - **SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Defendant**

- -
- -

Stephanie Harrison QC, Shu Shin Luh, Anthony Vaughan and Grainne Mellon (instructed by **Duncan Lewis**) for the **1st, 3rd and 4th Claimants**
Stephanie Harrison QC and Shu Shin Luh (instructed by **Wilson Solicitors LLP**) for the **2nd Claimant**
Lisa Busch QC and Rory Dunlop (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 25 and 26 February, 22 and 25 April

- -

Approved Judgment

Index:

Mr Justice Cranston:

I INTRODUCTION

1. In broad terms this is a challenge to the lawfulness of the Secretary of State for the Home Department examining in some circumstances the asylum claims of persons in immigration detention. The challenge is advanced in two ways. It is a test case in that the cases of the four claimants were joined, as representative of similar claims by others challenging the unfairness of their asylum claims being examined and their being detained. Secondly, it is a "generic" challenge in that it is alleged that the process by which the Secretary of State examines the asylum claims of certain categories of persons while in detention is inherently unfair. Over one hundred cases raising similar issues have been stayed pending the decision in this case.

2. There is no need to canvass the troubled procedural history of this litigation in detail, or at this stage to attribute blame for what has proven to be a sorry state of affairs. Permission to apply for judicial review in Mr Hossain's case was granted on 17 November 2015 and the matter was listed for a substantive hearing. Following an application through their solicitors Duncan Lewis Solicitors and Wilson Solicitors LLP, another three cases were linked to Mr Hossain's case. While the challenge was to the lawfulness of what the Secretary of State was doing as a whole, some of the cases had individual features which were thought needed addressing. On 8 January 2016 the Secretary of State sought an order bringing forward the date of the hearing, which had been listed for 27 April 2016, on the basis that the issues set out in the linked cases needed to be dealt with expeditiously. On 4 February 2016 I granted that application and the matter was listed for hearing on 25 February 2016.

3. On 25 February 2016, what was supposed to be a two-day hearing began, but on the second day the Secretary of State indicated that she was not in a position to continue. Consequently, the hearing was adjourned and was listed to resume on 22 and 25 April 2016. In the meanwhile, the material to be grappled with multiplied, without in any way being rationalised. The Secretary of State produced hundreds of pages of witness evidence and a further skeleton argument, to which the claimants filed and served evidence and submissions in reply. The case was heard but there were further written submissions by the parties following that. Writing a judgment in these circumstances, when there are other pressing matters in the court, has not proved easy.

II THE SECRETARY OF STATE'S POLICIES

4. There is no need to refer to the Refugee Convention, EU or national law governing the right to claim asylum (or international protection) and how it takes practical shape in the Immigration Rules and Asylum Policy Instructions except for three aspects. One is that Article 4.1 of the EU 2011/95/EU Qualification Directive provides that Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate an application for international protection. Consistently with the Directive, Parliament has provided in section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act") that a decision-maker, in determining whether to believe a statement made by or on behalf of a person making an asylum or human rights claim, must take account the failure to make the claim before being notified of an immigration decision (such as to remove

the person) or before being arrested under an immigration provision, unless the person had no reasonable opportunity to do so.

5. The second is that under section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") if the Secretary of State is satisfied that a person comes from a country listed as safe for her return, she must certify an asylum claim as clearly unfounded unless satisfied that it does not fall into that category: section 94(3). If a person's asylum claim is refused and certified there is no right of appeal in the UK, only abroad. These are so-called non-suspensive appeals.

6. Thirdly, no distinction is drawn between asylum-seekers and others in the various powers of immigration detention. Powers to detain persons who require leave to enter or remain in the UK but do not have it, pending a decision on whether to set removal directions, and pending the removal of persons pursuant to such directions, are contained in sections 10(1) and 10(9) of the Immigration and Asylum Act 1999, paragraph 16 of Schedule 2 to the Immigration Act 1971 and section 62 of the 2002 Act. These statutory powers are subject to limits under the European Convention on Human Rights ("ECHR") and the common law. A seminal case in common law is *R* v. *Governor of Durham Prison ex p. Singh* [1984] 1 WLR 704, limiting the period of immigration detention to what is reasonably necessary to achieve its purpose. Furthermore, public law error bearing on the exercise of this power also renders detention unlawful: *R (on the application of Lumba)* v. *Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245.

Immigration detention

Chapter 55 of the EIG

7. The Secretary of State's policy of immigration detention is contained in her *Enforcement Instructions and Guidance*, Chapter 55 ("the EIG"). The policy states that the power to detain must be retained in the interests of maintaining effective immigration control, but that there is a presumption in favour of temporary admission or release and that, wherever possible, alternatives to detention are used: the EIG, paragraph 55.1.1. Paragraph 55.3 sets out principles as to when to detain: for the presumption in favour of temporary admission or temporary release not to apply, there must be strong grounds for believing that a person will not comply with conditions; all reasonable alternatives to detention must be considered; and each case must be considered on its merits. The non-exhaustive factors that the decision-maker takes into account in deciding whether to detain are set out at paragraph 55.3.1.

8. There are five reasons set out in Chapter 55 of the EIG for when detention may be appropriate: the person is likely to abscond if given temporary admission or release; there is insufficient reliable information to decide whether to grant temporary admission or release; removal from the UK is imminent; detention is needed whilst alternative arrangements are made for the person's care; and release is not considered conducive to the public good: paragraph 55.6.3 of the EIG. Under paragraph 55.8 of the EIG detention is reviewed at fixed intervals and continued detention must be authorised at certain levels of seniority. Reviews also take place when there is any potentially material development in the detainee's case, including the receipt of a Rule 35 report (explained shortly).

9. Importantly, paragraph 55.10 of the EIG identifies persons who are considered unsuitable for detention, except in only very exceptional circumstances. Among these are:

> "Unaccompanied children and young persons under the age of 18…
>
> The elderly…
>
> Pregnant women…
>
> Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
>
> Those suffering from serious mental illness which cannot be satisfactorily managed within detention…
>
> Those where there is independent evidence that they have been tortured.
>
> People with serious disabilities which cannot be satisfactorily managed within detention.
>
> Persons identified by the competent authorities as victims of trafficking…"

10. The meaning of paragraph 55.10 has been considered in a number of cases. In *R (on the application of Das)* v. *Secretary of State for the Home Department* [2014] EWCA Civ 45; [2014] 1 WLR 3538, Beatson LJ emphasised that it provides broad guidance about how discretion is to be exercised and it should not be interpreted in the same way as a statute.

> "Care must also be taken not to stray beyond interpretation into what is in substance policy formation by judicial glosses which unduly circumscribe what is meant to be a discretionary exercise by the executive branch of government": [47].

Where the policy does apply, there is a high hurdle to overcome to justify detention: [68].

Rules 34 and 35

11. The Detention Centre Rules 2001, 2001 SI No 238, provide for the health care of those detained for immigration purposes and the appointment of doctors and other medical staff. Rule 34 provides that detained persons must be given a physical and mental examination within 24 hours of admission to a detention centre. Those who do not consent to an examination initially are entitled to have it later, upon request. Among the various Detention Service Orders governing the administration of detention centres is Detention Service Order 6/2013, on the reception and induction checklist and supplementary guidance. It provides that "the initial screening and the subsequent doctor's appointment must pay particular regard to the consideration of Rule 35".

12. Under Rule 35, medical practitioners are under a duty to report to the manager of a centre on a detained person whose health is likely to be injuriously affected by detention, detained persons suspected of having suicidal intentions, and

> "(3)… any detained person who he is concerned may have been the victim of torture."

The reports must go to the Secretary of State.

13. Guidance for immigration officers entitled *Detention Rule 35 Process* provides for the handling of a Rule 35(3) report. It states that the report will inform a detention review and that consideration there is different from that due in an asylum decision. The guidance counsels immigration officers to consider whether the Rule 35 report constitutes independent evidence of torture. (The definition of torture in the policy was considered by Burnett J in *R (on the application of EO and others)* v. *Secretary of State for the Home Department* [2013] EWHC 1236 (Admin), [82].) It states that each case is different and it is not possible to provide definitive guidance on when a Rule 35 report will constitute independent evidence of torture. However,

> "it must have some corroborative potential (it must 'tend to show') that a detainee has been tortured, but it need not definitively prove the alleged torture".

14. Pointers are identified in the guidance for immigration officers as to what constitutes independent evidence of torture: a report which simply repeats an allegation of torture will not be independent evidence of torture; one raising a concern of torture with little reasoning or support or which mentions nothing more than common injuries or scarring for which there are other obvious causes is unlikely to constitute independent evidence of torture; and a report which details clear physical or mental evidence of injuries which would normally only arise as a result of torture, and which records a credible account of torture, is likely to constitute independent evidence. The guidance continues:

> "If the report constitutes independent evidence of torture, consider whether there are very exceptional circumstances such that detention is appropriate.
>
> Very exceptional circumstances could arise where, for example, release would create an unacceptably high risk of absconding, of reoffending or of harm to the public. There will not be very exceptional circumstances in the case of a routine detention absent other reasons, e.g., a removal without a high absconding risk or harm issue - see Ch. 55 of the EIG..."

The MLR policy

15. There is an Asylum Policy Instruction entitled *Medico-Legal Reports From The Helen Bamber Foundation and The Medical Foundation Medico Legal Report Service* ("the MLR policy"), July 2015. This guidance explains how caseworkers should consider asylum claims involving allegations of torture or serious harm where a medico-legal report from one of these Foundations forms part of the evidence. An asylum decision

will normally be suspended to wait for such a report where the Home Office receives notification of a pre-assessment appointment with the Foundations and the report is material to the asylum claim. Because awaiting a report is likely to mean that an asylum decision cannot be taken within a reasonable timeframe, individuals with a pre-assessment appointment will normally be released from detention: paragraph 2.1.

The detained fast-track policy 2000 – July 2015

The detained-fast-track in outline

16. In addition to detention under the policy in Chapter 55 of the EIG, from 2000 government policy enabled persons claiming asylum to be detained if the claim could be determined quickly. This was the so called detained fast-track policy (referred to as "the DFT"). The detained fast-track processes comprised both the detained fast-track and detained non-suspensive appeals process, although as we have seen the question of detention pending appeal cannot arise with the latter category since they have no right of appeal in-country. The detained fast-track process operated at certain immigration removal centres, Harmondsworth, Colnbrook and Oakington (until 2005) for men, and Yarl's Wood for women. It was suspended in July 2015.

17. The legal and policy details for the detained fast-track process operating in 2014 are set out in detail in Ouseley J's judgment in *Detention Action* v. *Secretary of State for the Home Department* [2014] EWHC 2245 (Admin). In summary, persons making an asylum claim could be detained if a quick decision was likely in their case: see [43]. The suitability criteria identified certain categories of persons who should not be in the process: [47]. It seems that by the time Ouseley J considered it, a majority of those dealt with in the detained fast-track were in the removal centres as a result of enforcement action – they were overstayers or illegal entrants arrested by the police or immigration officials – with only a minority having just arrived in the UK and making an asylum claim at port: [19], [72].

Case law

18. Over the years the detained fast-track policy was subject to regular challenge in the courts. In *R (L and another)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230, the Court of Appeal said that there was no reason why the fast-track process at Oakington should not afford an adequate opportunity for asylum claimants to demonstrate an arguable case. What fairness required depended on the content of each claim. Lord Phillips MR gave as illustrations of cases which might not be appropriate for the detained fast-track those where medical evidence would be required and it might not prove possible to bring a suitably qualified medical expert onto the site in the time available; those where there was the need for an expert report on country conditions; and those where time was needed for the authentication of documents: [49]-[50].

19. The Grand Chamber of the European Court of Human Rights rejected a challenge under Article 5 of the European Convention on Human Rights ("ECHR") to the detained fast-track system process in *Saadi* v. *United Kingdom*, Application no 13229/03, (2008) 47 EHRR 17. In that case the applicants were detained for seven days after claiming asylum on arrival in the UK. The court held that detention was justified to prevent unauthorised entry, and that the conditions under which the

applicants were detained were adequate in that there was provision for them to receive legal advice, medical care, and access to religious and recreational facilities.

20. Part of the detained fast-track policy was for expeditious appeals against the Secretary of State's refusals of asylum claims. *R (Refugee Legal Centre)* v. *Secretary of State for the Home Department* [2005] 1 WLR 2219; [2004] EWCA Civ 1481 was a generic challenge by an NGO to the policy regarding the appeals system at Harmondsworth. The Court of Appeal held that the question for it was whether the system provided asylum seekers with a fair opportunity to put their case: [6]. The court said that the challenge did not involve considering retrospectively in judicial review whether particular decisions were flawed as unfair (as in *R (on the application of Q)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 364; [2004] QB 36). Rather the issue was whether prospectively, in the nature of things, the system was inherently unfair: [7], [24]. Giving the judgement of the court Sedley LJ encapsulated the issue as follows:

> "[8] The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the courts. Without reproducing the valuable discussion of the development of this branch of the law in *Craig, Administrative Law* 5th edition (2003), chapter 13, we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to be derived from added procedural safeguards, and the costs to the administration of compliance. But it is necessary to recognise that these are not factors of equal weight. As Bingham LJ said in *Secretary of State for the Home Department* v. *Thirukumar* [1989] Imm AR 402, 414, asylum decisions are of such moment that only the highest standards of fairness will suffice; and as Lord Woolf CJ stressed in *R* v. *Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763, 777, administrative convenience cannot justify unfairness. In other words, there has to be in asylum procedures, as in many other procedures, an irreducible minimum of due process."

21. Sedley LJ turned to the claimant's case: the process was unfair because it compressed into a single day – the day after arrival – the sole interview with a legal representative and the substantive asylum interview by immigration officers, with no formal opportunity to make supplementary representations before, next day, a written decision was given; the pressure on the asylum seeker was even greater because the minimum interval between the two interviews was only half an hour; and many of the asylum seekers had arrived only the day before after difficult journeys: [9]. Sedley LJ noted that whether or not solicitors representing clients in the fast-track system had complained about the fairness of the fast-track process was unhelpful since it was subjective material: [14].

22. As to the lawfulness of the policy, what was lacking, said Sedley LJ, was a clearly stated procedure – in public law terms, a policy – which recognised that it would be unfair not to enlarge the standard timetable in a variety of instances: [18]-[19]. It was necessary to consider the fast-track process in the round: [20]. Provided that the system was operated in a way that recognised the variety of circumstances in which fairness would require an enlargement of the standard three-day timetable, the fast-track system itself was not inherently unfair so as to be unlawful: [23]. The court concluded that, if operated flexibly, the system could operate without an unacceptable risk of unfairness: [25].

23. There were also individual challenges to the operation of the detained fast-track system. Thus in *R (JB (Jamaica))* v. *Secretary of State for the Home Department* [2013] EWCA Civ 666, [2014] 1 WLR 836 the court held that the claimant overstayer's detention under the fast-track policy was unlawful: on the facts his appeal had not been capable of determination within a two week period, with the result that a decision on his claim was likely to be neither fair nor sustainable. Moore-Bick LJ said that the screening interview was not designed for the detained fast-track process, in particular in not directing the attention of the officer to whether a claim could properly be investigated within the limited time period provided: [28]. The claimant's claim of homosexuality needed supporting evidence from sources external to himself, some likely to be available only in Jamaica (where he came from) or elsewhere abroad: [29]. It should have been obvious to anyone that it was not a simple claim because of the difficulty of ascertaining where the truth lay: [30]. The case went to the Supreme Court on the designation of Jamaica as a safe country under section 94 of the 2002 Act: [2015] UKSC8; [2015] 1 WLR 1060.

The Detention Action *challenges*

24. In 2014 an NGO, Detention Action, launched a wholesale challenge to the version of the detained fast-track system then in force in *R (Detention Action)* v. *Secretary of State for the Home Department* [2014] EWHC 2245 (Admin), mentioned earlier. In the course of his judgment Ouseley J canvassed the deficiencies in the detained fast-track process. He asked whether the screening process and safeguards focused on the suitability of a claim for quick determination and of the applicant for detention. There also had to be consideration specifically of whether the determination of a case would be fair under the process: [106]-[107]. As to Rule 35 reports, Ouseley J said that they did not work as intended: if they produced new material which would have led to further questions at screening, those questions should be pursued then and there as to the applicant's suitability for handling in the fast-track: [133]-[134]. Ouseley J said that there had to be specific consideration at screening, and with any Rule 34 medical report, as to whether a person with mental health issues could have his case fairly considered in the fast-track: [156]-[157].

25. Overall, Ouseley J held that the various shortcomings in the fast-track were remediable if detainees saw legal representatives sooner, prior to their substantive asylum interviews. He said:

> "[200] The unacceptably high risk of unfairness may be resolved in a number of ways; it would not have to be by changing the instruction of lawyers, although that seems the obvious point to start given the seemingly indefensible period

> of inactivity. However, if the screening process were improved or if Rule 35 became an effective safeguard or if greater time were more readily allowed, the change to the way in which lawyers are instructed might not be necessary. It is the failings elsewhere which lead to the allocation of lawyers as the point at which something has to change."

26. The Secretary of State made changes in the detained fast-track policy so that applicants were to be given four days within which to consult their lawyers. The Court of Appeal dismissed an appeal grounded on Ouseley J's taking this into account and only making a declaration of unlawfulness: *R (on the application of Detention Action)* v. *Secretary of State for the Home Department* [2014] EWCA Civ 1270. The court rejected the blanket approach of bringing the whole appellate process within the detained fast-track to a halt because many of the decisions within it had been fair. Where it was alleged that they had not been fair individual applications could be made.

27. In a separate appeal against Ouseley J's judgment, the Court of Appeal considered the Secretary of State's policy as regards the quick processing criteria in the *Detained Fast-Track Processes Guidance* as it applied to appeals in detention. Under these, asylum-seekers whose claim for asylum was refused were detained pending their appeal. The court held that the policy was flawed because it was not sufficiently clear and transparent: the Immigration Act 1971 authorised detention in broad terms, but persons needed to know, when personal liberty was at stake, the sufficiently defined criteria being applied to detain them: *R (on the application of Detention Action)* v. *Secretary of State for the Home Department* [2014] EWCA Civ 1634, [2015] INLR 372.

28. Detention Action also challenged the legality of the rules which governed fast-track appeals to the First-tier Tribunal (Immigration and Asylum Chamber) of refusals by the Secretary of State of asylum applications. Nicol J held that the rules were ultra vires the Tribunals, Courts and Enforcement Act 2007: *R (on the application of Detention Action)* v. *First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin).

29. The Court of Appeal upheld his decision in *R (Detention Action)* v. *First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840, [2015] 1 WLR 5341. The issue, said the court, was whether there was inherent systemic or structural unfairness in the rules which rendered them ultra vires. That turned on the safeguards, in particular the powers to postpone or adjourn a hearing. The court said that the period under the rules of seven days between the date of the refusal decision and the hearing of the appeal was bound to be insufficient in a significant number of cases when there would be a need to obtain evidence to corroborate the person's account in rebuttal of an adverse credibility finding: [42]. There were also difficulties facing legal representatives in taking instructions from clients in detention, so making it impossible for them to say whether further inquiries were likely to be fruitful, justifying transfer out of the fast-track: [42]. Overall, the court held, the scheme did not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues they raised and the measure of the task facing legal representatives in taking instructions from clients in detention: [45].

R (JM) and the July 2015 consent orders

30. In early July 2015 the Secretary of State agreed a consent order ("the *R (JM)* order") in test case litigation involving four persons who had been detained in the fast-track: *R (on the application of JM, RE, KW, MY)* v. *Secretary of State for the Home Department* [2015] EWHC 2331 (Admin). These were representative cases from the Helen Bamber Foundation. The consent order stated:

> "1. The Detained fast-track (DFT) as operated at 2 July 2015 created an unacceptable risk of unfairness to vulnerable or potentially vulnerable individuals within the meaning of 2 below. There was an unacceptable risk of failure:
>
> a. to identify such individuals; and
>
> b. even when such individuals were identified, to recognise those cases that required further investigation (including, in some cases, clinical investigation).
>
> This created an unacceptable risk of failure to identify those whose claims were unsuitable for a quick decision within the DFT.
>
> 2. In paragraph 1 above "vulnerable" or "potentially vulnerable" individuals include but are not limited to asylum seekers who may be victims of torture, significant ill-treatment, human trafficking, or may be suffering from mental disorder or other physical or mental impairment which may affect their ability to present their claims in the DFT…
>
> 4. Having regard to what each said in their asylum interviews, each of the four representative Claimants should have been but was not identified as having a claim that was unsuitable for a quick decision and was therefore, unlawfully subject to the DFT process from entry into it."

31. The Order also recorded that the Secretary of State had acted unlawfully in not removing from the detained fast-track persons who had a report from the Helen Bamber Foundation confirming that the case had been referred to them and assessed as requiring further investigation. In each claimant's case she accepted that she could not fairly determine their claims in the fast-track process because each required further clinical investigation into their claims of torture, ill-treatment or other vulnerability. She also accepted that she had acted unlawfully in refusing to accept the Rule 35 report as indicating that the claim was unsuitable for quick decision within the detained fast-track process. Blake J gave a short judgment relating to the order. He stated that it was the indicator of vulnerability at the screening interview that ought to have triggered identification of the person as unsuitable for the detained fast-track process.

32. There was a further consent order of 20 July 2015 in relation to other parties, in which the Secretary of State accepted that as of 2 July 2015 the detained fast-track process operated without full compliance with section 149 of the Equality Act 2010, to the extent that certain vulnerable groups were at an unacceptable risk of unfairness: *R (on the application of IK, Y, PU)* v. *Secretary of State for the Home Department*, CO/479/2015 ("the *R (PU)* order").

Current policy: handling asylum claims in detention

33. On 2 July 2015 the Minister of State for Immigration, James Brokenshire MP, made a written statement to the House of Commons announcing that the government would temporarily suspend the operation of the detained fast-track policy. A fast-track process, he said, was an important part of the immigration system, including for those who have very weak or spurious claims, so ensuring that help was rightly focused on those who truly needed it. It was vital to deal robustly with unfounded or abusive claims in the asylum system, he added, but also to identify vulnerable applicants, including victims of trafficking or torture, to ensure that they received a fair hearing. The Minister said that the government had to be satisfied that the safeguards for dealing with vulnerable applicants throughout the system were working well enough to minimise any risk of unfairness. Asylum must not be used as a means to avoid legitimate immigration control.

The DAC team and the Detention interim instruction (DII)

34. In response to the decision to suspend the detained fast-track, the Home Office formed a dedicated detained asylum casework team ("the DAC team") for examining asylum claims by those in detention. It also published guidance entitled *Detention: Interim Instruction for cases in detention who have claimed asylum, and for entering cases who have claimed asylum into detention* on 16 July 2015 ("the *Detention Interim Instruction*" or "DII"). It states that the suspension of the DFT does not mean that asylum seekers can not be detained. The instruction reads:

> "4. All cases in detention must be held in accordance with general detention criteria, as set out in Chapter 55 of the Enforcement Instructions and Guidance (EIG). When deciding to detain and/or whether to maintain detention, staff must always consider the provisions of EIG 55.10."

35. Section 3 of the DII deals with the "handling of asylum claims and considering detention or temporary admission/release". Enforcement cases are dealt with in paragraph 10, which states that where an individual claims asylum whilst in detention pending their removal, or whilst detained following an enforcement visit, the case worker should refer the case to the National Removals Command ("NRC"), which is a dedicated unit in the Home Office making decisions on immigration detention. The NRC should review it in accordance with the general detention criteria as set out in Chapter 55 of the EIG. If the decision is taken to maintain detention, the NRC notifies the DAC team, who take over the case and arrange for the asylum screening interview to be carried out as soon as possible (if it has not already taken place): paragraph 12.

36. After the asylum screening interview, the DII continues, detention is reviewed by the DAC team in accordance with paragraph 55.8 of the EIG. Paragraph 13 of the DII states that particular attention should be paid to any vulnerabilities that have been raised. Detention is also to be reviewed by the DAC team, in accordance with paragraph 55.8 of the EIG, at significant stages in the progress of an asylum case or where there may be a significant change in circumstance impacting on the likelihood of removal within a reasonable time. Examples include after the asylum screening interview and on receipt of additional information in support of the claim: paragraph 14. As to torture the DII states:

> "11. Allegations of torture should be carefully considered before referring a case to the Detained Asylum Casework. Where such allegations are supported by independent evidence such as medical records or a Rule 35 report, the case should not normally be referred to the Detained Asylum Casework."

37. There are then provisions in the DII for asylum claims made at the Asylum Intake Unit at Croydon, London, at port or once apprehended as a clandestine. If they might be suitable for detention because there is a reasonable likelihood of certifying the claim as clearly unfounded, and of removal within a reasonable time, or for other exceptional circumstances, they should be referred to the NRC after screening. Particular attention is to be paid to any vulnerabilities under paragraph 55.10 of the EIG and to removability within a reasonable time.

38. Section 4 of the DII is entitled "process for deciding asylum claims in detention", and reads in part:

> "[24] …A decision on the asylum claim would normally need to be taken within 28 days of the initial asylum claim, but you will need to consider any requests for further time, for example, to obtain documents or translations to substantiate the claim. You must keep under review the time that it is likely to take to make a decision on the asylum claim. If it becomes apparent that, for any reason (including, for example, the applicant's need to obtain further evidence, or operational reasons) the decision is likely to be significantly delayed, then detention should be reviewed in accordance with Chapter 55 of the EIG to ensure detention remains lawful."

The Process map

39. To provide additional guidance to caseworkers, the Home Office issued a "DAC Process Map" and "Interim process map for cases that are processed whilst being detained" ("the *Process map*"). It is to be used by those in the DAC team and read in conjunction with the DII and the main asylum guidance policies. The *Process map* states that particular care must be given to applicants who, due to their particular circumstances, may require the rescheduling of interviews, an extension of timescales for the submission of representations or, in some cases, release from detention. The instructions apply to all asylum cases, including those from non-suspensive appeal countries, which are accepted for processing while in detention. The *Process map* continues:

"Induction interview

5. Once an application is transferred to the relevant [immigration removal centre], a DAC officer will conduct an induction interview within a day of their arrival. The purpose of the induction interview is to ascertain if the applicant needs assistance from a publically funded legal representative or if they have instructed a firm privately. The applicant will be asked for consent to access medical information and asked whether they have any medical conditions that the Home Office needs to be aware of. They will also be asked whether they have any family in the UK and whether they wish to submit any documents in support of their application. The applicant will also be able to request a gender specific interviewer, their preferred language for the interview and/or for their asylum interview to be deferred for a short duration, for example, if they are expecting to instruct a firm privately.

6. If a duty legal representative is requested, then a referral will be made to a legal firm who has a contract with the Legal Aid Agency (LAA) to provide representation for the case…

Asylum interview

7. The DAC team will then be responsible for booking the asylum interview. Although there are no set timescales for the booking of an asylum interview, it will largely depend on the individual circumstances of the case as to when an interview is booked. Officers should ensure that the applicants have sufficient time to instruct his/her legal representatives. As a rough guide, unless an applicant expressly requests an earlier interview, asylum interviews should not be booked any earlier than five working days from the date when the referral is sent to the legal representatives. This is consistent with national asylum operations.

8. There is also no automatic period after an interview for the submission of further evidence and/or written legal representations. But if the interviewing officer decides to ask for further evidence or if the applicant requests additional time in which to submit information of relevance to the claim, the applicant should be given a reasonable time in which to provide it – normally up to five workings days. More time can be given where it is appropriate to do so.

9. However, the interviewing officer must, at the end of the asylum interview, agree a deadline for the submission of further evidence or legal representations. This does not prevent the applicant or the legal representatives from submitting a written request for an extension of the timescales after the interview. Whether or not the deadline is extended will depend on the

> individual circumstances of the case and the justification given for the request.
>
> …
>
> Handling of HB/FfT referrals and MLR reports
>
> 10. Caseworkers should follow the guidance set out in the Asylum Instructions on Medico-Legal Reports from the Foundations, for asylum claims involving allegations of torture or serious harm, where a MLR from the 'Medico Foundation Medico-Legal Report Service' at Freedom from Torture ["FfT"] or the Helen Bamber Foundation ["HB"] is likely to form part of the evidence… Nevertheless if an appointment letter from the Foundations is submitted at any time before the [First Tier Tribunal] hearing, the applicant is likely to be released from detention."

40. Under the heading "Decision making", the *Process map* states that if an asylum application is refused with an in-country right of appeal, "case owners should carefully consider whether detention remains appropriate…": paragraph [14]. The *Process map* advises that detention should be kept under continued review in accordance with Chapter 55 of the EIG and persons should be released immediately if their detention can no longer be properly maintained under it. It states that due regard should be given to Rule 35 reports in considering whether to maintain detention: paragraph [18].

Policy background

41. In her witness statement, Alison Samedi, head of asylum policy in the Home Office, and the official responsible for the DII, explains its background. She sets out rationale for maintaining detention for some of those claiming asylum as follows:

> "Maintaining effective immigration control is a legitimate policy objective. Accordingly, the government expects anyone who comes to the UK to observe immigration law. Those without immigration status are expected to return home voluntarily at the first opportunity and not to make spurious or opportunistic applications to remain, including for asylum – which detract valuable resources from those with a genuine need for protection, merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in their removal. Simply claiming asylum cannot be sufficient reason in itself for releasing from detention where there are otherwise legitimate immigration or public order reasons for detaining an illegal migrant. If it were so it would provide a perverse incentive to claim asylum wholly at odds with the intention of the Refugee Convention and to the detriment of genuine refugees and the effectiveness of the immigration system.

> Unfortunately, there will always be some individuals who are determined not to comply with immigration law and need to be removed from the UK. For these individuals a decision to detain in order to enforce immigration control pursues a legitimate aim and is in accordance with the law. That said, depriving someone of their liberty should never be undertaken lightly and there is a presumption in favour of temporary admission or release. It is also clear that detention must not prevent the fair and proper consideration of any application to remain in the UK, particularly when the issue in question is the safety of the applicant on return to their own country.
>
> It is in everyone's best interests – the applicant's, the government's, the taxpayer's – to have an asylum system where decisions are taken quickly and effectively so that protection can be granted to those who need it and those found not to be in need of protection are removed swiftly. It is also right that resource is focused on those who are in genuine need of protection and that those who break immigration laws are not encouraged to make opportunistic and spurious asylum claims simply to frustrate removal and remain in the UK. It cannot, therefore, be right that an individual cannot be detained purely on the basis of claiming asylum no matter how weak the claim or how high the risk of harm and/or absconding associated with the claimant.
>
> If the Home Office were not allowed to consider the asylum claims of such individuals whilst detaining them with a view to removal, it would significantly weaken immigration control, as it would provide a very strong incentive for those facing enforced removal to claim asylum opportunistically, simply to avoid that action. Releasing cases just because they had claimed asylum, even if they had flagrantly flouted immigration laws would likely result in an increase in absconding, and of abusive and meritless claims adding cost and time burdens to the non-detained process, and then a need to re-detain prior to removal. This would have a significantly detrimental effect on the health of the overall asylum process and on immigration control. It is an unfortunate reality that in some cases individuals will not comply voluntarily with a requirement to leave the UK and their removal must be enforced. As I have already set out in this witness statement, Home Office internal management information shows that an average of 30 individuals a week claim asylum from within detention only after removal directions are set."

42. As regards vulnerability in detention, Ms Samedi refers to Rule 35 and states that even where a caseworker accepts that a Rule 35 report constitutes independent evidence of torture, detention may be maintained in accordance with the Rule 35 policy where there are very exceptional circumstances, for example, where release

would create an unacceptably high risk of absconding. Ms Samedi says that in contrast to the detained fast-track process, the fact that someone has made an asylum claim which can be determined speedily is not a criterion for detention, that is, it is not, in itself, sufficient to justify detention. Rather, it is a factor to be taken into account in deciding whether detention will comply with the requirements of Chapter 55 of the EIG, in particular the requirement that there be a reasonable prospect of removal within a reasonable period of time.

43. Ms Samedi states that while there are valid reasons as to why an individual may wait until being faced with removal to claim asylum, caseworker experience showed that the majority do so in order to frustrate removal. If it became apparent that, for any reason, including, for example, the applicant's need to obtain further evidence, or operational reasons, the decision was likely to be significantly delayed, detention has to be reviewed in accordance with Chapter 55 of the EIG to ensure detention remains lawful. She continues that the indicative timescales in the *Process map* reflect the complexity of the types of claims currently being dealt with in detention, which "are late, opportunistic, unduly unmeritorious or Third Country Unit (TCU) or Non-suspensive appeals (NSA) cases". (Third Country Unit cases are asylum cases where claimants are removable to another EU Member State under the Dublin Regulation to have their claim dealt with there.)

44. As regards flexibility, Ms Samedi states that requests for extra time or for an asylum interview to be rearranged should be honoured, wherever possible. There was no requirement in non-detained cases to give legal representatives time to submit further submissions after an asylum interview unless the applicant expressly asked for extra time. This meant that in some asylum cases a decision might be served the next day. However, a decision had been taken to allocate as a matter of course a minimum of 5 days for asylum claimants processed in detention to submit further representations or evidence on which they wished to rely, and a longer period if requested.

> "This is in addition to the fact that unlike non-detained asylum cases, asylum cases processed in detention are given automatic access to legal consultation before the interview, legal representation at the interview and detained applicants can seek further advice from their lawyer in the period between the interview and the decision being served. Asylum seekers whose cases are processed in detention therefore receive additional support – particularly in relation to access to legal advice – to safeguard against any (perceived or real) difficulties faced by bringing an asylum claim whilst detained."

45. As regards the inter-relationship of Rule 35 reports and asylum interviews, Mr Dan Smith, head of the DAC team, stated in an email to Duncan Lewis in January 2016 that detention and asylum are separate issues. In summary, he said, the view of the DAC team is as follows:

- "Asylum interviews will not routinely be cancelled if a Rule 35 has not been completed even if a representative or client consider one should be;

- The asylum interview is the appropriate place to disclose any relevant facts of an asylum claim;

- Rule 35 reports and detention are reviewed regularly including at the conclusion of the interview;

- Delaying an interview only adds to the time spent in detention and extends the period of time your client has to wait to be interviewed which we do not think is acceptable in terms of liberty or public funds.

  Interviews with the Home Office should proceed unless there are exceptional circumstances."

The Shaw Report

46. In January 2016 the government published a report by Stephen Shaw**,** previously director of the Prison Reform Trust and the Prisons Ombudsman, entitled *Review into the Welfare in Detention of Vulnerable Persons. A report to the Home Office*, Cm 9186 **(**"the Shaw Report"). In the course of his report, Mr Shaw commented that it is wholly unacceptable for the Home Office to dismiss a Rule 35 report on the grounds that it is insufficiently informed or insufficiently independent. As part of the Shaw Report, Professor Mary Bosworth conducted a literature review linking detention to adverse mental health outcomes. Among Mr Shaw's recommendations are the following:

> "Recommendation 9: I recommend that there should be a presumption against detention for victims of rape and other sexual or gender based violence. (For the avoidance of doubt, I include victims of FGM as coming within this definition.)
>
> Recommendation 10: I recommend that the Home Office amend its guidance so that the presumptive exclusion from detention for pregnant women is replaced with an absolute exclusion.
>
> Recommendation 11: I recommend that the words 'which cannot be satisfactorily managed in detention' are removed from the section of the EIG that covers those suffering from serious mental illness.
>
> Recommendation 12: I recommend that those with a diagnosis of Post Traumatic Stress Disorder should be presumed unsuitable for detention.
>
> Recommendation 13: I recommend that people with Learning Difficulties should be presumed unsuitable for detention.
>
> Recommendation 14: I recommend that transsexual people should be presumed unsuitable for detention.

> …
>
> Recommendation 21: I recommend that the Home Office immediately consider an alternative to the current Rule 35 mechanism. This should include whether doctors independent of the [immigration removal centre] system (for example, Forensic Medical Examiners) would be more appropriate to conduct the assessments as well as the training implications."

47. In a written statement to the House of Commons on 14 January 2016, the Minister for Immigration, James Brokenshire MP, said that the government had put in place a system which prevented the abuse of appeals procedures and encouraged timely and voluntary departures by denying access to services such as bank accounts, rental property, the labour market and driving licences to those with no right to be in the UK. Where individuals nonetheless failed to comply with immigration law, and refused to leave, enforcement action would be taken to remove them from the UK. It was a long-established principle, however, that where an individual was detained pending removal, there must be a realistic prospect of removal within a reasonable time. Depriving someone of their liberty would always be subject to careful consideration and scrutiny, and would take account of individual circumstances.

48. As regards the Shaw Report, the Minister said, in part:

> "First, the Government accept Mr Shaw's recommendations to adopt a wider definition of those at risk, including victims of sexual violence, individuals with mental health issues, pregnant women, those with learning difficulties, post-traumatic stress disorder and elderly people, and to recognise the dynamic nature of vulnerabilities. It will introduce a new "adult at risk" concept into decision-making on immigration detention with a clear presumption that people who are at risk should not be detained, building on the existing legal framework. This will strengthen the approach to those whose care and support needs make it particularly likely that they would suffer disproportionate detriment from being detained, and will therefore be considered generally unsuitable for immigration detention unless there is compelling evidence that other factors which relate to immigration abuse and the integrity of the immigration system, such as matters of criminality, compliance history and the imminence of removal, are of such significance as to outweigh the vulnerability factors. Each case will be considered on its individual facts, supported by a new vulnerable person's team."

III THE INDIVIDUAL CLAIMANTS

49. The four claimants form part of a larger cohort of claims issued in the court which seek to challenge the lawfulness of the Secretary of State's administration of asylum claims by those in immigration detention. The four cases were heard as test cases with all the remaining claims in the cohort being stayed pending judgment in their cases.

Tahidul Hossain

50. On 18 August 2000 Mr Hossain arrived in the UK with a working visit visa valid until 27 December 2000. On 20 September 2015 he was encountered by immigration officers and had been working in an Indian restaurant in Cumbria. He provided them with various forms of identification with different aliases, including a Bangladeshi passport in the name of Shana Miah, with a vignette which stated that he had indefinite leave to remain. On investigation, the vignette was found to have belonged to a female national of New Zealand. A fingerprint trace did not provide a match. Eventually, Mr Hossain gave his true identity and, under caution, when asked why he could not return to Bangladesh stated: "Mine is a very poor country". He was served with a notice, dated 20 September 2015, of his liability to removal under section 10 of the Immigration and Asylum Act 1999. He was detained on the basis of his risk of absconding.

51. After ten days of detention, on 30 September 2015 Mr Hossain claimed asylum on account of his membership of the Bangladesh National Party and an arrest warrant issued in 1988. On 6 October 2015, he was referred to the NRC to consider his detention. On 14 October 2015, the DAC team accepted his case. The reasons were as follows:

> "The applicant appears to have entered the UK some fifteen years ago and remained illegally since that time. He has proved to have a propensity to deceive, he provided 3 different IDs to the Home Office; he was also found to be in possession of a fraudulent passport. Further to this the applicant only claimed asylum after arrest and detention which on face value appears to be an attempt to frustrate removal. Given his previous history, I have no confidence that that applicant would comply with reporting and detention in DAC is appropriate. No mit[igating] circs."

52. On 15 October 2015 Mr Hossain arrived at the Colnbrook Immigration Removal Centre. He was given a Rule 34 medical examination on arrival and complained of 'long-standing back pain when he was assaulted by soldiers'. On 17 October 2015, he saw a GP again. On 20 October 2015, Mr Hossain had an asylum screening interview. He said that his passport had been taken by the person who brought him here from Kuwait. He came to the UK to save his life. He had been beaten by a soldier in Kuwait who broke a bone in his back. He had back pain and problems sleeping. In Bangladesh, the local police had issued an arrest warrant for him in 1988. He had been in an anti-government demonstration. The warrant was at his party's headquarters in Bangladesh. He did not have any documents relevant to his claim but he intended to have additional documents sent to him from Bangladesh and that would take four or five days. A detention review on 20 October 2015 noted that if he again "suggested he might be a victim of torture" (a reference to the events in Kuwait) this would need to be explored further.

53. Duncan Lewis were allocated as Mr Hossain's solicitors on 21 October 2015. On 26 October 2015, on their advice, he requested a Rule 35 assessment. In a letter before the claim of 28 October 2015, Duncan Lewis asked that his substantive asylum interview be postponed pending the receipt of the Rule 35 assessment. The Secretary

of State refused a postponement: he had not raised allegations of torture at his Rule 34 medical examination. She also refused him temporary admission. The interview was scheduled for 30 October 2015 but he did not attend since he was said to be unwell. Mr Hossain's claim for judicial review and an application for urgent consideration was lodged that day, 30 October 2015.

54. The following day, 1 November 2015, a Rule 35(3) report identified small scars on his forearms and injuries to his finger and left foot which were in keeping with his account. The doctor ticked the box on the Rule 35 standard form that Mr Hossain may be a victim of torture. He told the doctor that in 1998 in Bangladesh he was tortured by five members of the opposition party, who left him for dead. The doctor commented that further investigation by the Home Office may be needed.

55. On 3 November 2015, the Secretary of State accepted that the Rule 35 report constituted independent evidence of torture. However, she said that his detention would be maintained on the basis of exceptional circumstances under Chapter 55 of the EIG, namely the high absconding risk and poor immigration history. Approving a recommendation to maintain detention, the authorising officer commented:

> "…I consider that in the particular circumstances of this case there are very exceptional reasons why the detention should be maintained despite the contents of the [Rule 35] report.
>
> - The claimant has lived illegally in the UK for over 15 years
>
> - He failed to regularise his stay at the end of his visa and failed also to leave the UK as required by the conditions of his visa. There is no reason to believe that he would have ever claimed asylum had he not been arrested as an immigration offender.
>
> - Given the claimant's poor immigration history, and a belated asylum application, he will be in no doubt that his removal is imminent and that the Secretary of State for the Home Department will seek to enforce his removal at the earliest possible, if he is unsuccessful in his application.
>
> - His failure to comply with the conditions of his visa and illegal working, he cannot be relied upon to comply with any conditions
>
> - Therefore given the high risk of absconding, there are very exceptional reasons why detention should be maintained despite the contents of the [Rule 35] report."

There were similar reviews maintaining his detention conducted on 3 November 2015, 13 November 2015, 20 November 2015 and 25 November 2015.

56. Meanwhile, on 2 November 2015 King J had ordered that consideration of Mr Hossain's case be suspended pending submissions from the Secretary of State. On 17 November 2015 HHJ Gore QC, sitting in the High Court, granted Mr Hossain permission to apply for judicial review. He observed that it was at least arguable that liability to abscond was not a very exceptional circumstance under Chapter 55 of the EIG. Mr Hossain was released from detention on 27 November 2015. He reported regularly after that.

57. Some eight weeks after being released from detention, on 13 January 2016, Mr Hossain had his substantive asylum interview. He said that he was fit and well and had no medical conditions, although he said that a doctor had said his backbone had been squeezed. He took sleeping pills on prescription. He feared for his life if he were returned to Bangladesh. He said that he had been sentenced to 10 years' imprisonment. He gave an account of torture in Bangladesh by five members of the *Awami League*. In response to the question as to why he did not claim asylum when he first arrived in the UK 15 years previously, he said that he did not receive proper advice.

58. There is a witness statement from Mr Hossain, where he explains his failure to advance his asylum claim until arrested: he thought that he had to pay off his agent before doing anything. He also states that he disclosed that he was a victim of torture at the screening interview. Mr Hossain's lawyers have obtained a court document from Bangladesh about the 10-year sentence and letters from the Bangladesh Nationalist Party.

59. On 18 March 2016 the Secretary of State refused Mr Hossain's claim for asylum. Given the inconsistencies in his various accounts of persecution in Bangladesh, and the doubts about the documents he had submitted, it was not considered that he had been a member of the Bangladesh Nationalist Party. Importantly, she did not consider that he would wait 15 years to make an asylum claim if his life was under threat and then make it only after he was arrested.

60. Recently, Mr Hossain's solicitors have obtained a report from Dr Mason, a specialist in accident and emergency medicine, opining that the lesions on Mr Hossain's body are consistent with his account of being assaulted in Bangladesh. There is also a report dated 8 April 2016 from Dr Ashraf-ul Hoque, a post-doctoral researcher at the School of Oriental and African Studies, University of London. He confirms that the court documents from Bangladesh about Mr Hossain conform to official Bangladeshi standards but says that he cannot confirm their authenticity in the absence of the originals. The Bangladesh Nationalist Party letters are likely, he states, to be genuine. In his opinion Mr Hossain's account of events is plausible and consistent with wider trends in the country. A third report is from Dr Rachel Thomas, a chartered consultant clinical psychologist, dated 7 April 2016, who considers Mr Hossain "to be plausible psychologically as a victim of torture…" and opines that he has significant mental health problems.

61. Mr Hossain's solicitor from Duncan Lewis, Meena Gupta, has explained in a witness statement the difficulty she faced in such cases in obtaining funding from the Legal Aid Agency and the report from Dr Hoque and the medical reports. Eventually, she was able to obtain the reports from Dr Mason and Dr Thomas.

MNK

62. MNK, from Pakistan, was issued with a family visit visa on 19 May 2008. He was encountered working illegally by West Midlands Police on 28 September 2015. He told the police and an immigration official separately that he had been granted asylum. (In his witness statement, he denies this and says that what he said was misinterpreted.) No record could be found of the grant of asylum, he did not offer to produce documents supporting his claim and he did not offer any mitigating circumstances against his detention. MNK was detained and served with a notice of removal from the UK.

63. On 1 October 2015, MNK claimed asylum on the basis of his political opinion. A detention review of 5 October 2015 assessed his abscond risk as medium. On 14 October 2015 his case was referred to the DAC casework team who accepted it as suitable:

> "The applicant has overstayed and worked illegally in the UK since 2008. He was only encountered by chance and only claimed asylum after arrest and detention which on face value may suggest it is an attempt to frustrate removal. I also note that the applicant upon encounter told the [immigration officers] that he had been granted asylum in 2008 which shows he has a propensity to deceive. Given all of this I consider it likely he would abscond if placed on reporting. No mit[igating] circ[umstance]s: Suitable for DAC."

64. When transferred to Colnbrook Immigration Removal Centre three days later, MNK underwent a Rule 34 medical examination and did not disclose any history of torture or mental health problems.

65. MNK's asylum screening interview was conducted on 19 October 2015. He confirmed that he had no medical conditions, apart from stress due to being in detention, and that he was not taking any medication. He said that he was subject to an arrest warrant in Kashmir for political activity. He had been kidnapped and detained for two days. He did not mention being tortured. He said he had documents to support his claim.

66. Duncan Lewis were allocated to MNK as his solicitors on 19 October 2015. The DAC team informed MNK on 2 November 2015 that his substantive asylum interview had been scheduled for 6 November 2015. On 3 November 2015, Duncan Lewis requested a postponement of the interview on the basis that MNK was taking steps to obtain documents from Pakistan to support his asylum claim. The Secretary of State postponed the interview until 19 November 2015.

67. There was a Rule 35 medical report on 4 November 2015. The doctor expressed concerns that MNK may have been a victim of torture. There were scars on his hands which were consistent with his account of ill-treatment. (The doctor said that scars on his knees could simply be a tightening of the skin).

68. On 5 November 2015 the DAC team informed MNK that it did not accept that the Rule 35 report constituted independent evidence of torture by reference to the

Detention Rule 35 Process guidance, in particular to the fact that the doctor's report repeated MNK's allegation of torture, raised a concern of torture with little reasoning or support, and mentioned injuries for which there could have been other obvious causes. (There is a contradictory sentence in the DAC record but it is obviously there in error.) Even if the report were independent evidence of torture, the DAC team said, there were "exceptional circumstances" which meant that MNK's continued detention remained appropriate namely, his risk of absconding, that he had overstayed his visa by nearly seven years, that he had been found working illegally in the UK and that he only claimed asylum when faced with removal from the UK.

69. MNK's case was reviewed by a senior officer on 6 November 2015, who authorised MNK's continued detention. According to his witness statement, which I accept, he reasoned as follows:

> "I then reviewed MNK's detention on 6 November 2015. In doing so, I had regard to MNK's immigration history and to the Rule 35(3) report. I noted that MNK had overstayed his visa by several years and had taken no steps to regularise his stay beyond the expiry of his leave. The circumstances of his arrest, during illegal working, suggested an economic motive behind his illegal stay in the UK. I could see no evidence to suggest that MNK would have ever claimed asylum had he not been encountered by the police and consequently faced with removal. I was fortified in this view by the fact that MNK, on arrest, insisted to the police officers that he had been granted asylum in 2008… I therefore considered that in the particular circumstances of MNK's case, there was a very high risk of absconding which in turn meant there were very exceptional reasons as to why detention should be maintained."

70. Duncan Lewis sent a pre-action protocol letter on 13 November 2015. On 16 November 2015 they requested that MNK be released on temporary admission, and that his substantive asylum interview be further postponed. The Secretary of State declined both requests. As regards rescheduling of the interview she pointed out that she had previously exercised flexibility in MNK's case, and that Duncan Lewis had not provided her with any indication of the nature of the documents which they sought to obtain and their relevance to the asylum claim. She noted that MNK had had seven years whilst in the UK to gather any required documentation.

71. MNK filed his claim for judicial review on 18 November 2015 with a request for urgent consideration. On the same day, Collins J granted interim relief and suspended consideration of his claim by the DAC casework team. MNK was released from detention, initially without conditions, but later with monthly reporting, with which he complied.

72. The substantive asylum interview was conducted on 4 January 2016. MNK stated that he had been tortured in Pakistan. He suffered from depression as a result, albeit that he had only attended a GP in connection with this for the first time on 1 January 2016. He had been threatened in a letter in 2007 and that was the only other document he wanted to submit. He explained that he did not claim asylum on entering the UK because the deal with the agent was that if he cleared the airport

without problems the agent would return some of the payment to his brother in Pakistan.

73. Subsequently, there was a report dated 19 February 2016 from Dr Frank Arnold, who has written many reports for such cases. Dr Arnold has deciphered a semi-legible medical note for Kashmir, describing MNK as semi-conscious, his mental state anxious and depressed, having multiple injuries, including to his knees. Dr Arnold opined that the lesions on MNK's knees are true scars, and are consistent with lacerations which might be sustained during a fall and then being dragged along the ground.

74. The trainee solicitor at Duncan Lewis responsible for MNK's case, Aishah Khan, has explained in a statement the difficulty in obtaining Legal Aid Agency funding for reports and in locating persons to prepare them. Eventually Dr Rachel Thomas was found and prepared a report of MNK's mental health.

Zuberia Auleear

75. Zuberia Auleear, from Mauritius, arrived in the UK with entry clearance as a visitor valid for six months in February 2005. She was aged 25 at the time. She obtained a student visa and various extensions of her leave to remain as a student until 30 April 2011. On 28 April 2011 Ms Auleear applied through her then solicitors, Corbin & Hassan, for an extension of her leave outside the Immigration Rules on the ground that she wanted to marry her partner, an EEA national, also living in the UK. That application was refused on 1 June 2011 but the solicitors applied for reconsideration on 10 August 2011. On 9 August 2011 Ms Auleear was written to at her home address and informed that her application for consideration would be dealt with in due course, no removal action would be taken until then, but that she was in the UK unlawfully and could not work or access public funds. In March 2012, Corbin & Hassan returned fees of £400 and paid £200 compensation following a complaint by Ms Auleear about their standard of service.

76. On 24 July 2011 Ms Auleear wrote to Her Majesty, the Queen, about a forced marriage she had undergone in Paris. She had been summoned to Paris by her mother and father on 1 April 2011. On 14 April 2011 she underwent an Islamic religious ceremony to a Mr Ahmad, who was established in France. She escaped back to the UK three days later. Buckingham Palace forwarded her letter to the Secretary of State on 1 September 2011. The Secretary of State's response was that she had the application for consideration from the solicitors. That response was sent to Ms Lyn Brown MP, whom Ms Auleear had involved on her case. The Secretary of State informed Ms Brown on many occasions over the following years that Ms Auleear's case for leave to remain was still under consideration. On 5 November 2014 Ms Brown was informed that the case was of some complexity.

77. On 26 May 2015, Ms Auleear was served with a notice that she was liable to removal from the UK. She filled out a notice in reply about her forced marriage. On 2 June 2015 she engaged new lawyers, Rehoboth Law, whom she instructed about the forced marriage. On 5 June 2015 they applied on her behalf for leave to remain on the basis of her private life and under the 10 year route. The Office of Immigration Services Commissioners subsequently held Rehoboth Law to be incompetent in pursuing the application for leave to remain, which was weak, and not a claim for asylum. On 15

June 2015 the Home Office wrote to Ms Auleear at her home address advising that any claim for asylum had to be made in person.

78. On 1 July 2015 the Secretary of State made the decision to detain Ms Auleear, and on 28 July 2015 she was arrested at her home and detained. She admitted working around 35 hours per week. She was also served with the Secretary of State's refusal of the 2011 application for leave to remain. The letter stated that she did not qualify under the Immigration Rules. Although the forced marriage claim was an asylum claim she had not claimed in person, as required, at the Asylum Screening Unit at Croydon so that her fear of returning to Mauritius had not been considered. The letter added that the source of her alleged fear was her family, but they were resident in France, so there was no reason for her not to return to Mauritius. The Secretary of State certified Ms Auleear's Article 8 human rights claim as clearly unfounded under section 94 of the 2002 Act, Mauritius being listed there as a safe country for return.

79. The day after her arrest, on 29 July 2015, Ms Auleear enquired by email about voluntary removal to Mauritius:

> "My only issue is I have collected lots of things through the years and it is sitting in a room, I only was allowed to bring some of my very basic needs with me so my concern is how will I get my valuable things from my room.
>
> Will I be able to apply for a bail to be able to pack up my stuff and book my own flight? I also need to do a cargo as I don't have nothing back home so I will need my things with me, will I be allowed to do this?
>
> Can you please explain the process to me I would really appreciate."

Later, Ms Auleear explained her email to the voluntary deportation team as being sent at a time of stress.

80. On 30 July 2015, Ms Auleear was transferred to Yarl's Wood, where she claimed asylum the following day, 31 July 2015, with the assistance of an immigration officer. On 4 August a detention review noted that her removability was low, with a time line of more than 3 months, and her risk of absconding medium. That day she instructed her current solicitors, Wilson Solicitors, at an advice surgery at Yarl's Wood. The Secretary of State referred her case to the NRC. She was detained pending its decision. Detention reviews on 6 and 11 August took the same line as that of 4 August. On 11 August there was a note by the NRC gatekeeper as follows:

> "There is no evidence to suggest subject is unsuitable for detention as per Chapter 55 [of the] EIG. Subject was previously compliant with reporting however as detention is not deemed at face value to be prolonged, detention is appropriate in this case. Provisionally accepted for DAC."

81. The asylum screening interview took place on 13 August 2015. Ms Auleear answered "No" and "Not applicable" when asked whether she had health issues. She told of the

forced marriage and that if she went back to Mauritius she feared her family would kill her. She stated that she did not intend to produce further documents to support her claim.

82. Around that time, 14 August 2015, Ms Auleear's claim was accepted for consideration by the DAC team. The reasoning was that Ms Auleear had previous opportunities to claim asylum and had not done so, and that the events in Paris preceded the application to extend her leave on 24 April 2011. The view taken was that Ms Auleear only claimed asylum when faced with removal. She also posed a high risk of absconding. Moreover, since her claim was certifiable, her removal could take place quickly. The DAC team informed Wilsons that her substantive asylum interview would take place on 21 August 2015.

83. On 17 August 2015, Wilsons asked for longer to prepare Ms Auleear's case before the interview and for her temporary release. Wilsons also requested more time after the interview since it might need to obtain an expert report about forced marriage in Mauritius since the Secretary of State's latest Country Information and Guidance ("COI") on that country was out of date. On 18 August 2015, the Secretary of State agreed to postpone the interview until 24 August 2015. Ms Auleear's solicitor from Wilsons, Rachel Lau, explains in a witness statement the pressure she was under in representing Ms Auleear because of the timetable.

84. On 21 August 2015 Wilsons sent a pre-action protocol letter with a request for a further postponement of Ms Auleear's substantive asylum interview. They needed the expert report. The letter claimed that her detention was unlawful because her case was being processed at a speed similar to what it would have been in the detained fast-track system. The Secretary of State agreed to postpone Ms Auleear's interview until 26 August 2015, noted that her solicitors had been instructed for ten days and that an expert report would have no effect on whether the asylum interview took place. She declined to release Ms Auleear from detention. The Secretary of State noted that Mauritius was a country with respect to which there was a statutory presumption that claims for asylum would be refused and certified as clearly unfounded.

85. Ms Auleear's substantive asylum interview was conducted on 26 August 2015. She had no documents to submit that day but did have some she intended to submit in support of her claim. Ms Lau, from Wilsons, who was at the interview, explained to the interviewer that there might be other documents, from her previous solicitors, and there was an application for funding for an expert report. As to why she had not applied for asylum previously, Ms Auleear explained that her previous solicitor advised her to apply for leave to remain on the basis of her long-term residence.

86. In the meantime there had been an application for judicial review and interim relief. On 25 August 2015 Holgate J ordered that the determination of Ms Auleear's asylum claim "in a Detained Asylum Casework process (DAC/DNSA)" be suspended but said that his order did not prevent her continued detention or the planned asylum interview. Nonetheless, the Secretary of State released Ms Auleear from detention after her asylum interview on 26 August. On 18 September 2015, there was a report from Dr Laura Jeffrey of the University of Edinburgh that there were firm foundations about Ms Auleear's fears of forced marriage in Mauritius. The report noted that it seemed possible but unlikely that Ms Auleear would receive protection from the state

should she require it. The Secretary of State refused Ms Auleear's asylum claim on 23 November 2015, certifying it as clearly unfounded. Subsequently, she has noted that Ms Auleear's fear is from non-state agents, her family, with no particular profile to be able to inflict harm without the state stepping in to protect her.

TCV

87. TCV is a national of Vietnam, who was born on 10 May 1997. He entered the UK in the back of a lorry on 30 October 2014 and was apprehended by the police. He claimed asylum on 31 October and that he had been a victim of human trafficking. He was placed in the care of Northamptonshire Social Services as an unaccompanied minor. His mobile telephone was confiscated on the basis of concerns that he had been trafficked and that this was his link to the traffickers. Around 3 November 2014 he went missing.

88. In late December 2014, Northamptonshire Social Services completed a form for TCV to be referred into the National Referral Mechanism ("NRM" – the Home Office mechanism for considering trafficking claims) pointing to indicators that he was a potential victim of trafficking. On 8 January 2015, a Competent Authority decision-maker in the NRM concluded that there were no reasonable grounds for believing that TCV was a victim of trafficking: his account was internally consistent, it was broadly corroborated by objective evidence, but he was not exploited under the definition of trafficking because he was "listed with the police as a missing person". On 13 February 2015, TCV's asylum claim was treated as having been withdrawn due to the fact that he had absconded.

89. On 21 August 2015, TCV was encountered by immigration officers at a nail bar and detained. On 23 August 2015, he was given a healthcare screening at Campsfield Immigration Removal Centre and a notice of removal. Detention was justified, inter alia, on the basis of his risk of absconding. The 24-hour detention review on 22 August 2015 stated that he was liable to be removed from the UK and that he was likely to disappear if released. There was no reference to the NRM referral in this or in subsequent detention reviews. He reasserted his claim to be a minor and was given a single room in the detention centre while an age assessment was conducted. Given his claimed date of birth, Northampton Social Services assessed TCV as an adult on 25 August 2015. On 27 August he was served with a notice of removal within three months. He saw a solicitor from Duncan Lewis on 26 August 2015.

90. On 8 September 2015, Duncan Lewis sent a letter before claim stating that TCV had been a victim of trafficking and that he wanted to claim asylum because he feared traffickers in Vietnam. It requested an NRM referral. Duncan Lewis also wrote to the Home Office Competent Authority to have the reasonable grounds decision refusing the trafficking claim reconsidered. The Secretary of State referred the matter to the DAC team and, consequently, on 12 September, TCV was transferred to Colnbrook Immigration Removal Centre. TCV had a Rule 34 assessment. His asylum screening interview took place on 15 September 2015.

91. On 16 September, TCV was interviewed by Vietnamese consular authorities in order to establish his identity and nationality, with a view to providing him with fresh travel documentation. On 18 September, Duncan Lewis wrote to the Competent Authority requesting reconsideration of the trafficking assessment that had been undertaken with

respect to him. On 23 September, TCV's representatives wrote to the DAC team requesting his release pending investigation into his circumstances, and for his asylum claim to be processed in the community. The Competent Authority said on 24 September 2015 stating that it would restart the investigation into his trafficking circumstances.

92. TCV claimed for judicial review on 25 September 2015. The same day Lang J granted his application for interim relief and ordered that he not be interviewed or his claim determined until the judicial review was finalised. TCV was released from detention on 28 September 2015. On 20 October 2015, the Home Office Competent Authority made a reasonable grounds decision recognising him as a potential victim of trafficking. At the time of the hearing he had not had a substantive asylum interview and no conclusive grounds decision had been made with respect to trafficking. There is a report from a specialist adviser on human trafficking regarding TCV dated 5 April 2016.

IV THE GENERIC EVIDENCE

93. There was a substantial volume of evidence about the DII policy bearing on the fairness of its operation in practice. Objections were made on both sides to some of the evidence. Thus Ms Busch QC for the Secretary of State cited Sedley LJ in *R (on the application of Refugee Legal Centre)* v. *Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219 in support of her argument that the evidence of the claimants' solicitors did not assist. For the claimants, Ms Harrison QC objected that the evidence of Gurinderpal Jagpal on flexibility in decision-making by members of the DAC unit dated from March 2016 (referred to below) had little purchase, since that was after the decisions in the claimants' cases. This part of the judgment simply summarises the generic evidence.

The claimants' evidence

94. Toufique Hossain is a solicitor and director of public and immigration law at the law firm Duncan Lewis, which represents over half of all persons handled by the DAC team. In three witness statements he opines that the process for detained asylum seekers has not changed since the suspension of the detained fast-track. He states that there is no clear test applied by the DAC team compared with that for entry into the detained fast-track. His firm's experience is of a refusal to release even when significant actual or potential vulnerabilities are revealed during the screening interview. Moreover, the screening interview does not properly identify unsuitability for detention, as with TCV (there was evidence of trafficking), MNK (who revealed his stress in detention), or Mr Hossain (who told of the anti-government demonstration in Bangladesh). Rule 34 examinations fail to identify torture victims.

95. Toufique Hossain states that many of his firm's clients have not claimed asylum at an early stage for justified reasons such as paying back debts to people smugglers, bad advice, because they have been trafficked or because they are reluctant to disclose traumatic, shameful or disturbing experiences. The low success rate of those claiming asylum in detention reflects, in his opinion, the unfairness of the process. Mr Hossain also states that there are delays in allocating lawyers to those at the removal centres. Once a lawyer is allocated, the timescales are then accelerated and rigid. There is a long waiting list for Rule 35 assessments and, in his experience, the Secretary of State

improperly rejects Rule 35(3) reports. Further, caseworkers are extremely reluctant to grant extensions of time to obtain Rule 35 reports. Mr Hossain sets out other difficulties in representing asylum claimants in detention, for example obtaining translations of clients' documents and expert reports, and what he asserts is the Secretary of State's rigid approach to timescales. He makes the point that almost all of Duncan Lewis's clients have not absconded when released from immigration detention.

96. There are also witness statements from Marcela Navarrete, an assistant solicitor at Wilson Solicitors LLP, who has the conduct of the case of Ms Auleear's case. Wilsons have a legal aid contract like Duncan Lewis to provide legal assistance at the removal centres. Ms Navarrete states that those within her firm handling DAC cases find a lack of adequate safeguards to secure fairness and the release of unsuitable cases from the process and from detention. In her opinion there is also a disproportionately and unjustifiably harsh impact on vulnerable or potentially vulnerable groups. The DII operates similarly to the detained fast-track process. The imperative to process cases quickly trumps flexibility and fairness. Requests for a Rule 35 assessment face delays or, in some cases, a failure to conduct them at all. Independent evidence of torture from a Rule 35 report does not necessarily result in release. Ms Navarrete explains the difficulties for solicitors in preparing complex claims, trafficking cases and sexuality-based claims when persons are detained. She states that the evidence gathering is inherently difficult.

97. Dr Juliet Cohen has been head of doctors at Freedom from Torture since 2005. The suspension of the detained fast-track process has meant a limited elongation of the process, she says, but she still has concerns about considering asylum cases by torture survivors in detention. For them, the decision to detain rather concerningly precedes a full assessment of suitability for detention. Even where individuals provide information which indicates a past experience of torture and other vulnerabilities, this does not seem to lead to an assessment or the consideration of whether detention is justified. Delay in claiming asylum and a failure to regularise their stay is often through a person's fear of sticking their head above the parapet. Dr Cohen states that waiting lists for Rule 35 assessments have lengthened, and even when an assessment is obtained it may not achieve a person's release because of their immigration history.

98. In two statements the executive director of the Helen Bamber Foundation, Tarnjit Birdi, sets out its concern about the screening process used by the DAC team to identify vulnerable individuals. It had 371 individuals referred to it by the DAC team over the six months from 3 July 2015. Of these the Foundation found that 215 had significant issues identified in the screening interview (torture, trafficking, ill-treatment, mental illness) and 118 of these also had a Rule 35 report. Yet neither resulted in the person's release. Of the 156 whom the Foundation found did not have significant issues from the screening interview, 93 had a Rule 35(3) report which did not result in release. Of the 381 individuals, a further 39 identified a history of torture, harm, ill-treatment or other vulnerability at the substantive asylum interview. In another part of the statement, Ms Birdi sets out by reference to specific cases the Foundation's view that Rule 35 reports had been rejected for unsatisfactory reasons.

99. The acting director of Medical Justice, Theresa Schleicher, echoes many of Dr Cohen's concerns in her witness statement. In summary, the Foundation's view is that the critical safeguards to ensuring the identification of indicators of vulnerability

in individuals who have complex claims or claims which require further investigation are not in place and applicants continue to be detained when they are unsuitable. In practice they are subjected to an accelerated asylum process in detention. Moreover, there is no evidence of a prompt release from detention if cases are identified as requiring further investigation which cannot be undertaken in detention within the indicative timeframes.

100. Paul Dillane, executive director of the UK Lesbian and Gay Immigration Group, sets out in his witness statement the difficulties faced by lesbian, gay and transgender applicants in the determination of claims for asylum in detention, including exposure to bullying, abuse and harassment.

The Secretary of State's evidence

101. The Secretary of State has filed voluminous evidence from officials about the operation of the process for handling those who claim asylum once detained. As well as Alison Samedi, mentioned earlier, those from the Home Office giving this evidence were Gurinderpal Jagpal, a senior executive officer in the DAC team; James McGinley, head of the NRC Gatekeeper Team; Grant Trimmer, a member of Asylum Policy; David Crooks, a senior operational manager in the DAC team; Simon Barrett, a member of the Removals, Enforcement and Detention Policy team; Ian Cheeseman, another member of that team; Mathew Dixon, head of the Detained Casework Transformation Programme; Terry Gibbs, assistant director of detention services at Harmondsworth and Colnbrook; Chris Hannigan, of Asylum Operations; Tom Carlton, also of Asylum Operations; Dave Hollings-Tennant of the Asylum Policy team; and Helen Sayeed, of the Asylum Strategy and Trafficking team. Moreover, Dr Sufian Jabbar, a GP employed by the Central and North West London NHS Foundation Trust at Harmondsworth and Colnbrook, gave a statement about Rule 35 reports. This evidence falls under various heads and boils down as follows.

Asylum claims in detention

102. Overall, relatively few asylum claims are considered when a person is in immigration detention. Between 1 July 2015 and 31 January 2016 over 23,000 claims for asylum were registered nationally. Of those between 3 July 2015 and 31 January 2016, 1,413, around 6 per cent, were accepted for consideration in detention.

103. Ms Samedi's statement contains figures on asylum cases which had a decision in detention between 3 July 2015 and 16 December 2015. The vast majority were already detained when they claimed asylum. (Mr Crooks says that 80 per cent of the asylum claims referred to the DAC team for consideration are made by people who were already in detention when they make their asylum claim.) Only eight applicants were granted asylum (1.4 per cent). Of the remainder, 85.2 per cent were refused and 13.4 per cent withdrew their asylum claim.

104. During this period, Ms Samedi states that a total of 33 asylum appeals were heard where there had been a decision in detention carrying an in-country right of appeal. As of 16 December 2015, the Secretary of State had received one determination allowing an appeal and 22 determinations dismissing appeals. A further 10 were pending as of that date. Of those 10, one claimant was still in detention. Eight claimants were released from detention prior to their appeals being determined. Six

appeals were dismissed and two were pending. One person departed from the UK voluntarily prior to the outcome of the appeal.

105. For his statement, Mr Jagpal selected data from October 2015 for closer analysis. (He considers it broadly representative of asylum claims considered in detention.) That month the DAC team considered 174 asylum claims from those in detention. Of these cases, 163 were already in detention before submitting an asylum claim, 11 claiming asylum on the day they were detained. All made their asylum claim after being detained under immigration powers. On average, they had been in the UK for five years before submitting their asylum claim; the average time between the expiry of the claimants' leave and the submission of an asylum claim being three years and nine months; the average time from the date of a claimant's detention and the submission of an asylum claim was 22 days.

106. Almost one half of this October 2015 cohort (84 of the 174) had previously pursued other applications to remain in the UK and so could potentially have claimed asylum at that time. All 174 had breached immigration law in one way or another: 44 (25.2 per cent) had entered the UK illegally; 94 (54 per cent) had overstayed beyond the expiry of their leave; 25 (14.4 per cent) had previously used deception of some kind (e.g., false documents to obtain or extend leave or employment); 28 (16 per cent) admitted working unlawfully or had been arrested whilst working unlawfully; and 37 (21.2 per cent) had previously failed to comply with reporting conditions.

107. The decisions made by the Secretary of State in relation to these 174 claimants were as follows: 70 (40.2 per cent) had their decision certified as clearly unfounded under section 94 of the 2002 Act; 49 (28.1 per cent) had their asylum claims refused but with an in-country right of appeal; 23 (13.2 per cent) withdrew their claims; and two (1.1 per cent) were granted asylum. Thirty (17.2 per cent) had not received a decision in their case at the time the analysis was undertaken, but all were no longer in detention, except for one whose case has been passed to the Criminal Casework Directorate due to the possibility of deportation.

108. Of the 174 over 70 per cent were released from detention. Fourteen (8 per cent) were released due to a Rule 35 report being accepted as independent evidence of torture, and 42 (24.1 per cent) were released due to a letter of interest from the Helen Bamber Foundation under the MLR policy. Otherwise, release followed bail being granted by the First Tier Tribunal, delays in the appeal process, or judicial review proceedings being taken. With 21 cases, claimants were released due to other reasons, including the need for travel documents which could not be obtained quickly, positive reasonable grounds decisions in trafficking referrals, medical conditions, court orders and the grant of asylum. Out of the 42 releases resulting from a Helen Bamber Foundation referral, 19 absconded, failed to report or failed to maintain contact with the Home Office as required; four left the UK voluntarily, four withdrew their asylum applications, and 19 had their claims refused and the decision certified as clearly unfounded under section 94 of the 2002 Act.

Decisions to detain

109. By reference in part to the various forms used by immigration officers, Mr Trimmer explains in his witness statement that if they consider detention, whether of an asylum-seeker or not, they ask the person about their health, family, vulnerabilities

and suitability for detention. Indicators of trafficking are also recorded. After detention, caseworkers can release the individual if detention would not be compatible with Chapter 55 of the EIG. Otherwise they can refer the case to the NRC for a decision on detention.

110. In his statement, Mr McGinley explains that the NRC was established as a centralised unit in July 2013 following a review of detention management. Outside specialist areas such as criminal casework and third country cases, the NRC must authorise detention before a bed can be allocated in a detention centre. The policy aim is to provide an assurance that detention is appropriate and lawful in accordance with Chapter 55 of the EIG. In 2014–2015 the NRC rejected as suitable for detention 18 per cent of the 13,366 cases referred to them. The majority of the rejected cases were because travel documents were required to effect removal and these could reasonably be obtained without detention.

111. If a person claims asylum once detained, Mr McGinley continues, the case must be referred to the NRC to be reconsidered again in the light of the new information. Of the 3,754 cases between 2 July 2015 and 31 January 2016 referred to the NRC where the person claimed asylum, 2,214 involved claims for asylum after the person had been detained for removal from the UK. In 1,151 of these 2,214 cases, continued detention was considered appropriate. The 1,063 cases not considered suitable for continued detention were mainly considered to be complex cases, requiring a significant time for determination. In 63 of these cases, continued detention was not regarded as appropriate because of a person's vulnerabilities which had not been identified earlier.

Screening interview

112. One step in considering an asylum claim in detention is the screening interview. Since most of the cases accepted by the DAC team are already detained when the person makes a claim for asylum, the screening interview is conducted in detention. Mr Trimmer explains its purpose as gathering basic information about persons, their immigration history, and the main reasons behind their claim (whom they fear, why and key dates) and what documents they may have to support it. Claimants are asked about medical conditions, trafficking and why their case might not be suitable for consideration in detention. There are specific questions touching on vulnerability and the opportunity is given to applicants to raise any other issues they consider relevant. Mr Trimmer says that the demeanour of the applicant and the statements they make during screening may also indicate a vulnerability or welfare issue. There are many questions which are designed subtly to elicit details of vulnerabilities. The question about trafficking is supplemented by other questions with dual functions, for example the questions about the purpose of coming to the UK and asking for an outline of the journey here.

113. After the screening interview, Mr Crooks states that a review of detention takes place. That is usually undertaken by the officer conducting the screening interview. In line with the DII, particular attention is paid to any vulnerabilities uncovered in the screening interview. Between 3 July 2015 and 31 January 2016, 13 of 1,444 claimants were released from detention following the screening interview.

114. Mr Crooks summarises the procedural steps and training so that DAC staff can identify vulnerable and potentially vulnerable interviewees and indicators of human trafficking.

Legal aid, substantive interview, and flexibility

115. Mr Jagpal explains that claimants are advised about free legal representation at the time of the induction interview. If claimants do not nominate private legal representatives they can see a duty lawyer. Between 3 July 2015 and 31 January 2016, 597 individuals were allocated a duty representative at the point of induction. Free legal surgeries are widely publicised on posters within the immigration removal centres. The interview and consultation suites available for claimants and solicitors at Harmondsworth were increased from 27 in September 2014 to 38 in September 2015. Moreover, at least five days before the substantive asylum interview new asylum claimants in detention are given access to a legal aid lawyer if they want one.

116. The substantive asylum interview is outlined by Mr Hollings-Tennant. He exhibits the Asylum Policy Instruction, *Asylum Interviews*. It identifies for caseworkers the factors they should be aware of and the realistic and flexible approach they should take. Mr Hollings-Tennant states that it requires a focused and sensitive approach to questioning. The information elicited is subjected to a sensitive and rigorous enquiry, he states, so that protection is granted to those who genuinely need it.

117. In a third witness statement, Mr Jagpal refers to the 36 requests for flexibility made by lawyers representing asylum claimants in detention in March 2016. In 35 of those cases the application was granted. Further time was required to prepare for an asylum interview or to obtain supporting documents for the claim. The time requested was granted in full in all but three cases.

Rule 35 reports

118. In his statement, Mr Barrett opines that concerns relevant to Rule 35 may arise at any point of a person's detention, although it is most likely that they will be raised at the initial Rule 34 health screening. In Mr Barrett's view this does not rely on the detained person knowing about Rule 35 or requesting a specific Rule 35 examination. Mr Barrett states that the record number of Rule 35 reports in 2015 (2,038) suggests a high level of awareness of its importance among healthcare staff.

119. As to the timelines of responses to Rule 35 reports by caseworkers, Mr Barrett explains that Rule 35 activity is monitored in the Home Office on a weekly basis. For the week ending 6 March 2016, a representation week on his evidence, a total of 61 Rule 35 reports were received. Of these, one had not been given a response by the date of the weekly report, 11 March, and one had received a late response, outside the two working day target.

120. An exhibit to Mr Barrett's statement is a UK Visas and Immigration *Quality Analysis Report*, March 2015. It took a sample of 60 Rule 35 cases in the first quarter of 2014 and experts assessed their quality. None failed, but a high number of reports were observed to contain little or no medical evidence in support. Included in this category were Rule 35(3) reports which contained the allegations of the detainee about torture, without there being a required statement as to whether there was any or limited

medical evidence to support them. Within the cases in the sample, the content and level of detail contained in Rule 35(3) reports varied significantly and often did not include the information set out in Detention Services Order, 17/2012. Twenty-nine (64 per cent) of the 45 cases which had Rule 35(3) reports were marked as weak because they had serious errors.

121. In his witness statement, Dr Jabbar states that there has been an emphasis by the medical teams on improving and unifying how Rule 35 reports are completed. The number of requests and requirements for an appointment to make a Rule 35(3) examination has increased from between 5-10 per week to an average of 30 per week over recent months. He observes that:

> "[I]n my own experience and that of my colleagues working alongside me in the immigration removal centres, there has been an increase in detainees requesting [Rule 35(3)] appointments after they have been resident at the centre a while. These are individuals who did not disclose a torture allegation during their initial health check for whatever reason, but who may have become aware of the [Rule 35] process at a later date. The GP team has also noted an increase in [Rule 35(3)] appointment requests as a result of detainees stating they have been advised by their legal representatives to "get a rule 35 done"… Again, in our experience there is a high volume of detainees who state at their [Rule 35(3)] assessments that they "do not really know what the [Rule 35] is" and they have been advised by legal reps to "get an appointment as soon as possible… it will help my case". Once the GPs have explained the process and purpose of a [Rule 35(3)] and examined the individual, there are occasions where a [Rule 35(3)] is not completed as the GP concludes it is not actually required as there is no evidence of torture having taken place."

122. In his statement, Mr Carlton explains the training course for caseworks regarding Rule 35 and the other materials relevant to the administrative of the rule.

123. Between 1 August 2015 and 30 November 2015, Mr Jagpal states that 73 persons were released as a result of a Rule 35 report, it being accepted as independent evidence of torture. Of those, 32 (44 per cent) absconded after their release; 30 (41 per cent) had their asylum claim certified as clearly unfounded; 13 (18 per cent) have had their asylum claim treated as implicitly withdrawn because they have either absconded or failed, without reasonable explanation, to attend an asylum interview or submit a witness statement as required; 22 (30 per cent) have had their asylum claim refused, but with an in-country right of appeal; one was granted asylum; and seven (10 per cent) have yet not received a decision in their case.

Shaw Report

124. Mr Cheeseman and Mr Dixon in their statements explain the steps being taken by the Home Office to make changes following the Shaw Report to the manner in which asylum claims are handled when applicants are detained. One aspect is the

introduction of a new adult safe-guarding team to focus on vulnerable and potentially vulnerable adults.

V GROUNDS OF CHALLENGE

125. In examining the various grounds of challenge the claimants advance I treat as the object of the challenge the DII. As is evident from Part II of the judgment, the DII has effect along with other guidance, such as the *Process map*. But it is convenient to use the simple terminology "DII" to refer to what the claimants contend is unlawful.

126. It is helpful at this early stage to consider a submission of the Secretary of State that the *Detention interim instruction* and the *Process map* are not really a policy at all, certainly not a new one. All that is being done is to detain persons, mainly following enforcement action, when they are suitable for detention under long standing law and policy. If these persons claimed asylum, their claim was considered by the DAC team according to established asylum policies. Persons are released who do not pose an abscond risk, who fall within the EIG, paragraph 55.10 categories (there being no very exceptional circumstances justifying continued detention), and whose asylum claim will take too long to process for detention to be justified. The DII simply reminds caseworkers to apply Chapter 55 to detention now that the DFT has been suspended.

127. This contention can be dealt with shortly. I accept that the policy basis for detaining persons dealt with by the DAC team is in the main Chapter 55 of the EIG and that asylum claims by those in detention are addressed under the usual policies. But the DII and *Process map* are more than this since they set out how asylum claims in detention are to be handled, not least in accordance with the indicative time scales. It is clear to me that the DII is a policy, albeit a relatively small piece of the asylum policy jigsaw.

DII as an unlawful process having regard to *R (JM)*

128. The claimants contend that the DII is a process, equivalent to the DFT, the detained fast track, and that it is legally flawed because DFT-type processes are unlawful under the consent order in *R (JM)* v. *Secretary of State for the Home Department* [2015] EWHC 2331. Just like the DFT, the claimants also submit, the DII relies on the same safeguards of screening and Rule 35 reports. The reality is that the DFT contained a majority of enforcement cases, the target caseload under the DII. Further, as with the DFT, the DII is an accelerated process. The claimants point firstly to the express provision of paragraph 24 of the DII, quoted earlier, that asylum claims have to be progressed as quickly as circumstances allow. Secondly, the claimants underline the 28-days indicative timescale in the *Process map*. In fact, they submit, the timescale is usually 11 days if one takes the time referred to in the *Process map* from that crucial point when a lawyer is allocated to the substantive hearing.

129. The Secretary of State cannot defend the timescales on the ground that flexibility is inbuilt, the claimants submit, since the DFT policy also stated that timescales were not rigid and had to be varied in light of the circumstances. In fact, an inflexible approach was exhibited in the claimants' own cases and is the experience of lawyers working in the system, as evidenced in Mr Hossain's and Ms Navarrete's statements.

130. In my view this ground of challenge goes nowhere. On their face the DFT and DII policies are fundamentally different. The DFT policy was to detain asylum seekers on the sole criterion that their claims for asylum could be determined speedily, even when there was no risk of absconding. Under the DII, Chapter 55 of the EIG governs detention and there is a presumption in favour of release unless, for example, there is the specified risk of absconding.

131. Nor do I accept that the DII policy is unfair because somehow asylum claims are progressed more speedily compared with the leisurely pace for many of those who apply for asylum at the Asylum Intake Unit at Croydon. Certainly in paragraph 24 of the *Detention interim instruction* caseworkers are told to process an asylum claim as speedily as possible, but that is in the context that with, say, the person who is detained on an enforcement visit to a work place, and then makes an asylum claim, there is prima facie a reasonable chance of removal within the *Process map* timeframe.

132. Indeed, I accept the Secretary of State's submission that the timescales ensure that detention is kept to a minimum and that there can be no arguable objection to them. There is the 28 day overall period and the other time periods set out in the *Detention interim instruction* and *Process map*. However, it is made clear in various places there, as well as in Ms Samedi's witness statement, that these are not hard and fast limits and that requests for more time, for example, to obtain documents or translations, will be considered. In the claimants' own cases I explain later in the judgment that none of the decisions taken in the Secretary of State's name can be regarded as in error, except with TCV, where she accepts there was fault.

133. Moreover, I do not regard the claimants' legal analysis as correct. What needs to be done is to examine the DII on its own terms. I turn to that below but the point to make here is that it is not the DFT. In any event I fail to see what purchase the DFT litigation has in the present judicial review. First, Ouseley J held in *R (on the application of Detention Action)* v. *Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) that none of the deficiencies he identified in the DFT were of themselves unlawful and that the DFT as a whole was capable of being lawful if those detained were given early access to legal assistance. That of course is now a feature at the removal centres, with the contracts awarded by the Legal Aid Agency to firms such as Duncan Lewis and Wilsons to provide early legal assistance to those detained.

134. Secondly, the Orders in *R (JM)* are clearly binding on the parties, but I fail to see where that goes as a matter of law in a case with different parties and different arrangements. No consent order, statement of matters relied on in making it, and reasons given by a judge in approving it under 54A PD.17 of the Civil Procedure Rules can have any effect in our common law system in creating a binding precedent. Forensically I can see the advantages for the claimants of attempting to link the DFT and the DII; as a matter of law I find the argument without merit.

Fairness not explicitly stated in policy

135. The claimants contend that the DII is legally flawed because fairness is not made explicit as one of the criteria for the application of the policy. They cite *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC

12; [2012] 1 AC 245 and *Detention Action)* v. *Secretary of State for the Home Department* [2014] EWCA Civ 1634, [2015] INLR 372 as authority that policies must be transparent and clear, that even if long standing they are unlawful if lacking in certainty and transparency as to how they will be applied, and that such matters cannot be left implicit.

136. In their submission, where fairness is not emphasised as a clear criterion in the DII, and the other policies do not deal with it explicitly and clearly, signposting to Chapter 55 of the EIG and the Asylum Process Instructions cannot save it. The DII policy should state explicitly that when caseworkers consider detention its effect on the fair determination of the asylum claim must be addressed. Similarly, as regards other decisions, such as in relation to Rule 35 reports and on requests for the exercise of flexibility, fairness should be stated as a factor to which caseworkers must have regard. The failure to do this means the DII policy is unlawful.

137. In my view there is no general rule that government must make explicit in its policies all the criteria which will govern their application. The findings of Lord Dyson in *Lumba* and Beatson LJ in *Detention Action* [2014] EWCA Civ 1634 about the publication of government policy were made in cases concerned with the statutory power of executive detention and directed at excluding the vice of arbitrariness from its exercise. That was certainly the thrust of Beatson LJ's careful remarks and finding: see [14], [67]-[70]. In *Lumba*'s case Lord Dyson referred to the rule of law calling for a transparent statement by the executive of the circumstances in which broad statutory criteria are exercised and referred *obiter* to arrest and surveillance as well as detention: [34]. The legal base for the publication of criteria for the exercise of executive discretion he seemed to find in procedural fairness, enabling individuals to know the criteria being applied to detain them so they could challenge an adverse decision: [36].

138. In as much as there is a wider principle of publication in Lord Dyson's *obiter* remarks in *Lumba*, they too turn on the well established principle of procedural fairness: "What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made": [38]. Professor Timothy Endicott explains how legitimate expectations have provided a legal base for the requirement of a degree of consistency in the application, and one might extrapolate the publication, of executive policies: see *Administrative Law*, 3rd edition, Oxford, 307, 2015. There might be a legislative obligation, or justification in good administration for government policy to be published. Absent procedural fairness or perhaps legitimate expectations, however, there appears to be no basis in public law principles for a general requirement about the publication of government policy.

139. Whatever the scope and legal base in public law of a principle requiring the publication of government policy it does not apply to require an explicit statement of the duty to act fairly in the DII. Procedural fairness, as I have just said, is a well established principle, ingrained now in public administration. It would be otiose to state it. If required in this context then why not other contexts as well? In any event if stated it would be relatively meaningless for caseworkers if it were not operationalised. This is done to an extent in the DII, for example in paragraph 24 which expressly states that there is a need for caseworkers to keep under review the

time it is likely to take to make a decision and to review decisions in the light of it. I reject this ground of challenge.

Inherent unfairness in the DII: the generic challenge

140. Fairness means offering persons a fair opportunity to make meaningful representations about their case. That must be calibrated against the background of the interests at issue. Since in this context a person's claim to asylum is at issue, the highest standards of fairness are demanded. In making that point in *R* v. *Secretary of State for the Home Department ex p. Thirukumar* [1989] Imm AR 270, Bingham LJ added that if an opportunity to make representations is to be meaningful, the mind of the applicant must be directed to the considerations which will, as matters stand, defeat his application: at p.414. There is also authority that the circumstances may be such that fairness requires that the applicant has an opportunity to address adverse inferences and obtain corroborative evidence: see *R (L)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230, [49]-[50].

141. The issue here is how the fairness of a system is to be considered in a generic challenge. It seems first to have been addressed in *R (on the application of Refugee Legal Centre)* v. *Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2005] 1 WLR 2219. In that case, Sedley LJ acknowledged that the choice of an acceptable system was, in the first instance, one for the executive. The test to be applied by the court was whether, looking at the full range of cases, the system in the round was inherently unfair. In that case the time limits for the fast track system for the Secretary of State to make an asylum decision were short, three days, but the court held that it was not inherently unlawful so long as it was operated flexibly.

142. The Court of Appeal returned to the issue of the inherent fairness of a system in a case involving the conditions being imposed on persons being released from prison on license: *R (Tabbakh)* v. *Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827, [2014] 1 W.L.R. 4620. It applied the test in the *Refugee Legal Centre case*: the issue was whether the system established by the policy was inherently unfair for failure to provide offenders with a fair opportunity to make meaningful representations about those conditions. The threshold was high. The question was not whether there was a very high risk of the policy leading to unlawful action (the test I had posited at first instance: [2013] EWHC 2492 (Admin), [244] 1 WLR 1022, [51]) but whether there was reason to believe that the system was capable of operating fairly in the generality of cases. The court's conclusion was that the system was lawful.

143. Then in *R (on the application of Detention Action)* v. *First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840, [2015] 1 WLR 5341 the Court of Appeal held that the fast track appeal system, set out in rules governing asylum appeals, was structurally unfair. In a judgment, with which Briggs and Bean LJJ, Lord Dyson MR in effect reaffirmed the test in the *Refugee Legal Centre case*:

> "27 I would accept Mr Eadie's summary of the general principles that can be derived from these authorities: (i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more

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

144. In my view the courts are not expert in the type of inquiry demanded when a whole system of public administration is on trial as to how it handles the "full run of cases". The *Detention Action* [2015] EWCA Civ 840 case concerned a system with which courts are very familiar, that governing appeals to a tribunal. *Tabbakh* focused on a specific point in an administrative process. It seems to me that it can be much more difficult for a court to determine inherent unfairness for a full run of cases in other administrative contexts. Courts are primarily settlers of disputes and, in judicial review, determine lawfulness in particular cases. An inquiry into an administrative system as a whole is not generally suited to the formal, forensic process normally associated with judicial review where evidence is presented through statements, there is typically no cross-examination, and the parties make their cases sequentially.

145. An investigation into how an administrative system works as a whole requires the more informal, wide-ranging and iterative methods of inquiries. An example in this very area is the *Shaw Report*, where a person with a lifetime of experience in detention systems led a team, over a number of months, commissioned research by others, received written submissions from organisations and individuals, met with the range of persons involved in the system, and made visits to see the day to day operation of detention centres: Cm 9186, 2016, Appendices 1–8.

146. Hickinbottom J made similar observations about the limitations of courts in *R (on the application of Edwards)* v. *Birmingham City Council* [2016] EWHC 173 (Admin); [2016] HLR 11. That was a challenge to the Council's practices and policies when handling homeless persons' cases. The claimants sought a general declaration that these failed to comply with its obligations under the Housing Act 1996 and a general mandatory order for compliance. Hickinbottom J said:

> "129 There is no doubt that, in the two cases in which permission to proceed has been obtained (Ms Edwards and Ms Cole), it has been granted on the basis that, at the substantive hearing, the Claimants' general claims are in play. However, as I stressed at the hearing, this is not a public inquiry into the way in which the Council handles homeless applications. Such an inquiry is not the function of this court: there are more

> appropriate fora in which such inquiries into alleged maladministration can be made, e.g. the appointment of an inspector to report on an authority's compliance with its obligation to secure improvement in the way its functions are exercised, "having regard to the combination of economy, efficiency and effectiveness (under section 10 of the Local Government Act 1999), or an investigation by the ombudsman into "an alleged or apparent failure in service which it was the authority's function to provide" or "an alleged or apparent failure to provide such a service" (under section 26(1) of the Local Government Act 1974)."

147. In the present litigation, the claimants contended that the DII operated inherently unfairly in preventing some of those claiming asylum while detained from putting their case. The fact that for claimants such as Mr Hossain, MNK and TCV interim relief from this court stopped the clock, so that they were able to obtain supporting documents and reports, did not mean the system was not unfair, because that was to look at inherent unfairness retrospectively.

148. In the claimants' submission, the DII system for particular asylum claimants is inherently unfair – those with complex cases, torture victims, trafficking victims and those vulnerable or potentially vulnerable through mental or physical illness, gender, sexuality and so on. That was because the DII included persons within it without prior screening; retained persons in detention without giving them the opportunity to rebut the presumption in favour of inclusion or to advance a case for exclusion; denied release even after independent evidence of torture or a referral in trafficking cases to the NRM; and failed to account in complex cases for the obvious time which would be taken in obtaining documents, reports and translations.

149. In my judgment, the generic claim fails. The starting point, as Sedley LJ held in the *Refugee Legal Centre* case, is that the government is entitled to adopt its policy, in this case as explained at length in Ms Samedi's statement the need to protect immigration control by ensuring that the Secretary of State can detain and then remove those in the country unlawfully, who pose a risk of absconding and who then make asylum claims which can be determined within a reasonable period of time. As Ms Samedi explains, the rationale of the policy is that if there was no such power to detain, making an asylum claim, no matter how unmeritorious, would be an effective way of frustrating removal.

150. Against that background there is then what the policy expressly provides. First, it says nothing about how substantive asylum claims are decided: that is in the ordinary way in accordance with the Asylum Instructions. As to process, I noted earlier that the DII makes clear on its face that caseworkers should consider requests for more time, for example to obtain documents or translations. That as a matter of interpretation means that if for valid reasons the asylum claim really needs more than the 28 days set down in the *Process map*, this will be granted and the officials managing detention will reconsider whether detention remains appropriate under *Hardial Singh* principles and Chapter 55 of the EIG. Moreover, the *Process map* indicates flexibility in other ways: in paragraph 7 the timescale for the asylum interview is "a rough guide"; in paragraph 8 "normally" up to 5 working days will be given for submitting further evidence and information in support of a claim and more

time can be given, if appropriate; and in paragraph 9 the caseworker and applicant should "agree" a deadline for further evidence. This policy of flexibility is underlined in Ms Samedi's statement.

151. Next, there is the evidence the parties adduced about how the DII works in practice. The claimants' solicitors, Mr Hossain and Ms Navarrete, gave evidence about their experience and that of other solicitors. Despite what appears to have been Sedley LJ's view at paragraph 14 of the *Refugee Legal Centre* case, I do not discount their evidence as unhelpful. There was also the evidence from the Foundations, including Ms Birdi's evidence of the 371 individuals referred to it by the DAC team in the last six months of 2015, and that of those 215 had significant issues identified at screening or by a Rule 35 report yet this did not secure release.

152. But the point about the claimants' evidence is that it simply does not match the weight of the evidence the Secretary of State has produced for the full run of cases when asylum claims are made and applicants are in detention. Let me take three crucial steps in the process. First, as against the claimants' case of inherent unfairness in persons having their asylum claim considered in detention without screening and the unfairness this leads to, there is Mr Trimmer's evidence about the first encounter with immigration officials and the forms which must be completed. There are also the figures that in most cases where someone claims asylum at first encounter immigration officials do not seek the authority to detain. Coupled with that is Mr McGinley's witness statement recalling that, between 2 July 2015 and 31 January 2016, over 80 per cent of the claimants referred to the NRC for possible detention who were not yet in detention were assessed as being unsuitable. Further, he gives evidence that the NRC decided that almost half of the referrals who had claimed asylum in detention were not suitable for ongoing detention. So the evidence of the whole run of cases at this point does not demonstrate inherent unfairness.

153. Rule 35 medical examinations are a second bone of contention. But the figures the Secretary of State has given belie the claimants' case of inherent unfairness because reports do not result in release when continued detention because of the high risk of absconding cannot be justified. To the contrary, Mr Jagpal's figures for 3 July 2015 to 3 January 2016 show that of the 492 Rule 35 reports for asylum cases in detention to which immigration officers responded, 108 resulted in release due to the report being accepted as independent evidence of torture. Those figures must be coupled with the 2014 Quality Analysis report on Rule 35 reports, that in no case did they incorrectly fail to order release. That same report also found that a significant number of Rule 35(3) reports, that there was independent evidence of torture did not stand up to critical analysis.

154. Under the Secretary of State's policies there is, of course, no obligation to release simply because of a Rule 35(3) report if there is an unacceptably high risk of absconding. The figures do not evidence unfairness over the whole run of cases when the Secretary of State assesses absconding risk. Of Mr Jagpal's 73 detainees released between 1 August 2015 and 30 November 2015 as a result of a Rule 35 report alone, 32 (44 per cent) subsequently absconded, only one was granted asylum, with ten decisions outstanding. Those figures have some resonance in Dr Jabbar's evidence, with its heavy hints of abuse of the Rule 35 process.

155. A third step in the process is the substantive asylum interview and the charge of inherent unfairness because the Secretary of State will not postpone it until a Rule 35 report is received. In my view that does not hold water in light of evidence about the nature of the interview, in particular when it allows claimants to explain their case at length. There is then the opportunity under the policy to provide further evidence following it, along with the detention review, usually conducted by the officer undertaking the interview. Crucially, however, the charge of unfairness at this stage dissolves because by now all interviewees have access to lawyers under legal aid. The claimants' own cases demonstrate the effectiveness of those arrangements. I accept the force of Mr Jagpal's evidence from March 2016 about the flexibility the Secretary of State displays with requests for an extension of time.

156. In conclusion, both on its face and in practice, the DII cannot be said to be inherently unfair, whatever the position might be in individual cases. As demonstrated in the Secretary of State's figures, with the run of cases the system of handling asylum claims in detention exhibits the capacity to react as fairness requires. That is also the reality in the overall full run of cases as regards the various steps in the process, for example, the first encounter, the role of the NRC, the Rule 34 and Rule 35 reports, and the screening and substantive interviews. I accept the Secretary of State's submission that individually and cumulatively those mechanisms serve to ensure that asylum-seekers are released from detention where fairness demands, because their own vulnerabilities make detention inappropriate, or where it is apparent that their asylum claim is complex and that it would not be proportionate to detain while it is determined. Although there may be unfairness in individual, aberrant cases, the claimants' various criticisms of the system do not meet the high threshold to demonstrate systematic unfairness in preventing applicants from advancing their claims.

Breach of public sector equality duty

157. The claimants' case is that in devising and formulating detention policy, in undertaking any review of its operation, in making changes to it, in its application generally and in subjecting them to it, the Secretary of State was bound to have due regard to the public sector equality duty under section 149 of the Equality 2010 Act ("the 2010 Act"). In their submission she has not conducted the Equality Impact Assessment in respect of the post-DFT DAC required by that section. For present purposes the relevant protected characteristics in these claims include disability, gender and sexual orientation and transgender: section 149 (7).

158. The claimants' first argument is that in the *R (PU)* consent order the Secretary of State undertook to comply, in any review of unfairness in the DFT, with her public sector equality duty and to publish how she had done so. Her failure to do this before implementing the DII is at the every least inconsistent with those undertakings, if not in breach. I have already said that any argument which uses as its base a consent order relating to different arrangements for handling asylum claims by those in detention does not get off the ground. I reject this ground of attack.

159. The second argument the claimants advance is that the Secretary of State's adoption of the DII amounted to a new or changed policy and was in any event an exercise of her functions engaging the equality duty. The claimants' case is that the DII is incompatible with the public sector equality duty since it does not refer to the

protected characteristics. Indeed there has been no consideration of the disproportionate adverse impact of not being able to operate critical safeguards for identifying those with a protected characteristic through measures such as screening, Rule 35, and the NRM mechanism, and for removing those protected groups from detention.

160. No adequate regard has been given, the claimants further contend, to the specific needs of vulnerable minorities, for example, those with mental illness. Similar problems arise with in those in detention whose claims are based on their sexual orientation, as reflected in *JB (Jamaica)*, because of the complexity and need to obtain corroborating evidence. Women who have experienced sexual violence or exploitation are another vulnerable group whose cases are likely to be especially complex. The purported flexibility in the DII time scales does not address the particular needs of protected groups.

161. In the claimants' submission the Secretary of State cannot hide behind the Shaw Report. That review is highly critical of the treatment of vulnerable and protected groups in immigration detention and has confirmed the multiple differential adverse impacts of detention on vulnerable and potentially vulnerable protected groups. The Shaw Report provides the information upon which to conduct an equality impact assessment but it has not in itself fulfilled the section 149 duty. In any event the DII was applied in these claims prior to Mr Shaw's investigation and consequently in the absence of any equality impact assessment on the application of Chapter 55.10 of the EIG to protected groups subject to detention.

162. The Secretary of State's first response to this is that the DII does not represent new policy but is a reversion to the existing policy primarily contained in Chapter 55 of the EIG, that the public sector equality duty does not apply. To my mind this is an unrealistic approach and I have already rejected it. Secondly, the Secretary of State states that any necessary equality impact assessments related to policy and process changes in response to the Shaw Report will be published at the appropriate time, but there is no reason for her to produce a compendium assessment based on the totality of Mr Shaw's findings. In my view this is beside the point since the legal challenge is to the public sector equality duty in relation to the DII, not Mr Shaw's report.

163. Thirdly, the Secretary of State points to the work she has undertaken which matches what would be expected in meeting the public sector equality duty. Thus she points to her response to a report by the Tavistock Institute on the detention of people with mental health problems, which was to publish a *Policy Equality Statement on Mental Health* in Detention on 27 November 2014. To inform it, she undertook a targeted consultation in early 2014 of those NGOs with an interest in the area. The statement refers to the establishment of multidisciplinary teams within immigration removal centres and to the training for custody officers.

164. Similarly, Mr Pedlow in his witness statement sets out the steps behind the development and publication in 2015 of the Asylum Instructions, *Sexual Identity Issues in an Asylum Claim* and *Gender Identity Issues in an Asylum Claim*. That involved close work with NGOs in the area. This followed a report by the Chief Inspector of Immigration and Borders into the handling of asylum claims based on sexual orientation. In response to Mr Dillane's evidence for the claimants, Mr Pedlow refers for example to the training for staff and the complaints systems in place

in immigration removal centres for bullying and harassment. Finally, in February 2016, the Secretary of State launched a "Detained Asylum Safeguarding Team" pilot, to test additional safeguarding processes.

165. The public sector equality duty under section 149 of the 2010 Act is well known and needs only a brief summary. It obliges the Secretary of State, in exercising her functions, to have due regard, inter alia, to the need to eliminate conduct such as discrimination which is prohibited by this Act and to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. Discrimination for these purposes includes indirect discrimination. Having due regard to the need to advance equality of opportunity is defined further in section 149 (4)-(6). Due regard means proportionate regard, or that which is appropriate in all the circumstances: *R (Bracking)* v. *The Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. As well as paying due regard to her equality duty at the time a policy is under consideration, a decision-maker may need to do so in individual cases: *Pieretti* v. *Enfield London Borough Council* [2010] EWCA Civ 1104; [2011] PTSR 565.

166. As Singh J indicated in an analogous context, the duty now incorporated in section 149 of the 2010 Act is important and non-compliance cannot be regarded as unimportant: *R (on the application of HA (Nigeria))* v. *Secretary of State for the Home Department* [2012] EWHC 979 (Admin), [199]. The Secretary of State has taken important steps relevant to her performance of the public sector equality duty. Clearly relevant are the *Policy Equality Statement on Mental Health in Detention*, the Asylum Instructions on sexual and gender identity and the responses to the Shaw Report. But those are not comprehensive in addressing the protected characteristics encompassed by the duty. What more the Secretary of State needs to do is not for me to say; all I can conclude is that on the case presented to me she has not, in my judgment, paid due regard in all aspects to her public sector equality duty in considering asylum claims in detention.

The test cases

167. The claimants' own cases are said to be representative of other cases of asylum claims by those in detention to which the DII applies. The cases are said to be indicative of the unfairness with the DII. Although the claimants have in each case been released following judicial review claims in this court, the claimants' case is that what happened to them is illustrative of how the Secretary of State's presumption of opportunistic and abusive late claims operated unfairly, how her so-called safeguards did not work and how those with similar, complex cases and vulnerabilities remain improperly in immigration detention.

Tahidul Hossain

168. Mr Hossain's case was advanced before me as a paradigm example of unfairness and prejudice. In Mr Hossain's case it is said to derive initially from his detention with no pre-screening to uncover information on his asylum claim and his vulnerabilities, and the absence of any opportunity to rebut the adverse inference regarding his late claim. As to Mr Hossain not making revelations of torture under the Rule 34 procedure, the case was put that there are accepted problems with that process. Then at the screening interview it was contended that there was a failure to give him an opportunity to rebut

the adverse inference regarding his late claim, to refer him for a Rule 35 examination despite his health problems and disclosures, and to consider the obvious complexity of a political asylum claim with documents located in Bangladesh.

169. There was then said to be a delay of 16 working days after Mr Hossain claimed asylum before he was allocated a lawyer, and a period of inactivity during which he was unable to challenge his detention or progress his claim. There was the further unfairness in the decision to refuse to postpone the substantive interview for a Rule 35 assessment when it was not prima facie abusive and when the assessment was due imminently. It is said that the Secretary of State's assertions that claims from a torture victim can be explored in the substantive interview, absent a Rule 35 assessment, misses the point about the fairness of subjecting the person to interview in the first place. Finally, there was the Secretary of State's refusal to release Mr Hossain even when judicial review was launched and despite her erroneous approach to the "very exceptional circumstances" test for detention.

170. In my view there was no unfairness in Mr Hossain's asylum claim being considered while he was detained. Indeed in my view Mr Hossain's case is the paradigm example of the Secretary of State being entitled in law to detain someone who has made an asylum claim. He was someone who had been in the country unlawfully for some 15 years, who was discovered with false documents and various aliases, who initially dissembled about his identity and who, under caution, indicated he was an economic migrant. Ten days after detention, he made his claim for asylum. Admittedly, there was unexplained delay in Mr Hossain's acceptance by the DAC team but in my view there was no flaw in the Secretary of State regarding this prima facie as a late, opportunistic claim to asylum, made with a view to thwarting removal, and one suitable for continued detention and expeditious consideration. Parliament has given the steer for this with section 8 of the 2004 Act. Accordingly, Mr Hossain's detention was not unlawful. Certainly he was not prompted to explain why his asylum claim was late but even now the explanation he gives of poor advice can be characterised (to put it no higher at this stage) as weak.

171. Significantly, until the Rule 35 assessment on 1 November 2015 there was nothing that the Secretary of State knew, or ought to have known, to justify the release of Mr Hossain from detention. There was nothing about torture in Bangladesh in his Rule 34 examination, when he first claimed asylum, in his screening interview or, I would note, in the letter before claim from Duncan Lewis on 28 October 2015. There were documents he said he needed from Bangladesh, but on its face his statement that he could obtain them in four or five days would not appear implausible in this day and age. I do not accept that the refusal of the Secretary of State to suspend Mr Hossain's substantive asylum interview was flawed on the basis that he had not had a Rule 35 assessment. When King J suspended the process of interviewing on 2 November, he observed, in my view correctly, that Mr Hossain's claim to being a victim of torture and a vulnerable person did not seem to relate to anything which had happened in Bangladesh, as distinct from Kuwait.

172. Once the Secretary of State accepted that the Rule 35(3) report was independent evidence of torture on 3 November 2015, the issue became whether Mr Hossain's detention could be maintained under Chapter 55.10. In my judgment the detailed reasons given in the detention review of 3 November 2015 and in subsequent detention reviews cannot be regarded as unlawful. Notwithstanding HHJ Gore QC's

observations when granting permission, these detailed reasons can, in my view, properly be regarded as constituting the very exceptional circumstances as required by Chapter 55.10 and the *Detention Rule 35 Process* guidance. The policy states explicitly that very exceptional circumstances include when there is an unacceptably high risk of absconding. That Mr Hossain has complied with his current reporting after his release on 27 November 2015 on conditions in my view casts no shadow over the Secretary of State's detention decisions last November that Mr Hossain posed an unacceptably high risk of absconding.

MNK

173. The unfairness in MNK's case was submitted to be along the same lines to that in Mr Hossain's case. In my view there was nothing the Secretary of State knew, or ought to have known, which suggests that she was in error in concluding on 14 October 2015, for the reasons stated, that MNK's late asylum claim could be dealt with in detention. As with Mr Hossain, his immigration history can only be described as unattractive and his asylum claim falling into the category of late, opportunistic claims designed to thwart removal. His justification for not claiming asylum at port, that it was only if he gained entry to the UK would his brother receive a partial refund in Pakistan, did not preclude an application at the Asylum Intake Unit at Croydon long before 2015.

174. In the screening interview of 19 October 2015, MNK made no allegations of torture and revealed no vulnerabilities, except the stress of being in detention. He said he had documents in Pakistan to support his claim. His substantive asylum interview, scheduled for 6 November 2015, was postponed until 19 November when his solicitors requested it so that he could obtain those documents. There was certainly no error in his continued detention when, on its face, this was a request to obtain extant documents. The Secretary of State refused to postpone the interview yet further and justified this because there was no indication as to what documents MNK was attempting to obtain in Pakistan. I cannot see anything unlawful in the Secretary of State requiring an explanation of why a postponement is being sought and what it might entail. Only then can she judge whether the claim is potentially complex and no longer suitable for consideration in detention.

175. The Rule 35 report contained concerns that MNK may have been a victim of torture. The Secretary of State rejected the report as independent evidence of torture. Under the *Detention Rule 35 Process* guidance the Secretary of State can reject a Rule 35 report if it tends not to show that a detainee has been tortured for the reasons given there. That was what she did and I cannot detect any unfairness in her doing so.

176. Where Ms Harrison QC may have had a point is in relation to the 5 November 2015 decision justifying in the alternative, MNK's continued detention had the Rule 35 report been accepted as independent evidence of torture. The reasoning was that there were "exceptional circumstances" under Chapter 55 of the EIG for MNK's continued detention. In fact, the test is one of "very exceptional circumstances", not "exceptional circumstances". When a senior officer upheld continued detention the following day, 6 November 2015, he applied the correct test. However, his reasoning that there was a very high risk of MNK absconding does not gel with the earlier detention review of 5 October 2014, that MNK's absconding risk was medium. There is no need for me to reach a conclusion on the matter because of the Secretary of

State's finding on the Rule 35(3) report. As with Mr Hossain, Duncan Lewis secured MNK's release on 18 November 2015 through an urgent application to this court earlier that day.

Zuberia Auleear

177. In Ms Auleear's case it is contended that the initial decision to detain her on 1 July 2015, and her actual detention on 28 July, were both unlawful. She had been reporting so that there should have been no concerns about her absconding. On 1 July, re-consideration of her 2011 claim was pending and the letter served on her detention on 28 July recognised that she had a potential international protection claim. Moreover, it is submitted, there was error in proposing Ms Auleear to the DAC team, and their accepting her, without a proper consideration of her asylum claim, its complexity (especially when the country of origin report on Mauritius was out of date), and that there was no absconding risk. There was then the unfairness in the refusal to adjourn the substantive asylum interview to give Ms Auleear an adequate opportunity to obtain expert evidence. Indeed, in Ms Auleear's case there was unfairness throughout in not giving her the chance at any point to explain why her asylum claim was not abusive.

178. There is no doubt that until Ms Lau from Wilsons arrived on the scene Ms Auleear received some shoddy service from her two previous lawyers. The Office of Immigration Services Commissioners has opined that she should have been advised not to pursue leave to remain on the basis of Article 8 or otherwise but to apply for asylum. Looking at it through the Secretary of State's eyes, however, Ms Auleear was legally represented, had Lyn Brown MP involved in her case, and made no asylum claim. In my view, the Secretary of State was entitled to assume that Ms Auleear was being competently advised to pursue her claim for leave to remain but not for asylum.

179. When Ms Auleear raised issues of international protection again in 2015, when served with the notice of liability to be removed, the Secretary of State told her that if she were to apply for asylum she must do so in person. She did not do so. Thus when she was detained on 28 July 2015, the letter served on her explained that she had been in the country unlawfully, as she had been told in 2011, she was working unlawfully, contrary to what she was told not to do in 2011, and since she was from a safe country under section 94(3) of the 2002 Act her claim was certified as a non-suspensive appeal case. I cannot regard her detention as unlawful: she was being detained for what the Secretary of State reasonably thought was speedy removal.

180. The position began to change when Ms Auleear finally made the asylum claim on 31 July 2015 with the assistance, I note in passing, of an immigration officer at Yarl's Wood. First, there were the detention reviews of 4, 6 and 11 August, all stating that Ms Auleear had "low" removability (a time line of more than 3 months was identified) and that her risk of absconding was medium. Secondly, there was the nature of the asylum claim, recounted at the screening interview of 13 August and Wilson's letter of 17 August, raising the possible need for an expert report on forced marriage in Mauritius. In my view, it cannot be said that the Secretary of State was acting unfairly in refusing to postpone the substantive asylum interview until after the report was received. However, once in the substantive asylum interview Ms Auleear explained that she had not applied for asylum previously on legal advice, and given

the nature of her claim, it is certainly arguable that its fair determination would not have been possible within the time period envisaged in the *Process map*. As it was, the issue does not arise because Ms Auleear was released from detention.

TCV

181. The Secretary of State accepts that she unlawfully detained TCV. The Home Office Competent Authority came to a negative reasonable grounds decision that he was not trafficked, meaning that he was detained. However, that decision was wrong since it was reached because he had absconded from the care of Nottingham Social Services, not because the Competent Authority had made any substantive ruling on whether he had been trafficked. The guidance which applied at the time stated that when the Competent Authority was not able to gather more information because a person had disappeared, it should have suspended the reasonable grounds decision. If TCV had been correctly registered as a "potential victim of trafficking suspended absconder" on the system, as the Secretary of State accepts that he should have been, he would not have been detained. Given the Secretary of State's concession in TCV's case, I need say nothing more about it.

Conclusion on the test cases

182. Despite TCV's case I cannot find that these test cases establish unfairness in the DII system as a whole. All were lawfully detained for the purpose of removing them from the UK. Except for TCV, they remained in detention lawfully, until released, for the reasons I have given. There was no unfairness to them and they were all able to advance their asylum claims, eventually with the assistance of the lawyers, who were available for them under the Secretary of State's policies and the legal aid arrangements.

VI CONCLUSION

183. For the reasons given I reject the claimants' challenges to the Secretary of State's policies, except for her failure to meet her public sector equality duty. I will make a declaration as to the latter but no further action is, in my judgment, required given the steps the Secretary of State has taken and referred to earlier in the judgment. As for the individual claimants, the only unlawfulness was in TCV's detention. Any damages claim in his case will be transferred to and dealt with in the Queen's Bench Division.